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No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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**CHRISTOPHER DELGADO, PETITIONER,**  
**vs.**  
**UNITED STATES, RESPONDENT.**

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**MOTION FOR LEAVE TO PROCEED  
IN FORMA PAUPERIS**

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Petitioner, through counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel was appointed in the court of appeals under the Criminal Justice Act, 18 U.S.C. § 3006A(b). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

June 28, 2023

s/ Carlton F. Gunn  
CARLTON F. GUNN  
Attorney at Law

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**CHRISTOPHER DELGADO, PETITIONER,**  
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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Whether evidence of other bad acts is exempted from the limits and requirements of Rule 404(b) of the Federal Rules of Evidence when it is “inextricably intertwined” with the crime charged and, if so, what the standard is for determining whether evidence is “inextricably intertwined.”

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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Christopher Delgado petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

**I.**

**OPINIONS BELOW**

The memorandum disposition of the court of appeals, which is unpublished, is included in the appendix as Appendix 1. The district court's written order is included as Appendix 2.

**II.**

**JURISDICTION**

The judgment of the court of appeals was entered on April 21, 2023. *See* App. A001. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

### III.

#### **STATUTORY PROVISION INVOLVED**

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

**(b) Crimes, Wrongs, or Other Acts.**

**(1) Prohibited Uses.** Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

**(2) Permitted Uses.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

**(3) Notice in a Criminal Case.** In a criminal case, the prosecutor must:

**(A)** provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

**(B)** articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

**(C)** do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

### IV.

#### **STATEMENT OF THE CASE**

##### A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

\* \* \*

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS  
PRESENTED.

1. The Investigation, Indictment, and Pretrial Motion.

Petitioner and three codefendants were indicted, more than four years after the offenses, for conspiracy to distribute methamphetamine and cocaine and actual distribution of methamphetamine on four different days. *See App. A129.* The methamphetamine had been purchased by a confidential informant. *See A133-34.* For the first two purchases, the informant met only with the first two codefendants, who had obtained the methamphetamine from the third codefendant – one Oscar Rodriguez. *See App. A133-34.* For the third purchase, the informant met directly with Rodriguez, and on the fourth occasion, he received drugs from Rodriguez’s supplier, whom the government claimed was Petitioner. *See App. A134.*

After the third purchase, the informant had asked Rodriguez about purchasing guns as well as methamphetamine. *See App. A134.* Rodriguez said he could get guns and offered to sell both methamphetamine and a gun when the informant called to arrange the next methamphetamine sale. *See App. A134.* Rodriguez and the man the government claimed was Petitioner thereafter facilitated the informant’s purchase of a gun from another man who was not charged in the case. *See App. A134-35, A137.*

The government filed a motion to admit evidence of the gun sale. *See App. A022-23.* It argued, first, that Rule 404(b) of the Federal Rules of Evidence, governing “other bad acts,” did not apply because the gun sale was

“inextricably intertwined” with the fourth methamphetamine sale, *see App. A026-30*, and, second, that the evidence was admissible under Rule 404(b) if the rule did apply, as evidence of identity and modus operandi, *see App. A030-32*. The defense opposed the motion. *See App. A034-37*. The district court rejected the government’s modus operandi argument and expressed uncertainty about the government’s identity argument, but agreed the gun sale was “inextricably intertwined.” *See App. A008 n.5, A009-10, A012*.

## 2. The Trial.

The government’s witnesses at trial included the informant, an FBI agent who supervised the informant and participated in monitoring<sup>1</sup> and surveilling the methamphetamine purchases, and codefendant Rodriguez, who had entered into a cooperation agreement with the government. App. A132-33. The government also introduced surveillance photographs of the meetings and excerpts of audio and video recordings from a recording device the informant had worn during his meetings with the defendants. *See App. A132*. But the surveillance photographs and video showed only Rodriguez, not the man the government claimed was Petitioner. *See App. A133*. As to that man, the recording device captured only the man’s voice. App. A031. In light of this, the government introduced an excerpt from a post-arrest interrogation of Petitioner, in which officers tried to get Petitioner to admit the voice was his. *See App. A138-39*. Petitioner did admit the voice “sounds familiar,” App.

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<sup>1</sup> The informant was wearing a live microphone which the agent used to listen in real time. App. A132.

A138, and the government claimed Petitioner nodded affirmatively when the detectives said it was his voice, *see* App. A138-39, but the district court believed the nodding was “open to interpretation,” App. A138.<sup>2</sup>

a. Informant testimony.

The informant testified about his meetings with the defendants, his purchases of methamphetamine, and his purchase of the gun. He began by describing the first two purchases, when he dealt only with the first two codefendants. *See* App. A133-34. He next described the third purchase. *See* App. A134. On that occasion, the first two codefendants took him to a location where Rodriguez rode up on a bicycle, took the informant’s money, rode away, and returned with the methamphetamine. App. A134. After this purchase, the informant got Rodriguez’s phone number and asked if Rodriguez could get guns, to which Rodriguez replied that he could. *See* App. A047-48.

The informant then testified about a fourth meeting, at which the informant met the man the government claimed was Petitioner. The informant called Rodriguez, and Rodriguez agreed to sell the informant both methamphetamine and a gun. App. A049, A087. The informant met Rodriguez on a street in Rodriguez’s neighborhood, and they drove to another location in the neighborhood, where Rodriguez parked and made some phone calls. App. A134. The informant counted out money for the drugs and gave it to Rodriguez. App. A134; *see* App. A121. Soon after that, a man walked up to

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<sup>2</sup> The court allowed the government to present the evidence at trial because it believed it was a question for the jury to decide. App. A132.

the car, shook Rodriguez's hand, and dropped the methamphetamine into the car. *See* App. A055.

Rodriguez then asked the man, "Did you convince that fool to get that or not?," App. A056, A121, which the informant claimed was a reference to the gun the informant was going to purchase, *see* App. A056. The man told them to wait, and they went to another location, where Rodriguez made some more phone calls. App. A069-70; *see* A123-25. They "wait[ed] a long time," App. A072, but eventually returned to the location where they had received the methamphetamine, App. A069, and the informant "ultimately" purchased a gun, App. A069.

b. Qualified identification testimony.

The government also elicited qualified identification testimony from the informant and the FBI agent who testified. The agent had driven by during the fourth purchase and radioed as he drove by that the man who had walked up to Rodriguez's car "looked like Christopher Delgado," whom the agent had previously met, App. A135. But the agent admitted the man was on the other side of Rodriguez's car and he had only "a matter of a few seconds" to observe the man. App. A135.

The informant had been closer to the man, but even he was able to observe the man only "briefly." App. A054. He was shown a six-person photospread more than four years after the meeting and identified Petitioner as only "maybe" the man who had supplied the methamphetamine at the fourth meeting. *See* App. A135. He was also shown video from the post-arrest

interrogation of Petitioner and at that time said only that Petitioner “looked like” the man who had supplied the drugs. App. 135. In his trial testimony, which was more than five years after the meeting – and after he had previously seen Petitioner in the photospread and the interrogation video – he still said only that he was “pretty sure” Petitioner was the man. *See* App. A055. He did add a claim that he recognized a tattoo on Petitioner’s left hand, *see* App. A067-68, A075, but what he had said when he looked at the post-arrest interrogation video was that he recalled tattoos on the man’s left arm and could provide no details, *see* App. A136.

c. Cooperating codefendant Rodriguez’s testimony.

Rodriguez also testified about the four drug transactions. He claimed Petitioner had supplied the methamphetamine on all four occasions. *See* App. A079. He claimed Petitioner “fronted” the methamphetamine for the first two drug transactions and he brought the money back to Petitioner after receiving it from the informant. App. A136. As to the third occasion, he claimed Petitioner did not want to “front” the drugs, so he took the money from the informant to Petitioner and then brought the drugs back to the informant. *See* App. A080-88. He also claimed Petitioner was the man who walked up to the car and supplied the drugs on the fourth occasion. *See* App. A092, A096-101, A104-05. There was no question about Rodriguez’s ability to recognize Petitioner, since he had known Petitioner for several years, but he was subject to impeachment based on his cooperation agreement, a prior conviction, and false statements he had made in the past. *See* App. A136-37.

Rodriguez also testified it was Petitioner he contacted about the gun. He claimed Petitioner told him it would take some time, but he could get the gun. *See App. A088.* Rodriguez claimed a plan was then made for he and the informant to come over and pick up the drugs and the gun. *See App. A088.* The informant met Rodriguez at Rodriguez's house, and the two men drove to and parked in front of the residence of another man Rodriguez knew. App. A090-91. Rodriguez claimed Petitioner had told him to park there because that was where the gun transaction was going to take place. *See App. A092, A102.* Rodriguez identified his own voice on the informant's recording as the one asking, "Did you convince that fool to get that or not?," App. A101, A121, claimed this referred to the gun, *see App. A101*, and claimed Petitioner was telling him they had to wait for the other man "[b]ecause he's the one that had the gun at the time," App. A102. Rodriguez also identified his voice making two phone calls that he said were calls to Petitioner about the gun and then explaining the delay to the informant. *See App. A106-07, A111-14, A123-27.* Finally, Rodriguez testified he and the informant met with the other man in the other man's garage – "later that day," after "waiting for a while" – and the other man sold the gun to the informant for \$900. *See App. A114-18.*

### 3. The Appeal.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit. In addition to two claims not pertinent to this petition, he argued the district court should not have admitted the evidence about the gun sale. *See App. A141-53.* He argued, first, that the sale of the firearm was not part of the

drug sale transactions, and, second, that this was not a case in which evidence of the firearm sale was necessary to permit the prosecutor to offer a coherent and comprehensible story regarding the charged crimes. *See App. A141-51.* Regarding the second argument, he outlined in detail how both the informant’s testimony and Rodriguez’s testimony about the gun sale could have been omitted and still left a perfectly coherent and comprehensible story. *See App. A144-51.*

The government argued the evidence was properly admitted as “inextricably intertwined” and its admission could also be affirmed on the alternative ground that it was admissible under Rule 404(b), to show identity. *See App. A163-73.* In support of its “inextricably intertwined” argument, the government pointed to the fact that the gun and drug sales were discussed in the same conversations, claimed Petitioner established the prices and coordinated the sales, claimed both the drugs and guns were stored together and belonged to Petitioner, and claimed the gun sale was supposed to take place at the same time as the drug sale and in fact took place just an hour later. *See App. A167-68.* The government also claimed the gun sale was within the scope of the conspiracy, *see App. A169-70*, and that it was “integral to the narrative,” App. A170. As to its Rule 404(b) argument, the government argued the recordings of the phone calls about the gun were relevant to show identity because they captured Petitioner’s voice and could be compared to his voice when he was interrogated. *See App. A172-73.*

In a reply brief, Petitioner reiterated his argument that the gun sale was not “inextricably intertwined.” As to the government’s factual characterization of the relationship between the gun sale and drug sales, Petitioner pointed to

several government exaggerations and/or mischaracterizations. *See App. A178-79.* As to the government’s “integral to the narrative” argument, Petitioner noted the government had offered no explanation of why the opening brief’s outline of the testimony with the references to the gun sale omitted was not a coherent and comprehensible narrative. *See App. A179-80.* As to the government’s argument that the gun sale was within the scope of the conspiracy, Petitioner noted this was incorrect, because the indictment charged a conspiracy to sell only drugs, not guns. *See App. A180-81.* As to the Rule 404(b) argument, Petitioner noted that, first, the district court had not relied on the Rule 404(b) rationale, and, second, the recordings – in which there were only vague references to “that’s cool” and “that” and no reference to “gun” – was not the prejudicial evidence. *See App. A181-82.*

The court of appeals affirmed in an unpublished memorandum opinion. It relied not on the scope of conspiracy or Rule 404(b) arguments, but on the “inextricably intertwined” theory.

“Evidence of ‘other acts’ is not subject to Rule 404(b) analysis if it is ‘inextricably intertwined’ with the charged offense.” *United States v. Beckman*, 298 F.3d 788, 793 (9th Cir. 2002) (quoting *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012 (9th Cir. 1995)). The inextricably intertwined exception applies when an act (1) “constitutes a part of the transaction that serves as the basis for the criminal charge” or (2) is “necessary” to “permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime.” *Vizcarra-Martinez*, 66 F.3d at 1012-13.

Here, the drug sale underlying Delgado’s charges and the firearm sale were clearly “part of . . . a single criminal transaction.” *Id.* Delgado’s co-conspirator and co-defendant, Oscar Rodriguez, agreed to sell “drugs and a firearm” to a confidential informant; Delgado stored his drugs and guns in the same location; Delgado and Rodriguez stayed in contact after the drug sale to coordinate the firearm sale; the firearm sale occurred one

hour after the drug sale; and Rodriguez received a broker’s fee from Delgado for arranging the drug and firearm sale. That Delgado was charged only with drug-related offenses and no firearm offense does not render evidence of the firearm sale inadmissible. *See United States v. Warren*, 25 F.3d 890, 895 (9th Cir. 1994) (“Offenses committed in a single criminal episode do not become inadmissible because the defendant is being tried for only some of his acts.”); *see also United States v. Rizk*, 660 F.3d 1125, 1131 (9th Cir. 2011). Because the firearm sale was inextricably intertwined with the underlying charge, the district court did not err.

App. A002-03.

**V.**

**REASONS FOR GRANTING THE PETITION**

The “inextricably intertwined” exception to Rule 404(b) has been criticized by courts and commentators, outright abandoned by one circuit, and severely narrowed by two other circuits. This has worsened an already existing split in application of the exception that will not disappear without intervention by this Court. This case presents an excellent vehicle for resolving the split because the “other bad acts” at issue here – the gun sale – would not be admissible under the severely narrowed view – or, in one instance, abandonment – of the circuits that have criticized the exception, and also would not be admissible under an alternative Rule 404(b) theory. It is important to resolve the split because invocation of the “inextricably intertwined” exception is ubiquitous; evidence admitted under the exception will not always be admissible under Rule 404(b); and invoking the exception instead of the rule results in the evasion of important procedural requirements

in Rule 404(b). Finally, while it is important to resolve the split regardless, the lower courts’ adoption of a broad “inextricably intertwined” exception such as that applied in this case is wrong, both for the reasons advanced by the criticizing commentators and courts and because it is completely lacking in textual support in the Federal Rules of Evidence.

A. THE “INEXTRICABLY INTERTWINED” EXCEPTION THAT THE NINTH CIRCUIT APPLIED HAS BEEN SEVERELY CRITICIZED BY BOTH COURTS AND COMMENTATORS.

The evidentiary rule codified in Rule 404(b) and the “inextricably intertwined” exception trace back to the nineteenth century and even pre-colonial English law. *See United States v. Green*, 617 F.3d 233, 240-244 (3d Cir. 2010). There was originally no limitation at all on the use of other bad acts evidence. *Id.* at 240. In the face of abuse by the infamous Star Chamber, Parliament passed a law barring such evidence. *Id.* But there developed an exception to this rule when the evidence was offered to prove something other than propensity, including what was labeled the “res gestae,” meaning conduct that was intimately connected with the crime charged. *See id.* at 240-43. The rule admitting evidence of other bad acts was codified in Rule 404(b) when the Federal Rules of Evidence were adopted, and the “res gestae” exception continued, though relabeled as either “intrinsic evidence” or “inextricably intertwined” evidence. *See Green*, 617 F.3d at 244-45. *See also United States v. Bowie*, 232 F.3d 923, 927-28 (D.C. Cir. 2000) (noting every circuit recognized “some formulation” of exception and collecting cases).

The res gestae concept and “inextricably intertwined,” or “intrinsic evidence,” exception have been criticized by both commentators and circuit courts, however. The criticism began 100 years ago when Professor Morgan wrote that “res gestae” was a “troublesome expression” which owed its prominence “to an inclination of judges and lawyers to avoid the toilsome exertion of exact analysis and precise thinking.” *Green*, 617 F.3d at 244 (quoting Edmund Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 Yale L. J. 229, 229 (1922)). Dean Wigmore joined in the criticism, describing res gestae as an “empty phrase [which encouraged] looseness of thinking and uncertainty of decision,” and was “most frequently used as a cover for loose ideas and ignorance of principles.” *Green*, 617 F.3d at 244 (quoting 6 John Wigmore, *Wigmore on Evidence* § 1767 (Chadbourn rev. 1976), and 1A John Wigmore, *Wigmore on Evidence* § 218 (Tillers rev. ed. 1983)). A more modern treatise labels the exception a “flawed formula” and opines:

[T]he idea of inextricably intertwined offenses has proved elastic and invites abuse, which is a good objection. In practice, this expanded idea of contextual relevance often paves the way to prove acts that are anything but inseparable from the charged crime, and this label can become a catchall for admitting acts that are far more prejudicial to the defendant than useful in determining guilt of the charged offense.

1 Christopher D. Mueller and Laird C. Kirkpatrick, *Federal Evidence* § 4:33 (4th ed. 2013).

Circuit courts have taken up the criticism. One can begin with the Third Circuit opinion – *Green* – that set forth the history summarized above. *Green* pointed to three problems with the “inextricably intertwined” exception. First,

it “creates confusion because, quite simply, no one knows what it means,” which leads to “formulations [that] purport to embody the same test, but clearly . . . are not interchangeable.” *Id.*, 617 F.3d at 1046. Second, properly applied, the exception is unnecessary, for “[i]f the so-called ‘intrinsic’ act is indeed part of the crime charged, evidence of it will, by definition, always satisfy Rule 404(b).” *Id.* at 247 (quoting *Bowie*, 232 F.3d at 927). Third, “some of [the test’s] broader formulations, taken at face value, classify evidence of virtually any bad act as intrinsic.” *Green*, 617 F.3d at 248.

The D.C. Circuit joined the commentators’ criticism even earlier – in *Bowie*. First, it warned that “[b]ifurcating the universe into intrinsic and extrinsic evidence has proven difficult in practice,” because “[w]hich of a defendant’s acts should be considered the charged crime and which should not is often uncertain.” *Id.*, 232 F.3d at 927. Second:

[T]reating evidence as inextricably intertwined not only bypasses Rule 404(b) . . . , but also carries the implicit finding that the evidence is admissible for all purposes notwithstanding its bearing on character, . . . . There is, as well, a danger that finding evidence “inextricably intertwined” may too easily slip from analysis to mere conclusion. What does the “inextricably intertwined” concept entail? When is a defendant’s crime or act so indistinguishable from the charged crime that an item of evidence is entirely removed from Rule 404(b)?

*Id.* at 928.

Finally, the Seventh Circuit also joined the criticism. First, in an opinion by Judge Posner, it joined in *Bowie*’s criticism:

Although many cases recite the “inextricably intertwined” formula (citations omitted), it is unhelpfully vague. Courts do not agree on whether it refers to evidence “intrinsic” to the charged crime itself, in the sense of being evidence of the crime, or whether though evidence of another crime it may be introduced in order to “complete the story” of the

charged crime. As explained in the *Bowie* opinion, neither formulation is satisfactory: to courts adopting the former, “inextricably intertwined evidence is intrinsic, and evidence is intrinsic if it is inextricably intertwined,” while “the ‘complete the story’ definition of ‘inextricably intertwined’ threatens to override Rule 404(b). A defendant’s bad act may be only tangentially related to the charged crime, but it nevertheless could ‘complete the story’ or ‘incidentally involve’ the charged offense or ‘explain the circumstances.’ . . .”

