No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTONIO TILLMON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Fourth Circuit erred by concluding that there was sufficient evidence to support Mr. Tillmon's convictions on Counts 1, 2, 48, and 49?

II. Whether the Fourth Circuit erred by affirming the admission of scripted video evidence suggesting Mr. Tillmon's participation in an undercover agent's plan to obtain a gun he could use to commit murder?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who was the Defendant-Appellant below, is Antonio Lamont Van Tillmon. Respondent, who was the Plaintiff-Appellee below, is the United States of America.

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A. Opinion, U.S. Court of Appeals for the Fourth Circuit, issued 26 February 2019.

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CITATION OF PRIOR OPINION

The United States Court of Appeals for the Fourth Circuit decided this case by published opinion issued 26 February 2019, in which it vacated Mr. Tillmon's convictions of three counts of federal programs bribery, and affirmed Mr. Tillmon's convictions of two drug offenses and two firearms offenses. A copy of the Fourth Circuit's opinion is included in the Appendix to this petition.

JURISDICTIONAL STATEMENT

This petition seeks review of an opinion affirming Mr. Tillmon's convictions, following a jury trial, of (1) conspiracy to distribute and possess with intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1), 846; (2) conspiracy to possess firearms in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(o); (3) attempt to possess with the intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. § 841(a)(1), 18 U.S.C. § 2; and (4) possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). The petition is being filed within the time permitted by the Rules of this Court. *See* S. Ct. R. 13. This Court has jurisdiction to review the Fourth Circuit's opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This Court has held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

STATEMENT OF THE CASE

FBI Operation Rockfish

In early 2013, the FBI was investigating allegations of corrupt law enforcement activity in Northampton and Halifax Counties, North Carolina. J.A. 521, 1597. After receiving information that Lann Tjuan Clanton, an officer with the Weldon Police Department in Halifax County, was involved in drug trafficking and other crimes, the FBI decided to investigate by developing an undercover operation, known as "Operation Rockfish." J.A. 405. As the FBI envisioned it, undercover agents would "pose as members of a transnational drug trafficking organization that had opened up a supply route from Miami, moving drugs, multiple kilogram quantities of heroin and cocaine, north along [Interstate 95] up to the New York City area," and returning the "illegal drug proceeds south along" the same route. J.A. 406. Agents would form a "transportation cell," part of the larger fake drug trafficking organization, and attempt to "recruit law enforcement officers for their ability to badge their way out of legitimate traffic stops by other law enforcement officers . . . ." J.A. 406.

Undercover FBI agents recruited Clanton to participate in the fake drug trafficking organization in exchange for money. J.A. 1599. Clanton later recruited Northampton County deputy sheriff Ikeisha Jacobs, and agents paid Clanton and Jacobs to recruit others to participate in operations. J.A. 1598-99; *see* J.A. 408, 890.

The "general template for the operations" was for the team of recruits to meet at a warehouse set up by the FBI, equipped with video cameras. J.A. 412, 535. The

team members would then help undercover agents, who wore audio recording devices, load fake drugs into a hidden compartment in an FBI-owned vehicle. J.A. 412.

In the summer of 2014, FBI undercover agents asked Jacobs to form and lead a separate group for future operations. J.A. 1598; *see* J.A. 408-09, 513, 1196. Jacobs contacted Antonio Tillmon, a police officer in Windsor, North Carolina, whom Jacobs knew from their time working together as correctional officers. J.A. 884-85, 890, 1590, 1605. When Jacobs contacted Mr. Tillmon in the summer of 2014, she asked him "about a job," telling him he could help her and make money. J.A. 890. Jacobs invited Mr. Tillmon to dinner at Ruby Tuesday in Roanoke Rapids, North Carolina. J.A. 972.

The 19 August 2014 dinner at Ruby Tuesday

On 19 August 2014, Mr. Tillmon and his two daughters, then ages 6 and 7, arrived at Ruby Tuesday in Roanoke Rapids. J.A. 893-97. Jacobs introduced Mr. Tillmon and his daughters to "John" and "Lisa," who were FBI undercover agents. J.A. 413, 566-67, 661, 893. Adrienne Moody, whom Mr. Tillmon had met before when he worked as a correctional officer, also dined with the group. J.A. 409, 884, 898-99. At dinner, Mr. Tillmon met Alaina Sue-Kam-Ling, a correctional officer, and Crystal Pierce. J.A. 409, 893.

Ruby Tuesday was a "lively, loud, . . . public location," and the FBI agents were surprised to see that Mr. Tillmon came with his daughters. J.A. 567. The agents did not mention transporting heroin, cocaine, or any other illegal drugs. J.A.

525-26. They did not use any code or slang words for heroin or cocaine. J.A. 672-73. They did not tell Mr. Tillmon that they were part of a drug trafficking organization. J.A. 651-52.

As Mr. Tillmon tended to his daughters over dinner, Lisa and John mentioned a "product," and discussed a "cover story," including what the participants could say if they were pulled over, and discussed why they wanted law enforcement officers. J.A. 526, 570-78, 979. John suggested that the participants could show their "credentials" to an officer who pulled them over. J.A. 575, 662.

At some point during the dinner, Lisa asked Jacobs whether those present had guns. J.A. 671. Jacobs gestured to Mr. Tillmon in the form of a gun, and Mr. Tillmon responded, affirming that he always carried a gun. J.A. 671, 901; see J.A. 579-80. John and Lisa instructed the group that they could show guns, but they were not supposed to use guns. J.A. 665-67; see J.A. 577.

After dinner, Mr. Tillmon received a message from Jacobs, asking him to ride with her the next day. J.A. 903. Mr. Tillmon agreed. J.A. 903.

