APPENDIX

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in Houston

UNITED STATES OF AMERICA
V.
PERENEAL KIZZEE

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: **4:14CR00601-001**
USM NUMBER: 79299-379

☐ See Additional Aliases.

Thomas B. Dupont, II
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1SS, 2SS, and 3SS on December 17, 2015. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Possession of ammunition and firearm by a convicted felon	02/05/2014	1SS
21 U.S.C. § 841(a)(1) and (b)(1)(C)	Possession of a controlled substance with intent to deliver	02/05/2014	2SS
18 U.S.C. § 924(c)(1)(A)(i)	Possessing a firearm during and in relation to a drug trafficking crime	02/05/2014	3SS

☐ See Additional Counts of Conviction

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the .

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 10, 2016
Date of Imposition of Judgment

Melinda Harmon
Signature of Judge

MELINDA HARMON
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

June 14, 2016
Date

Appendix A

NGC INGC

DEFENDANT: **PERENEAL KIZZEE**
CASE NUMBER: **4:14CR00601-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 130 months.
This term consists of SEVENTY (70) MONTHS as to each of Counts 1SS and 2SS, to run concurrently, followed by a consecutive term of SIXTY (60) MONTHS as to Count 3SS, for a total of ONE HUNDRED AND THIRTY (130) MONTHS.

☐ See Additional Imprisonment Terms.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ ☐ a.m. ☐ p.m. on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **PERENEAL KIZZEE**
CASE NUMBER: **4:14CR00601-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years.
This term consists of THREE (3) YEARS as to each of Counts 1SS, 2SS, and 3SS, to run concurrently, for a total of THREE (3) YEARS.

☐ See Additional Supervised Release Terms.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. *(for offenses committed on or after September 13, 1994)*

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state registration in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☐ See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **PERENEAL KIZZEE**
CASE NUMBER: **4:14CR00601-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$300.00		

A $100 special assessment is ordered as to each of Counts 1SS, 2SS, and 3SS, for a total of $300.

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

☐ See Additional Restitution Payees.

TOTALS	$0.00	$0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **PERENEAL KIZZEE**
CASE NUMBER: **4:14CR00601-001**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $300.00 due immediately, balance due
- ☐ not later than _____, or
- ☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or

D ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court
Attn: Finance
P.O. Box 61010
Houston, TX 77208

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States v. Kizzee

United States Court of Appeals for the Fifth Circuit

December 15, 2017, Filed

No. 16-20397

Reporter

877 F.3d 650 *; 2017 U.S. App. LEXIS 25394 **; 2017 WL 6398243

UNITED STATES OF AMERICA, Plaintiff—Appellee, v. PERENEAL KIZZEE, Defendant—Appellant.

Prior History: [1]** Appeal from the United States District Court for the Southern District of Texas.

Core Terms

questions, out-of-court, hearsay, interrogation, cross-examine, argues, drugs, testimonial statement, guilt, nontestifying, testimonial, narcotics, prior opportunity, search warrant, witnesses, firearms, counts, implicating, unavailable, ammunition, declarant, arrested, inferred, controlled substance, harmless error, inculpating, introduce, triggered, grams, crack cocaine

Case Summary

Overview

HOLDINGS: [1]]-Where the charges against defendant included possession of a controlled substance with intent to deliver, and where the prosecutor asked a detective about the questions he had posed to a criminal suspect, and where in response to the detective's questions, the suspect had inculpated the defendant for distributing narcotics, and where the suspect did not testify directly and was not subject to cross-examination at trial, the prosecutor's questions and the detective's responses effectively admitted the suspect's out-of-court statements in violation of the *Confrontation Clause*; [2]-The error was not harmless because no other witness provided testimony from personal knowledge that the defendant sold drugs, and the suspect's testimony was crucial to establishing the defendant's guilt as the only other evidence establishing defendant as a drug dealer was circumstantial.

Outcome

Conviction vacated and case remanded for new trial.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Error

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

HN1[↓] De Novo Review

An appellate court reviews an alleged violation of the *Confrontation Clause* de novo, subject to a harmless error analysis. The government has the burden of defeating a properly raised *Confrontation Clause* objection by establishing that its evidence is non-testimonial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

HN2[↓] Right to Confrontation

The *Confrontation Clause of the Sixth Amendment* provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. *U.S. Const. amend. VI*. The *Confrontation Clause* bars the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination. Testimony is defined as a solemn declaration or affirmation made for the purpose of establishing or proving some fact. But the *Confrontation Clause* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. 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. When the statement from an out-of-court witness is offered for its truth, constitutional error can arise.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

HN3[↓] Right to Confrontation

A statement is testimonial if its primary purpose is to establish or prove past events potentially relevant to later criminal prosecution. Interrogations by law enforcement are classified as testimonial hearsay. In Crawford, the

U.S. Supreme Court explained that statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. The Court reinforced this view in Davis where it stated that the product of police interrogation, whether reduced to a writing signed by the declarant or embedded in the memory of the interrogating officer, is testimonial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

HN4[↓] Right to Confrontation

Police testimony about the content of statements given to them by witnesses are testimonial under Crawford; officers cannot refer to the substance of statements made by a nontestifying witness when they inculpate the defendant. Where 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. Officer testimony regarding statements made by witnesses is thus inadmissible where it allows a jury to reasonably infer the defendant's guilt. Similarly, a prosecutor's questioning may introduce a testimonial statement by a nontestifying witness, thus implicating the Confrontation Clause.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