*United States v. Taylor*, 522 F.3d 731, 734 (7th Cir. 2008) (Posner, J.) (quoting *Bowie*, 232 F.3d at 928). Then, after repeating *Taylor*’s criticism in cases such as *United States v. Connor*, 583 F.3d 1011 (7th Cir. 2009), *see id.* at 1019, the Seventh Circuit “reiterated [its] doubts” again, *United States v. Gorman*, 613 F.3d 711, 718 (7th Cir. 2010), and went on to completely disavow the exception. It stated: “Henceforth, resort to inextricable intertwinement is unavailable when determining a theory of admissibility.” *Gorman*, 613 F.3d at 719. *See also United States v. Irving*, 665 F.3d 1184, 1215 (10th Cir. 2011) (Hartz, J., concurring) (opining that “[t]he intrinsic/extrinsic dichotomy does not assist in the analysis of admissibility,” opining “the distinction between intrinsic and extrinsic evidence is unclear and confusing, and can lead to substituting conclusions for analysis,” and quoting *Gorman*, *Green*, and *Bowie*).

\* \* \*

B. THERE IS A SPLIT IN THE CIRCUITS ON WHETHER TO  
CONTINUE TO RECOGNIZE THE “INEXTRICABLY INTERTWINED”  
EXCEPTION, WHETHER TO SEVERELY NARROW IT, AND HOW  
BROADLY IT SWEEPS IF IT IS NOT SEVERELY NARROWED.

The foregoing opinions criticizing the “inextricably intertwined” exception have worsened a split that already existed. That the split already existed was recognized in both *Taylor* and *Green*. *Taylor* noted “[c]ourts do not agree on whether it refers to evidence ‘intrinsic’ to the charged crime itself, in the sense of being evidence of the crime, or whether though evidence of another crime it may be introduced in order to ‘complete the story’ of the charged crime.” *Id.*, 522 F.3d at 734. *Green* noted the other circuits “employ a variety of tests,” *id.*, 617 F.3d at 245, that “are not interchangeable,” *id.* at 246. *See also Bowie*, 232 F.3d at 928 (recognizing there are “various formulations”).

The split described in this criticism is evidenced by the different circuits’ case law, especially after the criticizing courts’ elimination or narrowing of the exception. First, there is the Seventh Circuit’s complete disavowal of the exception. There are then the two other circuits that have criticized the exception. Those circuits, while stopping short of complete disavowal, have severely limited the exception. The Third Circuit has “reserve[d] the ‘intrinsic’ label for two narrow categories of evidence.” *Green*, 617 F.3d at 248. “First, evidence is intrinsic if it ‘directly proves’ the charged offense.” *Id.* Second, “uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the

charged crime.” *Id.* at 249 (quoting *Bowie*, 232 F.3d at 929). And the D.C. Circuit similarly recognizes the exception in only “a narrow range of circumstances.” *Bowie*, 232 F.3d at 929. One circumstance is where “the evidence is of an act that is part of the charged offense.” *Id.* Another is the one adopted by the Third Circuit – where the acts are “performed contemporaneously with the charged crime [and] facilitate the commission of the charged crime.” *Id.* But “there is no general ‘complete the story’ or ‘explain the circumstances’ exception.” *Id.*

Along the other side of the continuum are two or three, much broader, formulations articulated by the other circuits, which, as recognized in *Taylor*, “do not agree” and, as recognized in *Green*, “are not interchangeable.” *Supra* p. 14 (quoting *Taylor*, 522 F.3d at 734, and *Green*, 617 F.3d at 246). The Ninth Circuit, as evidenced by its application of the exception in the present case, and the Fifth, Sixth, and Tenth Circuits, apply the exception if the charged crime and the other act are “part of . . . a single criminal transaction,” App. A002 (quoting *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012-13 (9th Cir. 1995)), or “single criminal episode,” App. A003 (quoting *United States v. Warren*, 25 F.3d 890, 895 (9th Cir. 1994)); *United States v. Ceballos*, 789 F.3d 607, 620 (4th Cir. 2015); *United States v. Irving*, 665 F.3d 1184, 1212 (10th Cir. 2011) (quoting *United States v. Lambert*, 995 F.2d 1006, 1007 (10th Cir. 1993), and *United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990)); *United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995), which at least the Fifth Circuit expands to other acts that are “part of a continuing pattern of criminal activity,” *Barnes*, 49 F.3d at 1149. The First, Second, Fourth, and Eleventh Circuits apply the exception when the charged crime and

the other act “arose out of the same . . . series of transactions as the charged offense, . . . or is necessary to complete the story of the crime on trial.” *United States v. Brizuela*, 962 F.3d 784, 793-94 (4th Cir. 2020) (quoting *United States v. Kennedy*, 32 F.3d 876, 886 (4th Cir. 1994), and *United States v. Towne*, 870 F.2d 880, 886 (2d Cir. 1989)). *See also United States v. Ramirez-Frechel*, 23 F.4th 69, 76 (1st Cir. 2022) (citing *Brizuela* for holding that uncharged conduct intrinsic “when it arises from the same series of transactions as the charged offense”); *United States v. Lyle*, 919 F.3d 716, 736 (2d Cir. 2019) (quoting *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000)); *United States v. Wenxia Man*, 891 F.3d 1253, 1273 (11th Cir. 2018); *United States v. Weeks*, 716 F.2d 830, 832 (11th Cir. 1983), *quoted in Towne*, 870 F.2d at 886. Finally, the Eighth Circuit may use a third, even broader, formulation, at least at times. It has found a prior act “inextricably intertwined” simply because it “was sufficiently close in time and related to [the charged offense].” *Buchanan v. United States*, 714 F.3d 1046, 1047 (8th Cir. 2013).

There is no reason to believe the circuits will resolve their differences on their own, moreover. To begin, there are too many circuits with too many varying approaches. And several circuits have recognized the disagreement and dismissed it. The *Buchanan* opinion responded to a request to reject or modify the “inextricably intertwined” exception by summarily stating: “That test is well-established in our circuit, and ‘[i]t is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.’” *Id.* at 1047 n.3 (quoting *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002)). The Fourth Circuit recognized that “other circuits have criticized or done away” with the exception, but was unswayed because its holdings applying the exception “are

consistent with the approach embraced by a number of other circuits.” *Brizuela*, 962 F.3d at 794 n.8. *See also United States v. Graziano*, 391 Fed. Appx. 965, 966 n.1 (2d Cir. 2010) (unpublished) (acknowledging *Bowie*, but holding “we are, of course, bound by prior rulings of this court approving this theory of admissibility”).

In sum, there is a well-entrenched virtual potpourri of approaches to an “inextricably intertwined” exception to Rule 404(b). One circuit completely disavows the exception, two circuits narrow it to only evidence that is essentially part of the charged crime, and other circuits “employ a variety of tests,” *Green*, 617 F.3d at 245, that are (a) far from “interchangeable,” *id.* at 246, and (b) vague and therefore susceptible to dangerously conclusory application. This Court should resolve (a) whether any version of the exception is appropriate and (b) if some version is appropriate, what that version is.

### C. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE SPLIT IN THE CIRCUITS.

The present case is an excellent vehicle for resolving the split in the circuits. This is because the evidence of the gun sale is not admissible under the “inextricably intertwined” exception if the Seventh Circuit’s complete disavowal or the Third and D.C. Circuit’s severe narrowing is adopted, but is admissible under the exception, at least in the view of the Ninth Circuit, if the broader view is adopted.

The evidence of the gun sale is not admissible as “inextricably

“intertwined” under the Seventh Circuit approach because that circuit’s complete disavowal means there *is* no “inextricably intertwined” exception. Evidence of other acts can still be offered under Rule 404(b), but there is no viable Rule 404(b) rationale for the gun sale evidence here. It did not tend to show intent, knowledge, or any of the other mens rea related facts listed as possibilities in the rule, and the government did not argue those theories in the district court. The government did argue in the district court that the evidence proved petitioner’s identity and modus operandi, *see App. A031-33*, but the district court did not accept that argument, *see App. A008 n.5, A012*, and that ruling was hardly an abuse of discretion. The government renewed a narrow identity argument as an alternative ground for affirmance in the court of appeals, *see App. A172-73*, but the court of appeals did not adopt that argument. And even if it had, the identity argument – premised on the desire to use the voice on a recording, *see App. A172-73* – would not have justified admitting anything more than a recording with vague references to “that’s cool” and “that,” *see App. A182*. It would not have justified admitting the far more damaging testimony about the actual transaction, which revealed the “that” to be a gun.

The evidence of the gun sale would also be inadmissible under the severely narrowed view of the “inextricably intertwined” exception taken by the Third Circuit and D.C. Circuit. It did not, to track the language of the Third Circuit *Green* opinion, “directly prove,” *id.*, 617 F.3d at 248, the charged drug offenses. It also did not “facilitate the commission,” *id.* at 249, of the drug offenses. And so also for the D.C. Circuit test; the gun sale was not “part of the charged [drug] offense[s],” *Bowie*, 232 F.3d at 929, and, as just noted, did not

“facilitate the commission,” *id.*, of the drug offenses.

This is also not a case in which the evidence of the other act – the gun sale – and the evidence of the charged offenses – the drug sales – were literally “intertwined,” so that the evidence of the other act could not be separated out. *See Taylor*, 522 F.3d at 734 (acknowledging cases in which “the evidence of the charged crime may unavoidably reveal the uncharged one” and/or “the evidence of the ‘other’ crime can’t be disentangled from the evidence of the charged crime”). *See also* App. A002 (memorandum in present case recognizing second “inextricably intertwined” category of evidence “necessary” to ‘permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime” (quoting *United States v. Vizcarra-Martinez*, 66 F.3d at 1012-13)). The evidence could have been separated out as described in Petitioner’s opening brief in the court of appeals. *See* App. A144-50. The informant’s testimony could have been limited by simply omitting the testimony about his request for guns after the third drug sale and the testimony about the later sale of the gun and eliciting testimony only about the offer to sell drugs and the later sale of the drugs. *See* App. A145. And the testimony of the cooperating codefendant could have been similarly limited. First, he could have testified that the informant “asked me for an ounce of methamphetamine” instead of “asked me for a firearm and an ounce of methamphetamine,” and that Petitioner “agreed to supply the ounce of methamphetamine” instead of “agreed to supply the firearm and the ounce of methamphetamine.” App. A150. Second, he could have described meeting the informant and driving him to the address Petitioner provided; explained he drove there because that is where Petitioner told him to go; and explained that

this was near Petitioner’s house, without the additional explanation that it was also going to be the location of the gun sale. App. A150. Third, he could have described Petitioner approaching the car, the informant counting out the money and handing it to him, exchanging greetings with Petitioner, and handing Petitioner the money after Petitioner dropped the drugs into the car, without going into the subsequent phone calls about the gun and purchase of the gun. App. A150.

An example of a case recognizing the feasibility of such limits can be found even in the circuits that broadly apply the “inextricably intertwined” exception. The district court in *United States v. Brown*, 888 F.3d 829 (6th Cir. 2018), admitted, under a res gestae theory, *see id.* at 835, a 911 call in which the caller had not only informed the dispatcher about the defendant’s possession of a gun, but indicated that the defendant could be dangerous because of past domestic violence, *see id.* at 836-37. The Sixth Circuit held it was error to admit this testimony because:

The references to domestic violence were unnecessary to complete the government story, which narrowly required only a showing of possession of a handgun. Had any references to defendant being “dangerous” in the past or involved in domestic violence been redacted, it would have had no effect on the foundation of the government’s proof – [the] testimony regarding the events.

*Id.* at 838.

Here, to track *Brown*, “[t]he references to [the gun sale] were unnecessary to complete the government story, which narrowly required only a showing of [the drug sales].” The difference between the court of appeals’ analysis in the present case and the analysis in *Brown* illustrates “how elusive

and unhelpful the ‘inextricably intertwined’ standard can be,” *Green*, 617 F.3d at 246. It validates Wigmore’s concern about “looseness of thinking and uncertainty of decision.” *Supra* p. 13 (quoting *Green* and Wigmore). It illustrates one of the problems with the “inextricably intertwined” exception – that it “often paves the way to prove acts that are anything but inseparable from the charged crime, and . . . can become a catchall for admitting acts that are far more prejudicial to the defendant than useful in determining guilt of the charged offense.” *Supra* p. 13 (quoting Mueller and Kirkpatrick treatise). It implicates this last commentator’s caution that “[p]rior crimes should not be admitted merely because they closely precede or follow the charged crime, or because they . . . involve some of the same people, places, or implements” and “[e]ven offenses that are closely connected in these ways should be excluded if they do not shed light on acts, events, or conditions that matter.” Mueller and Kirkpatrick, *supra* p. 13, § 4:33.

In sum, the evidence was properly admitted only if it is the broader view taken by the Ninth Circuit and some other circuits that is correct – and even then only if that view is applied broadly. The evidence was not properly admitted if it is the view of the Seventh Circuit or the view of the Third Circuit and D.C. Circuit that is correct. That makes this case an excellent vehicle to resolve the question presented.

#### D. IT IS IMPORTANT FOR THIS COURT TO RESOLVE THE SPLIT IN THE CIRCUITS.

Resolving the split is important for three reasons. First, the “inextricably

“intertwined” exception is ubiquitous in the reported cases. A search of appellate opinions for just those words, without even reaching out for the alternative phrasing of “intrinsic evidence” or “res gestae,” produces hundreds, if not thousands, of cases. And loose use of the exception (a) detracts from the intellectual rigor of legal analysis and (b) leads down the slippery slope to admission of more and more evidence of more and more questionable value.

Second, evidence the courts treat as “inextricably intertwined” will not always be admissible under Rule 404(b). While the Third Circuit described the exception as unnecessary because evidence admissible under the exception usually would also be admissible under Rule 404(b), *see Green*, 617 F.3d at 247, that is only if the exception is properly applied. The Third Circuit also noted that “some of [the exception’s] broader formulations, taken at face value, classify evidence of virtually any bad act as extrinsic.” *Id.* at 248. And the Seventh Circuit was less sanguine than the Third Circuit, noting that “[i]f [inextricably intertwined] evidence is not direct evidence of the crime itself, it is usually propensity evidence simply disguised as inextricable intertwinement evidence.” *United States v. Gorman*, 613 F.3d at 718. Using the exception untethered to the rule creates the dangers recognized by the D.C. Circuit and Judge Posner – that it “may too easily slip from analysis to mere conclusion,” *Bowie*, 232 F.3d at 928, and that it “invites prosecutors to expand the exceptions to [Rule 404(b)] beyond the proper boundaries of the exceptions,” *Taylor*, 522 F.3d at 735. *See also Green*, 617 F.3d at 243 (quoting Wigmore’s concern about “looseness of thinking and uncertainty of decision”); Mueller and Kirkpatrick, *supra* p. 13, § 4:33 (expressing concern that exception “invites abuse”).

The present case is a good example of evidence that was not alternatively admissible under Rule 404(b). The district court expressly rejected one of the government’s Rule 404(b) arguments and was uncertain about the other, and the court of appeals ignored the renewed argument the government made on appeal, which was limited in any event. *See supra* p. 20.

Third, Rule 404(b) creates important procedural requirements that can be evaded if the evidence in question is admitted under an alternative “inextricably intertwined” theory. The rule requires, in criminal cases, that the prosecutor “provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it.” Fed. R. Evid. 404(b)(3)(A). The prosecutor must also “articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.” Fed. R. Evid. 404(b)(3)(B). This is important because it allows for careful pretrial consideration that will avoid the “loose ideas and ignorance of principles” that concerned Wigmore and lead to the “exact analysis and precise thinking” that Morgan feared is sometimes absent. *Supra* p. 13. *See* Fed. R. Evid. 404 advisory committee note (2020 Amendments) (“Advance notice of Rule 404(b) evidence is important so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied – even in cases in which a final determination as to the admissibility of the evidence must await trial.”).

E. THE NINTH CIRCUIT ADOPTION OF AN “INEXTRICABLY INTERTWINED” EXCEPTION, AT LEAST IN ITS BROAD FORM, IS WRONG.

The split discussed above should be resolved in any event, but the view taken by the Ninth Circuit is wrong. It is wrong not only for the reasons given by the Third, Seventh, and D.C. Circuits, but for textual reasons as well.

The most glaring textual problem is that there is nothing in the text of the rules of evidence establishing an “inextricably intertwined” exception. As explained at length in the Third Circuit’s *Green* opinion, the exception developed from the common law concept of “*res gestae*,” which also appears nowhere in the text of the rules. *See id.*, 617 F.3d at 240-45. And the exception is a product not of legal reasoning, but “an inclination of judges and lawyers to avoid the toilsome exertion of exact analysis and precise thinking” and “used as a cover for loose ideas and ignorance of principles.” *Supra* p. 13 (quoting *Green*, Morgan, and Wigmore). Its lack of definition in the text of the rules is evidenced by the “variety of tests” that “clearly are not interchangeable,” *Green*, 617 F.3d at 245-46, and about which the courts “do not agree,” *Taylor*, 522 F.3d at 734.

Looking to the text of the rules supports the view that there is no general exception for “inextricably intertwined” evidence. The relevant rules are the rules of relevance in Article IV of the Federal Rules of Evidence. The initial, general rules are Rule 402, which makes all “relevant evidence” admissible, Fed. R. Evid. 402, and Rule 401, which defines “relevant evidence” as evidence that (a) “has any tendency to make a fact more or less probable than

it would be without the evidence” when (b) “the fact is of consequence in determining the action,” Fed. R. Evid. 401. These initial, general rules are followed by more specific rules, including Rule 404, for “character evidence,” addressed in subsection (a) of the rule, and “crimes or other acts,” addressed in subsection (b) of the rule. Fed. R. Evid. 404.

Under the general rule of construction that a specific provision controls over general provisions, *see Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991), it must be the specific rule – Rule 404(b) – that governs evidence of crimes or other acts. “Other” acts, and “crimes” and “wrongs,” are thus governed by Rule 404(b), and only acts that are not “other,” i.e. are part of the charged crime, are outside that rule. The rule may reasonably be limited to other “bad” acts under the rule of ejusdem generis, which “limits general terms [that] follow specific ones to matters similar to those specified,”<sup>3</sup> *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163 n.19 (2012) (quoting *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 562 U.S. 277, 294 (2011)). But at least those “bad” “other” acts are governed by Rule 404(b). They are not governed by some non-textual “inextricably intertwined” exception that not even the courts, let alone a statute or rule, consistently define.

