
No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

SAMANTHA WINTER

Petitioner

v.

UNITED STATES OF VIRGINIA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

United States Court of Appeals for the Fourth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

QUESTION 1: WHETHER THE DISTRICT COURT ERRONEOUSLY DENIED MS. WINTER'S MOTION TO SUPPRESS HER STATEMENTS TO LAW ENFORCEMENT OFFICERS, WHERE ATF AGENTS AND A KING GEORGE COUNTY DETECTIVE CONDUCTED A CUSTODIAL INTERROGATION OF SAMANTHA WINTER WITHOUT FIRST NOTIFYING MS. WINTER OF HER RIGHTS PURSUANT TO *MIRANDA V. ARIZONA*.

QUESTION 2: WHETHER THE DISTRICT COURT ERRONEOUSLY ADMITTED EVIDENCE PURSUANT TO RULE 404(B) OF THE FEDERAL RULES OF EVIDENCE THAT HER THEN BOYFRIEND DEVON BYRD, TRAFFICKED THC LACED CANDY FROM CALIFORNIA.

QUESTION 3: WHETHER THE DISTRICT COURT ERRONEOUSLY ADMITTED EVIDENCE REGARDING THE THC CANDY TRAFFICKED BY DEVON BYRD.

- (a) Whether the trial court erroneously denied Samantha Winter's Motion to Suppress the THC candy trafficked by Devon Byrd that law enforcement officers seized during an unconstitutional, warrantless search of Ms. Winter's car during a traffic stop; and
- (b) Whether the trial court erroneously admitted Mr. Byrd's mug shot, packages of the THC candy that law enforcement seized from Mr. Byrd, certificates of analysis and testimony regarding Mr. Byrd's drug trafficking and arrest, where the evidence was not relevant to the allegations that Ms. Winter lied about her marijuana use when purchasing a gun

QUESTION 4: WHETHER THE TRIAL COURT'S ERRONEOUS RULINGS ARE HARMLESS.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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**TO THE HONORABLE JUSTICES OF THE UNITED STATES
SUPREME COURT:**

Your Petitioner, Samantha Winter, by counsel, represents that the Final Judgment Order entered by the United States Court of Appeals for the Fourth Circuit in the case styled, *United States v. Samantha Winter*, Record Number 18-4520, on May 3, 2019, was entered in error, that she is aggrieved by the decision of the appellate court, and respectfully prays that a writ of certiorari issue to review the judgment below.

For the reason of uniformity herein, the Petitioner will be referred to by her name or as “Petitioner” and the Respondent shall be known as “the Government,” as they were referred to by the Court of Appeals. The facts relevant to the issues on this appeal can be found in the Joint Appendix, which is cited herein as “(JA)”

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not been published.

JURISDICTION

Petitioner Samantha Winter appeals the final judgment order entered by the United States Court of Appeals for the Fourth Circuit on May 3, 2019 affirming the judgment of the district court entered on July 20, 2018 finding her guilty of violating Title 18, Section 922(g)(3) of the United States Code Annotated, possession of a firearm by a prohibited person, Title 18, Section 922(a)(6), false statement in connection with the purchase of a firearm, and Title 18, Section 924(a)(1)(A), false statement to a licensed firearm dealer.

Title 28, Section 1254(1) of the United States Code provides that the final judgment order of courts of appeals may be reviewable by the Supreme Court “by writ of certiorari granted upon the petition of any party to any criminal case, before or after rendition of judgment or decree.”

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case requires interpretation and application of the Fourth and Fifth Amendments to the Constitution of the United States and Federal Rule of Evidence 404(b).

The Fourth Amendment provides, in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The Fifth Amendment provides, in pertinent part:

No person... shall be compelled in any criminal case to be a witness against himself.”

U.S. Const. amend. V.

Rule 404(b) of the Federal Rules of Evidence provides, in pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident....

Fed. R. Evid. 404(b).

STATEMENT OF THE CASE

Appellant Samantha Winter, age twenty-one (21) at the time, went to Triune Shooting Sports, (“Triune”), a gun shop in Warrenton, Virginia, to buy a gun. JA 221. She took gun education classes pursuant to her gun purchase. JA 242. On December 10, 2016, Ms. Winter returned to Triune and completed forms to purchase her gun. JA 246. During the application process, she completed form 4473. Question 11e on the Form 4473 asks applicants “[a]re you an unlawful user of marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance.” JA 232. Ms. Winter answered “no” to this question. *Id.* Ms. Winter passed a background check and purchased her gun. JA 246.