The 20 August 2014 trip

On the morning of 20 August 2014, Mr. Tillmon picked up Jacobs and Sue-Kam-Ling, and Jacobs directed him to a Denny's restaurant in Rocky Mount, North Carolina, where they met Moody, Pierce, and Kavon Phillips, another correctional officer whom Mr. Tillmon had not met before. J.A. 903-05. The group then followed Lisa to a warehouse in Rocky Mount. J.A. 414-15, 905-06.

At the warehouse, the group met a white man, an undercover agent

introduced as "Paul," and a black woman, also an undercover agent, introduced as "Kei." J.A. 906-08. The agents were not armed. J.A. 416-17; *see* J.A. 942-43.

At Paul's request, Mr. Tillmon helped carry a cooler full of ice and drinks to the back of a white GMC Acadia. J.A. 910-12. Paul took packages out of the cooler and handed them to John, who was underneath the vehicle. J.A. 912-13.

According to Lisa, while standing behind the Acadia, she said to Mr. Tillmon "that we were starting to move H." J.A. 591. Mr. Tillmon remembered that Lisa said "eight," and said that he did not understand what she meant. J.A. 915, 983. Neither Lisa nor any of the other agents said anything to Mr. Tillmon about heroin, cocaine, or any other drugs. *See* J.A. 526, 672.

Jacobs drove the Acadia out of the warehouse. J.A. 917. Mr. Tillmon did not know where they were going; in his own vehicle, he followed Jacobs to the National Harbor in Maryland. J.A. 916-18.

Upon arriving at the National Harbor, a busy tourist area, Mr. Tillmon walked around and took pictures. J.A. 776, 984; *see* J.A. 755. He and Sue-Kam-Ling met Jacobs, Moody, Phillips, and Pierce there. J.A. 919. The group then met Kei and a black man, also an undercover agent, who was introduced as "Tee." J.A. 921-22. Tee paid the group members on a Ferris wheel ride at the harbor; Mr. Tillmon received $2,000. J.A. 750, 922; *see* J.A. 452. Mr. Tillmon then drove back to North Carolina. J.A. 923.

The 22 October 2014 trip

For the next two months, Mr. Tillmon had no contact with the agents, and he

did not discuss the August 20 trip with Jacobs or seek to be included in additional trips. J.A. 548-49, 701; *see* J.A. 985.

In October 2014, Jacobs asked Mr. Tillmon about riding with her again, and he agreed. J.A. 923-26. On 22 October 2014, Moody drove Mr. Tillmon, Jacobs, Sue-Kam-Ling, and Phillips to Denny's, where they ate with Pierce before going to the warehouse. J.A. 924-28.

At the warehouse, Lisa took something out of the back of Paul's car and handed it to John, who was under the Acadia. J.A. 613-17, 929-30. Mr. Tillmon walked around and talked to Sue-Kam-Ling. J.A. 931. John approached Mr. Tillmon and talked to him about a "bullshit bill of sale." J.A. 986; *see* J.A. 610, 932. John told Mr. Tillmon that if he got pulled over, he could show the bill of sale, which had John's phone number on it. J.A. 610-11. The agents did not say anything to Mr. Tillmon or the rest of the group about heroin, cocaine, or any other drug, or any code name for any drug. J.A. 680-90.

At Jacobs's direction, Mr. Tillmon and Sue-Kam-Ling got into the Acadia and left the warehouse. J.A. 932. Mr. Tillmon followed Lisa to a Tanger Outlet Mall in Maryland, and left the Acadia there. J.A. 933. Moody drove the group to a McDonald's, where they met Tee, who was waiting in a van with Lisa. J.A. 619-20, 933-34. Inside the van, Tee laughed and joked with the group while he paid them. J.A. 934. Mr. Tillmon received $2,000. J.A. 462, 624, 934.

Mr. Tillmon drove Moody's car back to North Carolina with Phillips and Sue-Kam-Ling while Jacobs, Moody, and Pierce went shopping. J.A. 935.

The 26 March 2015 trip

For five months after the October 22 trip, Mr. Tillmon did not communicate with the agents, or seek to be involved in additional trips. J.A. 548, 701. In March 2015, Jacobs asked whether Mr. Tillmon was "available to ride with her" again, and he agreed. J.A. 936. On 26 March 2015, Mr. Tillmon picked up Jacobs, and they met Phillips, Moody, and Sue-Kam-Ling at Denny's in Rocky Mount, before continuing to the warehouse. J.A. 936-37. When they arrived, they were ushered into an office in the warehouse. J.A. 938-40.

In the office, Lisa asked each of the participants whether they had a gun. *See* J.A. 942-45. When Sue-Kam-Ling indicated that she did not, Mr. Tillmon gave her an extra gun he had with him. J.A. 944-45.

Mr. Tillmon and Sue-Kam-Ling then walked back out to the main part of the warehouse, and talked near the door of the office. J.A. 946. John was under the Acadia. J.A. 948. Lisa hung back, and came out of the office a few minutes later. *See* J.A. 948.

Eventually, Mr. Tillmon walked back toward the Acadia. J.A. 951. Kei, Lisa, Phillips, and Jacobs were standing in a group. *See* J.A. 641, 951-52. Lisa admonished the group that they had to bring firearms from now on, "that they couldn't be F-ing around because there was, it's a million dollars worth of heroin." J.A. 484, 462. Kei gestured to Mr. Tillmon, who stood nearby, talking to Sue-Kam-Ling. *See* J.A. 953, 995. Kei asked Mr. Tillmon "did [he] have her," which he understood to mean did he give Sue-Kam-Ling a gun. J.A. 953; *see* J.A.