The acts do have to be “other,” which leaves some room for a narrow category of “inextricably intertwined” acts. This would include acts that, in the words of the D.C. Circuit in *Bowie*, are “part of the charged offense.” *id.*, 232 F.3d at 929. It might also include acts that, in the words of the Third Circuit in *Green*, ““directly prove[ ]’ the charged offense,” *id.*, 617 F.3d at 248, and, in

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<sup>3</sup> Here, the general term, “act,” following the more specific terms, “crime” and “wrong.”

the words of both *Green* and *Bowie*, “facilitate the commission of the charged crime,” *Green*, 617 F.3d at 249 (quoting *Bowie*, 232 F.3d at 929), though these might more properly be viewed as “other” acts that happen to satisfy the requirements of Rule 404(b).

“Inextricably intertwined” acts would not include, on the other hand, any and all acts that are part of a “single criminal episode,” *supra* p. 17, at least if that term is applied as broadly as it was here; any and all acts that are “part of a continuing pattern of criminal activity,” *supra* p. 17; any and all acts that “arose out of the same . . . series of transactions,” *supra* p. 18; or, worst of all, any “acts” that are “sufficiently close in time and related,” *supra* p. 18. “Transactions,” or “acts,” that are part of a “series” or a “pattern” may be “related,” but they are still separate transactions, or separate “acts.”<sup>4</sup>

The distinction is illustrated by the facts of this case. Petitioner engaged in two separate “transactions” or “[bad] acts” – illegally selling drugs (actually more than once) and illegally selling a firearm. These acts may have involved the same parties (though the gun transaction actually involved an additional party as well, namely, the other man who actually provided the gun and was paid for it) and may have been close in time (though the gun sale took place “later that day” only after the informant and Rodriguez had “wait[ed] a long time,” *supra* pp. 6, 8 (quoting App. A072, A114), but they were not the same transaction or act. The gun sale was an “other” act and “other” acts are

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<sup>4</sup> The courts using the term “episode” do not define what they mean by it, but dictionaries define “episode” sometimes narrowly as a single occurrence and sometimes more broadly as a series of related occurrences. *See, e.g.*, *Webster’s Third New International Dictionary* 765 (2002).

governed by Rule 404(b), not some court-created “res gestae” or “inextricably intertwined” exception that means different things in different circuits.

**VI.**

**CONCLUSION**

The Court should grant the Petition.

Respectfully submitted,

DATED: June 28, 2023

s/ Carlton F. Gunn  
CARLTON F. GUNN  
Attorney at Law

## **A P P E N D I X 1**

**NOT FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

APR 21 2023

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 22-50070

Plaintiff-Appellee,

D.C. No.  
2:18-cr-00758-DSF-4

v.

CHRISTOPHER DELGADO, AKA Lil  
Glow, AKA Spoke,

MEMORANDUM\*

Defendant-Appellant.

Appeal from the United States District Court  
for the Central District of California  
Dale S. Fischer, District Judge, Presiding

Submitted April 12, 2023\*\*  
Pasadena, California

Before: W. FLETCHER, LEE, and MENDOZA, Circuit Judges.

Christopher Delgado appeals from his jury conviction for one count of conspiracy, in violation of 21 U.S.C. § 846, and one count of distribution of methamphetamine, in violation of 21 U.S.C. § 841(a)(1). Delgado argues the

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).*

district court erred by admitting evidence of a firearm sale and an excerpt from Delgado's interrogation ("interrogation excerpt"). Delgado also challenges a matter that is under seal. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Delgado argues the district court erred by admitting evidence of a firearm sale as "inextricably intertwined" with Delgado's underlying drug offense. According to Delgado, the evidence is inadmissible under Federal Rule of Evidence 404(b). "[W]e review de novo the district court's application of the Federal Rules of Evidence to the other acts evidence." *United States v. Wells*, 879 F.3d 900, 925 (9th Cir. 2018).

"Evidence of 'other acts' is not subject to Rule 404(b) analysis if it is 'inextricably intertwined' with the charged offense." *United States v. Beckman*, 298 F.3d 788, 793 (9th Cir. 2002) (quoting *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012 (9th Cir. 1995)). The inextricably intertwined exception applies when an act (1) "constitutes a part of the transaction that serves as the basis for the criminal charge" or (2) is "necessary" to "permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime." *Vizcarra-Martinez*, 66 F.3d at 1012–13.

Here, the drug sale underlying Delgado's charges and the firearm sale were clearly "part of . . . a single criminal transaction." *Id.* Delgado's co-conspirator

and co-defendant, Oscar Rodriguez, agreed to sell “drugs and a firearm” to a confidential informant; Delgado stored his drugs and guns in the same location; Delgado and Rodriguez stayed in contact after the drug sale to coordinate the firearm sale; the firearm sale occurred one hour after the drug sale; and Rodriguez received a broker’s fee from Delgado for arranging the drug and firearm sale. That Delgado was charged only with drug-related offenses and no firearm offense does not render evidence of the firearm sale inadmissible. *See United States v. Warren*, 25 F.3d 890, 895 (9th Cir. 1994) (“Offenses committed in a single criminal episode do not become inadmissible because the defendant is being tried for only some of his acts.”); *see also United States v. Rizk*, 660 F.3d 1125, 1131 (9th Cir. 2011). Because the firearm sale was inextricably intertwined with the underlying charge, the district court did not err.

2. Reviewing for abuse of discretion, *United States v. Alvirez*, 831 F.3d 1115, 1120 (9th Cir. 2016), we find no error in the district court’s admission of the interrogation excerpt. Identity was a key issue at trial because the confidential informant’s video recorded Delgado’s voice, but not his face. Because the interrogation excerpt concerned Delgado’s recognition of his voice, it was highly probative in proving Delgado was the supplier in the confidential informant’s video. The district court properly performed a Rule 403 balancing analysis and reasonably concluded that the probative value of the interrogation excerpt was not

substantially outweighed by the danger of unfair prejudice.

3. Finally, Delgado challenges a matter that is filed under seal.

Reviewing for abuse of discretion, we affirm.

**AFFIRMED.**

## **APPENDIX 2**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF  
AMERICA,

Plaintiff,

v.

CHRISTOPHER DELGADO, et  
al.,

Defendants.

CR 18-00758-DSF-4

Order GRANTING in Part and  
DENYING in Part  
Government's Motions *in*  
*Limine* (Dkts. 122, 123, 127,  
132, and 146)

Before the Court are motions *in limine* filed by the government. All rulings on motions *in limine* are tentative. The issues may be raised again during trial—outside the presence of the jury—if circumstances change.

### I. Background

The government charges Christopher Delgado with conspiracy to distribute methamphetamine and distribution of methamphetamine for allegedly selling the drug to a confidential informant (CI) on October 1, 2014. A video of the transaction recorded by the CI (the CI Video)<sup>1</sup> shows an off-camera individual

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<sup>1</sup> The CI Video has been divided by the government into two separate digital files titled “2056\_10032014.002.avi” and “2056\_10032014.003.avi.” See Dkt. 132, Milstein Decl. ¶¶ 3-4, Exs. A & B. The Court will refer to the video files as CI Video 2 and CI Video 3, respectively.

Interrogation Transcript at 13:24-14:07.

It is abundantly clear that Mr. Delgado's statement is not a "specific non-denial" of the October 1, 2014 drug transaction. He believes that he is watching a video from "two [years before his arrest]—2017. If anything, by removing the surrounding context from the Interrogation Transcript and seeking to admit only this limited excerpt, the government has made Mr. Delgado's statement even more misleading and prejudicial. See, e.g., My Cousin Vinny (Twentieth Century Fox 1992) (In which the defendant's incredulous post-arrest statement "I shot the clerk? I shot the clerk?" is repeated at trial by the arresting Sheriff as a matter-of-fact confession: "I shot the clerk. I shot the clerk."). But there appears to be no way to make it less misleading other than by including other excerpts that the Court has found to be inadmissible.

For these reasons and those stated in the Court's prior Order, the government's MIL 2 is DENIED.

**C. Motion in Limine to Admit Testimonial Evidence of Firearm Sale (Dkts. 127, 132)**

Granted in Part. The government seeks to admit four excerpts from the CI Video that relate to Mr. Delgado allegedly facilitating the sale of a firearm to the CI. Dkt. 132 (Gov. MIL 3) (sealed). The government asserts that, immediately after concluding the charged drug sale on October 1, 2014, Mr. Delgado and the co-conspirator, Mr. Rodriguez, discussed the sale of a firearm to the CI through a third party (Jorge Baraja).<sup>2</sup> Id. at 2. Mr. Delgado is not charged in connection with the firearm sale, though it is alleged in the indictment. See Dkt. 1 (Indictment) at 4 ("Overt Act

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<sup>2</sup> The government contends, and the recording appears to support, that the sale of the drugs and the gun were expected to occur at the same time.

No. 12: On October 1, 2014, using coded language in a telephone call, defendant RODRIGUEZ agreed to sell drugs and a firearm to the CI later that day.”).

The government argues that evidence of the firearm sale is admissible on two grounds: “First, this evidence is inextricably intertwined with evidence of the drug sale. Second, the evidence is admissible to prove defendant’s identity and his modus operandi under Rule 404(b).” Gov. MIL 3 at 1. The government seeks to introduce the following excerpts from the CI Video related to the alleged gun sale:

- Excerpt 1: Conversation between Mr. Rodriguez and (purportedly) Mr. Delgado discussing the gun sale in which Mr. Delgado states that the third-party seller would be arriving in “fifteen minutes.” CI Video 2 at 9:08-9:46;
- Excerpt 2: Phone conversation between Mr. Rodriguez and (purportedly) Mr. Delgado approximately 10 minutes later to discuss whether the sale of “the toy”<sup>3</sup> “will be done or not.” The CI Video records only Mr. Rodriguez’s side of the conversation. After hanging up, Mr. Rodriguez talks to the CI about Mr. Delgado, including details about Mr. Delgado’s alleged gang moniker and the identity of his older brother. CI Video 2 at 18:42-18:58, 19:39-20:20;
- Excerpt 3: Phone conversation between Mr. Rodriguez and an off-camera individual (purportedly Mr. Delgado) following up on the location of the third-party seller (purportedly Mr. Baraja).<sup>4</sup> Mr. Delgado says he will contact the seller to let

---

<sup>3</sup> The government asserts that “toy” is coded language referring to a firearm. Gov. MIL 3 at 3.

<sup>4</sup> The government asserts that Mr. Delgado is the off-camera individual speaking on the phone with Mr. Rodriguez in Excerpt 3. See Gov. MIL 3 Excerpts at 4. However, the government previously submitted a full

him know that Rodriguez and the CI are waiting for him and then call Rodriguez “as soon as [Baraja] gets back.” CI Video 3 at 4:16-5:59; and

- Excerpt 4: Conversation between Mr. Rodriguez and the CI purportedly discussing Mr. Delgado, including where he lives and where he stores his firearms and drugs. CI Video 3 at 11:00-11:23.

Gov. MIL 3 Excerpts.

Mr. Delgado opposes the motion on the grounds that the charged drug sale and the uncharged gun sale are “not ‘intertwined’ at all” and the gun transaction is too generic to establish a modus operandi for Mr. Delgado.<sup>5</sup> Dkt. 134 (Opp’n to Gov. MIL 3) at 2-3. Mr. Delgado further argues that portions of the video are inadmissible hearsay. Dkt. 139 (Suppl. Opp’n to Gov. MIL 3).

**Inextricably Intertwined.** The Ninth Circuit permits two categories of evidence that may be “inextricably intertwined” with a charged offense and therefore admitted without regard to Rule 404(b) of the Federal Rules of Evidence. Evidence of prior acts

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transcript of the CI Video that identifies that off-camera individual on the phone as “U[nidentified] M[ale] 3.” See Dkt. 72-2 (CI Video Transcript) at 33:17-34:22. The same CI Video Transcript refers elsewhere to Mr. Delgado as “U[nidentified] M[ale] 2.” See id. at 21:24-28. The government now claims that Unidentified Male 2 and Unidentified Male 3 from the CI Video are the same person (Mr. Delgado)—but the government does not address the discrepancy in the full CI Video Transcript or explain how it intends to establish that Mr. Delgado is, in fact, the unidentified individual on the phone in Excerpt 2. A proper foundation must be laid to establish the identity of all speakers in the CI Video.

<sup>5</sup> The Court agrees with the defense that this is not proper modus operandi evidence.

may be admitted as “inextricably intertwined” with the charged offenses if (1) “the evidence ‘constitutes a part of the transaction that serves as the basis for the criminal charge’” or (2) when necessary “to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime.” United States v. DeGeorge, 380 F.3d 1203, 1220 (9th Cir. 2004) (quoting United States v. Vizcarra-Martinez, 66 F.3d 1006, 1012-13 (9th Cir. 1995)).

Under the first category, “uncharged transactions” that are “closely linked to the events charged in the . . . conspiracy” are admissible. United States v. Williams, 989 F.2d 1061, 1070 (9th Cir. 1993) (“The policies underlying rule 404(b) are inapplicable when offenses committed as part of a ‘single criminal episode’ become other acts simply because the defendant ‘is indicted for less than all of his actions.’” (quoting United States v. Soliman, 813 F.2d 277, 279 (9th Cir. 1987))). In the same vein, it is “well established that the government in a conspiracy case may submit proof on the full scope of the conspiracy; it is not limited in its proof to the overt acts alleged in the indictment.” United States v. Rizk, 660 F.3d 1125, 1131 (9th Cir. 2011).

The Court finds the CI Video transcript excerpts related to the gun sale to be “part of the same transaction” as the charged drug sale and therefore admissible. Excerpt 1—a conversation between Mr. Delgado and Mr. Rodriguez about the alleged gun sale—occurs immediately after Mr. Delgado delivers the drugs and in the same location (standing outside Mr. Rodriguez’s car). See United States v. Montgomery, 384 F.3d 1050, 1062 (9th Cir. 2004) (concluding that acts that “occurred within the temporal scope of the conspiracy and comprised the conspiracy” were inextricably intertwined and admissible). In addition, the alleged drug and gun sales contain “a sufficient contextual or substantive connection” to one another, Vizcarra-Martinez, 66 F.3d at 1013,

because Excerpt 4 shows that Mr. Delgado purportedly stored his drugs and firearms together. See CI Video Excerpts at 5 (Rodriguez telling the CI that Delgado “leaves all the [guns] and all [the drugs]” in Mr. Baraja’s house). The government has sufficiently shown that the gun and drug sales comprise a single planned transaction that stretches over the course of the same afternoon.

Moreover, though the government has not charged Mr. Delgado with any gun-related crimes, “the indictment alleges a conspiracy” and evidence “to show the full scope of that conspiracy” is “inextricably intertwined” with the conspiracy charge and [] not ‘other acts’ subject to Rule 404(b).” Rizk, 660 F.3d at 1132; United States v. Serang, 156 F.3d 910, 915 (9th Cir. 1998) (government is not precluded from introducing evidence that “explained both the nature of the[] [parties’] conspiratorial relationship, and how and why” the conspiracy was implemented simply because a defendant is indicted for less than all of his actions). Because the October 1, 2014 firearm sale is reasonably asserted to be part of the larger conspiracy, see Indictment at 4, and the government’s evidence is sufficiently connected to that conduct, the four video excerpts are admissible.

**Hearsay.** Mr. Delgado further argues that the following portion of Excerpt 2 is inadmissible hearsay:

RODRIGUEZ: Yeah, he’s fuckin’ Little Glow’s brother.

CI: Who?

RODRIGUEZ: Remember Glow?

CI: Glow, no.

RODRIGUEZ: No? You don’t remember that fool?

CI: No.

## **APPENDIX 3**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

THE HONORABLE DALE S. FISCHER, JUDGE PRESIDING

**REPORTER'S TRANSCRIPT ON APPEAL**

## Los Angeles, California

Thursday, January 30, 2020, 9:56 A.M.

## Government's Motions in Limine

PAT CUNEO CSR 1600, CRR-CM  
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1                   So I think then the rest of the recording would  
2 come -- or not all of it but some of the recording or some  
3 other explanation about why Mr. Delgado might not remember  
4 would be necessary; but I've already decided that was more  
5 prejudicial than probative so, no, that statement is not  
6 coming in.

7                   The firearms sale. It's definitely not *modus*  
8 *operandi*, may be ID but I'm not quite sure exactly how that  
9 evidence is going to work. But it does seem to me to be --  
10 I hate that word -- inextricably intertwined so I'll hear  
11 from you, Mr. Kassabian, if you'd like.

12                  MR. KASSABIAN: Would you like me to approach the  
13 lectern?

14                  THE COURT: Sure.

15                  MR. KASSABIAN: I'd argue that it's not  
16 inextricably intertwined with the actual charged conduct in  
17 this case. The charged conduct in this case is drug  
18 dealing.

19                  It involves, allegedly -- well, it involves a  
20 person at a car window engaging in a methamphetamine sale.  
21 The government says that that is my client. Obviously,  
22 we're saying that it isn't; that they can't meet their  
23 burden of proof to identify him.

24                  That is what he is charged with. He's also  
25 charged with a further conspiracy with this cooperator

1 saying that he was the supplier in these other transactions  
2 that -- drug transaction where there was no -- where he was  
3 not present or in any of the other evidence.

4 The gun sale is extraneous. To be inextricably  
5 intertwined requires a finding that the party cannot tell a  
6 coherent story, cannot tell the story of the underlying  
7 event without including this other event.

8 The government is perfectly capable of telling the  
9 story of a man coming up to a car window, having a short  
10 discussion, handing over methamphetamine and taking money.

11 Whether they were talking about something else,  
12 doesn't -- does not interfere with their ability to tell a  
13 coherent story about that event; that sometime later up the  
14 street a third party, without Unknown Male No. 2's presence,  
15 engaged in a firearm transaction with a cooperator and the  
16 CI is not necessary to tell a coherent story about the car  
17 window methamphetamine deal.

18 They are not intertwined at all let alone  
19 inextricably intertwined which again requires the inability  
20 to tell a coherent story without including the other  
21 activity.

22 THE COURT: I know that's what the words say but I  
23 think the cases have let in evidence that certainly wouldn't  
24 meet that precise test so tell me that this -- these two  
25 things happened on the same day.

1 MR. KASSABIAN: Yes.

2 THE COURT: And Unidentified Male No. whatever  
3 came to the car window. The government contends that's  
4 Mr. Delgado and engaged in a drug sale.

5 MR. KASSABIAN: Yes.

6 THE COURT: And then the same day --

7 MR. KASSABIAN: Yes.

8 THE COURT: -- further down the street,  
9 Mr. Rodriguez and some other person now are talking about  
10 buying a gun; and aren't they expecting the same person to  
11 come back with the gun?