Several months later, on May 8, 2017, the Postal Service executed a controlled delivery of a package of THC laced candy to a residence in King George County, Virginia. JA 200. The package went to a house occupied by the ex-girlfriend of Ms. Winter’s boyfriend, Devon Byrd. JA Volume II, Video of Devon Byrd Traffic Stop. That day, law enforcement observed Mr. Byrd drive up to the house in a car typically used by Ms. Winter and owned by her father. *Id.*; JA 204. They saw Mr. Byrd enter the house with an empty backpack and leave with a filled backpack. JA 203. After he left the

residence, law enforcement followed him by car and eventually stopped the car. JA 181-82. Two officers approached either side of the car. *Id.* An officer on the passenger's side of the car immediately noticed a gun near Mr. Byrd, screamed "gun," and then removed the gun from the car. JA 206. Shortly thereafter, Mr. Byrd exited the car. JA 206-07. Law enforcement first initiated a K-9 search, which eventually alerted on the backpack that they observed Mr. Byrd carry. JA 193-95. Law enforcement removed the backpack from the car, opened it and saw it contained gummy candy. JA 185. Detective Glen Massey of the King George County Sheriff's Department then instructed an officer to search the entire car. JA 215. According to Detective Massey, he stopped Mr. Byrd based upon surveillance of Mr. Byrd at the house and information obtained from the Postal Service. JA Volume II, Video of Devon Byrd Traffic Stop. Law enforcement officers then arrested Mr. Byrd. *Id.* Law enforcement eventually discovered that in December, 2016, Ms. Winter purchased the gun found. JA Volume II, Video of Samantha Winter Interrogation.

After arresting Mr. Byrd, law enforcement officers contacted Ms. Winter that same day and advised her of Mr. Byrd's arrest and seizure of her car. JA 28; 219. Ms. Winter came to the King George County Police Station to recover the car after receiving a ride from a friend of a friend. JA

29. The station is located in a remote wooded area. *Id.* Upon her arrival at approximately 9:00 p.m., it was dark and the police station was essentially empty. *Id.* Ms. Winter left her telephone in the car, as she anticipated that she would not be able to bring her phone into the station. JA 32. Law enforcement officers put Ms. Winter in a small conference room, where she sat behind a circular table opposite the door. After some time, Detective Massey entered the room with two agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives, (“ATF”). Detective Massey advised Ms. Winter that she was not under arrest and free to leave. But, from her position behind the table, Ms. Winter could not physically leave the room unless the Agents stood up from the table and stepped aside to give her a path to leave. JA Volume II, Video of Samantha Winter Interrogation.

Immediately after introducing himself, Detective Massey left the room, leaving the two ATF agents. Neither Agent advised Ms. Winter of their government affiliation other than to say, “ATF.” They also neglected to tell Ms. Winter that she was not under arrest or that she was free to leave. Ms. Winter advised the Agents that she had never been in trouble before and only had a prior speeding ticket. JA Volume II, Video of Samantha Winter Interrogation.

Agents then asked Ms. Winter if she smoked marijuana, how often, and stressed that they were not concerned with her use of marijuana. On several occasions, Ms. Winter asked, “what’s going on,” stated that she was confused about the point of the conversation and that she was there to get her car. The Agents told Ms. Winter that her boyfriend had been at his ex-girlfriend’s house with drugs earlier in the day, before his arrest. At that point, Ms. Winter said, “how do I go about getting my car back because that is the only thing that I have.” Agents told Ms. Winter that they wanted to speak about her and then they would talk about her car. JA Volume II, Video of Samantha Winter Interrogation.

Ms. Winter answered the Agents’ questions about her marijuana use and her answers on the form that she completed when purchasing her gun. Ms. Winter told the Agents that she thought the form went to the state. The Agents corrected that perception and told her that her false answer on the form constituted a federal offense. The point of telling her this, the Agents claimed, was “just for her information.” Most important, the Agents again stated that they were not concerned about her admission because she was being truthful and told her that if she had lied about other matters they would be “going down a different path.” The Agents then contradicted themselves by telling Ms. Winter that she was facing federal charges but that by being

truthful she is not going to get into any more trouble and that the only thing that is going to get her in trouble is lying and not being truthful. JA Volume II, Video of Samantha Winter Interrogation.

Emotional and in tears, Ms. Winter then asked, “[b]efore we go any further, is this something I need to call an attorney about?” Both agents shook their heads and told her she was not under arrest. Ms. Winter then said, “[i]f I walk out of here will y’all arrest me, that is what I am asking.” The Agents responded, “we are not even talking about that now; I am worried about him,” as they both shook their heads again. The Agents then told Ms. Winter that they were not interested in arresting her that night or down the road for that matter, and, if she told the truth, they would take that to a federal prosecutor who would make the ultimate decision. JA Volume II, Video of Samantha Winter Interrogation.