994. Mr. Tillmon said he did. J.A. 953.

Mr. Tillmon left the warehouse in his Expedition with Jacobs. J.A. 954. Jacobs told Mr. Tillmon to follow one of the other cars. J.A. 954-55. They drove to Maryland, where they met Kei in the parking lot of the Tanger Outlet Mall. J.A. 955. Tee was there, in a white Corvette. J.A. 955. Mr. Tillmon got into the Corvette, where Tee paid him $2,500. J.A. 955-56; *see* J.A. 486. Mr. Tillmon then drove back to North Carolina with Jacobs. J.A. 956.

The 30 April 2015 arrest

The next month, Mr. Tillmon agreed to go on another trip with Jacobs. J.A. 957. On 30 April 2015, Moody drove Mr. Tillmon, Jacobs, and Sue-Kam-Ling to pick up Phillips, and the group went to the warehouse, where they were arrested. J.A. 961-62. Mr. Tillmon had no drugs or drug paraphernalia when he was arrested, and there was no evidence that he ever was involved with using or dealing drugs in any way. J.A. 547.

Indictment of Mr. Tillmon and his co-defendants

Mr. Tillmon and fourteen co-defendants were charged in a fifty-four count indictment. *See* J.A. 115-76. All fifteen defendants were charged with one or more drug offenses carrying a ten-year mandatory minimum sentence. J.A. 117-18; *see* 21 U.S.C. § 841(b)(1)(A). Twelve defendants were also charged with multiple counts of violation of § 924(c). J.A. 121, 137, 151, 160, 166.

Pre-trial proceedings

Mr. Tillmon pleaded not guilty to all ten counts charged against him. J.A.

85. Each of Mr. Tillmon's fourteen co-defendants pleaded guilty to a criminal information charging less serious crimes than alleged in the indictment, and significantly reducing their exposure to mandatory minimum sentences. J.A. 62, 72-73, 77-79; *see* J.A. 1594-96.

Mr. Tillmon's trial

Mr. Tillmon's case was tried to a jury beginning on 15 May 2017, before Senior United States District Judge Malcolm J. Howard. J.A. 97.

The Government's evidence

The FBI agents

The Government's first witness was FBI Agent John Spears, the case agent for Operation Rockfish. J.A. 403-05. Spears testified that, as far as he knew, every conversation the undercover agents ever had with Mr. Tillmon was recorded. J.A. 532. The FBI had no evidence of any conversations Mr. Tillmon had outside the presence of agents, such as with Jacobs. J.A. 539.

The Government offered into evidence ten rectangular packages wrapped in brown paper, which Spears said were the same ten packages transported in the Acadia on 20 August 2014. J.A. 545. Spears testified that the packages loaded into the Acadia were made to look "like a kilo of some type of illegal drug." J.A. 541. When asked how he could tell the packages transported on August 20 contained fake heroin, Agent Spears responded, "Well, because I'm the one who designed the scenarios." J.A. 542. According to Spears, the way that Mr. Tillmon and his co-defendants were supposed to learn the contents of the packages was that they

would be told that the packages were heroin. J.A. 543.

Spears testified that Mr. Tillmon did not pick up the packages, and that none of the agents ever told Mr. Tillmon how many kilograms of fake drugs they were transporting. J.A. 544. Spears admitted that Mr. Tillmon never trafficked any real drugs. J.A. 546.

The Government also called undercover agents Lisa and Kei. Lisa, the lead undercover agent on Operation Rockfish, J.A. 556-57, testified that at "pre-operational meetings," the agents "made sure that [they] said something that implied that what we were doing was illegal," but did not say, "tomorrow you'll be moving heroin," "[b]ecause drug traffickers, even the soccer-mom type drug traffickers, don't use those terms." J.A. 560; *see* J.A. 650-51.

Lisa first testified that the fake drug involved in the August 20 trip was cocaine, J.A. 580, and later said she could not remember whether "it was cocaine or heroin that we said it was at that point," J.A. 581. Lisa testified that she did not say anything about heroin in Mr. Tillmon's presence during the operation. *See* J.A. 672. According to Lisa, while in the warehouse, she commented to Mr. Tillmon that they "were starting to move H." J.A. 591.

Lisa testified that the October 22 operation involved fake heroin. J.A. 603. She admitted that she did not say anything during the operation about heroin, or use any code name intended to refer to heroin. J.A. 680-90.

According to Lisa, the 26 March 2015 operation involved both fake heroin, which she called "brown," and fake cocaine, which she called "green." J.A. 625; *see*

J.A. 702-04. She admitted that neither she nor the other agents ever said anything to Mr. Tillmon to suggest that "green" meant cocaine. J.A. 702-03. Although Lisa testified that real drug traffickers do not use the word "heroin," J.A. 706, she testified that while the group was in the warehouse on March 26, she said that "everyone needs to be carrying and that, that they couldn't be F-ing around because there was, it's a million dollars worth of heroin that we're moving." J.A. 642.

Asked why she was not clear with the participants about what they would be transporting, Lisa said she could not be. *See* J.A. 716. She testified that being clear would let the participants know that they were being investigated by FBI undercover agents, or it would show that they were "careless drug dealers." J.A. 716-17. Either way, Lisa testified, if she was clear and used the word "heroin," no one—either a "crooked cop" or a law-abiding citizen—would want to participate in the operations. J.A. 717.

During Kei's testimony, the Government attempted to offer into evidence a recording of a conversation between Mr. Tillmon and Tee inside the Corvette where Tee paid the participants in the March 26 operation. J.A. 769-770. The court sustained Mr. Tillmon's objection to the recording. J.A. 770. The Government made two more attempts to admit the recording, but the court continued to sustain Mr. Tillmon's objection. J.A. 771-73, 796-97.

Town of Windsor witnesses

The Government called James Lane, Chief of the Windsor Police Department, and James Hoggard, mayor of Windsor. J.A. 727, 784.

Lane testified that while Mr. Tillmon worked for the Department from 2011 until 2015 as a patrol officer, his duties were to "to answer radio calls from 911, from the Bertie County Communications Center," and to "patrol the town and be vigilant, to look out for any suspicious activities or any crimes occurring while he was working." J.A. 727, 729-30.