12 MR. KASSABIAN: The same person?

13 THE COURT: The same --

14 MS. CHOU: Can I clarify, Your Honor?

15 THE COURT: Yes, please.

16 MS. CHOU: So the agreement, when the informant  
17 reached out to Mr. Rodriguez prior to October 1<sup>st</sup> --

18 THE COURT: Wants to buy drugs and a gun.

19 MS. CHOU: And a gun; right.

20 And the informant, understanding of what was going  
21 to happen on October 1<sup>st</sup>, that it was going to be for an  
22 ounce of meth as well as for a firearm, the interaction with  
23 Rodriguez, the informant, and the defendant when the  
24 defendant came to the car initially, the defendant dropped  
25 off the ounce of meth; and the only conversation that they

1 had that, you know, in the course of that meeting was: The  
2 other guy is going to have a gun but he's not here. He had  
3 to take his cousin to the doctor. He'll be back and it's  
4 going to happen.

5 THE COURT: The other guy? So not Mr. Delgado.

6 MS. CHOU: Mr. Delgado is the person talking about  
7 how the gun is with a third party and that the third party  
8 is not available because the third party had to run an  
9 errand and they're all waiting for the third party to come  
10 back. The third party has been identified as an individual  
11 named Jorge Baraja.

12 THE COURT: Okay.

13 MS. CHOU: So I'll just refer to him as  
14 Mr. Baraja.

15 So the informant in Rodriguez had this  
16 conversation with Mr. Delgado; and it's just -- it's  
17 literally just about the gun. There's no conversation about  
18 this meth it great. You're really going to like this meth.

19 The only conversation that Delgado has at the car  
20 is: The guy with the gun is not here right now. He'll be  
21 back. So then they wait and there are a couple of phone  
22 calls in which Rodriguez called Delgado, the defendant, to  
23 get updates about: Is that guy back yet?

24 The only contact that Rodriguez has -- and it's  
25 recorded on the body-wire recording -- is contact with the

1 defendant to get updates about when Mr. Baraja was going to  
2 return with the gun.

3 Eventually later that day, Mr. Baraja did return  
4 and the firearm transaction occurred at Mr. Baraja's  
5 residence which is also on that street; and the defendant  
6 was not physically present at that gun deal because they  
7 were just waiting for Baraja to come back.

8 So those are the facts, Your Honor.

9 THE COURT: So why can't you tell your drug story  
10 without mentioning the firearms?

11 MS. MILSTEIN: Your Honor, the conspiracy that is  
12 charged, first of all, may I approach the lectern, Your  
13 Honor?

14 THE COURT: Sure.

15 And could you not start with beginning of the  
16 world part one and just get to the point of answering my  
17 question: Why can't you tell your story without  
18 referring -- I know it's a conspiracy. I know it mentions a  
19 gun.

20 MS. MILSTEIN: Certainly, Your Honor.

21 Part of the reason we can't tell the story without  
22 referring to the gun here is because we cannot prove the  
23 players in this story without proving the identity of the  
24 players in that story; and the way we prove the identity of  
25 the players in that story is by playing recordings of the

1 transactions.

2 And the recordings of the transactions include the  
3 way the -- because of the way the defendant and the other  
4 players in this controlled purchase set this thing up, the  
5 recordings include discussions that reference the gun buy,  
6 Your Honor.

7 THE COURT: But I'm not required by law to allow  
8 those recordings in so.

9 MS. MILSTEIN: No, of course not, Your Honor. But  
10 the government has to prove the element of identity and that  
11 is a central feature in this case.

12 THE COURT: It's actually different from  
13 inextricably intertwined, but I had a question about  
14 identity so continue with that argument.

15 MS. MILSTEIN: Sure. Sure, Your Honor.

16 And so I guess in thinking about the inextricable  
17 link between the gun and the drug buy, I think there can be  
18 no clearer link between those two things.

19 I think it's encapsulated in two things.

20 First, there is no sort of break in the  
21 conversation between when in time the defendant drops the  
22 methamphetamine into the car in which the cooperating  
23 witness and the confidential informant are sitting and when  
24 the defendant immediately brings up the gun deal that's  
25 supposed to happen contemporaneous but actually happens just

1 a bit later.

2 And then on the other hand, when right after the  
3 defendant is arrested, when the law enforcement officers are  
4 asking the defendant about the transaction, they play him  
5 that exact clip. They play him that clip because that is  
6 evidence of his involvement in this deal.

7 And because those two things are so bound up in  
8 each other, because the gun talk and the drug talk are so  
9 bound up in each other and because the elements of proof,  
10 one of which underlying it is identity, the government just  
11 has to be able to provide the jury with the information in  
12 those recordings to be able to prove the elements of the  
13 charges charged here.

14 And because the government has to prove --

15 THE COURT: Doesn't actually make any sense to me.  
16 It's not so just because you say it is so.

17 MS. MILSTEIN: Certainly not, Your Honor.

18 THE COURT: Why can't you just play the drug  
19 portions?

20 MS. MILSTEIN: Because on the day of the  
21 transaction, there is no drug portion. The portion of the  
22 video as it actually happens is --

23 THE COURT: Well, so he just drops the meth, gets  
24 \$600, and then just starts talking about the firearm?

25 MS. MILSTEIN: Yes, Your Honor. It happens in --

1 I'm not an expert in time but I would estimate it's less  
2 than a second. The break between dropping the meth in and  
3 the talk about the firearms.

4 It is so fast that the jury is not going to get  
5 anything from it; that the actual telling of the story of  
6 the meth transaction, I don't think the government would  
7 actually play any of the deal from that time.

8 THE COURT: Mr. Kassabian won't have any objection  
9 to that.

10 MS. MILSTEIN: I'm sure he wouldn't.

11 But I think the government's evidence of that day  
12 and the defendant's presence on that day depends on the  
13 government's ability to play that video.

14 His voice there, particularly in comparison, which  
15 the Court has already ruled admissible, comparison of the  
16 post-arrest statement as videotaped is very important  
17 because identity is such an issue here.

18 And that, I think, is separate and apart from the  
19 403 -- 404(b), rather, in estimation that the parties have  
20 engaged in litigation in.

21 But it's simply because the gun and drug  
22 transaction were discussed contemporaneously in that car  
23 transaction on October 1<sup>st</sup> that those two things are so  
24 inextricably intertwined.

25 THE COURT: All right.

1                   MR. KASSABIAN: May I respond, Your Honor?

2                   THE COURT: Please.

3                   MR. KASSABIAN: The government just said that  
4 there was no drug discussion. So there was no intertwining  
5 of a drug discussion and a firearms discussion.

6                   And just to make it clear, nobody said "gun,"  
7 nobody said "toy," nobody said "gat," "heater." I don't  
8 know. Maybe I think of Jimmy Cagney movies that I watch  
9 with my kids.

10                  They say: Did that convince that fool to get that  
11 or not? Get that.

12                  The government seems to be mixing things together  
13 here in a way that is a bit confusing to me.

14                  THE COURT: Mixing up identity and inextricably  
15 intertwined.

16                  MR. KASSABIAN: Mixing up identity and  
17 inextricably intertwined.

18                  We talked about this in the fall. This isn't my  
19 case. I didn't investigate it. If they've got identity  
20 problems, they've got identity problems.

21                  It's not inextricably intertwined with the drug  
22 sale and that's the standard that we're dealing with here.

23                  Voice comparison? Voice comparison is fine. I  
24 mean, you've already ruled on that and I'm not going to  
25 argue it anymore.

1           But the firearm, mixing a firearm transaction into  
2 a drug transaction where it doesn't belong, where he hasn't  
3 been charged with it, is very prejudicial.

4           I've been upfront with the government; that  
5 depending on how they -- their case comes in, I may --  
6 may -- look at trying to impeach one of the witnesses with  
7 inconsistent statements regarding the firearms transaction.

8           I can't make that decision here today and I  
9 wouldn't. I've got to figure that out when their case comes  
10 in. So if I want to balance the prejudice and the benefit  
11 of undermining the government's case, that's for me to do;  
12 and if I make the right decision or the wrong decision,  
13 that's my problem.

14           For the government to bring in the firearms in  
15 this drug case is wrong. It's prejudicial. These are not  
16 inextricably intertwined cases.

17           If they've got issues with their ID, they've got  
18 issues with their ID and that's why we have a trial. So,  
19 Your Honor, I would urge you to deny the motion, to keep the  
20 firearms material out of the government's case-in-chief.

21           It's too prejudicial and it's not intertwined  
22 with -- inextricably intertwined with the drug sale.

23           THE COURT: All right.

24           Mr. Kassabian filed a supplement which the  
25 government moved to strike. I don't know why you bothered

## **APPENDIX4**

1 NICOLA T. HANNA  
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3 BRANDON D. FOX  
4 Assistant United States Attorney  
5 Chief, Criminal Division  
6 SARA MILSTEIN (Cal. Bar No. 313370)  
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17 Attorneys for Plaintiff  
18 UNITED STATES OF AMERICA

19 UNITED STATES DISTRICT COURT

20 FOR THE CENTRAL DISTRICT OF CALIFORNIA

21 UNITED STATES OF AMERICA,

22 CR No. 18-00758-DSF (AMENDED)

23 Plaintiff,

24 v.  
25 GOVERNMENT'S MOTION IN LIMINE TO  
ADMIT TESTIMONIAL EVIDENCE OF  
THE OCTOBER 1, 2014 FIREARM  
SALE; DECLARATION OF SARA  
MILSTEIN

26 CHRISTOPHER DELGADO,  
27 aka "Lil Glow," and  
"Spoke,"

28 Defendant.

Hearing Date: 01/27/2020  
Hearing Time: 8:30 a.m.

29 Plaintiff United States of America, by and through its counsel  
30 of record, the United States Attorney for the Central District of  
31 California and Assistant United States Attorneys Sara Milstein and  
32 Jennifer Chou, hereby files its motion in limine for this Court's  
33 order admitting at trial in the government's case-in-chief against  
34 defendant Christopher Delgado, also known as "Lil Glow" and "Spoke"  
35 ("defendant"), testimonial and recorded evidence of defendant's

1 involvement in selling a firearm to a Federal Bureau of  
2 Investigation confidential informant.

3 This motion is based upon the attached memorandum of points and  
4 authorities, the files and records in this case, and such further  
5 evidence and argument as the Court may permit.

6 Dated: 01/10/2020

Respectfully submitted,

7  
8 NICOLA T. HANNA  
United States Attorney

9  
10 BRANDON D. FOX  
Assistant United States Attorney  
Chief, Criminal Division

11  
12 /s/ Sara Milstein  
13 SARA MILSTEIN  
JENNIFER CHOU  
14 Assistant United States Attorneys  
15 Attorneys for Plaintiff  
UNITED STATES OF AMERICA

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Defendant Christopher Delgado, also known as "Lil Glow" and "Spoke" ("defendant"), distributed methamphetamine and conspired with co-defendant Oscar Rodriguez ("Rodriguez") and others to distribute methamphetamine to a confidential informant working at the direction of the Federal Bureau of Investigation (the "CI"). For these actions, defendant has been charged with conspiracy to distribute at least five grams of methamphetamine, in violation of 21 U.S.C. § 846 (Count One), as well as one count of distribution of at least five grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(viii) (Count Six).

At trial, the government intends to prove that on October 1, 2014, defendant supplied the CI with one ounce of methamphetamine, as charged in the Indictment, and also that defendant facilitated the sale of a firearm to the CI later that date. Undercover recordings establish defendant's involvement in both sales.

The government hereby moves for admission of evidence of the gun sale on two grounds. First, this evidence is inextricably intertwined with evidence of the drug sale. Second, the evidence is admissible to prove defendant's identity and his modus operandi under Rule 404(b) of the Federal Rules of Evidence. Moreover, defendant would not be unfairly prejudiced by introduction of this evidence because he has represented that he intends to reference the gun sale himself at trial. (Decl. of Sara Milstein ("Milstein Decl.") ¶ 2.) The government seeks to admit four excerpts, which are attached as Exhibit C to the Declaration of Sara Milstein.

1 **II. RELEVANT FACTUAL BACKGROUND**

2 Defendant participated in a conspiracy whose objects included  
3 the distribution of methamphetamine to the CI. As in every  
4 conspiracy, each member had a role to play; defendant's role was  
5 that of supplier. Defendant agreed with Rodriguez to sell  
6 methamphetamine and a firearm to the CI on October 1, 2014.  
7 Defendant worked through middlemen to accomplish these sales.

8 Prior to October 1, 2014, Rodriguez agreed to sell an ounce of  
9 methamphetamine and a firearm to the CI. On October 1, 2014,  
10 Rodriguez drove the CI and parked on North Clybourn Avenue between  
11 Stagg Street and Wixom Street to wait for delivery of the  
12 methamphetamine. Shortly after 3:00 p.m., surveillance saw a person  
13 resembling defendant walk up to the front passenger side of  
14 Rodriguez's car. The CI's body-worn video recording captured  
15 conversation among the CI, Rodriguez, and defendant, though not  
16 defendant's face. Defendant delivered approximately 26.85 grams of  
17 99% pure methamphetamine in exchange for \$600.

18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13 **III. ARGUMENT**

14 A. Evidence of the Gun Sale is Inextricably Intertwined with  
15 Evidence of the Charged Methamphetamine Sale

16 As the United States Supreme Court has explained, because the  
17 prosecution carries the burden of proof, it has a "need for  
18 evidentiary richness and narrative integrity in presenting a case."  
19 Old Chief v. United States, 519 U.S. 172, 183 (1997). Accordingly,  
20 the Ninth Circuit recognizes a res gestae exception to Rule 404(b) in  
21 order to provide "a coherent and comprehensible story regarding the  
22 commission of the crime." United States v. DeGeorge, 380 F.3d 1203,  
23 1220 (9th Cir. 2004) (quoting United States v. Vizcarra-Martinez, 66  
24 F.3d 1006, 1012-13 (9th Cir. 1995)). "Evidence should not be treated  
25 as 'other crimes' evidence when 'the evidence concerning the  
26 ['other'] act and the evidence concerning the crime charged are  
27 inextricably intertwined.'" United States v. Soliman, 813 F.2d 277,

1 279 (9th Cir. 1987) (quoting United States v. Aleman, 592 F.2d 881,  
2 885 (5th Cir. 1979) (alteration in original)). The need to tell a  
3 complete narrative exists even when such evidence may produce an  
4 emotional response. See United States v. Ganoe, 538 F.3d 1117, 1124  
5 (9th Cir. 2008) ("The trial judge's job is to avoid unfair prejudice.  
6 The court is not required to scrub the trial clean of all evidence  
7 that may have an emotional impact.") (quoting United States v.  
8 Morales-Aldahondo, 524 F.3d 115, 120 (1st Cir. 2008)). "A jury is  
9 entitled to know the circumstances and background of a criminal  
10 charge. It cannot be expected to make its decision in a void -  
11 without knowledge of the time, place, and circumstances of the acts  
12 which form the basis of the charge." United States v. Daly, 974 F.2d  
13 1215, 1217 (9th Cir. 1992) (citation omitted).

14 While these principles apply when the "particular acts of the  
15 defendant are part of . . . a single criminal transaction," United  
16 States v. Beckman, 298 F.3d 788, 794 (9th Cir. 2002), they also hold  
17 true in conspiracy cases. The Ninth Circuit has held that "the  
18 government in a conspiracy case may submit proof on the full scope of  
19 the conspiracy; it is not limited in its proof to the overt acts  
20 alleged in the indictment." United States v. Rizk, 660 F.3d 1125,  
21 1131 (9th Cir. 2011). For the same reason, evidence supporting a  
22 charged conspiracy is not itself subject to the strictures of Rule  
23 404(b). Indeed, numerous cases hold that evidence "inextricably  
24 intertwined" with the charged offense need not be analyzed under Rule  
25 404(b). See, e.g., United States v. Ripinsky, 109 F.3d 1436, 1442  
26 (9th Cir.), amended by 129 F.3d 518 (9th Cir. 1997). Evidence is  
27 inextricably intertwined when it "constitutes a part of the

1 transaction that serves as the basis for the criminal charge" or (2)  
 2 the government finds it necessary in order "to offer a coherent and  
 3 comprehensible story regarding the commission of the crime."

4 Vizcarra-Martinez, 66 F.3d at 1012. This concept is particularly  
 5 relevant in drug sales that involve guns, as the Ninth Circuit has  
 6 repeatedly recognized "the relationship between guns and drug  
 7 dealers." United States v. Pitts, 6 F.3d 1366, 1371 (9th Cir. 1993).

8 In United States v. Sitton, 968 F.2d 947 (9th Cir. 1992), for  
 9 example, the defendant was charged with conspiracy to manufacture and  
 10 to possess methamphetamine with intent to distribute. The defendant  
 11 objected under Rule 404(b) to the district court's admission into  
 12 evidence of firearms and methamphetamine seized in a search of his  
 13 home. Although in that case the search was described as "unrelated"  
 14 to the conspiracy, the Ninth Circuit still held that "the evidence  
 15 was not of prior bad acts but was directly relevant to prove [the  
 16 defendant's] participation in the conspiracy." Id. at 958. More  
 17 pointedly, the evidence "was relevant to show that [the defendant],  
 18 an alleged member of the conspiracy, was involved with drugs and  
 19 weapons (the alleged purposes and means of the conspiracy) during the  
 20 relevant period." Id. (citations omitted). The reasoning from  
 21 Sitton applies here, as the charged conspiracy encompasses  
 22 defendant's and Rodriguez's agreement to sell methamphetamine and  
 23 firearms to the CI.<sup>1</sup>

24

---

25 <sup>1</sup> Although the government seeks to present evidence relating to  
 26 only the firearm sale of October 1, 2014, as it is inextricably  
 27 intertwined with the charged methamphetamine sale on that same date,  
 28 Rodriguez and Baraja, the government does not intend to introduce  
 evidence that on October 14, 2014, Rodriguez and Baraja sold the CI a  
 9mm Beretta pistol belonging to defendant for \$1,100, unless  
 defendant makes specific reference to this second gun sale at trial.

1       The Ninth Circuit has also repeatedly held that the  
 2 circumstances surrounding a defendant's involvement with a firearm  
 3 are inextricably intertwined with the charged offense, and thus  
 4 admissible under Federal Rules of Evidence 403 and 404. See United  
 5 States v. Collins, 90 F.3d 1420, 1428-29 (9th Cir. 1996) (evidence  
 6 that defendant was attempting to commit burglary at building where  
 7 gun was found was admissible both to provide context to defendant's  
 8 crime and to rebut his defense that his reason for being there was  
 9 merely recreational); Daly, 974 F.2d at 1216-17 (evidence that  
 10 defendant was involved in shoot-out with police inextricably  
 11 intertwined with evidence of possession-of-firearm charge because  
 12 shoot-out evidence put defendant's illegal conduct into context and  
 13 rebutted his claim of self-defense); United States v. Butcher, 926  
 14 F.2d 811, 815-16 (9th Cir. 1991) (evidence of other guns found in  
 15 defendant's home and drugs found in truck in proximity to charged gun  
 16 inextricably intertwined with charged offense and showed knowledge).