Still crying and upset, Ms. Winter explained again that she purchased the gun and did not buy it for her boyfriend. She stated that she cannot go to jail and the Agents assured her that she was not going to jail. The Agents then told her, “a lot of it has to do with you telling the truth, though.” While the Agents continued their interrogation, Ms. Winter focused on her car and told the Agents, “if there is a chance to get my car back, I would like to know how, if not, you are going to have to call me a ride.” In response, one

Agent said, “well . . . we’ll talk to Detective Massey about the car,” and then the Agent continued his questioning. Ms. Winter tried to emphasize the importance of getting her car back when she told the Agents that she got into a fight with her parents, got kicked out of the house, and lived in her car before moving in with Mr. Byrd. She then said that everything that she has is in her car. As Ms. Winter explained why she needed the car, both Agents and Detective Massey knew that Ms. Winter’s wallet, credit cards, social security card and driver’s license were in the car. JA 30; JA 189-90; JA 210. Ms. Winter also explained that she needed her car to go to work in the morning and if she could not have her car, she needed to make other arrangements. Focused on getting a statement, the Agents continued questioning Ms. Winter until they finally allowed her to leave, when they could not elicit any more information from her. JA Volume II, Video of Samantha Winter Interrogation.

Ultimately, on January 4, 2018, a grand jury sitting in the Eastern District of Virginia returned an indictment against Samantha Winter, alleging that she violated Title 18, Section 922(g)(3) of the United States Code Annotated, by possessing a firearm as a prohibited person. JA 11. This is the very charge that ATF agents “informed” Ms. Winter about during the interrogation. When Ms. Winter would not plead guilty to that

charge, at the Government's initiation, on January 25, 2018, a grand jury returned a superseding indictment against Ms. Winter adding two (2) more charges, alleging that she violated Title 18, Section 922(a)(6) by making a false statement in connection with the purchase of a firearm and, Title 18, Sections 924(a)(1)(A) by making a false statement to a licensed firearm dealer. JA 13. All three (3) charges stem from Ms. Winter's answer to question 11e., denying that she unlawfully used marijuana when she applied to purchase a gun from Triune, and that she used marijuana while possessing the purchased gun.

Ms. Winter pled not guilty to all three (3) charges and elected a jury trial. Before trial, Ms. Winter filed a Motion to Suppress her statement to law enforcement, Motion to Exclude 404(b) evidence about Devon Byrd's importation of THC laced candy from California, and Motion to Suppress items seized from Mr. Byrd following his traffic stop. JA 17 - 24. The district court denied each Motion. JA 609. Ms. Winter appeared before the Honorable Liam O'Grady on February 27, 2018 for a jury trial upon the charged offenses. On March 1, 2018, the jury found Ms. Winter guilty on all counts. JA 563-65.

At the conclusion of the sentencing hearing, held on July 20, 2018, Judge O'Grady sentenced Ms. Winter to two (2) years of probation on each

count, to run concurrently, with the condition that she serve fifteen (15) days of incarceration, pay a \$300 special assessment, complete eighty (80) hours of community service and participate in substance abuse and mental health treatment. JA 617. On July 23, 2018, Ms. Winter filed a timely Notice of Appeal in this Court from the final judgment of the United States District Court for the Eastern District of Virginia, pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure. JA 622. After considering the parties' briefs, on May 3, 2019, the Fourth Circuit Court of Appeals entered an order affirming the judgment of the district court entered on July 20, 2018.

REASONS FOR GRANTING THE PETITION

I. ISSUE 1: THE DISTRICT COURT ERRONEOUSLY DENIED MS. WINTER'S MOTION TO SUPPRESS HER STATEMENTS TO LAW ENFORCEMENT.

As the Agents failed to issue a *Miranda* warning to Ms. Winter prior to conducting her custodial interrogation, her statements should have been suppressed. “A confession made during a custodial interrogation will be suppressed unless police advise the defendant of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and the defendant knowingly, intelligently, and voluntary waives those rights.” *United States v. Holmes*, 670 F.3d 670 F.3d 586, 591 (4th Cir. 2012). Based upon the totality of the circumstances, while Ms. Winter was not under arrest, she was in custody and did not feel free to leave.

Physically, Ms. Winter could not leave. She sat alone in a small police station conference room with two (2) to three (3) law enforcement officers present at all times. She was positioned behind a table, across the room from the door, and could not leave the room unless the Agents stood up and moved aside.