Hoggard testified that Windsor officers are employees of the Town of Windsor. J.A. 784-85. He said he knew Mr. Tillmon personally, J.A. 792, and that he knew him to be a good police officer, J.A. 793.

Mr. Tillmon's motion for judgment of acquittal

At the close of the Government's evidence, Mr. Tillmon moved for judgment of acquittal on all counts. *See* J.A. 829-53, 1053-57. The court entered judgment of acquittal on Count 28, which charged attempted possession with the intent to distribute heroin on 20 August 2014, and otherwise denied the motion. J.A. 98-99, 1057.

Mr. Tillmon's evidence

Kavon Phillips, Crystal Pierce, and Adrienne Moody

Mr. Tillmon called as witnesses three of his co-defendants, Phillips, Pierce, and Moody. Phillips and Pierce each testified that they did not know they were transporting heroin on August 20 or October 22. J.A. 868, 1020-21. Moody testified that she believed she was trafficking cocaine, and was "not sure of hearing about the heroin," and only heard one of her co-defendants (not Mr. Tillmon) say something about heroin on "the last trip," on 26 March 2015. J.A. 1036, 1040.

Antonio Tillmon

Mr. Tillmon testified in his defense. J.A. 877-1018. Mr. Tillmon testified that Jacobs had invited him to dinner in Roanoke Rapids, and that he was going to be in the area so he ate dinner with her, accompanied by his two daughters. J.A. 892. He testified that when he left the Ruby Tuesday dinner on August 19, he had not been offered a job, or agreed to do a job. J.A. 902. Later in the evening, he received a text message from Jacobs asking him to ride with her the next day, and he agreed. J.A. 903.

Mr. Tillmon testified that he went to the warehouse, and made trips to Maryland, on August 20, October 22, and March 26, and that, as was his practice, he carried a firearm. J.A. 901, 944, 989-90. He also testified that he was paid $2000 on August 20, $2000 on October 22, and $2500 on March 26. J.A. 922, 934, 955.

Mr. Tillmon testified that he did not know, any of the times he traveled from Rocky Mount to Maryland, that there was heroin being transported. J.A. 963. He testified that on August 20, he heard Lisa say something about "eight" while they were in the warehouse, and that he did not understand what was going on or what Lisa meant. J.A. 914-15, 983. He said he did not know what the agents loaded into the Acadia. J.A. 913, 931, 948, 956. Mr. Tillmon testified that no one ever told him, and he did not know, that "brown" meant heroin, or that "green" meant cocaine. J.A. 963. After reviewing a recording from the warehouse on March 26 where Lisa commented about "a million dollars worth of heroin," Mr. Tillmon said he did not

hear that comment at the time. J.A. 953, 993-95.

During Mr. Tillmon's cross-examination, the Government once again sought to introduce a recording of Mr. Tillmon's conversation with Tee in the Corvette on March 26. J.A. 997. This time, the court overruled Mr. Tillmon's objection and admitted the recording. J.A. 998, 1001, 1004-09. Mr. Tillmon testified, consistent with the beginning of the recording, that he had confirmed to Tee that he had a .40 caliber pistol with him that day, and that Tee had paid him $2500 in the Corvette. J.A. 1005; *see* J.A. 1401-02 (transcript of recording). The Government then played the remainder of the recording, in which Tee pretended to need a gun he could use to kill people without leaving behind shells, and asked Mr. Tillmon for advice. J.A. 1006-09; *see* J.A. 1402-04.

Mr. Tillmon's renewed motion for judgment of acquittal

At the close of all evidence, Mr. Tillmon renewed his motion for judgment of acquittal on all remaining counts of the indictment. J.A. 100; *see* J.A. 1081-93. The court denied the motion. J.A. 100, 1093.

Closing arguments

In closing, the Government argued that "most incriminating of all," Mr. Tillmon got into the Corvette with Tee and Tee said "he want[ed] a high-capacity gun that can bang a lot of people and not leave shell casings behind." J.A. 1148. The Government told the jury, "That, ladies and gentlemen, what you saw on that video shows the true defendant—not what you saw on the stand, the person calling him Mr. Tee. You saw that video. You saw the true defendant and what he knew

he was doing during all these operations." J.A. 1149.

Jury verdict

The jury returned a verdict of guilty on each count. J.A. 1405-12. As to the drug conspiracy charge, the jury found that one kilogram or more of heroin was attributable to Mr. Tillmon, but that no cocaine was attributable to him. J.A. 1405-06. As to each of the two remaining charges of attempt to possess with the intent to distribute a mixture or substance containing heroin, the jury found that one kilogram or more was attributable to Mr. Tillmon. J.A. 1408, 1410.

Post-trial motions

After the verdict, Mr. Tillmon renewed his motion for judgment of acquittal on all counts of conviction. J.A. 101, 1413-46. Mr. Tillmon also filed a motion for new trial. J.A. 101, 1447-57. Before Mr. Tillmon's sentencing date, the district court granted his renewed motion for judgment of acquittal on Counts 33 and 34, conditionally granted a new trial on those two counts, and denied the motion on all other counts. J.A. 110, 1514-27. The district court denied the motion for new trial pursuant to Fed. R. Crim. P. 33. J.A. 110, 1528-30.

Sentencing and judgment

At a sentencing hearing held on 10 October 2017, the district court varied downward to the mandatory minimum and imposed a total sentence of 180 months' imprisonment. J.A. 1553-54, 1560-69.

Mr. Tillmon timely filed a notice of appeal on 17 October 2017. J.A. 1570. The Government did not appeal from the district court's post-trial judgment of

acquittal on Counts 33 and 34. *See* J.A. 112-13.