17       As provided above, evidence of other acts may be admitted when  
 18 it "constitutes a part of the transaction that serves as the basis  
 19 for the criminal charge," or if the government finds it necessary in  
 20 order "to offer a coherent and comprehensible story regarding the  
 21 commission of the crime." Vizcarra-Martinez, 66 F.3d at 1012. Here,  
 22 evidence of defendant's gun sale fits both categories.

23       Here, the Indictment expressly alleges that, in furtherance of  
 24 the conspiracy charged in Count One, on October 1, 2014, Rodriguez  
 25 agreed to sell both drugs and a firearm to the CI. Evidence that  
 26 defendant was involved in the gun sale is inextricably intertwined  
 27 with evidence of defendant's involvement in the drug sale. In this

way, evidence of the gun sale relates directly to charged conduct.<sup>2</sup> To prove the charged acts, the government must be permitted to introduce evidence of that charged conduct, which includes: (1) the anticipated testimony of at least one witness that the October 1, 2014 transaction was intended to be for both drugs and a gun, and that defendant was the source for both; and (2) recorded conversations in which defendant makes coded reference to the impending gun sale.

As to the second category, the jury should be permitted to learn of defendant's full involvement with Rodriguez. This evidence is necessary for the government to tell the story of the entire transaction on October 1, 2014, and to clarify own defendant's recorded statements, which prove the inextricable link between defendant's gun and drug sales. The recorded conversations prove that there is sufficient contextual and substantive connection between the evidence of defendant's gun sale and the alleged drug conspiracy and substantive drug distribution charges.

Moreover, without evidence or explanation of the gun sale from trial witnesses, the jury may be misled into believing that defendant's only interaction with Rodriguez was his brief visit to distribute methamphetamine. Instead, the two men had multiple contacts on October 1, 2014, and these contacts show the dynamic of Rodriguez's and defendant's relationship: they were members of a conspiracy in which Rodriguez connected defendant to willing buyers, and defendant supplied the contraband.

<sup>2</sup> Not only is the gun sale already alleged as an overt act in the conspiracy, but the government also intends to seek a first superseding indictment that would, among other things, include a direct reference defendant's involvement in that gun sale.

B. Evidence of the Gun Sale is Admissible as Other Act

Evidence of Identity and Modus Operandi Under Rule 404 (b)

3 Evidence of the gun sale, separate from being "inextricably  
4 intertwined" with charged offenses, is also admissible because it  
5 proves identity or modus operandi, among other things, under Federal  
6 Rules of Evidence Rule 404(b). See United States v. Bailey, 696 F.3d  
7 794, 799 (9th Cir. 2012). Evidence is admissible under Rule 404(b)  
8 if (1) the evidence tends to prove a material point; (2) the prior  
9 act is not too remote in time; and (3) the evidence is sufficient to  
10 support a finding that the defendant committed the other act. See  
11 United States v. Vo, 413 F.3d 1010, 1018 (9th Cir. 2005).

12           "Once it has been established that the evidence offered serves  
13 one of the [404(b)] purposes, the . . . 'only' conditions justifying  
14 the exclusion of the evidence are those described in [Federal] Rule  
15 [of Evidence] 403: unfair prejudice, confusion of the issues,  
16 misleading the jury, undue delay, waste of time, or needless  
17 presentation of cumulative evidence." United States v. Curtin, 489  
18 F.3d 935, 944 (9th Cir. 2007). "Relevant evidence is inherently  
19 prejudicial; but it is only unfair prejudice, substantially  
20 outweighing probative value, which permits exclusion of relevant  
21 matter under Rule 403." United States v. Hankey, 203 F.3d 1160, 1172  
22 (9th Cir. 2000) (citation omitted). Rule 403's "major function is  
23 limited to excluding matter of scant or cumulative probative force,  
24 dragged in by the heels for the sake of its prejudicial effect." Id.

25 The recording of October 1, 2014, helps identify defendant as  
26 the drug and gun. Identity in this case is a central issue, as the  
27 undercover recording captured the supplier's voice but not his face.

1 The government should be allowed to introduce excerpts of defendant's  
2 voice from the undercover recording, including discussion of the gun,  
3 and to argue that the voice matches defendant's voice from the  
4 recorded post-arrest interview of February 13, 2019. Evidence that  
5 defendant used Rodriguez as a broker and worked with Rodriguez to  
6 distribute contraband is admissible and relevant to the issue of  
7 identity. The evidence also demonstrates defendant's modus operandi  
8 of working through middlemen to sell his contraband.

9 The evidence fulfills the other requirements of Rule 404(b) as  
10 well. The gun deal took place the same day as the drug deal, and  
11 defendant's own recorded conversations corroborate defendant's  
12 involvement in the gun sale, making it more likely than not that  
13 defendant was the individual involved. The evidence is therefore  
14 relevant and proves a material point.

15 Because the defense has stated that it plans to reference the  
16 gun sale at trial during cross-examination, defendant will not be  
17 substantially prejudiced by the government's introduction of such  
18 evidence in its case-in-chief. (Milstein Decl. ¶ 2; see infra Part  
19 IV.1.) See United States v. Maloney, 699 F.3d 1130, 1145 (9th Cir.  
20 2012) ("Defense counsel opens the door to topics or issues, not  
21 specific facts."). Moreover, any potential prejudice to defendant  
22 can be eliminated or mitigated through a limiting instruction to the  
23 jury. See, e.g., Dubria v. Smith, 224 F.3d 995, 1002 (9th Cir.  
24 2000); United States v. Arambula-Ruiz, 987 F.2d 599, 604 (9th Cir.  
25 1993); United States v. Bradshaw, 690 F.2d 704, 709 (9th Cir. 1982)  
26 ("Limiting instructions may reduce or eliminate prejudice which would  
27 otherwise occur."). Here, the Court can instruct the jury that

evidence of defendant's other acts is admitted only to show defendant's identity and modus operandi, not for any other purpose. See Ninth Cir. Model Jury Instr. - Criminal - No. 2.10 (2010 ed.). When coupled with a proper limiting instruction, the potential for prejudice resulting from admission of defendant's prior arrest in this case will produce no unfair prejudice.

C. Evidence of the Gun Sale Should Come in During the Government's Case-in-Chief, Not Just on Rebuttal

It would not be appropriate to force the government to wait to refer to the gun transaction until after defendant has opened the door during cross-examination. Despite defendant's representation that he intends to elicit testimony about the gun during cross-examination, he also represented that he may decide not to do so. If so, the government would be deprived of its ability to prove an overt act in the conspiracy, and the jury would be prevented from learning of relevant evidence. If government were only allowed to admit evidence of defendant's gun sale in a rebuttal case, crucial narrative context would be lost, and the jury may be confused by the disordering and rehashing of events. The drug and gun sales are so inextricably linked that any contrived separation of the two would harm the government's case and the jury's understanding of it.

#### IV. CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court grant this motion in limine to permit the government to introduce in its case-in-chief evidence of the October 1, 2014 gun sale to the CI.

## **APPENDIX5**

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CHRISTOPHER DELGADO

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES, Plaintiff,  
v.  
CHRISTOPHER DELGADO, Defendant. } Case No. CR18-758-DSF  
} DEFENDANT'S OPPOSITION TO MOTION  
} TO ADMIT TESTIMONIAL EVIDENCE OF  
} THE OCTOBER 1, 2014 FIREARM SALE  
} Hon. Dale S. Fischer  
} Date: January 27, 2020  
} Time: 8:30 a.m.

## I. INTRODUCTION

The government’s argument that the Court must admit evidence of an October 1, 2014 firearms sale in this drug prosecution fails. The firearm sale between the confidential informant and a third party is not “inextricably intertwined” with the charged drug transaction, nor is it admissible to prove any “modus operandi” for that drug transaction. The firearms sale is not part of the charged conduct in this case, it is prejudicial to the defense, and may not be admitted in the government’s case-in-chief.

Discovery in this case shows, however, that two witnesses that the government intends to call contradict one another materially regarding the firearms sale. It is possible that the defense may seek to impeach these witnesses with their inconsistent stories. But the defense cannot make that decision now. It

1 can only make that decision - balancing the benefits and the prejudice of the  
 2 evidence - after hearing these witnesses' testimony.

3 Accordingly, the Court should exclude evidence of the October 1, 2014  
 4 firearms sale in the government's case-in-chief. If the defense chooses to cross  
 5 examine witnesses regarding the sale, the defense acknowledges that evidence  
 6 may be admitted to the extent of that cross-examination.

7 **II. DISCUSSION**

8 **A. THE OCTOBER 1, 2014 FIREARMS SALE IS NOT "INEXTRICABLY  
 9 INTERTWINED" WITH THE CHARGED DRUG TRANSACTION; NOR IS IT  
 10 EVIDENCE OF A "MODUS OPERANDI".**

11 In its argument, the government repeatedly states that the firearms sale  
 12 between a third party and the confidential informant in this case is somehow so  
 13 inextricably intertwined with the charged drug sale that its evidence must be  
 14 admitted. The government, however, never explains how these two transactions  
 15 are intertwined. It does not provide such an explanation because it cannot. The two  
 16 transactions are not "intertwined" at all, whether inextricably or not.

17 The story is straightforward. The CI and a co-defendant made a car-window  
 18 drug purchase with a person, Unidentified Male Number 2, who the government  
 19 claims is defendant Christopher Delgado. There was discussion with UM2 that the  
 20 government asserts is about another person who the CI and co-defendant plan to  
 21 meet later. Some time later, down the street, the CI bought a gun from a third  
 22 party, not a defendant in this case.

23 The government asserts, but fails to provide any reasoned argument for the  
 24 proposition, that the gun sale and drug sale are so "inextricably intertwined" that  
 25 evidence of the gun sale must be admitted to prove the drug case. That is because  
 26 there is no reasoned argument available.

27 The government acknowledges that "other act" evidence is typically  
 28 inadmissible, but that rule is subject to exceptions, including whether the other act

1 is so inextricably intertwined with the charged conduct that must be admitted. But  
 2 that exception is extremely limited. It permits admission of other acts only to the  
 3 extent that they are necessary to offer a coherent story regarding the charged  
 4 offense. *United States v. Anderson*, 741 F.3d 938, 949 (9th Cir. 2013). By no  
 5 stretch of the imagination is evidence of the later third-party gun sale necessary to  
 6 tell a coherent story of the prior car-window drug transaction between UM-2 and  
 7 the confidential informant..

8 Even less persuasive is the government's argument that the gun sale is  
 9 admissible to show a modus operandi of "working through middlemen." The  
 10 admissibility of other acts evidence to show modus operandi is a method of  
 11 proving identity. If a method that a defendant used to commit one crime is  
 12 sufficiently distinctive, it may be admissible to prove the defendant committed  
 13 another crime with the same characteristics. *United States v. Sanchez*, 988 F.2d  
 14 1384, 1393 (5<sup>th</sup> Cir. 1993) (For other-act evidence to be admissible under a modus  
 15 operandi theory requires that the acts share distinctive characteristics that present a  
 16 "signature quality" to the crimes.); *United States v. Luna*, 21 F.3d 874, 881 (9<sup>th</sup>  
 17 Cir. 1994) (Error to introduce evidence of other bank robberies where features of  
 18 the crimes were generic rather than distinctive.)

19 There is nothing distinctive in a third party selling a gun to a buyer, let  
 20 alone any distinctive similarities between the third-party gun sale or UM-2's car-  
 21 window drug sale. Indeed, the government's argument fails entirely to explain  
 22 how comparing these to acts could go to identify Mr. Delgado as UM-2, the core  
 23 issue in this case.

24 The government's argument fails. The government should not be allowed to  
 25 present evidence of the gun sale in its case-in-chief, Such evidence is not  
 26 probative of the drug charges here, and would serve only to prejudice the  
 27 defendant in the minds of the jury.

28

**B. THE DEFENSE MAY SEEK TO IMPEACH PROSECUTION WITNESSES WITH INCONSISTENT STATEMENTS ABOUT THE GUN SALE, BUT CANNOT MAKE THAT DECISION BEFORE TRIAL.**

Two witnesses that the government intends to call to testify regarding the drug transaction have given materially different pre-trial statements about the gun transaction. The defense may wish to impeach one or both of these witnesses regarding these inconsistent statements, but will need to balance the prejudice of informing the jury about the gun sale against the benefit of impeaching the witness.

It is impossible for the defense to make that decision before trial. Indeed, not until a witness actually testifies can that decision be truly made. Accordingly, the evidence of the gun sale must be excluded unless and until the defense raises it on cross-examination. The government may then address it, but only to the extent the matter was raised by cross-examination.

### III. CONCLUSION

For the reasons set forth above, this Court should exclude all evidence of the October 1, 2014 gun sale in the government's case-in-chief.

Respectfully submitted,

DATE: January 13, 2020

## BUEHLER & KASSABIAN, LLP

By: /s/Mark M. Kassabian  
MARK M. KASSABIAN  
Attorney for Defendant  
CHRISTOPHER DELGADO

## **APPENDIX6**

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18 UNITED STATES OF AMERICA

19 UNITED STATES DISTRICT COURT

20 FOR THE CENTRAL DISTRICT OF CALIFORNIA

21 UNITED STATES OF AMERICA,

22 CR No. 18-00758-DSF-4

23 Plaintiff,

24 v.  
25 GOVERNMENT'S REPLY IN FURTHER  
SUPPORT OF ITS MOTION IN LIMINE TO  
ADMIT TESTIMONIAL EVIDENCE OF THE  
OCTOBER 1, 2014 FIREARM SALE

26 CHRISTOPHER DELGADO,  
27 aka "Lil Glow," and  
28 "Spoke,"

29 Defendant.

30 Hearing Date: 01/27/2020  
31 Hearing Time: 8:30 a.m.  
32 Location: Courtroom of the  
33 Hon. Dale S. Fischer

34 Plaintiff United States of America, by and through its counsel  
35 of record, the United States Attorney for the Central District of  
36 California and Assistant United States Attorneys Sara Milstein and  
37 Jennifer Chou, hereby files its reply in further support of its  
38 motion in limine to admit at the trial of defendant Christopher  
39 Delgado, also known as "Lil Glow" and "Spoke" ("defendant"),  
40 testimonial and recorded evidence of defendant's involvement in  
41 selling a firearm to a Federal Bureau of Investigation confidential  
42 informant ("CI").

This reply is based upon the attached memorandum of points and authorities, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: January 16, 2020

Respectfully submitted,

NICOLA T. HANNA  
United States Attorney

BRANDON D. FOX  
Assistant United States Attorney  
Chief, Criminal Division

/s/ Sara Milstein  
SARA MILSTEIN  
JENNIFER CHOU  
Assistant United States Attorneys

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

On January 7, 2020, the government filed a motion in limine to admit evidence and testimony about defendant's involvement in the October 1, 2014 gun sale to the CI.<sup>1</sup> On January 13, 2020, the defense filed its opposition. This reply follows.

## II. ARGUMENT

#### A. The Evidence Is Inextricably Intertwined

Contrary to the defense's assertions, the government has provided ample evidence to prove that the October 1, 2014 drug and gun transactions were inextricably intertwined. The body camera video, which captures the CI's voice counting out money to pay for the methamphetamine that defendant brought with him, also captures defendant assuring co-conspirator Oscar Rodriguez ("Rodriguez") that the gun would be available in "like, fifteen minutes, honestly." Mot. in Limine (Dkt. 127), Decl. of Sara Milstein ¶ 5, Ex. C, Excerpt 1 ("Excerpt 1"). There is no break in the conversation between the topics because the speakers, themselves, intertwined the drug and gun deals in their conversations. The drugs and gun were intended to be sold at the same time, which explains why, in same conversation when defendant dropped off the drugs to Rodriguez and the CI, defendant repeatedly reassured Rodriguez and the CI that the gun deal was "gonna happen," and that defendant's middleman would "be right back." (See Excerpt 1.)

<sup>1</sup> In its opening motion, the government noted that it might supersede the Indictment in this case. Based on agreements reached with the defense regarding a trial indictment and other trial matters, the government no longer intends to supersede the Indictment.

1       Defendant's post-arrest interview, portions of which were  
 2 already admitted by this Court (Dkt. 100), further weakens the  
 3 defense's argument that the drug and gun deals were somehow  
 4 unrelated. During the interview, law enforcement played the video  
 5 recording of the October 1, 2014, transaction. Specifically, law  
 6 enforcement played for defendant the recording from October 1, 2014  
 7 that is captured in Excerpt 1. Law enforcement presented this  
 8 recording, including the parts of it in which defendant is  
 9 referencing the gun for sale, because it is the best example of  
 10 defendant's voice, and this Court has already ruled that the  
 11 government is entitled to prove defendant's identity by voice  
 12 exemplar. To deny that the drug and gun evidence is intertwined is  
 13 to contradict what Rodriguez, the CI, defendant, and law enforcement  
 14 all understood as indivisible.

15       If the defense's argument is that no gun-related evidence should  
 16 be permitted at trial, then the government would be prohibited from  
 17 introducing the Excerpt 1 recording as trial evidence. But the  
 18 government must be permitted to introduce Excerpt 1 at trial because  
 19 it is directly relevant to the charged conduct and to show  
 20 defendant's identity. That defendant and others contemporaneously  
 21 interwove gun talk with drug talk does not mean that the jury should  
 22 be prevented from receiving the evidence. Rather, the jury should be  
 23 permitted to learn of the context of defendant's drug sale through  
 24 hearing Excerpt 1 and percipient-witness testimony about that  
 25 context.

26       **B. The Evidence is Permissible Under Rule 404(b)**

27       The defense attempts to minimize the significance of the  
 28 government's remaining Excerpts without examining the actual text of

1 those Excerpts. Mot. in Limine (Dkt. 127), Decl. of Sara Milstein  
 2 ¶ 5, Ex. C, Excerpts 2-4 (individually, "Excerpt 2," "Excerpt 3," and  
 3 "Excerpt 4"). The text, however, belies the defense's point and  
 4 proves that the Excerpts are relevant and probative of facts directly  
 5 in issue. Excerpt 2, on which defendant's voice can be faintly heard  
 6 on the other side of a phone call, connects the "toy," or gun, to  
 7 "the youngster," and the person who is "Little Glow's brother" who  
 8 "got caught up" and is "doing some serious time." These statements  
 9 directly identify defendant. Trial testimony is expected to show  
 10 that defendant's moniker is Lil' Glow, as provided in the case  
 11 caption, and that defendant's brother, whose moniker is Glow, was  
 12 incarcerated at the time of this conversation. The defendant's voice  
 13 in Excerpt 2, combined with the reference to defendant's moniker and  
 14 defendant's brother, serves to identify defendant. These facts  
 15 should be made available to the jury as evidence of defendant's  
 16 identity.

17 Excerpt 3, on which defendant can be heard on the other side of  
 18 a phone call speaking with Rodriguez about the gun's availability,  
 19 and Excerpt 4, in which Rodriguez refers to defendant as the  
 20 "youngster," just as Rodriguez did in Excerpt 2, both identify  
 21 defendant and connect back to Excerpts 1 and 2. Excerpts 3 and 4  
 22 also identify defendant. As Rodriguez said in Excerpt 2, defendant  
 23 is "all paranoid," and so, as Rodriguez explained in Excerpt 4,  
 24 although the "youngster lives down the street," "he leaves all the  
 25 straps and all that *jale* right there in the pad." These statements  
 26 identify defendant (the youngster) and connect him to both the straps  
 27 (guns) and the *jale* (methamphetamine) that defendant sold to the CI.