Psychologically, Ms. Winter did not feel she could leave. Knowing before the interrogation that the car seized contained Ms. Winter's wallet and other belongings of value and that she came to the station solely to get

her car, Detective Massey and the Agents leveraged the return of the car to compel Ms. Winter's presence. Ms. Winter clearly asked to get her car back several times. In addition, she asked to leave twice: once she told the agents to call her a ride if they would not return her car and the second time, she told the Agents it was getting late and she needed her car to go to work the next day. The Agents, however, kept questioning Ms. Winter, assuring her that they would talk about her car "later." The import of the car to Ms. Winter was confirmed by her admission that everything that she had was in the car. It was not until the end of the interrogation that the Agents called in Detective Massey who told her that he would not release her car. Detective Massey had clearly made the decision before Ms. Winter came to the station.

In *United States v. Giddins*, this Court considered the defendant's motion to suppress his statements where the police seized his car and used the seizure as a pretext to interview the defendant. Upon review of the totality of the circumstances, the Court opined, "[a] reasonable person would have felt unable to cease the interview and thus forfeit the opportunity, to obtain the return of his or her property. As we explain in more detail in Section III.B.1, *infra*, Giddins's car was essential to his livelihood and something he needed returned to him. Considering the totality of the

circumstances, Giddins was in custody, and *Miranda* warnings were required for any non-booking questions.” 858 F.3d 870, 880 (4th Cir. 2017).

Giddins is substantially similar to the circumstances in the present case. The Agents used the seizure of the car to get Ms. Winter to the station. Once there, Agents used the return of the car and claims of lenient treatment to compel Ms. Winter to make incriminating statements. At no time did the Agents provide Ms. Winter with a *Miranda* warning. In fact, when Ms. Winter asked if she needed to speak with a lawyer, the Agents effectively steered her away from the subject.

The Agents’ mercurial claims about leniency if Ms. Winter continued to be truthful, should not go unnoticed when assessing the totality of the circumstances surrounding Ms. Winter’s interrogation. The Agent’s statements lulled Ms. Winter into a sense of security as she incriminated herself in the felony charges for which she is now convicted. Throughout the interrogation, the Agents maintained that they did not care about marijuana use, leaving Ms. Winter, young and unfamiliar with the criminal justice system, with the belief that she was not going to be charged if she confessed to smoking marijuana. Once the Agents advised Ms. Winter that she committed a federal offense, the Agents stated that they only made that statement for informational purposes and that they had no intention to arrest

her that day or in the future, if she continued to provide truthful information. While the Agents stated that the federal prosecutor would make the final decision, all of their other statements completely negated that statement and left Ms. Winter with the impression that if she kept talking, she would not be charged.

The Government and the trial court incorrectly distinguish *Giddins* from the present case. This Court found compelling law enforcement's use of the car to compel Mr. Giddins to stay and involuntarily participate in the interrogation, just as the Agents did with Ms. Winter. While there are some differences between *Giddins* and the present case, those differences are distinctions without a difference or work in Ms. Winter's favor. First, unlike Mr. Giddins, Ms. Winter was at a greater disadvantage as she did not receive a *Miranda* warning and did not have access to her phone. Mr. Giddins had his phone and officers provided him with a *Miranda* waiver form and read the form to Mr. Giddins aloud.

Second, the trial court claimed that the door was locked in the *Giddins* case unlike the King George County Police Department interrogation room. In fact, the interview room in *Giddins* had two (2) doors. The door immediately behind Mr. Giddins was locked and the door on the opposite side of the room, behind law enforcement officers, was unlocked. Similarly,

Ms. Winter had no method of leaving the room behind her as she was sitting against a wall. There was only one (1) door in the King George interrogation room and Ms. Winter had to go through the Agents to leave the room. The trial court also opined that, unlike *Giddins*, because Detective Massey kept going in and out of the room, Ms. Winter should have known that she could leave the room. But, the police officers in *Giddins* kept going in and out of the interrogation room as well. *Giddins*, 858 F.3d 870, 877 (2017). Regarding the exit issue in *Giddins*, this Court opined:

It is true that one door was unlocked in the interrogation room, but it was the door past the questioning detective. The door immediately behind Giddins was locked, so in order to leave the room, Giddins would have had to walk past Det. Taylor. Additionally, at least twice during the interrogation, Det. Taylor moved Giddins's phone away from Giddins. Although Det. Taylor did tell Giddins that he was free to leave, “such a statement ‘is not talismanic or sufficient in and of itself to show a lack of custody.’ ”

Id. at 880. Ultimately, the Court concluded that one unlocked door and police assurances that he was free to leave, did not overcome the fact that Mr. Giddins, like Ms. Winter, felt compelled to stay to get his car.

Without receiving a *Miranda* warning before speaking with agents, Ms. Winter’s statement was the product of an unconstitutional custodial interrogation that should have been suppressed.