HN5[↓] Right to Confrontation

A prosecutor's questions may trigger the Confrontation Clause by revealing to the jury that a nontestifying witness conveyed incriminating information. If what the jury hears is, in substance, an untested, out-of-court accusation against the defendant, particularly if the inculpatory statement is made to law enforcement authorities, the defendant's Sixth Amendment right to confront the declarant is triggered. In-court descriptions of out-of-court statements are statements and can violate the Confrontation Clause, if the requisite requirements are otherwise met.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

HN6[↓] Right to Confrontation

The *Confrontation Clause* does not apply to out-of-court statements offered into evidence for a purpose other than establishing the truth of the matter asserted.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

HN7[↓] Right to Confrontation

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. Questions by prosecutors can also trigger *Confrontation Clause* violations. A prosecutor may violate the *Confrontation Clause* by introducing an out-of-court statement, even indirectly, if offered for its truth by suggesting a defendant's guilt.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

HN8[↓] Right to Confrontation

Even if a testimonial statement is admitted against a defendant at a criminal trial, the *Sixth Amendment* is not violated if both the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him or her.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

HN9[↓] Right to Confrontation

A police officer's testimony is no substitute for a nontestifying declarant and does not cure a *Sixth Amendment* violation.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Definition of Harmless & Invited Error

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

***HN10*[↓] Constitutional Rights**

Confrontation Clause violations and errors in the admission of hearsay evidence are subject to review for harmless error. A defendant deprived of the right to confront adverse witnesses is entitled to a new trial unless the government proves harmless error beyond a reasonable doubt. Harmless error means that there is no reasonable possibility that the evidence complained of might have contributed to the conviction.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Definition of Harmless & Invited Error

***HN11*[↓] Definition of Harmless & Invited Error**

Courts consider five factors when evaluating whether an error was harmless: (1) the importance of the witness' testimony in the prosecution's case, (2) whether the testimony was cumulative, (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, (4) the extent of cross-examination otherwise permitted, and (5) the overall strength of the prosecution's case.

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellee: John Richard Berry, Assistant U.S. Attorney, Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX.

For PERENEAL KIZZEE, Defendant - Appellant: Yolanda Evette Jarmon, Esq., Law Office of Yolanda Jarmon, Houston, TX.

Judges: Before JONES, SMITH, and PRADO, Circuit Judges.

Opinion by: EDWARD C. PRADO

Opinion

[*653] EDWARD C. PRADO, Circuit Judge:

Defendant—Appellant Pereneal Kizzee was charged with possession of ammunition and firearms by a convicted felon (count one), possession of a controlled substance with intent to deliver (count two), and possession of a firearm during and in relation to a drug trafficking crime (count three). Kizzee pleaded not guilty. At trial, the Government's key witness was Detective Lance Schultz. The prosecutor asked Detective Schultz about questions he posed to a criminal suspect, Carl Brown, during an interrogation. In response to Detective Schultz's questions, Brown inculpated

Kizzee for distributing narcotics. But Brown did not otherwise testify, and he was not **[*654]** subject to cross-examination at trial. Kizzee **[**2]** objected based on hearsay and the *Confrontation Clause*, which the district court overruled. A jury found Kizzee guilty on all three counts. On appeal, Kizzee argues that the prosecutor's questions and Detective Schultz's testimony effectively admitted Brown's out-of-court statements in violation of the *Confrontation Clause* and the rules on hearsay. Because we find that the prosecutor's questioning of Detective Schultz admitted testimonial hearsay in violation of the *Confrontation Clause*, we VACATE Kizzee's conviction for counts two and three and REMAND for a new trial.

I. BACKGROUND

On February 4, 2014, Detective Schultz and his partner, Detective Justin Lehman, were conducting surveillance at 963 Trinity Cut Off Drive in Huntsville, Texas (the "building" or "house").[1] The officers had previously received information suggesting that drugs were being sold at that location, and they were aware that Defendant Kizzee was frequently seen there during the day. During their surveillance, the officers observed Carl Brown arrive at the house, speak with Kizzee on the porch, and depart after two to three minutes. Suspecting that Brown had purchased drugs from Kizzee, the officers contacted Officer Taylor Wilkins and requested he follow Brown in order to **[**3]** develop probable cause and conduct a traffic stop.

Officer Wilkins testified at trial that he stopped Brown after observing a traffic violation. Officer Wilkins ordered Brown to exit the vehicle and requested permission to search his person, which Brown granted. After searching Brown, Officer Wilkins discovered a bag containing 0.54 grams of crack cocaine inside the liner of his cap. Officer Wilkins arrested Brown and transported him to the police department. At the police department, Detective Schultz questioned Brown. In response to Detective Schultz's questions, Brown stated that he purchased the narcotics found in his hat from Kizzee, and he had purchased drugs from Kizzee on previous occasions. Although Brown had served as a reliable informant for Schultz in the past, Brown later recanted his statements to Detective Schultz, denied implicating Kizzee, and indicated he did not want to testify.

After Detective Schultz questioned Brown, he obtained a search warrant for the building at 963 Trinity Cut Off Drive. On February 5, 2014, Officer Wilkins executed the search warrant with the assistance of other officers, including Agent Jared Yates. When the officers arrived, Kizzee opened **[**4]** the front door and peeked out of the doorway.

[1] The structure at 963 Trinity Cut Off Drive was approximately 600 or 700 square feet. Although, there were no bedrooms and no kitchen in the structure, it is sometimes referred to as Kizzee's residence or house.