Mr. Tillmon's appeal

On appeal, Mr. Tillmon argued that his convictions were not supported by sufficient evidence, and that the district court erroneously admitted certain evidence. See Def.'s Opening Br. at 4. As relevant here, Mr. Tillmon argued that he was entitled to judgment of acquittal on the drug charges, Counts 1 and 48, because the Government failed to prove Mr. Tillmon's intent—Mr. Tillmon did not knowingly enter into an agreement to distribute heroin, and he did not intend to possess with the intent to distribute heroin. *See id.* at 26-36. Mr. Tillmon argued that because his convictions on the firearms charges, Counts 2 and 49, depended on the convictions on Counts 1 and 48, he was entitled to vacatur of the district court's judgment on all four counts. *See id.* at 38-39. Mr. Tillmon also argued that the evidence was not sufficient to support his three convictions for federal programs bribery, and that the district court erred by admitting a video and audio recording of Mr. Tillmon's interaction with undercover agent Tee. *See id.* at 41-57.

After holding oral argument, on 26 February 2019, the Fourth Circuit issued a published opinion affirming in part and vacating in part the judgment of the district court. The Fourth Circuit affirmed Mr. Tillmon's convictions on Counts 1 and 48, and as a result, affirmed the convictions on Counts 2 and 49. App. at 17, 20-22. The Fourth Circuit vacated Mr. Tillmon's convictions on Counts 32, 36, and 54, concluding that the evidence was insufficient to support those convictions. *Id.* at 30. Finally, the Fourth Circuit rejected Mr. Tillmon's argument that an evidentiary

error warranted a new trial. *Id.* at 22-24.

Regarding Count 48, charging attempt to possess with the intent to distribute heroin, the Fourth Circuit stated that the evidence showed that Mr. Tillmon had "basic law enforcement drug trafficking training," that the fake heroin involved in the operation "was packaged in a manner commonly used to traffic controlled substances," and that "the staged packages were in plain view." *Id.* at 13. In affirming Mr. Tillmon's conviction on Count 1, conspiracy to possess with the intent to distribute heroin, the Fourth Circuit stated that Mr. Tillmon "was trained in drug trafficking techniques." *Id.* at 19. The Fourth Circuit relied on Mr. Tillmon's purported training in drug trafficking to support its decision that the trial evidence was sufficient, reasoning that "[t]he jury had all the more reason to find Tillmon responsible for such knowledge [of drug trafficking] given his background and training." *Id.*

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The first question presented, whether there was sufficient evidence to support Mr. Tillmon's convictions on Counts 1, 2, 48, and 49, was argued and reviewed below, because Mr. Tillmon moved for judgment of acquittal on all charges, which the district court denied on Counts 1, 2, 48, and 49. Mr. Tillmon also challenged the sufficiency of the evidence on appeal, and the Fourth Circuit affirmed his convictions on Counts 1, 2, 48, and 49. The second question presented, whether the district court erred by admitting the video evidence, was argued and reviewed below, because Mr. Tillmon objected to the admission of the evidence at trial and moved for a new trial, which the district court denied. Mr. Tillmon also argued on appeal that the evidentiary error required a new trial, and the Fourth Circuit disagreed and affirmed his convictions on Counts 1, 2, 48, and 49.

REASONS FOR GRANTING THE WRIT

Mr. Tillmon respectfully contends that there are compelling reasons for granting the writ of certiorari because the Fourth Circuit's mistaken view of the trial evidence deprived him of effective appellate review of the district court's denial of Mr. Tillmon's motion for judgment of acquittal. As a result, Mr. Tillmon stands convicted of four charges the Government failed to prove, and he is serving a fifteen-year prison sentence.

DISCUSSION

Operation Rockfish was conceived as an anti-corruption sting operation,

targeted at corrupt law enforcement officers. But Operation Rockfish failed to uncover an extensive law enforcement corruption scheme—it became a fake drug and gun case, as confirmed by the Fourth Circuit's decision vacating all of Mr. Tillmon's bribery convictions. Lacking any evidence that those recruited to participate in Operation Rockfish were corrupt like Clanton, agents began to manufacture evidence to charge the participants with drug- and gun-related offenses. Although agents carefully developed what they considered an elaborate fake drug trafficking operation, the agents could not manufacture evidence of Antonio Tillmon's intent to participate in heroin trafficking, because he never intended to do so.

I. THE FOURTH CIRCUIT ERRED BY AFFIRMING MR. TILLMON'S CONVICTIONS ON COUNTS 1, 2, 48, AND 49 BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT MR. TILLMON AGREED OR INTENDED TO DISTRIBUTE HEROIN.

The key issue on appeal was Mr. Tillmon's intent—Mr. Tillmon argued that the Government failed to prove that he knowingly participated in a heroin trafficking conspiracy, or intended to possess with the intent to distribute heroin. The Fourth Circuit concluded that the evidence of Mr. Tillmon's intent was sufficient, and affirmed his convictions on Counts 1, 2, 48, and 49. As shown below, the Fourth Circuit's review was infected by a misreading of the trial record. The Fourth Circuit bought into the Government's unsupported theory that Mr. Tillmon was a corrupt cop, using his law enforcement position to facilitate—rather than investigate—drug trafficking. Contrary to the Government's theory and Fourth

Circuit's belief, the trial evidence did not show that Mr. Tillmon had any law enforcement training or experience related to drug trafficking. Because the Fourth Circuit relied on Mr. Tillmon's purported training and experience to conclude that the evidence was sufficient, this error was critical to the Fourth Circuit's analysis. *See* App. at 13, 19, 21. The trial evidence does not support the convictions.