1       Excerpts 3 and 4 also show that defendant managed his contraband  
 2 sales through middlemen who "get[] a cut" of the profit from the  
 3 sales. (See Excerpt 4.) This is the same business model that  
 4 defendant used to supply drugs to the CI through Rodriguez on the  
 5 other distribution dates described in the indicted conspiracy. To  
 6 the extent that Rodriguez's explanation of defendant's business model  
 7 explains why and how defendant supplied and therefore indirectly  
 8 distributed drugs and a gun to the CI, defendant's modus operandi is  
 9 relevant to charged conduct. Evidence of that modus operandi should  
 10 be admitted at trial.

11       With respect to all of the Rule 404(b) evidence, the defense  
 12 asserts without explanation that the evidence is "prejudicial."  
 13 (Def.'s Opp'n, Dkt. 134, at 1, 3.) But all "[r]elevant evidence is  
 14 inherently prejudicial. To be excluded, evidence must be unfair and  
 15 it must *substantially* outweigh any probative value. United States v.  
 16 Hankey, 203 F.3d 1160, 1172 (9th Cir. 2000) (citation omitted).  
 17 Tellingly, the defense never asserts the evidence *substantially* or  
 18 *unfairly* prejudicial. It is neither. And the defense's opposition  
 19 failed to challenge the actual text of the Excerpts such that it  
 20 could credibly claim that any prejudice outweighed the probative  
 21 value. Where the Excerpts are directly probative of defendant's  
 22 identity and modus operandi, their significant probative value dwarfs  
 23 any unfair prejudice.

24       **C. Defendant's Second Gun Sale**

25       As provided in the government's opening motion, the government  
 26 does not intend to introduce evidence of defendant's involvement in a  
 27 second gun sale to the CI on October 14, 2014. (Mot. in Limine at 5  
 28 n.1.) The defense responded to the government's motion in limine to

1 state that it may attempt to impeach the credibility two government  
2 witnesses as to allegedly inconsistent stories about how the October  
3 1, 2014 gun sale occurred. (Def.'s Opp'n at 1, 4.) The government  
4 will then rehabilitate the witnesses. In so doing, the government  
5 may ask the witnesses to explain why their statements may have been  
6 inconsistent. The government expects at least one witness to explain  
7 that he/she briefly confused the facts of defendant's two gun sales –  
8 the one that took place on October 1, 2014, and the one that took  
9 place on October 14, 2014. In short, the government believes that if  
10 the defense tries to impeach government witnesses with the facts of  
11 one gun deal, it will be opening the door to testimony and evidence  
12 about *both* gun deals.

13 **III. CONCLUSION**

14 For the foregoing reasons, the government respectfully requests  
15 that this Court grant the government's motion in limine to permit the  
16 government to introduce evidence of the October 14, 2014 gun sale to  
17 the CI.

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## **APPENDIX7**

CA NO. 22-50070

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ) D.C. No. 2:18-cr-00758-DSF  
Plaintiff-Appellee, )  
v. )  
CHRISTOPHER DELGADO, )  
Defendant-Appellant. )

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**APPELLANT'S EXCERPTS OF RECORD  
VOLUME 2 OF 3**

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE DALE S. FISCHER  
United States District Judge

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Attorney for Defendant-Appellant

## CIFUENTES - DIRECT

1 MS. MILSTEIN: Thank you, Your Honor. Mr. Cifuentes,  
2 before we begin, if I could ask the Court to ask the witness  
3 to tip the microphone into your mouth, that would be great.  
4 Thank you.

5 DIRECT EXAMINATION

6 BY MS. MILSTEIN:

7 Q. Mr. Cifuentes, what do you do for work?

8 A. Recording studios. I work at recording studios.

9 Q. And have you ever been a part of a law enforcement  
10 investigation before?

11 A. No.

12 Q. Have you ever worked with law enforcement officers as  
13 part of a law enforcement investigation?

14 A. Can you repeat that question again?

15 Q. Yes. Have you ever worked with FBI agents or the Los  
16 Angeles Police Department officers to investigate crimes?

17 A. Yes.

18 Q. Was that investigation that you are thinking of, did that  
19 involve the FBI or the LAPD?

20 A. Yes.

21 Q. And about when did that happen?

22 A. June of '14.

23 Q. I want to ask you about a particular date as part of that  
24 investigation, September 11th, 2014. Do you remember that  
25 date?

CIFUENTES - DIRECT

1 Q. I'm going to show you Exhibit 31. What's happening in  
2 this photograph?

3 A. I'm just shaking his hand, I guess to say goodbye --

4 Q. And I'm going to show you --

5 A. -- after the purchase.

6 Q. I'm going to show you -- I'm sorry, I keep interrupting  
7 you.

8 A. Sorry. Go ahead.

9 Q. You testified that Oscar Rodriguez came back; is that  
10 right?

11 A. Yes.

12 Q. And you testified that is when he gave you the ounce of  
13 methamphetamine; is that right?

14 A. Yes.

15 Q. Did you have anymore discussions with Oscar Rodriguez  
16 that day?

17 A. Yes.

18 Q. What did you guys talk about?

19 A. Um, the law enforcement team asked me if I can try to get  
20 close to him and talk to him, and I did. I asked him if he  
21 can get some guns, and he said yeah. And I asked him for his  
22 number, and he gave me his number.

23 Q. So just to clarify the "hims" and the "hes" in what you  
24 just testified, did you testify that law enforcement asked  
25 you to ask Oscar for guns?

CIFUENTES - DIRECT

1 A. Yes.

2 Q. Did law enforcement ask you to ask Oscar Rodriguez for  
3 more drugs?

4 A. Yes.

5 Q. Did you do that?

6 A. Yes.

7 Q. And did you have any way of contacting Oscar Rodriguez?

8 A. Can you repeat that again?

9 Q. Did you have any way of getting in touch with Oscar  
10 Rodriguez?

11 A. Until before I had his number.

12 Q. When did you get his number?

13 A. Um, that day that, um, we are looking at Exhibit 3.

14 Q. Is that September 24th, 2014?

15 A. Yeah.

16 Q. After Mr. Rodriguez gave you his number, did you  
17 ultimately meet up with law enforcement?

18 A. Yes.

19 Q. And did you -- what happened when you met up with them?

20 A. We went through the same routine. I told them that I got  
21 Oscar's number, and I requested a -- to buy a gun from him.

22 Q. And did you give to law enforcement anything that you  
23 purchased that day?

24 A. Yes.

25 Q. After that day, September 24th, 2014, did the FBI tell

CIFUENTES - DIRECT

1 you to do anymore work as part of this investigation?

2 A. Yes.

3 Q. Did they tell you to contact Oscar Rodriguez?

4 A. Yes.

5 Q. And did you?

6 A. Yes.

7 Q. Did Oscar Rodriguez offer to sell you methamphetamine?

8 A. Yes.

9 Q. Did he offer to sell you a gun?

10 A. Yes.

11 Q. And at the FBI's instruction, did you arrange to meet  
12 him?

13 A. Yes.

14 Q. Did that meeting happen on October 21st, 2014?

15 A. Yes.

16 Q. And before this meeting, did you meet up with law  
17 enforcement?

18 A. Yes.

19 Q. Did you go through the same procedures we -- that you  
20 testified about earlier?

21 A. Yes.

22 Q. And after you met up with law enforcement, where did you  
23 go?

24 A. I went to the location wherever Oscar told me to go.

25 Q. And did you meet up with Oscar?

CIFUENTES - DIRECT

1 A. Yes.

2 Q. And was he in a house, outside a house?

3 MR. KASSABIAN: Objection, Your Honor, leading.

4 THE COURT: Overruled.

5 You can answer.

6 THE WITNESS: Oh, can you repeat that again? I'm  
7 sorry.

8 Q. When you met up with Oscar, what happened?

9 A. Um, he made a phone call and then they had him wait --  
10 they had him -- they had me and him waiting for the purchase  
11 to arrive. So we were waiting and waiting. It's a waiting  
12 game.

13 Q. And when you were with Oscar Rodriguez, did you meet up  
14 inside of a residence, outside of a residence?

15 A. Outside of a residence. Never inside of a residence.

16 Q. And where were you?

17 A. Um, law enforcement team left me, um, like down the  
18 street from Oscar's, and I walked -- and then I walked into  
19 his car.

20 Q. And what did his car look like?

21 A. It was a black, two-door car, sport.

22 Q. Did you get inside or did he get out?

23 A. Um, I got inside.

24 Q. Where were you sitting?

25 A. Pardon me?

CIFUENTES - DIRECT

1 Q. Where were you sitting?

2 A. Passenger.

3 Q. And was Oscar Rodriguez inside?

4 A. Yes.

5 Q. Where was he sitting?

6 A. Driver.

7 Q. You testified that Mr. Rodriguez had some phone calls.

8 A. Yeah.

9 Q. Did you hear any of those phone calls?

10 A. Do what?

11 Q. Did you hear what those phone calls were about?

12 A. Not really.

13 MR. KASSABIAN: Objection to any further answer, Your  
14 Honor.

15 THE COURT: Okay. He's answered the question.

16 Do you have another question?

17 MS. MILSTEIN: A different question.

18 THE COURT: Yes.

19 Q. And at this point, did the -- did the black car that  
20 Rodriguez was in, did he stay parked or did he move it  
21 somewhere?

22 A. He -- he stayed parked. We were waiting, and then we  
23 went up the street.

24 Q. When you went up the street, did you go into a driveway  
25 or what happened?

CIFUENTES - DIRECT

1 A. No, we were just waiting.

2 Q. Did you park?

3 A. Yeah, we parked.

4 Q. And when you parked, was Oscar Rodriguez's side of the  
5 car closest to the curb or were you closest to the curb?

6 A. I was closest to the curb.

7 Q. Now I want to play what has been admitted as United  
8 States Exhibit Number 4, excerpt 1. You can follow along in  
9 your transcript binder.

10 A. What is it? Exhibit, what?

11 Q. 4A1.

12 MS. MILSTEIN: And for the record, this is the video  
13 of Exhibit 4, excerpt 1.

14 (Thereupon, the video was played.)

15 Q. Now I'm pausing Exhibit 4, excerpt 1 at about 36 seconds  
16 in, right after someone says "For sure." And I want to ask  
17 you if you look at the transcript right there in front of  
18 you. When someone says "Hey, you want to fucking take that  
19 shit with you already," who is talking?

20 A. Oscar.

21 Q. And in response someone says, "Hum?" Do you know who  
22 said that?

23 A. Me.

24 Q. What was Oscar asking you about?

25 A. If I wanted to take that, the ounce of meth, the purchase

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1 with me.

2 Q. And later on, just a bit below, when Oscar Rodriguez  
3 says, "You got the funds for that already?" What's he talking  
4 about?

5 A. The money. If I have the money for it.

6 Q. For what?

7 A. For the purchase of the ounce.

8 Q. And later on in the transcript, you are saying, "Three,  
9 four, five, six, one, two, three, four, five, six," what are  
10 you doing at this point?

11 A. I'm counting the money. The law enforcement team always  
12 said that when I give the money to someone, to always count  
13 it out loud.

14 Q. And I'm going to resume playing this video, and we had  
15 paused it at 36. So again, you will see from the video  
16 Exhibit 4, excerpt 1, what it looks like. What does it look  
17 like on the screen to you right now?

18 A. Repeat that again?

19 Q. I'm just going to resume playing the video at 36 seconds  
20 through the end.

21 (Thereupon, the video was played.)

22 Q. Actually, I'm going to pause it right when after  
23 Rodriguez says, "Hey, so what's up? Did you convince that  
24 fool to get that or not?" At this point in time after he  
25 said, "What's up, my boy?" What happened?

CIFUENTES - DIRECT

1           A. Um, I see a gentleman, a young gentleman coming in closer  
2 to the car.

3           Q. Did you see what he looked like?

4           A. Yeah, briefly.

5           Q. And what did he look like?

6           A. Like the gentleman sitting right there.

7           Q. So testifying from your memory -- I'm going to ask you  
8 about that in just a moment -- but testifying from your  
9 memory of what you saw that day, about the person who came to  
10 the car, what did that person look like?

11          A. Young, like skinny, baggy clothes, from what I recall.

12          Q. And you already testified just a moment ago that the  
13 person you saw coming up looks like someone in this  
14 courtroom.

15          A. Yeah.

16          Q. Who is that?

17          A. The gentleman to the right.

18          Q. Could you please point him out?

19          A. Pardon me?

20          Q. Could you please point him out?

21           THE COURT: Tell us something he's wearing.

22          Q. Could you please just tell us an article of clothing that  
23 he's wearing?

24          A. Um, the black sweater.

25           THE COURT: Indicating the defendant.

CIFUENTES - DIRECT

1 Q. Now, are you 100 percent sure that it's him or does it  
2 just look like him?

3 A. Pretty sure.

4 Q. Referring to the person who looks like the defendant who  
5 came up to the car, what side of the car did they come up to?

6 A. Passenger.

7 Q. And was that the side that you were sitting on?

8 A. Yes.

9 Q. So what happened to the -- once the person who looks like  
10 the defendant came up to the car?

11 A. What happened when he pulled up to the car?

12 Q. When he came up to the car.

13 A. Um, he dropped off the purchase.

14 Q. What do you mean by that?

15 A. The ounce.

16 Q. And when you say "He dropped off the purchase," or the  
17 ounce, what do you mean?

18 A. He dropped it to the window.

19 Q. Into the car?

20 A. Yeah.

21 Q. Into the car that you were sitting in?

22 I'm going to now resume playing this exhibit.

23 THE COURT: It's about time for us to stop, Ms.

24 Milstein, if this is a good time, or do you have one more  
25 minute you want to?

CIFUENTES - DIRECT

1 MS. MILSTEIN: You know, maybe I could just finish  
2 playing this video?

3 THE COURT: All right.

4 MS. MILSTEIN: I'll resume playing. And we stopped  
5 where we stopped.

6 (Thereupon, the video was played.)

7 Q. So in this excerpt, you heard Mr. Rodriguez say to  
8 someone, "Did you convince that fool to get that or not?" Is  
9 that what you heard?

10 A. Yeah.

11 Q. Do you know what Mr. Rodriguez was talking about?

12 A. A gun. For the gun that I was going to purchase.

13 MS. MILSTEIN: Your Honor, I think this might be a  
14 good time to stop.

15 THE COURT: All right. Ladies and gentlemen, don't  
16 talk about the case or form or express any opinions about the  
17 case until it's finally submitted to you.

18 You are ordered to return tomorrow morning by 8 AM.  
19 Don't come too early. If you come before 7:45, there will be  
20 nobody here but me, and they don't give me a buzzer to let  
21 you in. So somebody will be there to let you in by 7:45. If  
22 you get there earlier, and you probably should plan to get  
23 here earlier, this is Downtown Los Angeles, there is traffic  
24 and all sorts of other stuff, so leave in plenty of time to  
25 get here. And we'll see you tomorrow.

14 REPORTER'S TRANSCRIPT OF PROCEEDINGS

16 | Los Angeles, California

17 Wednesday, February 5, 2020, 7:49 A.M.

19 Day 2 of Jury Trial, Page 277 through 440, Inclusive

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1 JAVIER ANTONIO CIFUENTES, GOVERNMENT'S WITNESS, RESUMED

2 DIRECT EXAMINATION

3 BY MS. MILSTEIN:

4 Q. Good morning, sir.

5 A. Good morning.

6 Q. You testified previously that on September 11<sup>th</sup>,  
7 2014, you met with people named Jon Fifer and Jacob  
8 Tavitian; is that right?

9 A. Yes.

10 Q. And before you met with those people, did you speak  
11 with either of them?

12 THE COURT: Ever?

13 BY MS. MILSTEIN:

14 Q. That day?

15 A. Yes.

16 Q. And did you speak with them by phone?

17 A. Yes.

18 Q. Did that phone call involve arranging the deal?

19 A. Correct.

20 Q. And the same sort of questions as to September 17<sup>th</sup>,  
21 2014. You testified previously that you met with Jon Fifer  
22 and Jacob Tavitian; is that right?

23 A. Yes.

24 Q. Did you speak with either of those people by phone that  
25 day?

1 A. Yes.

2 Q. Was that phone call to arrange the deal?

3 A. Yes.

4 Q. And, again, same questions as to September 24<sup>th</sup>,

5 2014?

6 A. Yes.

7 Q. Did you speak with -- you testified previously that you

8 met with Jon Fifer and Jacob Tavitian and also

9 Oscar Rodriguez that day; right?

10 A. Correct.

11 Q. Did you speak with any of those people that day?

12 A. Yes.

13 Q. And for those three deals -- September 11<sup>th</sup> 2014,

14 September 17<sup>th</sup>, 2014, and September 24<sup>th</sup>, 2014 -- you

15 testified that you spoke with someone over the phone; is

16 that right?

17 A. Correct.

18 Q. To arrange the deals?

19 A. Yeah.

20 Q. Who did you speak with?

21 A. Umm, Jon.

22 Q. That's Jon Fifer?

23 A. Yeah.

24 Q. Going back to October 1<sup>st</sup>, I believe I may have asked

25 you -- made a mistake when I asked you a question. I may

1 have referred to the date of October 21<sup>st</sup>.

2 A. Okay.

3 Q. Does that date have any meaning for you in this  
4 investigation or did I make a mistake?

5 A. October 1<sup>st</sup>?

6 Q. So what -- after September 24<sup>th</sup>, 2014, what was the  
7 next time you did work on behalf of the FBI as part of this  
8 investigation?

9 A. I believe like seven, eight days later for that.

10 (Coughing.)

11 Q. Was that October 1<sup>st</sup>, 2014?

12 A. Yeah.

13 Q. Could I get water (coughing)?

14 MS. MILSTEIN: Your Honor, may I ask the agent to  
15 bring the witness some water?

16 THE COURT: All right.

17 (Pause in the proceedings.)

18 THE WITNESS: Thank you.

19 All right. Much better.

20 BY MS. MILSTEIN:

21 Q. You testified on October 1<sup>st</sup>, 2014, you met with  
22 Oscar Rodriguez; is that right?

23 A. Yes.

24 Q. And you testified that you met with Oscar Rodriguez in  
25 Oscar Rodriguez' car; is that right?

1 A. No, not in -- no, it was not in his car. He was on  
2 Fifer's car, Jon's car.

3 Q. What date are you referring to?

4 A. On the 1<sup>st</sup>.

5 Q. October 1<sup>st</sup>?

6 A. Yeah. And I think I got them mixed up.

7 Q. Okay. So what I'm going to do is I'm going to ask you  
8 is your memory exhausted -- I'm going to show you a report  
9 and see if it refreshes your recollection.