Kizzee then shut and locked the door. The officers forced their way into the building within 45 seconds, and they found Kizzee in the bathroom filling the toilet with water from a five-gallon jug. Detective Schultz ordered Kizze to "show me your hands and get on the ground." Kizzee looked at Detective Schultz, but continued to pour water into the toilet bowl until Schultz grabbed Kizzee and arrested him. Kizzee was removed from the house, searched, and placed in the back of a patrol unit.

The officers thoroughly searched the house and surrounding grounds. The officers took apart the plumbing associated with the toilet and searched the pipes, but found no evidence of narcotics. Ultimately, the search yielded less than a gram of crack cocaine, $1,183 in Kizzee's front **[*655]** pockets, two rifles, and ammunition. According to Agent Yates, the search of the house revealed no evidence of crack cocaine use, nothing consistent with drug distribution, and no proof that Kizzee destroyed any evidence. The officers found a clear plastic bag containing 0.2 grams of crack cocaine in the overflow of the bathroom sink. They also found a microwave and several Pyrex **[**5]** dishes and plastic bowls on the bathroom shelves. Detective Schultz testified that a Pyrex dish and two plastic bowls contained a white residue on them, but Jennifer Hass, the Government's 3 expert witness, testified that no controlled substance was detected on these items. Two .22 caliber rifles were found in the corner of a room in the building. The officers also found several surveillance cameras still wrapped in plastic in the box, and a safe containing a money counter. Two additional rifles were found in a metal shed behind the building. The officers found three mobile phones in the house. One phone contained two missed calls from Brown's phone number, and one outgoing call to Brown's mobile phone. The calls were all made before Brown appeared at Kizzee's house on the day Brown was arrested. The phone also contained a text message warning of Brown's arrest.

Kizzee was arrested and charged with possession of ammunition and firearms by a convicted felon in violation of *18 U.S.C. § 922(g)(1)* (count one), possession of a controlled substance with intent to deliver in violation of *21 U.S.C. §§ 841(a)(1)* and *841 (b)(1)(C)* (count two), and possession of a firearm during and in relation to a drug trafficking crime in violation of *18 U.S.C. § 924(c)(1)(A)* (count three). **[**6]** Kizzee pleaded not guilty to all three counts.

After unsuccessfully challenging the validity of the search warrant, Kizzee stood trial. During Detective Schultz's testimony for the Government, the prosecutor inquired about Detective Schultz's questioning of Brown:

> Prosecutor: Detective Schultz, did you ask Mr. Brown a series of questions after you arrived at the police department?

[Schultz]: Yes, sir, I did.
Prosecutor: Did you ask Mr. Brown whether or not he obtained the narcotics that were discovered in his hat from Pereneal Kizzee?
[Schultz]: Yes, sir, I did.
Prosecutor: Did you ask him if he obtained the narcotics that were discovered in his hat immediately prior to being stopped?
[Schultz]: Yes, sir.
Prosecutor: Did you ask Mr. Brown whether or not he had seen any additional narcotics at 963 Trinity Cut Off?
[Schultz]: Yes.
. . .
Prosecutor: Did you ask him whether or not he obtained drugs from Mr. Kizzee on previous occasions?
[Schultz]: Yes, sir.
Prosecutor: Based on your observations the day before that involved the surveillance at Mr. Kizzee's residence, the stop by Officer Taylor [Wilkins], the discovery of narcotics, and your subsequent interview of Mr. Brown, what did you and Detective **[**7]** Lehman do?
[Schultz]: I was able to obtain a search warrant for 963 Trinity Cut Off.

Defense counsel objected to this line of questioning based on hearsay and the *Confrontation Clause*, which the district court overruled.

The jury found Kizzee guilty on all three counts. The court sentenced him to 130 months of imprisonment, consisting of 70 months each as to counts one and two, running concurrently, followed by a consecutive **[*656]** term of 60 months as to count three. Kizzee timely filed a notice of appeal.

II. DISCUSSION

A. *Confrontation Clause* Violation

On appeal, Kizzee argues that Detective Schultz's testimony implicitly introduced Brown's out-of-court statements in violation of the *Sixth Amendment Confrontation Clause* and hearsay rules.[2] Kizzee properly raised a *Confrontation Clause* objection, thus preserving his claim of error. *See United States v. Polidore, 690 F.3d 705, 710 (5th Cir. 2012)*. *HN1*[↑] This Court "review[s] the alleged violation of the *Confrontation Clause* de novo, subject to a harmless error analysis." *Id.* (citing *United States v. Bell, 367 F.3d 452, 465 (5th Cir. 2004)*). The Government has the burden of "defeating [a] properly raised *Confrontation Clause* objection by establishing that its evidence is non-testimonial." *United States v. Duron-Caldera, 737 F.3d 988, 993 (5th Cir. 2013)* (alteration in original) (quoting *United States v. Jackson, 636 F.3d 687,*

[2] The *Confrontation Clause* and hearsay rules are not coextensive, but they do overlap. *See Crawford v. Washington, 541 U.S. 36, 51, 53, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. This opinion focuses on the *Confrontation Clause* analysis to the extent it is dispositive.

695 & n.4 (5th Cir. 2011)).

HN2[↑] The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause bars the admission **[**8]** of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had [] a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Supreme Court has defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. at 51 (alteration in original) (citation omitted). But "the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" Williams v. Illinois, 567 U.S. 50, 132 S. Ct. 2221, 2235, 183 L. Ed. 2d 89 (quoting Crawford, 541 U.S. at 59-60 n.9). "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. When the statement from an out-of-court witness is offered for its truth, constitutional error can arise." Taylor v. Cain, 545 F.3d 327, 335 (5th Cir. 2008). We thus examine three issues: first, whether the prosecutor's questioning, combined with Detective Schultz's testimony, introduced a testimonial statement; second, whether the statement was offered for its truth, i.e., to show Kizzee's guilt; and third, whether Brown was unavailable to testify and Kizzee had a prior opportunity to cross examine him.