A. The Fourth Circuit Erred By Affirming Mr. Tillmon's Convictions On Counts 1 And 48.

"To prove conspiracy to possess [heroin] with intent to distribute, the Government must establish that: (1) an agreement to possess [heroin] with intent to distribute existed between two or more persons; (2) the defendant knew of the conspiracy; and (3) the defendant knowingly and voluntarily became a part of this conspiracy." *United States v. Burgos*, 94 F.3d 849, 857 (4th Cir. 1996) (en banc) (reciting standard in case involving cocaine base).

To prove an attempt to commit a substantive offense, the Government must prove "(1) culpable intent to commit the crime charged and (2) a substantial step towards the completion of the crime that strongly corroborates that intent." *United States v. Neal*, 78 F.3d 901, 906 (4th Cir. 1996). Here, the Government was required to show that (1) Mr. Tillmon had the specific intent to commit the substantive crime of possession with the intent to distribute a mixture or substance containing heroin; and (2) he took a substantial step toward completion of the offense that strongly corroborated that intent. *See id.*; *United States v. Maldonado*, No. 92-5144, 1993 WL 71644, at *1 (4th Cir. Mar. 16, 1993) (per curiam); J.A. 1168.

Because all of the purported drugs in this case were fake, to prove attempt, the Government had to show that Mr. Tillmon possessed with the intent to distribute a substance that he subjectively believed was heroin. *See United States v. Pennell*, 737 F.2d 521, 525 (6th Cir. 1984).

The evidence was insufficient on both Counts 1 and 48 because the Government did not show that Mr. Tillmon knowingly agreed to participate in heroin distribution, or subjectively intended to possess heroin.

As the Government argued at trial, all of the evidence in this case was recorded. J.A. 384. And although the agents believed they developed a fake heroin trafficking conspiracy, the Government offered no evidence that any of the agents or alleged co-conspirators ever revealed to Mr. Tillmon that there was an agreement to distribute or possess with the intent to distribute heroin.

At Ruby Tuesday, agents did not tell Mr. Tillmon that they were a drug trafficking organization, talk about heroin (or cocaine), or use any slang words for heroin. J.A. 651-52, 672-73. There was no evidence that Jacobs told Mr. Tillmon anything other than to invite him to dinner that evening. *See* J.A. 892.

The evidence does not show that Mr. Tillmon learned, during any of the three trips to Maryland, that there was an agreement to distribute and possess with the intent to distribute heroin. Lisa testified that she made one comment about "H" in the warehouse on August 20, which Lisa said she meant to refer to heroin. J.A. 591-92. There was no evidence to indicate that Mr. Tillmon understood that Lisa was referring to heroin—he said he heard her say "eight," and that he did not know

what she meant. J.A. 915. Even if Mr. Tillmon heard Lisa say "H," there was no evidence that Mr. Tillmon was familiar with drug slang, and he had no history of being involved in dealing heroin or any other drugs. J.A. 968; *see* J.A. 522. The district court correctly concluded that Lisa's stray reference to "H" was not sufficient to show that Mr. Tillmon had the requisite intent to attempt to possess heroin on August 20, and therefore it acquitted Mr. Tillmon of Count 28. J.A. 1057. Further, because there was no evidence that Mr. Tillmon was ever informed that the group was transporting heroin on October 22, the district court also acquitted Mr. Tillmon of Count 33. J.A. 1517-20.

Knowing that they had no evidence that Mr. Tillmon intended to participate in drug trafficking, agents scripted explicit comments about heroin and cocaine for the March 26 trip. *See* J.A. 1139. Only one such comment occurred in Mr. Tillmon's vicinity, when Lisa made a comment about "a million dollars worth of heroin" while standing in the warehouse, which was picked up on her own body recorder. J.A. 634, 642. While the Government has argued that Mr. Tillmon must have heard the comment, claiming that he "quickly responded that he had provided a gun to his coconspirator to aid the drug trafficking," J.A. 1477, the district court recognized that the record does not support the Government's characterization. J.A. 1519. Rather, the record shows that Mr. Tillmon responded to something Kei said *after* Lisa made the comment about "a million dollars worth of heroin." J.A. 1519. Mr. Tillmon's response was limited to confirming that he had given Sue-Kam-Ling a gun, and said nothing about "aid[ing] the drug trafficking." *See* J.A. 953, 1477.

Even assuming that Mr. Tillmon could hear Lisa say something about "a million dollars worth of heroin," that was not substantial evidence that would allow the jury to find beyond a reasonable doubt that Mr. Tillmon knew of an agreement to distribute or possess with the intent to distribute heroin, or intended to possess heroin. *See* J.A. 642. Lisa testified at trial that drug traffickers would not use the word "heroin." J.A. 560; *see* J.A. 650-51. She claimed that if the agents said "heroin," that "would definitely say we are police officers investigating you." J.A. 716-17. Therefore, according to Lisa's own testimony, no one who heard her comment would have believed that they were hearing about an actual agreement to traffic heroin. *See* J.A. 560, 650-51, 716-17.

The surrounding circumstances were also inconsistent with a heroin trafficking operation. Although firearms are tools of the drug trade, J.A. 506, none of the agents were armed at any time during the operations, J.A. 507, 992. According to the Government, the agents insisted that the defendants carry firearms. J.A. 484. The result was an inherently incredible scenario—the unarmed members of a purported transportation cell within a transnational drug trafficking organization would invite a group of armed people they did not know, including a law enforcement officer with no history of any illegal activity, into a warehouse full of expensive drugs. Neither Mr. Tillmon nor anyone else could have been expected to infer from those circumstances that he was participating in heroin trafficking.