II. ISSUE 2: THE DISTRICT COURT ERRONEOUSLY DENIED MS. WINTER'S MOTION TO EXCLUDE ADMISSION OF 404(B) EVIDENCE REGARDING DEVON BYRD.

The 404(b) evidence about Mr. Byrd, his arrest and drug trafficking activity, held no probative value to the charges before the trial court. Pursuant to Federal Rule of Evidence 404(b), the Government offered for admission, evidence, and the related circumstances concerning the evidence, of Devon Byrd's arrest. The Government claimed that such 404(b) evidence proved Samantha Winter's motive and intent behind purchasing her firearm. Given the charges, the jury had to determine Ms. Winter's guilt or innocence about whether she purchased and possessed a gun as an unlawful user of marijuana and lied about her drug use at the time of the purchase. Mr. Byrd's arrest for trafficking THC candy did not prove these actions.

Rule 404(b)'s "purposeful exclusion of such prior 'bad act' evidence is not grounded in its irrelevance." ... "Instead, the general inadmissibility of such evidence is based on the danger that this type of evidence will overly influence the finders of fact and thereby persuade them 'to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.' " ... Additionally, Rule 404(b)'s general exclusion of evidence of a defendant's prior bad acts "reflects the revered and longstanding policy that, under our system of justice, an accused is tried for *what* he did, not *who* he is." ... To that end, Rule

404(b) “protects against juries trying defendants for *prior acts* rather than *charged acts*.”

Although “other acts” evidence is not admissible to prove criminal propensity, such evidence “may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Fed. R. Evid. 404(b)(2). As the plain language of the rule suggests, this list of proper purposes is not exhaustive. ... Yet to constitute a proper purpose, “there must be some articulable inference for the jury to draw from the previous offense other than that the defendant had [a] bad character and therefore more probably had the intent to commit the crime he is now charged with.”

The government bears the burden of establishing that evidence of a defendant's prior bad acts is admissible for a proper purpose. ... To satisfy this burden, the government must identify each proper purpose for which it will use the other acts evidence and explain how that evidence “fits into a chain of inferences—a chain that connects the evidence to [each] proper purpose, no link of which is a forbidden propensity inference.” ... Even if the government provides a proper purpose for admitting prior bad act evidence, such evidence is still inadmissible if its likely prejudicial effect substantially outweighs its probative value.

[W]e set forth a four-step test for determining when evidence of prior bad acts is admissible under Rule 404(b). ... First, “[t]he evidence must be relevant to an issue, such as an element of an offense, and must not be offered to establish the general character of the defendant.” ... Second, “[t]he act must be necessary in the sense that it is probative of an essential claim or an element of the

offense.” ... Third, “[t]he evidence must be reliable.” ... And fourth, “the evidence's probative value must not be substantially outweighed by confusion or unfair prejudice in the sense that it tends to subordinate reason to emotion in the factfinding process.”

United States v. Hall, 858 F.3rd 254, 265-67 (4th Cir. 2017) (holding that defendant's prior conviction for possession of marijuana was not admissible to prove his intent to distribute marijuana found inside a deadlocked bedroom in his purported residence, in prosecution for possession with intent to distribute marijuana, absent any connection between the prior offense and the charged offense) (internal citations omitted).

Pursuant to Rule 404(b), the trial court, over Ms. Winter’s objection, admitted law enforcement testimony of Mr. Byrd’s arrest, testimony of a DEA forensic chemist regarding the drugs recovered at the time of Mr. Byrd’s arrest, and text messages purportedly exchanged between Ms. Winter and Mr. Byrd that make brief references to Ms. Winter’s gun purchase. The Government theorized that Ms. Winter really purchased her gun for Mr. Byrd as a straw purchase and wanted to introduce this evidence to support that claim. Ms. Winter, however, did not stand trial for making a straw purchase, rendering her motive and intent for purchasing her gun, irrelevant.

Pursuant to *Hall*, to determine whether the 404(b) evidence identified by the Government should have been admitted, this Court must review the

elements of the actual charges in this case. To establish that Ms. Winter violated 18 U.S.C. § 922(a)(6), the Government must prove that (1) she knowingly made (2) a false or fictitious oral or written statement that was (3) material to the lawfulness of the sale or disposition of a firearm, and was (4) intended to deceive or likely to deceive a firearms dealer.” *United States v. Abramski*, 706 F.3d 307, 315 (4th Cir. 2013) (quoting *United States v. Harvey*, 653 F.3d 388, 393 (6th Cir. 2011)). The Government, therefore, had to prove that Ms. Winter lied when she denied being an unlawful marijuana user, that her answer was material to her firearm purchase and that she intentionally lied about her use to deceive the firearms dealer into selling her a gun.