*1. Testimonial [**9] Statement*

We begin our analysis by examining whether the court admitted the testimonial statement of a witness who did not appear at trial. Crawford, 541 U.S. at 53-54. **HN3**[↑] "[A] statement is testimonial if its 'primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution.'" Duron-Caldera, 737 F.3d at 992-93 (quoting Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)). Brown's statements made to Detective Schultz while under interrogation by law enforcement are unquestionably **[*657]** testimonial hearsay. *See* Crawford, 541 U.S. at 53 (classifying "interrogations by law enforcement" as testimonial hearsay). In *Crawford*, the Court explained that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." Crawford, 541 U.S. at 52; *see also* Taylor, 545 F.3d at 335-36. The Court reinforced this view in *Davis* where it stated that "[t]he product of [police] interrogation, whether reduced to a writing signed by the declarant or embedded in the memory .

. . . of the interrogating officer, is testimonial." *547 U.S. at 826*.

Instead, the Government argues that no statement made by Brown was ever introduced at trial, and Detective Schultz testified only as to his own observations. After objecting to Detective Schultz's testimony regarding Brown's interrogation based on hearsay and the **[**10]** *Confrontation Clause*, counsel approached the bench to discuss Brown's status as a nontestifying witness. The prosecutor justified his questioning of Schultz by arguing that "hearsay is an out-of-court statement. You are not going to hear this witness utter one single word that Carl Brown replied in response to any of the questions. It can't possibly be hearsay." The Government adopts this argument on appeal, arguing that "[n]o statement made by Brown was offered for its truth;" the only testimonial statements offered to the jury were Detective Schultz's own statements.

This Court has recognized that *HN4*[↑] police testimony about the content of statements given to them by witnesses are testimonial under *Crawford*; officers cannot refer to the substance of statements made by a nontestifying witness when they inculpate the defendant. *See Taylor, 545 F.3d at 335*; *Favre v. Henderson, 464 F.2d 359, 362 (5th Cir. 1972)*. Where 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. *Favre, 464 F.2d at 364*. In *Favre*, we reasoned that "[a]lthough the officer never testified to the exact statements made to him by the informers, the nature of the statements . . . was readily inferred." *Id. at 362*. Officer **[**11]** testimony regarding statements made by witnesses is thus inadmissible where it allows a jury to reasonably infer the defendant's guilt. Similarly, a prosecutor's questioning may introduce a testimonial statement by a nontestifying witness, thus implicating the *Confrontation Clause*. *See United States v. Johnston, 127 F.3d 380, 393-95. (5th Cir. 1997)*; *Favre, 464 F.2d at 364*; *c.f. Gochicoa v. Johnson, 118 F.3d 440, 445-46 (5th Cir. 1997), cert denied, 522 U.S. 1121, 118 S. Ct. 1063, 140 L. Ed. 2d 124 (1998)*. This is true where "the jury would reasonably infer that information obtained in an out of court conversation between a testifying police officer and an informant . . . implicated a defendant in narcotics activity." *Johnston, 127 F.3d at 395*.

Here, Detective Schultz's testimony introduced Brown's out-of-court testimonial statements by implication. At trial, the prosecutor asked Detective Schultz the specific questions he posed to Brown, and the content of this testimony implicitly revealed Brown's statements. *See Taylor, 545 F.3d at 336*. Officer testimony that allows a fact-finder to infer the statements made to him—even without revealing the content

of those statements—is hearsay if "offered to establish identification, guilt, or both." *Favre, 464 F.2d at 362*. The prosecutor's questions explicitly identified Kizzee by name, linking him to the substance of Brown's interrogation. In fact, the prosecutor's questions appeared designed to **[*658]** elicit hearsay testimony without **[**12]** directly introducing Brown's statements. Brown's statements were testimonial because they were made under interrogation, and the primary purpose of that interrogation was to establish "past events potentially relevant to later criminal prosecution." *Davis, 547 U.S. at 822*. Brown identified Kizzee as his drug source. Although the Government did not introduce the exact statements made by Brown, the nature of his statements was readily inferred.

The Government cites two cases in support of its argument that no statement by Brown was introduced at trial: *United States v. Flores, 286 F. App'x 206 (5th Cir. 2008)*; *United States v. Lopez-Moreno, 420 F.3d 420 (5th Cir. 2005)*. But these cases are inapposite; they address whether the admission of non-assertive conduct by a nontestifying witness triggered a defendant's *Confrontation Clause* rights. It is true, as the Government argues, that where the content of a statement is not disclosed, the *Confrontation Clause* may not be violated. *See United States v. Castro—Fonseca, 423 Fed. Appx. 351, 2011 WL 1549213 (5th Cir. 2011)*; *Foy v. Donnelly, 959 F.2d 1307, 1312-13 (5th Cir. 1992)*. The *Sixth Amendment* protection is not triggered where the content of out-of-court statements is not revealed, and the statements at issue do not imply a defendant's guilt. *See Castro—Fonseca, 423 Fed. Appx. 351, 2011 WL 1549213, at *2*; *Foy, 959 F.2d at 1313*. But in this case, Detective Schultz's testimony conveyed critical substance about Brown's statements, inculpating Kizzee by name and implying his guilt in **[**13]** the crime charged.