10 MS. MILSTEIN: May I, Your Honor?

11 MR. KASSABIAN: No objection.

12 THE COURT: All right.

13 MS. MILSTEIN: Do you want me to show it to you,  
14 Mark?

15 (Counsel conferred.)

16 MR. KASSABIAN: No objection, Your Honor.

17 THE COURT: All right.

18 MR. KASSABIAN: Just to refresh recollection.

19 THE COURT: Sure.

20 MS. MILSTEIN: May I approach?

21 THE COURT: Yes.

22 (Pause in the proceedings.)

23 THE WITNESS: (Looking at document.)

24 THE COURT: Could we have a hint as to what he's  
25 refreshing his recollection about?

1 MS. MILSTEIN: Sure, Your Honor. It's a report  
2 that memorialized --

3 THE COURT: What is your question that he needs to  
4 refresh his recollection?

5 MS. MILSTEIN: Oh, sure, Your Honor.

6 My question was to confirm that he testified  
7 previously that the witness, who's currently on the stand,  
8 met with Oscar Rodriguez in Oscar Rodriguez's car.

9 THE COURT: Well, to refresh his recollection  
10 about what he testified to previously, he might have to look  
11 at the transcript which he doesn't have.

12 So I don't think that's really the question. Are  
13 you asking him what actually happened?

14 MS. MILSTEIN: I am, Your Honor.

15 THE COURT: So that's the question.

16 THE WITNESS: Yeah, I recall. Yeah.

17 THE COURT: Let's get the date that you're talking  
18 about. What date are you talking about?

19 THE WITNESS: I know where we're at now.

20 BY MS. MILSTEIN:

21 Q. I'm now taking back the report.

22 And, sir, has reading that report refreshed your  
23 recollection?

24 A. Yeah.

25 Q. And are you now testifying from your memory or are you

1 about to? Okay. I'm going to ask you again: When you met  
2 up with Mr. Rodriguez on October 1<sup>st</sup>, 2014, what happened?

3 A. Umm, I met him and I was in his -- I walked. I  
4 remember meeting up with the law enforcement team at a  
5 specific location. They dropped me off, and I walked to  
6 meet up with Oscar.

7 And from there he pulled up into a -- before his  
8 house, it was like a little street. I forgot what it was  
9 called. And he was there waiting for me.

10 I got into his car, and we were waiting. He made  
11 a phone call, and from there we moved. We went somewhere  
12 else to get the purchase of the meth.

13 Q. And did you ultimately get the purchase of the meth on  
14 October 1<sup>st</sup>, 2014?

15 A. Yes.

16 Q. How did that happen?

17 A. He made a phone call and then he drove off a few blocks  
18 up from his house, and he made a U-turn and parked right in  
19 front of the house and somebody came. A young guy came to  
20 the window and dropped it off.

21 Q. And which window did the young guy come to?

22 A. The passenger where I was sitting at.

23 MR. KASSABIAN: Your Honor, this appears to be  
24 repetitive of yesterday's testimony.

25 THE COURT: It does. Can we move along?

1 MS. MILSTEIN: We can, Your Honor.

2 Q. I believe you've testified that after the person that  
3 you saw that yesterday you identified as a person who looked  
4 like the defendant here in this courtroom, after that person  
5 dropped off the meth in the car, you had a -- there was a  
6 conversation that you were there for; is that right?

7 A. Yeah.

8 MS. MILSTEIN: And I'm going to play that  
9 conversation now.

10 (The recording was played.)

11 BY MS. MILSTEIN:

12 Q. So that was Exhibit 4, Excerpt 1; and, sir, if I could  
13 ask you to open up your transcript binder and turn to Tab  
14 4A-1?

15 A. (Witness complies.) Okay.

16 Q. So here I'm going to ask you to, based on your memory,  
17 tell us who are the speakers here. So in the beginning of  
18 Exhibit 4, Excerpt 1, we hear someone say: Hey, you want to  
19 take that with you already; is that right?

20 A. Yes.

21 Q. Who's the one speaking there?

22 A. Oscar.

23 Q. And later, you know, on in this transcript, we have  
24 someone saying: Yeah, you said six; right? Who's that?

25 A. Me.

1 Q. You recognize your own voice there?

2 A. Yes.

3 Q. And a bit later, if you turn the page, page 2 of 3 of  
4 Exhibit 4A-1, we have the first time when I believe it's you  
5 who say: What's up, my boy? Is that right?

6 A. Yeah.

7 Q. And is it right that Mr. Rodriguez says: What's up, my  
8 boy?

9 A. Yes.

10 Q. And then there's a third voice that says: What's up?

11 A. Yes.

12 Q. Did you recognize that as a different voice than either  
13 your voice or Mr. Rodriguez' voice?

14 A. Yes.

15 Q. Whose voice was that?

16 A. The gentleman sitting across.

17 Q. And remembering yourself there on October 1<sup>st</sup>, 2014,  
18 was that the voice of a third person, not you?

19 A. Yes.

20 Q. Not you; right? Not Mr. Rodriguez? But a third  
21 person?

22 A. Yes.

23 Q. And you've identified that person as the person you  
24 think looks like the defendant?

25 A. Yes.

1 Q. And you've testified that Mr. Rodriguez has said -- I  
2 believe I asked you this yesterday -- he said: What's up?  
3 Did you convince that fool to get that or not?

4                   What did you understand Mr. Rodriguez to be  
5 remembering to?

6 A. Umm, the purchase of the ounce of meth --

7 Q. Because at that time --

8 A. -- I was told to purchase.

9 Q. I'm sorry. I'm sorry. Could you repeat that answer?

10 A. The purchase of the ounce of meth that I was told to  
11 purchase.

12 Q. And by this time had you already gotten the  
13 methamphetamine or did it not come yet?

14 A. No, it has not come. He asked me to, if I wanted it,  
15 and I told him, yeah, I wanted to take it. So we were  
16 waiting for that person to drop it off.

17                   So that's when I told him: Six; right?

18                   And he told me yeah.

19                   So I counted \$600 right in front of him and that's  
20 when I gave him the \$600.

21 Q. And so what you just testified about, you're testifying  
22 about before any third person, any other person came up to  
23 the car?

24 A. Yeah.

25 Q. That's you talking to Mr. Rodriguez?

1 A. Yeah.

2 Q. And then after you finished that conversation, your  
3 testimony is that a person who looks like the defendant came  
4 up to the car?

5 A. Yeah.

6 Q. What happens once the defendant came up to the car?

7 A. I recall that I seen him and he shook Oscar's hand. He  
8 pulled up into the passenger side where I was sitting, shook  
9 his hand; and the one thing I recall there was a tattoo on  
10 the left-hand side -- of his left hand and that's what I  
11 told them.

12 I told the law enforcement team, because they  
13 always told me always keep aware of your surroundings, make  
14 sure you check tattoos or anything like that, scars on the  
15 face or anything.

16 And I told them I don't recall the tattoo but he  
17 had a tattoo on his hand and that's what I recalled.

18 I mean, it has been since 2014. It's been a long  
19 time and I don't take notes or anything like that. But from  
20 my recall, I remember a tattoo.

21 Q. And so let me ask you about this tattoo that you saw on  
22 the left-hand side of the defendant's hand -- or the  
23 defendant's left hand, rather.

24 And you testified yesterday that you were sitting  
25 in the front passenger seat of Mr. Rodriguez' car; is that

1 right?

2 A. Yes.

3 Q. And so you also testified that the defendant or someone  
4 who looks like the defendant came up to the front passenger  
5 side of the car to deliver the methamphetamine; is that  
6 right?

7 A. Yes.

8 Q. And so, you know, could you give us, you know, an  
9 estimate -- and you don't have to if you don't want to --  
10 give us an estimate of how close the defendant was when he  
11 delivered the methamphetamine?

12 A. Well, can you repeat that question? I'm sorry.

13 Q. How close was the defendant to you when he was by the  
14 car?

15 A. Like right next to the window. Like I'm right here  
16 (*indicating*) and he just pulled up. Like this much apart  
17 (*indicating*).

18 Q. And is that when you saw his left-hand tattoo?

19 A. Yeah.

20 Q. If you look back at Exhibit 4A-1, this page 2 of 3,  
21 you'll see the page numbers at the bottom, when  
22 Mr. Rodriguez, at the third line from the bottom, says: So  
23 should we just wait over here? Do you see that?

24 A. Yeah. So should we just wait?

25 Q. What is Mr. Rodriguez asking about?

1 A. Umm, Oscar was talking about from talking to the  
2 defendant that if we should wait where we were parked and we  
3 didn't. We left. We went to another location, I believe,  
4 and then we came back to purchase the gun.

5 Q. And in between the time that you got the  
6 methamphetamine and then when you purchased the gun, did you  
7 hear Mr. Rodriguez have any phone calls?

8 A. Umm, I don't -- I don't recall.

9 *(Pause in the proceedings.)*

10 BY MS. MILSTEIN:

11 Q. You testified that ultimately on October 1<sup>st</sup>, 2014,  
12 you purchased a gun; is that right?

13 A. Yes.

14 MS. MILSTEIN: I'm going to play an exhibit for  
15 you and I'm going to see if you recognize it. I'm going to  
16 play now Exhibit 4, Excerpt 3.

17 *(The recording was played.)*

18 BY MS. MILSTEIN:

19 Q. Now I'll ask you to turn to what's in your transcript  
20 binder as behind Tab 4A-3.

21 A. All right. What exhibit?

22 Q. It will be a blue tab that says "Exhibit 4A-3."

23 A. Uh-huh.

24 Q. Are you there?

25 A. I'm at Exhibit 4A.

1                   THE COURT: Yeah. And then go to look at the top  
2 of the page, and then it will say 4A or excerpt.

3 BY MS. MILSTEIN:

4 Q. Does it say Exhibit 4A, Excerpt 3, at the top, at the  
5 very top?

6 A. Uh-huh.

7 Q. Great. So we've just played Exhibit 4, Excerpt 3, and  
8 the transcript of it is in front of you as well. I'm going  
9 to ask you who you -- were you there for this phone call?

10 A. Yeah.

11 Q. And you remember it?

12 A. Uh-huh.

13 Q. So I'm going to ask you whose the person who says:  
14 What up, player, here?

15 A. Oscar.

16 Q. And at this time, as of the time that you're listening  
17 to the phone call live, did you know who Mr. Rodriguez was  
18 talking to?

19 A. No, not at that time I didn't know who he was talking  
20 to.

21 Q. And so later on in this transcript, kind of three lines  
22 above the bottom of page 1, Mr. Rodriguez says: But he's  
23 got the cash; right? He's got the cash right here, you  
24 know. Do you know what Mr. Rodriguez was talking about?

25 A. Yeah. Me having the cash for the purchase of the gun.

1 Q. And later on there's a speaker who says: What did he  
2 say? Who said that? If you look at page 2 of the  
3 transcript binder.

4 A. That was me.

5 Q. And did Mr. Rodriguez respond to you?

6 A. Umm, yeah, I believe so.

7 Q. When Mr. Rodriguez says that he wants to drop off his  
8 lady, then he's going to come right back. He's going to  
9 call, you know, that he's going to text him.

10                   What did you understand Mr. Rodriguez to be  
11 referring to?

12 A. Umm, the person that he was dropping off somebody, his  
13 girlfriend, and he was going to come back to make the  
14 purchase go through.

15 Q. Now, I'm going to play for you Exhibit 4, Excerpt 4;  
16 and I'll ask you to follow along the very next tab in your  
17 binder Exhibit 4A-4.

18 A. 4A-4.

19                   MS. MILSTEIN: And I'm now going to play  
20 Exhibit 4, Excerpt 4.

21                   *(The recording was played.)*

22 BY MS. MILSTEIN:

23 Q. Do you have the transcript binder open in front of you?

24 A. Yeah, but I can't find the page.

25 THE COURT: It's just the page after the one you

1 were looking at.

2 MS. MILSTEIN: The top should say in big bold  
3 letters?

4 THE COURT: Are you at 4A?

5 THE WITNESS: 4A.

6 THE COURT: Keep going to the top where it says --  
7 go ahead. What number is that?

8 THE WITNESS: 4A-2.

9 THE COURT: Okay.

10 THE WITNESS: 4A-3.

11 THE COURT: 3. Okay. Keep going.

12 Does that say 4?

13 THE WITNESS: Yeah.

14 THE COURT: Okay.

15 THE WITNESS: Thank you, ma'am.

16 BY MS. MILSTEIN:

17 Q. In Exhibit 4, Excerpt 4, the transcript of which is in  
18 front of you now, we hear someone say: How come the *paisa*  
19 didn't leave it to the youngster? Did you hear that?

20 A. Yes.

21 Q. And who is speaking there?

22 A. That was me speaking.

23 Q. And when you said this, what did you mean?

24 A. When I went -- that was like the longest purchase I  
25 ever did. We were waiting a long time and I just had to go.

1 I kept telling Oscar that: I'm going to get fired. My boss  
2 from the suit is going to fire me. I just needed to make  
3 this purchase happen ASAP, and it was already taking too  
4 long.

5 So I asked them how come the other person didn't  
6 leave it to the youngster; and he explained to me that that  
7 guy kicked everybody out and he doesn't leave anybody at his  
8 house so that's the reason why we had to wait. I had no  
9 choice but to wait.

10 Q. And when you were referring to the person you called  
11 the youngster, who did you mean?

12 A. The defendant.

13 Q. In other words, the person that you saw drop off the  
14 methamphetamine that day?

15 A. Yes.

16 Q. And later on at the very bottom of page 1, the same  
17 transcript, we hear Rodriguez say: That fool don't mind.  
18 He gets a cut, you know, *pinche paisa*.

19 When you heard that from Mr. Rodriguez, how did  
20 you understand that? What did that mean?

21 A. Umm, I understood that no matter what the youngster was  
22 going to get a cut regardless so he don't really care if the  
23 deal goes quick or it takes long. Either way, he's going to  
24 get his cut for sure.

25 Q. After you bought the methamphetamine from the defendant

1 and after you bought the methamphetamine -- sorry -- after  
2 you bought the gun that day on October 1<sup>st</sup>, 2014, did you  
3 meet back up with law enforcement?

4 A. Yes.

5 MR. KASSABIAN: Objection. Misstates his  
6 testimony.

7 THE COURT: Why don't you rephrase your question?

8 MS. MILSTEIN: I will, Your Honor.

9 Q. After you bought the methamphetamine from a person who  
10 looks like the defendant and after you bought the gun, did  
11 you meet up with law enforcement?

12 A. Yes. I walked back to where they dropped me off, where  
13 the location where they dropped me off and I had to walk to  
14 meet up with Oscar.

15 Then from there, I walked back to the same  
16 location. I got into a law enforcement car, and they had to  
17 take down everything that I was wearing. And I had to tell  
18 them everything that I saw, heard; and I wrote down  
19 everything that I went through to make this purchase.

20 Q. And this day were you wearing a recording device?

21 A. Yes.

22 Q. Did they unhook that from you as well?

23 A. Yes.

24 Q. And did you give them anything that you purchased that  
25 day?

1 A. Yes. I give them the meth and the gun.

2 Q. And in between the time that you left Mr. Rodriguez and  
3 that you met up with law enforcement, did you go anywhere in  
4 between?

5 A. No.

6 Q. Did you meet up with anyone in between?

7 A. No. I went straight to the car, the law enforcement  
8 car.

9 MS. MILSTEIN: May I have a moment, Your Honor?

10 *(Plaintiff's counsel conferred.)*

11 BY MS. MILSTEIN:

12 Q. Thinking about the methamphetamine that you purchased  
13 on October 1<sup>st</sup>, 2014, what was it about the person who  
14 delivered the methamphetamine that makes you think that he  
15 looks like the defendant?

16 A. His eyebrows, the tat, and -- I mean, it's been that  
17 long. I don't really recall his face a hundred percent. He  
18 obviously gained weight. But that tat was very clear. I  
19 remember from the tat on his left hand.

20 Q. And today do you see that tattoo on the defendant's  
21 left hand?

22 A. Yeah.

23 Q. That you saw on October 1<sup>st</sup>, 2014?

24 A. Yes.

25 Q. I'm sorry, I didn't hear.

1 A. Yes.

2 MS. MILSTEIN: No further questions, Your Honor?

3 THE COURT: Mr. Kassabian?

4 **CROSS-EXAMINATION**

5 BY MR. KASSABIAN:

6 Q. So, Mr. Cifuentes, you talked about some immigration  
7 benefits that you had gotten from the government by  
8 cooperating with them?

9 You talked about that with the -- when you were on  
10 direct testimony yesterday? Do you remember that?

11 A. Yes, sir.

12 Q. And you had testified that so far that the deferral of  
13 deportation has been temporary. Do you remember that?

14 A. Yes.

15 Q. Do you have hopes that ultimately you'll have some sort  
16 of permanent benefit from -- regarding immigration and not  
17 be deported?

18 A. Can you rephrase that question, please.

19 Q. Do you have hopes that as a result of your cooperation  
20 with the government you will not be deported?

21 A. No.

22 Q. You don't have any hopes?

23 A. Well, how do I put it? I have the right to have an  
24 attorney and get an attorney from that situation. Me  
25 providing help doesn't mean that I'm not going to get

## **APPENDIX8**

CA NO. 22-50070

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ) D.C. No. 2:18-cr-00758-DSF  
Plaintiff-Appellee, )  
v. )  
CHRISTOPHER DELGADO, )  
Defendant-Appellant. )

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**APPELLANT'S EXCERPTS OF RECORD  
VOLUME 2 OF 3**

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE DALE S. FISCHER  
United States District Judge

CARLTON F. GUNN  
Attorney at Law  
1010 North Central Ave., #100  
Glendale, California 91202  
Telephone (323) 474-6366

Attorney for Defendant-Appellant

1                   THE CLERK: Please raise your right hand.

2                   Do you solemnly swear that the testimony you shall  
3 give in the cause now before this Court shall be the truth,  
4 the whole truth, and nothing but the truth, so help you God?

5                   THE WITNESS: I swear.

6                   THE CLERK: Please be seated.

7                   State your full name for the record and spell it.

8                   THE WITNESS: Oscar Roberto Rodriguez. O-s-c-a-r  
9 R-o-b-e-r-t-o. Rodriguez, R-o-d-r-i-g-u-e-z.

10                  THE COURT: You may proceed.

11                   **DIRECT EXAMINATION**

12                  BY MS. CHOU:

13                  Q. Good morning, Mr. Rodriguez.

14                  A. Good morning.

15                  Q. In the fall of 2014, did you help sell methamphetamine  
16 with Jon Fifer and Hagop or Jacob Tavitian to a drug  
17 customer that you now know was an FBI informant?

18                  A. Yes, I did.

19                  Q. Have you pleaded guilty to conspiracy to distribute  
20 methamphetamine and distribution of methamphetamine for  
21 those sales?

22                  A. Yes, I did.

23                  Q. In pleading guilty, did you agree to cooperate with the  
24 government by testifying in this trial?