The Government has claimed that the circumstances, such as the agents' practice of hiding packages in the Acadia and the discussion of using a "bullshit bill

of sale" as a cover story, suggested illegal conduct. J.A. 540; *see* J.A. 986. Spears asked, "Why would you hide anything if it was legitimate goods or products? You wouldn't." J.A. 540. But that rhetorical question, and evidence that generally suggests or even supports a conviction of some unlawful conduct, will not suffice when the Government fails to prove the offense charged in the indictment—here, a conspiracy to distribute and possess with the intent to distribute heroin, and an attempt to possess with the intent to distribute heroin. *See* J.A. 117; *see also, e.g.*, *United States v. Webster*, 639 F.2d 174, 188 (4th Cir. 1981) (vacating drug distribution conspiracy conviction because, "[w]hile the government may have proved that [the defendant] used drugs, it did not prove he was a 'heroin distributor' as the indictment charged").

There was no evidence that Mr. Tillmon was shown a substance that looked like heroin—he never saw the contents of the packages, or even handled them. J.A. J.A. 705, 712. There was no evidence suggesting guilty knowledge—Mr. Tillmon never said anything suggesting that he understood there was an agreement to distribute and possess with the intent to distribute heroin, or that he was in possession of what he believed was heroin. J.A. 713. He took pictures on at least one of the trips, reflecting a lack of concern for hiding his activities. J.A. 776, 984.

The Fourth Circuit erred by concluding that there was sufficient evidence of Mr. Tillmon's knowing participation in heroin trafficking to affirm his convictions of conspiracy and attempt. J.A. 967. The Fourth Circuit misapprehended the evidence when it said that Mr. Tillmon had "basic law enforcement drug trafficking

training," that he "was trained in drug trafficking techniques," and that "testimony established that Tillmon had been trained in drug interdiction as part of his law enforcement duties." App. at 13, 19, 21.

Windsor Police Department Chief James Lane testified that Mr. Tillmon participated in a "traffic interdiction class"—not a drug interdiction class. J.A. 731. On cross-examination, Lane admitted that the traffic interdiction class Mr. Tillmon took predated Lane's employment with the Department. J.A. 737. When asked whether he knew the content of the traffic interdiction class Mr. Tillmon took, Lane admitted, "No. I have no idea what the content was." J.A. 737.

Mr. Tillmon testified that he did not take a class about stopping illegal substances from traveling on the roads. J.A. 967. He also testified that he was not a narcotics officer and that he had encountered illegal drugs very few times in his career.

The Fourth Circuit's belief that Mr. Tillmon had special knowledge of drug trafficking colored other facts the court relied on to find sufficient evidence. The Fourth Circuit cited testimony that the fake drugs were packaged as drugs are commonly packaged, a fact that would only matter to someone familiar with how drugs are packaged. *See* App. at 13, 21. The record showed Mr. Tillmon was not. *See* J.A. 967. The Fourth Circuit also cited evidence that the packages were placed where Mr. Tillmon could have seen them, but again, seeing the packages would matter only to someone who could recognize them. *See* App. at 13, 21.

Mr. Tillmon's training was central to the Fourth Circuit's analysis of his

intent. Mr. Tillmon's training was the first fact the court cited in explaining its view that the evidence was sufficient to support his conviction on Count 48. *See id.* at 13. In rejecting Mr. Tillmon's position on Count 1, the court reasoned that "[t]o accept Tillmon's argument, the jury would have had to believe that he—a trained law enforcement officer—did not know what was happening right in front of him." *Id.* at 19. According to the Fourth Circuit, Mr. Tillmon's "background and training" gave the jury all the more reason to believe that Mr. Tillmon knew and understood he was involved in drug trafficking. *Id.*

Stripped of the Fourth Circuit's incorrect assumptions about Mr. Tillmon's training and experience, the record is devoid of evidence that Mr. Tillmon intended to engage in drug trafficking. The undercover agents' calculated attempts to create a drug conspiracy case failed to uncover any evidence that Mr. Tillmon knowingly participated in drug trafficking. *See generally United States v. Russell*, 411 U.S. 423, 439 (1973) (Stewart, J., dissenting) ("For the Government cannot be permitted to instigate the commission of a criminal offense in order to prosecute someone for committing it."). Because the Government did not offer sufficient evidence to establish that Mr. Tillmon was guilty of the drug charges in Counts 1 and 48, the Fourth Circuit erred by affirming his convictions.

B. Because The Evidence Is Insufficient To Support The Convictions On Counts 1 And 48, Mr. Tillmon Is Also Entitled To Judgment Of Acquittal On Counts 2 And 49.

The Government specified in the indictment that Count 1 was the alleged predicate crime supporting the § 924(c) offense alleged in Count 2, and Count 48

was the alleged predicate crime supporting the § 924(c) offense alleged in Count 49. J.A. 119, 166. Therefore, the Government was required to prove beyond a reasonable doubt the elements of Counts 1 and 48 in order to secure convictions on Counts 2 and 49, respectively. *See United States v. Randall*, 171 F.3d 195, 208-09 (4th Cir. 1999) (where government charges § 924(c) count with specific predicate offense, it must prove elements of that predicate offense). The Government failed to offer sufficient evidence to convict Mr. Tillmon on Counts 1 and 48; therefore, the evidence was necessarily insufficient to convict Mr. Tillmon on Counts 2 and 49.

II. THE FOURTH CIRCUIT ERRED BY AFFIRMING THE ADMISSION OF UNDERCOVER AGENT TEE'S SCRIPTED COMMENTS TO MR. TILLMON ABOUT AGENT TEE'S PURPORTED DESIRE TO FIND A GUN THAT WOULD ALLOW HIM TO SHOOT VICTIMS WITHOUT LEAVING SHELLS AS EVIDENCE.