The Government's argument also disregards the fact that ***HN5***[↑] a prosecutor's questions may trigger the *Confrontation Clause* by revealing to the jury that a nontestifying witness conveyed incriminating information. *See Johnston, 127 F.3d at 394*. The question in this case is not whether Detective Schultz explicitly introduced Brown's out-of-court statements, but whether Brown's out-of-court statements were readily inferred from Detective Schultz's testimony. *See, e.g., Taylor, 545 F.3d at 336*; *United States v. Rodriguez-Martinez, 480 F.3d 303, 308 (5th Cir. 2007)*; *Favre, 464 F.2d at 362*. This approach is consistent with the law of other circuits. *See United States v. Meises, 645 F.3d 5, 21 (1st Cir. 2011)* ("If what the jury hears is, in substance, an untested, out-of-court accusation against the defendant, particularly if the inculpatory statement is made to law enforcement authorities, the defendant's *Sixth Amendment* right to confront the declarant is triggered.");

Ocampo v. Vail, 649 F.3d 1098, 1108 (9th Cir. 2011) ("[I]n-court descriptions of out-of-court statements . . . are 'statements' and can violate the *Confrontation Clause*, if the requisite requirements are otherwise met."); *Ryan v. Miller*, 303 F.3d 231, 249 (2d Cir. 2002) ("If the substance of the prohibited testimony is evident even though it was not introduced in the prohibited form, the testimony is still inadmissible."); *Mason v. Scully*, 16 F.3d 38, 43 (2d Cir. 1994) ("The fact that the content of [the co-conspirator's] statement to [the detective] was not revealed in detail was immaterial, for the **[**14]** plain implication that the prosecutor sought to elicit . . . was that the conversation . . . led the police to focus on [the defendant].").

The content of Brown's statements could be readily inferred from the prosecutor's questions and Detective Schultz's testimony. Detective Schultz's testimony revealed the substance of Brown's statements inculpating Kizzee, leading to the clear and logical inference that Brown believed and said that Kizzee was the source of his drugs. Thus, the prosecutor's questioning **[*659]** of Detective Schultz introduced testimonial statement for purposes of the *Confrontation Clause*.

2. Statement Offered for its Truth

Next, we consider whether Brown's statements introduced at trial through Detective Schultz's testimony were offered for their truth: to prove Kizzee's guilt in the crime charged. ***HN6***[↑] The *Confrontation Clause* does not apply to out-of-court statements offered into evidence for a purpose other than establishing the truth of the matter asserted. *See* *Williams*, 132 S. Ct. at 2235; *Crawford*, 541 U.S. at 59 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)); *Taylor*, 545 F.3d at 335.

The Government argues that Schultz's statements were limited to his own knowledge and actions, and they explained the basis for obtaining a warrant. According to the Government, Detective Schultz is permitted to testify about what he saw, what **[**15]** happened to Brown on February 4, and Schultz's actions based on what he learned from Brown and other sources. The Government characterizes Detective Schultz's testimony as follows:

> The substance of Schultz's testimony was that he saw Brown arrive at Kizzee's, buy drugs, and then leave. Immediately after that, Brown was arrested and found in possession of drugs. Schultz and Lehman obtained a search warrant and found drugs, drug paraphernalia, ammunition, firearms at Kizzee's house the next day. This is what Schultz saw and heard on February 4 and 5, rather than inadmissible hearsay.

Thus, according to the Government, Brown's statements were not offered to

show Kizzee's guilt, but for a constitutionally permissible, nonhearsay purpose. Kizzee argues that a reasonable jury could only have understood Schultz's testimony to communicate that Brown identified Kizzee as his drug source. Because the prosecutor's implicit statements suggested Kizzee's guilt and were not necessary to explain Schultz's actions, we find that Detective Schultz's testimony introduced Brown's statements for their truth.

Testifying officers may provide context for their investigation or explain "background" facts. *See* ***[**16]*** *United States v. Smith, 822 F.3d 755, 761 (5th Cir. 2016)*. Such 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. *See Castro—Fonseca, 423 Fed. Appx. 351, 2011 WL 1549213, at *2; United States v. Carrillo, 20 F.3d 617, 619 (5th Cir. 1994)*. These statements often provide necessary context where a defendant challenges the adequacy of an investigation. But absent such claims, there is a questionable need for presenting out-of-court statements because the additional context is often unnecessary, and such statements can be highly prejudicial. *See* 2 McCormick on Evidence § 249 (7th ed. 2013) (citation omitted) ("The need for this evidence is slight, and the likelihood of misuse great."). ***HN7***[↑] 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. *See Taylor, 545 F.3d at 335*; *Johnston, 127 F.3d at 394* ("The more directly an out-of-court statement implicates the defendant, the greater the danger of prejudice."); *United States v. Evans, 950 F.2d 187, 191 (5th Cir. 1991)*; *United States v. Hernandez, 750 F.2d 1256, 1257 (5th Cir. 1985)*; *United States v. Gomez, 529 F.2d 412, 416-17 (5th Cir. 1976)*; *see also United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004)*. Questions by prosecutors can also trigger *Confrontation Clause* **[*660]** violations. *See Johnston, 127 F.3d at 402-03*; *Favre, 464 F.2d at 362-64*; *Meises, 645 F.3d at 21-23*. A prosecutor may violate the *Confrontation Clause* by introducing an out-of-court statement, even indirectly, if offered for its truth by suggesting a defendant's guilt. **[**17]** *See Johnston, 127 F.3d at 394-95*. In *Hernandez, 750 F.2d at 1257-58*.