For Ms. Winter to be convicted of violating 18 U.S.C. § 924 (a)(1)(A), the Government had to prove that Ms. Winter knowingly made a false statement with respect to information that the law requires a federally licensed firearms dealer to keep. *United States v. Abfalter*, 340 F.3d 646, 653 (8th Cir. 2003). Specifically, the Government had to present evidence that the store where Ms. Winter purchased her gun is a federally licensed firearms dealer, that the law requires that dealer to keep records of an applicant’s drug use and that Ms. Winter knowingly lied to the firearms dealer about being an unlawful marijuana user when she purchased her gun.

Finally, “to sustain a conviction under 18 U.S.C. § 922(g)(3), the United States must prove that there was a pattern, and recency, of drug use by the defendant . . . or that the drug use was ‘sufficiently consistent, ‘prolonged,’ and close in time to [the defendant's] gun possession to put him on notice that he qualified as an unlawful user of drugs under the statute.’” *United States v. Williams*, 216 F. Supp.2d 568, 575 (E.D. Va. 2002).

Ms. Winter’s motive for purchasing her gun is not an element of any of the charged offenses. Regarding Ms. Winter’s intent, the Government had to prove that Ms. Winter intended to use marijuana while possessing a firearm and provide false statements regarding her use of marijuana when purchasing the gun. Evidence of Mr. Byrd’s arrest did not address any element of the charged offenses.

Evidence about Mr. Byrd’s arrest and drug trafficking activity prejudiced Ms. Winter by implying that she knew and participated in Mr. Byrd’s activities and purchased her gun for a drug dealer. These actions are far different from what is actually charged in the Superseding Indictment: using marijuana while purchasing and possessing a gun and lying about it. The Government’s opening statement evidenced the prejudicial effect of including Mr. Byrd in Ms. Winter’s trial. First the Government showed Mr. Byrd’s mugshot, JA 608A, and referred to him as “Debo,” JA 163. After a

few sentences about Ms. Winter's gun purchase, the Government spent a good portion of the opening statement describing Mr. Byrd's drug activity.

Ladies and Gentleman, when the defendant and Debo exited the store that day, Mr. Losee was unaware that a drug user and her drug-dealing boyfriend had just walked out of the store that day and collected possession of a firearm. The defendant and Debo came on the law enforcement's radar in May of 2017 with a drug transaction investigation. Law enforcement was investigating a crosscountry criminal enterprise that was using the United States mail to distribute large quantities of drugs.

An example of the types of drug that was being shipped through the mail was what looked to be this sugary candy, something that a child would eat, it was a gummie type of candy. Far from innocent, this gummie material was infused with high and potent levels of THC, which is the main chemical found in marijuana.

As part of the drug investigation, law enforcement was conducting surveillance, trying to track these packages and Debo came on to their radar. They began to engage in surveillance involving Debo.

JA 164.

The trial court expressed concern over the Government's opening statement in a sidebar immediately after Ms. Winter's counsel finished her opening statement.

You scared me with your opening statement. We are not going to try and organized crime case here, right? I mean, if you are going to put the – I don't want to hear a lot about the long-term

investigation which focused on Mr. Byrd. I want to go to the fact that agents focused on Mr. Byrd, they made the recover. But, you know, I think that it is unfairly prejudicial to bring in the breadth of the conspiracy and the whole Bloods end of things. That's not what this is about.

JA 173-74.

Mention of Mr. Byrd's drug trafficking activity invited the jury to infer that Ms. Winter purchased her gun for Mr. Byrd to use while selling drugs, when the Government had no proof to support this allegation. The Government alleged that Ms. Winter smoked marijuana when she purchased her gun. None of the evidence about Mr. Byrd's drug activity, however, confirmed Ms. Winter's marijuana use in December 2016, when she purchased her gun. The text messages between Mr. Byrd and Ms. Winter took place in April 2017, long after she purchased the gun. The trial court, therefore, erred in admitting 404(b) evidence regarding Devon Byrd.

III. ISSUE 3: THE DISTRICT COURT ERRONEOUSLY ADMITTED EVIDENCE REGARDING DEVON BYRD.

A. The District Court Erroneously Denied Ms. Winter's Motion to Suppress The Items Seized During the Traffic Stop Involving her Car, Where Law Enforcement Improperly Seized THC Candy And A Firearm from Ms. Winter's Car, Without a Warrant.

King George County law enforcement conducted an unconstitutional search of Ms. Winter's car.