The video of Tee talking with Mr. Tillmon after the 26 March 2015 trip was part of the scripted evidence agents created in an attempt to make Mr. Tillmon seem guilty of some illegal conduct. The video was unfairly prejudicial to Mr. Tillmon because it permitted the Government to argue that the "true defendant" was the one in the video with Tee and that Mr. Tillmon was showing his "true colors" as a violent criminal complicit in planned murders. J.A. 1107. The first part of the video showed that Mr. Tillmon was armed and that he was paid, but because the Government had already proved those facts—indeed, Mr. Tillmon had admitted them—the evidence was cumulative. But the trial court did not limit the admissibility of the video to the relevant, if cumulative, part. The Government's purpose to unfairly prejudice the jury was clear as it repeatedly sought to admit the

entire video, and then argued to the jury that the video evidence was the "most incriminating" evidence in the case. The trial court's decision to admit the video was reversible error.

"The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). As the Fourth Circuit has made clear, "it is hard to fathom anything more prejudicial than the unproved assertion that the accused is also guilty of the uncharged crime of murder while he is on trial for another offense." *United States v. Wilson*, 135 F.3d 291, 299 (4th Cir. 1998). The Government offered video evidence and a transcript of Tee and Mr. Tillmon talking after the trip to Maryland on 26 March 2015. J.A. 1004-09. The video showed that Tee paid Mr. Tillmon and that Mr. Tillmon confirmed that he was carrying a firearm. J.A. 1401-02. The Government had already presented evidence that Mr. Tillmon was paid on March 26 following the trip to Maryland and that he was armed on that date, making the video evidence on these points cumulative. J.A. 486, 637, 682, 956; *see United States v. Ness*, 652 F.2d 890, 893 (9th Cir. 1981) (slide show properly excluded as cumulative where witnesses had already testified as to its content).

The rest of the video evidence consisted of Tee telling Mr. Tillmon that he (Tee) wanted a small revolver so he could sneak up on his victims and shoot them without leaving shells as evidence and then throw away the gun. J.A. 1402-04 ("I'm

trying to get like a thirty-eight (.38), something small, a revolver that don't need no shells, know what I mean. . . . I just walk right up on 'em and keep rolling. . . . But when I'm bang off that, I'm banging just a bunch of people. . . . . I need somebody, you know, how you boom-boom and then throw that shit away and I ain't worried about it no more.")).

When Mr. Tillmon objected to the video evidence, the district court ruled the video evidence was inadmissible during the government's case-in-chief. J.A. 770, 797-98. Nevertheless, the Government persisted in its effort to admit the evidence. *See* J.A. 770-71, 797-98.

After Mr. Tillmon testified, the Government again sought to admit the video evidence. J.A. 997. Mr. Tillmon again pointed out that except for the cumulative evidence that Mr. Tillmon had been paid and was armed, the video evidence was not relevant to any of the charges against him and was highly prejudicial. J.A. 997-1000. The Government argued that the evidence was relevant to the charge in Count 2, conspiracy to use and carry a firearm during and in relation to a drug trafficking crime as charged in Count 1. J.A. 1000. Tee, however, makes no reference to drug trafficking; he expresses interest in obtaining a firearm only so he can shoot his victims. *See* J.A. 1402-04. As the Government noted in its closing, Tee was asking for "a gun that wouldn't leave evidence behind when he used it in a violent crime," not during and in relation to a drug trafficking crime. *See* J.A. 1107. The Government cannot use the video evidence to prove a crime—using and carrying a firearm during and in relation to a crime of violence—that was not

charged in the indictment. *See United States v. Randall*, 171 F.3d at 208-09.

The Government's persistence in seeking the admission of the video evidence is an acknowledgment of its prejudicial effect. *See, e.g.*, J.A. 770, 797-98. In closing, the Government mentioned the video evidence five times. J.A. 1100-01, 1107-08, 1114. In its rebuttal closing argument, the Government told the jury that the video evidence—at best, minimally probative cumulative evidence—was "most incriminating" evidence. J.A. 1148. The rebuttal closing comprises nine transcript pages, and the Government discusses the video evidence on six pages, more than any other evidence in the case. J.A. 1145, 1148-52. And the Government expressly asked the jury to use the video evidence to establish what its admissible evidence did not establish—that Mr. Tillmon knew he was involved with heroin trafficking. *See* J.A. 1149 ("You saw that video. You saw the true defendant and what he knew he was doing during all these operations.")).

Fourth Circuit case law supports Mr. Tillmon's contention that the admission of the video evidence was error. In *United States v. Wilson*, the Fourth Circuit vacated the defendant's conviction and ordered a new trial where the prosecutor in a case involving drug trafficking and firearms charges improperly argued in closing the defendant had committed murder. *See* 135 F.3d at 297-302. As in *Wilson*, there was a "serious risk" that the jury convicted Mr. Tillmon because the Government told the jury he was complicit in planned murders. *Id.* at 299-300. And also like *Wilson*, the prejudicial effect of the evidence was magnified by where the Government's argument about the video evidence was "prominent and

thoroughly developed." *Id.* at 300.

As shown above, the central issue was Mr. Tillmon's intent. The Government told the jury that the evidence was relevant to Mr. Tillmon's knowing intent to engage in heroin trafficking: "You saw that video. You saw the true defendant and what he knew he was doing during all these operations." J.A. 1149. Therefore, the erroneous admission of this evidence to prove the central issue in this case warrants reversal for a new trial.

CONCLUSION

For the reasons stated above, Appellant Antonio Lamont Van Tillmon respectfully requests that the Court vacate his convictions of Counts 1, 2, 48, and 49 on the ground that there is insufficient evidence to support the convictions, and remand for entry of judgment of acquittal. In the alternative, Mr. Tillmon respectfully requests that the Court vacate his convictions of Counts 1, 2, 48, and 49 on the ground that the district court committed reversible error at trial, and remand for a new trial.

This the 28th day of May, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Petition for Writ of Certiorari was served on the Respondent herein by depositing a copy thereof in the United States mail, postage prepaid, first class, addressed as follows:

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This the 28th day of May, 2019.

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