In this case, the prosecutor's questions and Detective Schultz's subsequent testimony exceeded the scope required to explain Detective Schultz's actions. Detective Schultz's testimony left the jury with the impression that Brown's statements were instrumental in obtaining a search warrant. While Detective Schultz no doubt observed this interrogation, his observations cannot serve as a justification to circumvent constitutional protections; testimony introducing out-of-court

statements by a nontestifying witness can result in a violation of the *Confrontation Clause*.[3] Admitting testimony regarding Brown's interrogation was not necessary to explain Detective Schultz's actions; there was minimal need for Detective Schultz to explain the details forming the basis of the search warrant. Detective Schultz could have merely explained that he obtained a warrant to search Kizzee's property following Brown's arrest. In fact, the Government's characterization of Detective Schultz's testimony on appeal does just this, omitting that the prosecutor questions Detective Schultz regarding Brown's interrogation.

Detective Schultz's testimony was not limited to merely explaining his actions; it showed that **[**18]** Brown bought drugs from Kizzee, and Kizzee had more at the house. Testimony regarding questions posed to Brown was not necessary. Other circumstantial evidence and Detective Schultz's observations would have been sufficient to explain his investigatory actions and provide background information. Thus, Brown's out-of-court statements inculpating Kizzee were introduced for their truth—to show Kizzee's guilt in the crime charged.

3. Unavailable Witness and Prior Opportunity to Cross-Examine

HN8[↑] Even if a testimonial statement is admitted against a defendant at a criminal trial, the *Sixth Amendment* is not violated if both the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him or her. *Crawford, 541 U.S. at 53-54*. The Government suggests that Kizzee had an opportunity to cross-examine Brown because he could have called him as a witness by subpoenaing him. The Government argues that it offered to stay the trial while he did so, but Kizzee refused. Thus, according to the Government, Kizzee had a prior opportunity to cross-examine Brown. The Government also repeatedly suggests that cross-examining Detective Schultz was sufficient because this case does not involve statements by out-of-court **[**19]** declarants; Schultz was a witness against Kizzee, he was present at trial, and he was subject to cross-examination. On the other hand, Kizzee argues that Brown's statements were admitted at trial, and he questions Brown's credibility as a witness. He further contends that it should not be incumbent on the defense to produce witnesses **[*661]** for the Government; to suggest otherwise misunderstands the burden of proof in a criminal case.

[3] In support of its argument, the Government offers two cases holding that law enforcement officers may testify about their own observations. *See United States v. Potwin, 136 F. App'x 609 (5th Cir. 2005)*; *United States v. Gauthier, 2001 U.S. App. LEXIS 31403, 2001 WL 85819 (5th Cir. Jan. 15, 2001)*. These cases are inapposite; neither involves law enforcement officer testimony regarding the substance of statements made in the course of interrogation. *See Potwin, 136 F. App'x at 611*; *Gauthier, 2001 U.S. App. LEXIS 31403, 2001 WL 85819, at *1*. In this case, Detective Schultz questioned Brown, and Brown provided answers in the form of statements, implicating Kizzee.

We agree. The fact that a defendant *could* call a witness cannot fairly constitute a prior opportunity to cross-examine that witness. Otherwise, a prosecutor could introduce hearsay statements by *any* available witness merely by proposing that the defense could call them instead. Even if Kizzee had a prior opportunity to examine Brown, Brown was not unavailable as defined by the Federal Rules of Evidence. *See* Fed. R. Evid. 804(a) (listing criteria for being unavailable as a witness). In fact, the Government concedes that "Brown was not unavailable as a witness. The United States had subpoenaed Brown, but elected not to call him." The Government did not offer any reason why it did not elect to call Brown as a witness, only that it was "not interested in having [Brown]." Finally, HN9[↑] a **[**20]** police officer's testimony is no substitute for a nontestifying declarant and does not cure a *Sixth Amendment* violation. *See* Davis, 547 U.S. at 826; Ocampo, 649 F.3d at 1113. Thus, we find that Kizzee's *Sixth Amendment* right to confront adverse witnesses at trial was violated by Detective Schultz's testimony when the prosecutor implicitly introduced Brown's out-of-court statements.

B. Harmless Error

Kizzee argues that the error in admitting Brown's statements in violation of the *Confrontation Clause* and hearsay rules was not harmless. According to Kizzee, he was not permitted to cross-examine Brown about his out-of-court statements, which were critical to the Government's case. Kizzee similarly questions the reliability of Brown as a witness. Kizzee also argues that no other witness in this case could provide testimony from personal knowledge about Kizzee's drug sales. The Government only argues that Kizzee cannot show that the admission of hearsay affected his substantial rights.

HN10[↑] *Confrontation Clause* violations and errors in the admission of hearsay evidence are subject to review for harmless error. *Polidore, 690 F.3d at 710*; *United States v. El-Mezain, 664 F.3d 467, 494 (5th Cir. 2011)*. A defendant deprived of the right to confront adverse witnesses is entitled to a new trial unless the Government proves harmless error beyond a reasonable doubt. *Duron-Caldera, 737 F.3d at 996*; *Rodriguez-Martinez, 480 F.3d at 308*. Harmless **[**21]** error means that "there is [no] reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)*. We find that the Government failed to show that the statements did not contribute to Kizzee's conviction beyond a reasonable doubt.[4] ***HN11***[↑] This Court

[4] Kizzee was convicted of three counts: possession of ammunition and firearms by a convicted felon in violation of 18 U.S.C. § 922(g)(1) (count one), possession of a controlled substance with intent to deliver in violation of 21 U.S.C. §§

considers five factors when evaluating whether an error was harmless: (1) "the importance of the witness' testimony in the prosecution's case," (2) "whether the testimony was cumulative," (3) "the presence or absence of evidence corroborating or **[*662]** contradicting the testimony of the witness on material points," (4) "the extent of cross-examination otherwise permitted," and (5) "the overall strength of the prosecution's case." *Duron—Caldera, 737 F.3d at 996* (citations omitted).