The Fourth Amendment provides, in pertinent part, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” ... And as the Supreme Court has held, “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.” ... In other words, to comply with the Fourth Amendment, police generally must obtain a warrant before conducting a search or seizing personal property. ... The warrant requirement is “subject only to a few specifically established and well-delineated exceptions.” ... [Where an officer conducts a warrantless search and seizure], one of these “jealously and carefully drawn” exceptions must apply for the search and seizure to be constitutional.

United States v. Graham, 686 Fed. Appx. 166, 169 (4th Cir. 2017) (internal citations omitted). No warrant exception applies in this case.

Exigent circumstances did not exist to justify a warrantless search of Ms. Winter’s car and seizure of the contents.

For police officers to successfully assert the exigent circumstances exception to the warrant requirement, “they need only possess a ‘reasonable suspicion’ that such circumstances exist at the time of the search or seizure in question.” ... To support this reasonable suspicion, the officers “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.” ...

In determining whether the exigent circumstances exception applies, courts must balance “the societal costs of obtaining a warrant,

such as danger to law officers or the risk of loss or destruction of evidence,” against “the reasons for prior recourse to a neutral magistrate.” ... We strike this balance “with due deference for the difference in perspective between an officer who must make snap judgments in minutes or seconds, and a judge who has ‘the 20/20 vision of hindsight.’ ” ... And to uphold an officer's actions, we must find that the officer acted with objective reasonableness—that “the facts available to the officer at the moment of the seizure or the search [would] ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate.”

This Court has developed a nonexhaustive list of factors that courts should consider in determining whether exigent circumstances justified a warrantless search or seizure:

(1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) the officers' reasonable belief that the contraband is about to be removed or destroyed; (3) the possibility of danger to police guarding the site; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband.

Id. at 170. While the presence of a gun presents a danger that may justify a warrantless search, the circumstances in this case do not. *See United States v. Newbourn*, 600 F.2d 452, 454 (4th Cir. 1979) (concluding that, “[t]hough there be no probable cause to believe that any crime has been committed, in some circumstances an automobile reasonably thought to contain a

legal handgun may be searched without a warrant by state officers in keeping with the state's broad regulatory role in aid of public safety and security in light of problems confronting a small law enforcement office.”) Law enforcement removed the gun from the car immediately after it was detected, and secured Mr. Byrd in a police car. There were several law enforcement officers on the scene, including Virginia State Police Officers that controlled passing traffic due to a minor traffic accident that occurred next to the location of Mr. Byrd’s stop. Because law enforcement thoroughly secured the scene, the presence of Ms. Winter’s gun did not justify a warrantless search.

Regarding the search incident to arrest exception, “we . . . hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. . . . Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. . . .” *Arizona v. Gant*, 556 U.S. 332, 343 (2009) (internal citations omitted).

In this case, Detective Massey admitted that he stopped Mr. Byrd based upon surveillance of Mr. Byrd and information from the Postal Service. JA Volume II, Video of Devon Byrd Traffic Stop. After having stopped the car, officers observed a gun, took it from Mr. Byrd, asked him to step out of the car, and then secured him in a police vehicle. At that time, Mr. Byrd had no way of accessing anything in the car, including Ms. Winter's gun.

Illegal search of Ms. Winter's car and seizure of her gun is not excused under the plain view exception either. "The rationale of the exception to the warrant requirement, as just stated, is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a 'general' one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. **But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of 'exigent circumstances.'**" *Coolidge v. New Hampshire*, 403 U.S. 443, 470-71 (1971) (emphasis added). Even though law enforcement observed Ms.

Winter's gun between Mr. Byrd's right leg and the console, one officer removed the gun from the car, detained Mr. Byrd, and placed him in a police car. Beginning at the Postal Service that morning, law enforcement choreographed Mr. Byrd's entire arrest upon the possibility that he possessed contraband. After arresting Mr. Byrd, law enforcement impounded the vehicle. Under these circumstances, nothing prevented law enforcement from obtaining a warrant to search and seize items from Ms. Winter's car.

Finally, the automobile exception does not apply because the police did not possess the requisite probable cause to believe the car driven by Mr. Byrd contained contraband.

Under the automobile exception, officers may search a vehicle without a warrant if the vehicle "is readily mobile and probable cause exists to believe it contains contraband" or evidence of criminal activity." ... Probable cause is present when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." ... It is to be determined by "an analysis of the totality of the circumstances," ..., as "viewed from the standpoint of an objectively reasonable police officer," ... When conducting a warrantless search of a vehicle, law enforcement officers with probable cause are permitted to search "every part of the vehicle and its contents that may conceal the object of the search." ... And "this exception permits police officers to search a vehicle for evidence of any crime, not just the crime of arrest."