The Government referenced Detective Schultz's testimony and Brown's interrogation in its closing statement. The importance of testimony to the prosecution's case can be underscored if it is referenced in closing statements. *United States v. Alvarado-Valdez, 521 F.3d 337, 342-43 (5th Cir. 2008)* ("Our task would be difficult were it not for the government's insistent reliance on the testimony in its closing argument, in light of which we cannot say the error was harmless."). Brown's statements also secured a search **[**22]** warrant for Kizzee's property. And they were crucial to establishing that Kizzee intended to sell or distribute the 0.2 grams of crack found in the house. With evidence that Brown obtained the drugs from Kizzee, the Government could establish Kizzee as a drug dealer rather than possessor. No other testimony was presented to connect Kizzee to Brown as the source of Brown's drugs. *See Rodriguez-Martinez, 480 F.3d at 308* (finding harmful error where an informant's out-of-court statement was the only evidence definitively identifying defendant as the drug source). And Brown was not presented as a witness at trial; Kizzee did not have a prior opportunity to cross-examine a key witness for the Government whose testimony was vital to the Government's case. Yet Brown was available as a witness; the Government subpoenaed Brown, but did not offer any reason for not electing to call him.

While other circumstantial evidence implicated Kizzee and corroborated Brown's out-of-court statements, we find this evidence is insufficient to show harmless error beyond a reasonable doubt. Detective Schultz testified that the Kizzee's property was known for drug transactions, and he regularly saw drug traffickers at the address in question. **[**23]** He also observed Brown briefly speak to Kizzee at the address, and he identified their interaction as a drug transaction based on his experience. After stopping and searching Brown, another officer found Brown to be in possession of crack cocaine. Schultz also testified that Kizzee was present at the house, and cell-phone logs linked Kizzee to Brown. Kizzee was found with $1,183 in his

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841(a)(1) and *841 (b)(1)(C)* (count two), and possession of a firearm during and in relation to a drug trafficking crime in violation of *18 U.S.C. § 924(c)(1)(A)* (count three). The testimonial statements at issue in this case pertained to Kizzee's role in distributing a controlled substance, implicating counts two and three. The statements were not relevant to count one. Kizzee's conviction for possession of ammunition and firearms by a convicted felon is thus undisturbed by our ruling.

front pockets. Officers also found guns and ammunition in the house, as well as apparently new surveillance cameras. But other evidence on the record contradicts Brown's statements. Only 0.2 grams were found in the house, less than the 0.54 grams found on Brown's person. Dishes found in the house had no evidence of any controlled substance when tested. And other officers testified that nothing was found in Kizzee's house that was consistent with using or distributing narcotics. There was also no evidence recovered to indicate that Kizzee destroyed any evidence in the house. This circumstantial evidence offered by the Government is inconclusive at best, and the prejudice caused by the prosecutor's improper questioning is more likely to have contributed to Kizzee's conviction. Thus, the Government's has **[**24]** not shown beyond a reasonable doubt that the admission of Brown's statements was harmless error.

As Kizzee argues, no other witness in this case could provide testimony from personal knowledge that Kizzee sold drugs. Brown's testimony was crucial to establishing Kizzee's guilt. But Kizzee questions Brown's credibility as a witness, and Brown denies ever making the statements attributed to him in the warrant application. The only remaining evidence establishing Kizzee as a drug dealer was circumstantial. And the remaining circumstantial **[*663]** evidence does not appear to be enough to show that "*there is* [no] reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman, 386 U.S. at 24*. Thus, we conclude that the violation of Kizzee's *Sixth Amendment* right was not harmless.

III. CONCLUSION

For the foregoing reasons, we find that the introduction of Brown's out-of-court statements through the prosecutor's questioning of Detective Schultz admitted testimonial hearsay in violation of the *Confrontation Clause*. As a result, we VACATE Kizzee's conviction for counts two and three and REMAND for a new trial.

Federal Reporter

(NOTE: Identify Changes with Asterisks (*))

UNITED STATES DISTRICT COURT

Southern District of Texas

Holding Session in Houston

UNITED STATES OF AMERICA
V.
PERENEAL KIZZEE

AMENDED JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: **4:14CR00601-001**
USM NUMBER: 79299-379

☐ See Additional Aliases.

Date of Original Judgment: June 10, 2016.
(or Date of Last Amended Judgment)

Thomas B. Dupont, II
Defendant's Attorney

Reason for Amendment

*☒ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
☐ Correction for Clerical Mistake (Fed. R. Crim. P. 36)
☐ Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))
☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
☐ Direct Motion to District Court Pursuant to ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☐ pleaded guilty to count(s)
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☒ was found guilty on count(s) 1SS on December 17, 2015, after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Possession of ammunition and firearm by a convicted felon	02/05/2014	1SS

☐ See Additional Counts of Conviction.
The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) 2SS and 3SS ☐ is☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 28, 2018
Date of Imposition of Judgment

Melinda Harmon
Signature of Judge

MELINDA HARMON
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

March 29, 2018
Date

Appendix C

MM | JAG

DEFENDANT: **PERENEAL KIZZEE**
CASE NUMBER: **4:14CR00601-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of *70 months.
*This term consists of SEVENTY (70) MONTHS as to Count 1SS.

☐ See Additional Imprisonment Terms.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ ☐ a.m. ☐ p.m. on _____ .
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **PERENEAL KIZZEE**
CASE NUMBER: **4:14CR00601-001**

SUPERVISED RELEASE

Upon release from imprisonment you will be on supervised release for a term of: *3 years.
*This term consists of THREE (3) YEARS as to Count 1SS.

☐ See Additional Supervised Release Terms.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☐ See Special Conditions of Supervision.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **PERENEAL KIZZEE**
CASE NUMBER: **4:14CR00601-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100*		

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

☐ See Additional Restitution Payees.

TOTALS	$0.00	$0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A *☒ Lump sum payment of $100.00 due immediately, balance due
☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or

D ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court
Attn: Finance
P.O. Box 61010
Houston, TX 77208

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ See Additional Defendants and Co-Defendants Held Joint and Several

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States v. Kizzee

United States Court of Appeals for the Fifth Circuit

April 15, 2019, Filed

No. 18-20306 Summary Calendar

Reporter

765 Fed. Appx. 62 *; 2019 U.S. App. LEXIS 11011 **; 2019 WL 1715998

UNITED STATES OF AMERICA, Plaintiff-Appellee v. PERENEAL KIZZEE, Defendant-Appellant

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[**1]** Appeal from the United States District Court for the Southern District of Texas. USDC No. 4:14-CR-601-1.

Core Terms

firearm, district court, enhancement, counts, felony offense, plain error, resentencing hearing, possessed, argues, base offense, imprisonment, ineffective, trafficking, ammunition, convicted

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellee: John Richard Berry, Assistant U.S. Attorney, Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX.

For PERENEAL KIZZEE, Defendant - Appellant: Yolanda Evette Jarmon, Esq., Law Office of Yolanda Jarmon, Houston, TX.

Judges: Before KING, SOUTHWICK, and ENGELHARDT, Circuit Judges.

Opinion

[*62] PER CURIAM:*

Pereneal Kizzee was charged with possession of ammunition and firearms by a convicted felon (count one), possession of a controlled substance with intent to deliver (count two), and possession of a firearm during and in relation to a drug trafficking crime (count three). On direct appeal, this court vacated Kizzee's convictions for **[*63]** counts two and three and remanded to the district court for retrial on those counts. The Government moved to dismiss counts two and three, and the district court granted the motion. At a

* Pursuant to *5TH CIR. R. 47.5*, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in *5TH CIR. R. 47.5.4*.

resentencing hearing, the district court reimposed the original sentence as to count one: 70 months of imprisonment and three years of supervised release.

On appeal, Kizzee argues that **[**2]** the district court erroneously applied a four-level enhancement to the base offense level for using or possessing a firearm or ammunition in connection with another felony offense, pursuant to U.S.S.G. § 2K2.1(b)(6)(B), which he contends no longer applied after the Government dismissed counts two and three. Further, Kizzee claims that his appointed counsel at the resentencing hearing rendered ineffective assistance by failing to object to the enhancement. The Government argues that the law of the case doctrine and its corollary the mandate rule preclude review of Kizzee's arguments. However, we decline to address the applicability of these doctrines and instead proceed to the merits. *See, e.g.*, *United States v. Ramos-Gonzales, 857 F.3d 727, 730 n.3 (5th Cir. 2017)*; *United States v. Simpson, 796 F.3d 548, 552 & n.7 (5th Cir. 2015)*.

Because Kizzee did not object to the enhancement at the resentencing hearing, this court's review is for plain error. *See United States v. Mondragon-Santiago, 564 F.3d 357, 368 (5th Cir. 2009)*. To establish plain error, Kizzee must show a forfeited error that is clear or obvious and that affected his substantial rights. *See Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009)*. If he makes such a showing, this court has the discretion to correct the error but only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* As pertains to a § 2K2.1(b)(6)(B) enhancement, "[t]he district court's determination of the **[**3]** relationship between the firearm and another offense is a factual finding," as is a district court's determination of what activity constitutes relevant conduct. *United States v. Coleman, 609 F.3d 699, 708 (5th Cir. 2010)*; *see United States v. Hinojosa, 484 F.3d 337, 340* (5th Cir. 2007). A question of fact that could have been resolved upon proper objection cannot constitute plain error. *United States v. Rodriguez, 602 F.3d 346, 361 (5th Cir. 2010)*.

Kizzee argues that the dismissal of counts two and three categorically prevented the application of § 2K2.1(b)(6)(B). Section 2K2.1(b)(6)(B) provides that the base offense level for a firearms offense should be increased by four levels "[i]f the defendant . . . used or possessed any firearm . . . in connection with another felony offense." Another felony offense, in turn, "means any Federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained." § 2K2.1, comment. (n.14(C)).

If Kizzee had objected, the district court could have resolved the factual question whether the preponderance of the evidence supported the finding that he possessed a firearm in connection with a felony offense. *See* *United States v. Anderson, 560 F.3d 275, 283 (5th Cir. 2009)*. Therefore, the application of the § 2K2.1(b)(6)(B) enhancement cannot constitute plain error. *See* ***[**4]*** *Rodriquez, 602 F.3d at 361*. As to Kizzee's ineffective assistance of counsel claim, we decline to review it without prejudice to any right Kizzee may have to raise such a claim in a later postconviction proceeding. *See* *United States v. Isgar, 739 F.3d 829, 841 (5th Cir. 2014)*.

[*64] Based on the foregoing, the judgment is AFFIRMED.