Graham, 686 Fed. Appx at 171 (internal citations omitted). Probable cause is a more rigorous standard than reasonable suspicion, defined as the “commonsense, nontechnical conception[] that deal[s] with ‘the factual and practical considerations of everyday life.’” *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

Here the police lacked probable cause to believe that Mr. Byrd possessed contraband. Law enforcement knew of a controlled delivery executed by the Postal Service, which, on information and belief, was not addressed to Mr. Byrd. Officers observed Mr. Byrd go into his ex-girlfriend’s house with a backpack and come out. They had no information about what was in the backpack.

All evidence seized as a result of the unconstitutional searches of Ms. Winter’s car during the traffic stop should have been excluded from admission at Ms. Winter’s trial. “[P]rimary evidence obtained as a direct result of an illegal search or seizure” will be excluded from evidence at trial as a judicial remedy for deterring Fourth Amendment violations like what occurred in this case. *Segura v. United States*, 468 U.S. 796, 804 (1984). The trial court, therefore, erred in allowing any evidence seized from Ms. Winter’s car, including her gun and the THC candy, from being admitted at trial.

B. The Trial Court Erred In Admitting Government Exhibits 1, 5A, And 25-30 As The Exhibits Were Irrelevant To The Charges Against Ms. Winter.

Exhibits 1, 5A and 25-30 were not relevant to the legal questions before the jury. Rule 401 of the Federal Rules of Evidence provides that evidence is relevant “if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action.” Fed. R. Evid. 401 (2018). In this case, Mr. Byrd’s mug shot, the certificate of analysis and pictures of the THC candy do not make the fact that Ms. Winter unlawfully used marijuana and lied about her use on the Form 4473 more probable than if these items had not been admitted. Nor was this evidence of consequence in proving the crime charged against Ms. Winter.

IV. ISSUE 4: THE TRIAL COURT’S ERRONEOUS ADMISSION OF MS. WINTER’S STATEMENTS, THE 404(B) EVIDENCE, AND THE ITEMS SEIZED FROM HER CAR, WERE NOT HARMLESS.

None of the trial courts errors are harmless. Federal Rule of Criminal Procedure 52(a) provides “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.” Admission of an involuntary confession is subject to harmless error

analysis. *Arizona v. Fulminate*, 499 U.S. 279, 312 (1991). This Court found that admission of Mr. Giddins confession not to be harmless.

The Court in *Fulminante* identified three considerations in finding whether admission of statements given by a defendant in violation of the Fifth Amendment would survive harmless error: (1) the importance of the statement to the government's case; (2) the impact on credibility of other evidence; and (3) the admission of prejudicial evidence based solely on the admission of the statement. . . . We review the record de novo to determine “whether the [government] has met its burden of demonstrating that the admission of the [statements] did not contribute to [the defendant's] conviction.”. . .

The government has failed to meet its burden here, arguing the incorrect test and merely citing to the other evidence in the case as overwhelming. In *Thompson*, we made explicit that even when the other evidence introduced in the case was sufficient to convict beyond a reasonable doubt, we impose a higher burden and a concomitantly more exacting test to determine whether a constitutional error was harmless

Giddins, 858 F.3d at 885-86. This Court found that because of the Government’s heavy reliance on Mr. Giddin’s statement - citing it in opening and closing argument- erroneous admission of the statement was not harmless, as the Government failed to prove beyond a reasonable doubt that the statement did not contribute to Mr. Giddin’s conviction. The same can be said of Ms. Winter’s statement. The Government made

Ms. Winter's statements to law enforcement a substantial part of their case, previewed her statements in the opening statement, JA 165-66, played video excerpts of her statements during the trial, JA 269-75, and highlighted the statements again during the closing statement, JA 526, 528, 546.

Assessing whether erroneous admission of 404(b) evidence is harmless, “the test for harmlessness is ‘whether we can say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.’ ” . . . ‘This inquiry is not whether, absent the improperly admitted evidence, sufficient evidence existed to convict.’ . . . Rather, the inquiry is ‘whether we can say that we believe it highly probable that the error did not affect the judgment.’ ” *United States v. Lightly*, 616 F.3d 321, 355-56 (4th Cir. 2010) (internal citations omitted). The first sentence of the Government's opening statement referenced Devon Byrd and connected him with Ms. Winter. JA 162. From that moment and through the remainder of the trial, a substantial part of the evidence introduced by the Government concerned Mr. Byrd and THC candy. The Government placed significant emphasis on Ms. Winter's relationship with Mr. Byrd and his drug trafficking. As the Government saturated the trial with 404(b) evidence about Mr. Byrd, this Court cannot find it “highly probable that the error did not affect the judgment.”

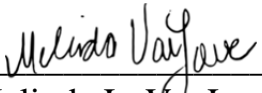
CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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By Counsel

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