25                  A. Yes, I did.

1 Q. Speaking about the informant to whom you sold the  
2 methamphetamine, how many times total did you sell  
3 methamphetamine to that informant?

4 A. Four times in total.

5 Q. And each time that you sold methamphetamine to the  
6 informant, was that methamphetamine you had made yourself?

7 A. No.

8 Q. Did you get it from someone else?

9 A. Yes, I did.

10 Q. Did you get it from the same person for all four deals?

11 A. Yes, I did.

12 Q. Who supplied you with the methamphetamine that you sold  
13 to the informant for those four deals?

14 A. Mr. Delgado.

15 Q. Do you see Mr. Delgado in the courtroom today?

16 A. Yes, I do.

17 Q. Can you describe where he's located and what he's  
18 wearing?

19 A. Sitting next to his lawyer in a gray sweater, blue  
20 shirt.

21 THE COURT: Indicating the defendant.

22 BY MS. CHOU:

23 Q. Now, today you're referring to him as Mr. Delgado. But  
24 back in 2014, did you know his full name?

25 A. No.

1 personal use methamphetamine?

2 A. Yes.

3 Q. I want to turn to September 24<sup>th</sup>, 2014, a week later.

4 On this date did you sell one ounce of methamphetamine to  
5 the informant?

6 A. Yes, I did.

7 Q. How did you learn about this deal?

8 A. Again with Jon Fifer.

9 Q. How did he reach out to you?

10 A. He called me.

11 Q. What did he ask for?

12 A. For an ounce of methamphetamine.

13 Q. Did you agree to supply it?

14 A. Yes, I did.

15 Q. Did you have an ounce of meth with you at the time?

16 A. No, I didn't.

17 Q. So what did you do after that call?

18 A. Once again, I called Mr. Delgado; and when -- this one  
19 was kind of difficult because seemed like he was in a rush  
20 to go somewhere or something.

21 He wasn't in a good mood. But either way, I  
22 reached out to him to see if I can go by and I stopped by.  
23 He said he did have it on him but this time he needed the  
24 money upfront.

25 Q. So he refused to front the ounce to you like he had the

1 previous two deals?

2 A. Correct.

3 Q. What did that mean you had to do?

4 A. It meant I had to meet up with Fifer and Tavitian and  
5 the informant to get the money and then go back to  
6 Mr. Delgado's residence to pick up the meth.

7 Q. So while you were at the defendant's residence, he said  
8 he had the ounce but he wasn't going to give it to you until  
9 you came back with the money. What did you do after that?

10 A. Then I had the informant and Jon Fifer and Jacob park  
11 across the street from my house to drop off the money, and  
12 then they initially parked in front of my house. And then I  
13 picked up the money from them and I rode my bike to  
14 Mr. Delgado's house.

15 MS. CHOU: Okay. I want to show you what has  
16 already been admitted as Exhibit 30.

17 *(The exhibit was displayed on the screen.)*

18 BY MS. CHOU:

19 Q. Do you recognize the person in this picture?

20 A. Yes, I do.

21 Q. Who is it?

22 A. That's me.

23 Q. And what are you doing in this picture?

24 A. I'm riding my bike to Fifer's car to meet up with him  
25 to pick up the money.

1 Q. Is that the sedan, the light-colored sedan that we see  
2 to the right of the photograph?

3 A. That's correct.

4 Q. So you're biking up toward -- you're biking to the car  
5 to meet with them?

6 A. Yes.

7 MS. CHOU: All right. I'd like to play the  
8 excerpt that's been previously admitted as Exhibit 3 and ask  
9 the jury to follow along in the transcript binder if they  
10 want.

11 *(The recording was played.)*

12 BY MS. CHOU:

13 Q. Is this a recording of a conversation that you had with  
14 Fifer and Tavitian once you met up with them at the Corolla?

15 A. That's correct.

16 Q. Now, do you recognize the voice of the person that  
17 said: That's him right there?

18 A. Yes.

19 Q. Who was that?

20 A. That's Tavitian, Jacob.

21 Q. And who is the person who then said: No shit?

22 A. Jon Fifer.

23 Q. And who's the person who said -- excuse me -- this  
24 motherfucker is so paranoid he wants me to pick it up on my  
25 bike?

1 A. That's me.

2 Q. Now, who are you referring to, who's the person who's

3 so paranoid?

4 A. "Lil Glow."

5 Q. The defendant?

6 A. Correct.

7 Q. Why did you describe him as paranoid here to Fifer and

8 Tavitian?

9 A. Because that's the mood that he was acting in that day.

10 I felt he was acting paranoid that day.

11 Q. And was that because he refused to front you the

12 money -- or excuse me -- front you the drugs that day in

13 part?

14 A. Correct. In part.

15 Q. Why did you ask Fifer and Tavitian to repark the car on

16 Stagg?

17 A. Because it's closer to his residence.

18 Q. Whose residence?

19 A. Mr. Delgado's.

20 Q. Why did you want them to be parked closer to the

21 defendant's residence?

22 A. So I wouldn't have to ride my bike all the way back

23 with the methamphetamine in my pocket.

24 Q. What else happened during this initial conversation

25 that you had with Fifer and Tavitian at the Corolla and the

1 informant?

2 A. I picked up the money.

3 Q. Who gave you the money?

4 A. The informant.

5 Q. How much did the informant give you?

6 A. \$700.

7 MS. CHOU: I want to show you what previously has  
8 been admitted as Exhibit 31.

9 *(The exhibit was displayed on the screen.)*

10 BY MS. CHOU:

11 Q. Do you recognize the person in the blue shirt in here  
12 in this picture?

13 A. Yes, I do.

14 Q. Who is that?

15 A. That's me.

16 Q. And there's a hand coming out of the car here. Whose  
17 hand is that?

18 A. That's the informant's.

19 Q. What's happening in this picture?

20 A. He had just handed me the money and shaking hands.

21 MS. CHOU: Let me show you what has been  
22 previously admitted at Exhibit 32.

23 *(The exhibit was displayed on the screen.)*

24 BY MS. CHOU:

25 Q. Oops. Do you recognize this picture?

1 A. Yes, I do.

2 Q. Who is the person that you see in this picture?

3 A. It's myself. It's me.

4 Q. And what are you doing here?

5 A. Getting the money from the informant.

6 Q. So after you got the money from the informant, what did

7 you do?

8 A. Then I rode my bike to Mr. Delgado's house.

9 Q. What happened when you got there?

10 A. Then I handed him the money. He handed me the

11 methamphetamine.

12 Q. When you say "he," are you referring to the defendant?

13 A. Correct.

14 Q. And what did you do with the methamphetamine?

15 A. I put it in my pocket and I rode my bike to Stagg and

16 Clybourn.

17 Q. What happened when you got there?

18 A. I handed the meth to Jon Fifer.

19 Q. And that completed the transaction; right?

20 A. Correct.

21 Q. Did you happen to have any conversation with the

22 informant during this particular meeting on

23 September 24<sup>th</sup>?

24 A. Yes, I did.

25 Q. Did the informant ask you for anything during this

1 meeting?

2 A. Yes, he did.

3 Q. What did he ask for?

4 A. He asked for a firearm.

5 Q. He asked you to sell him a firearm?

6 A. Correct.

7 Q. Did he ask for more drugs?

8 A. Yes.

9 Q. What was your response during this particular meeting?

10 A. I told him I would work on it because I -- yeah,  
11 because I didn't have it on me and I couldn't get it. So I  
12 told him I would try to get it for him.

13 Q. Did you give your phone number to the informant at this  
14 meeting?

15 A. Yes, I did.

16 Q. Why did you do that?

17 A. He wanted a cut off Jon Fifer and Tavitian.

18 Q. Cut them out of the chain of brokers?

19 A. Correct.

20 Q. You were you feeling comfortable enough with the  
21 informant at this point to deal with him directly?

22 A. Yes, I was. I did.

23 Q. I want to turn to October 1<sup>st</sup>, 2014. On this day did  
24 you sell one ounce of methamphetamine to the informant?

25 A. Yes, I did.

1 Q. Were Fifer and Tavitian a part of this deal?

2 A. No, they weren't.

3 Q. How did this deal get set up?

4 A. The same way it did before. He called me in  
5 anticipation and --

6 Q. Let me pause you for a second.

7 A. Okay.

8 Q. When you say "the same way as before," you mean Fifer  
9 called you?

10 A. No, no. The informant called me.

11 Q. Was this new?

12 A. Yeah.

13 Q. So you first heard about the deal when the informant  
14 called you directly?

15 A. Correct.

16 Q. And what did the informant ask you for when he reached  
17 out to you on the phone?

18 A. He asked me for a firearm and an ounce of  
19 methamphetamine.

20 Q. Did you agree to sell the ounce and the firearm to him?

21 A. Yes, I did.

22 Q. Did you have an ounce of meth and a firearm on you at  
23 the time?

24 A. No, I didn't.

25 Q. So then what did you do?

1 A. Then I called Mr. Delgado to let him know what's going  
2 on.

3 Q. What was his response, the defendant's?

4 A. He said it would take some time but that he would be  
5 able to do it.

6 Q. So he agreed to supply the firearm and the ounce of  
7 methamphetamine?

8 A. Correct.

9 Q. What was the plan for this deal?

10 A. Umm, that I was going to be for me to go over there,  
11 pick up the drugs, and hand it over to the informant. Also  
12 pick up the firearm.

13 Q. Is that what happened?

14 A. No.

15 Q. All right. Where did you have the informant meet you  
16 on October 1<sup>st</sup>?

17 A. Close to my residence on Cohasset.

18 MS. CHOU: Okay. I'm going to put up what's been  
19 previously admitted as Exhibit 37.

20 *(The exhibit was displayed on the screen.)*

21 BY MS. CHOU:

22 Q. Is this a map the Clybourn Avenue in your neighborhood?

23 A. Yes, it is.

24 Q. And is it -- does it accurately depict the streets and  
25 locations on Clybourn in Sun Valley?

1 A. Yes, it does.

2 Q. So I see at the bottom of the map a street called

3 Cohasset. Approximately where did you have the informant

4 meet you initially?

5 A. Right there. Right there on the corner of Clybourn and

6 Cohasset.

7 Q. And from there, what happened next?

8 A. From there, I had them wait for a while until I got

9 confirmation that it was okay to go and --

10 Q. Were you waiting on the street?

11 A. I was waiting in my residence.

12 Q. You were waiting in your residence?

13 A. Yeah.

14 Q. Did the informant join you in your residence?

15 A. No. He was sitting in his car.

16 Q. In his car?

17 A. Correct.

18 Q. Did the informant drive his car to your house that day?

19 A. I believe he did.

20 Q. Did you end up driving the informant's car that day?

21 A. No.

22 Q. Which car did you end up driving?

23 A. I ended up driving my car.

24 Q. And what does that car look like?

25 A. It's a black '96 Acura Integra.

1 Q. Now I want to ask you, are you sure you saw the  
2 informant driving a car to your residence that day?  
3 A. I'm not sure.  
4 Q. But at some point the informant got into your Acura; is  
5 that right?  
6 A. Correct.  
7 Q. And who was driving that Acura?  
8 A. I was.  
9 Q. So you were seated in the driver's seat?  
10 A. Correct.  
11 Q. Where did the informant sit in the Acura?  
12 A. In the passenger seat.  
13 Q. Did you end up driving from Cohasset and Clybourn to  
14 somewhere else that day?  
15 A. Yes, I did.  
16 Q. Where did you end up driving?  
17 A. I ended up driving to the front of 7837 Clybourn.  
18 Q. And I see that's one of the locations marked and  
19 labeled on Exhibit 27. Is that a residence?  
20 A. Yes, it is.  
21 Q. Do you know whose residence it is?  
22 A. Yes, I do.  
23 Q. Whose residence is it?  
24 A. Jorge.  
25 Q. Do you know Jorge by any other name?

1 A. Yeah, by "Big Dog."

2 Q. And I think we're speaking in the present tense and I  
3 just want to be specific. I'm talking about whose residence  
4 was 7837 Clybourn Avenue during this period of October 2014?

5 A. Correct.

6 Q. And it was Jorge, "Big Dog's" residence there?

7 A. Yes.

8 Q. Did you park in front of the residence?

9 A. Yeah, I did.

10 Q. Do you remember which side of the street you parked on?  
11 The east side or the west side?

12 A. The Sun Valley side, west side.

13 Q. West side. Were you facing northbound or southbound on  
14 Clybourn?

15 A. South.

16 Q. And is 7837 Clybourn Jorge's residence? That's on the  
17 west side; right?

18 A. Correct.

19 Q. So you were parked right in front of that house more or  
20 less?

21 A. Yes.

22 Q. So what happened after you parked in front of 7837  
23 Clybourn?

24 A. I was waiting for a phone call or a text from  
25 Mr. Delgado because he told me to park by -- to park there;

1 and then I didn't get a call or a text.

2 Instead, after 20 minutes, I saw him walking  
3 towards my car through the rearview mirror of my car.

4 Q. I want to back up for a second. Why was it that you  
5 had decided to park your car at 7837 Clybourn?

6 A. Because defendant asked me to.

7 Q. He told you to park specifically there?

8 A. Close by, yeah.

9 Q. Close by where?

10 A. Close by there.

11 Q. Why did the defendant tell you park in that  
12 vicinity?

13 MR. KASSABIAN: Objection, Your Honor. Calls for  
14 speculation.

15 THE COURT: Overruled.

16 If you know.

17 BY MS. CHOU:

18 Q. If you know. Let me ask it this way. Did the  
19 defendant tell you why he wanted you to park in that area?

20 A. Yes. Because that's where the transaction was going to  
21 take place for the firearm.

22 Q. Let me ask you about one of the other markers on this  
23 map, Exhibit 37, 7915 Clybourn Avenue. Are you familiar  
24 with that address?

25 A. 7915?

1 Q. Yes. It's the location marked at the top of the blue  
2 line on Clybourn?

3 A. Yes.

4 Q. You're familiar with that address?

5 A. Yes.

6 Q. At 2014 at this time, whose address was that?

7 A. Delgado's residence.

8 Q. So by parking at 7837 Clybourn, you were not at  
9 defendant's residence but were you pretty close; right?

10 A. Correct.

11 Q. Have you ever walked that distance between those two  
12 houses?

13 A. Yes.

14 Q. How long does it take to get from one point to another?

15 A. Two to three minutes.

16 THE COURT: Is this a good time for a break?

17 MS. CHOU: Sure, Your Honor.

18 THE COURT: All right. Ladies and gentlemen,  
19 don't talk about the case or form or express any opinions  
20 about the case unless it's finally submitted to you.

21 We'll take a 15-minute break. Again, make sure  
22 you stay in the jury room.

23 THE CLERK: All rise.

24 (The jurors exited the courtroom.)

25 (The following was held outside the jury's presence:)

1                   THE CLERK: Please be seated.

2                   THE COURT: All right. We'll take a 15-minute  
3 break. Can you gentlemen have Mr. Rodriguez back on the  
4 stand when we come back? Thank You.

5                   Go ahead.

6                   *(Pause in the proceedings.)*

7                   THE COURT: We have a good question from our very  
8 observant jury. If the evidence collected was in September  
9 of 2014, why was the evidence tested in 2017 and now being  
10 tried in 2008? Why the long gaps in between?

11                  I'll leave this in the custody of Ms. Blunt; and  
12 you can decide what you want to do, if anything, about the  
13 question.

14                  THE CLERK: Court is in recess.

15                  *(Recess.)*

16                  *(The following was held outside the jury's presence:)*

17                  THE CLERK: Please be seated and come to order.

18                  THE COURT: Anything we need to discuss before the  
19 jury comes in?

20                  MS. CHOU: The parties have conferred about the  
21 note and we've agreed that we would not like to answer it.

22                  *(Court and the clerk conferred.)*

23                  THE CLERK: All rise.

24                  *(The jurors entered the courtroom.)*

25                  THE CLERK: Please be seated.

1                   THE COURT: Everyone is back. The witness is back  
2 on the stand.

3                   Sir, you are still under oath.

4                   Ms. Chou, you may continue.

5                   MS. CHOU: Thank you, Your Honor.

6 Q. So before the break you had testified that you and the  
7 informant were in your Acura; and what color was the Acura?

8 A. Black.

9 Q. In your black Acura. And you were parked on the west  
10 side of Clybourn Avenue right outside of 7837 Clybourn  
11 facing southbound; right?

12 A. Correct.

13 Q. And I think you testified right before the break that  
14 you waited at that that location for 20 minutes?

15 A. Yes.

16 Q. Were you looking at a clock? Are you sure it was that  
17 long?

18 A. No. I'm speculating.

19 Q. But when you parked there, it's not like you met  
20 somebody who was waiting for you as soon as you parked; is  
21 that right?

22 A. Correct.

23 Q. Okay. And I just want to ask you, generally speaking,  
24 was this in the morning, in the afternoon, at night? What  
25 time of day was it?

1 A. In the afternoon.

2 Q. And what was the weather like that day?

3 A. Warm.

4 Q. Was it clear?

5 A. Yes.

6 Q. Was it -- so you could see the streets around you while

7 you were sitting in the Acura?

8 A. Correct.

9 Q. And I think you had testified right before the break

10 that you then saw the defendant walking down the street in

11 your rearview mirror?

12 A. Correct.

13 Q. That is to say, you saw in your rearview mirror the

14 defendant walking down the street?

15 A. Yes.

16 Q. So what direction was the defendant walking on Clybourn

17 Avenue?

18 A. South.

19 Q. So he was coming from north of your car?

20 A. Correct.

21 Q. He was coming from the direction of his residence?

22 A. Correct.

23 Q. And did he stop when he got to your car?

24 A. Yes, he did.

25 Q. Which side of your car did he stop at?

1 A. The passenger window.

2 Q. Was the window open or closed?

3 A. It was open.

4 MS. CHOU: All right. I'd like to play Excerpt 1  
5 of what has been admitted as Exhibit 4, the video version;  
6 and the jury can follow along in the transcript binder.  
7 This is 4-1.

8 (The videotape was played.)

9 BY MS. CHOU:

10 Q. I want to pause for a second. So do you -- is this the  
11 recording of a conversation that occurred on the afternoon  
12 of October 1<sup>st</sup>, 2014?

13 A. Correct.

14 Q. And what's happening while this -- during this  
15 recording in this moment in time?

16 A. Me and the informant are sitting in my car.

17 Q. Now, at the very beginning of the excerpt, do you  
18 recognize the voice that says the first line: Do you want  
19 to take that with you already?

20 A. Yes.

21 Q. Who was that?

22 A. That was me.

23 Q. And then the voice that said: Yeah, don't trip. Who's  
24 voice is that?

25 A. That's the informant.

1 Q. Now, when you asked: You want to take that ounce with  
2 you, what were you referring to?

3 A. That's what I was referring to, the ounce.

4 Q. What did you -- what did you mean by the ounce, the  
5 ounce of what?

6 A. The ounce of crystal meth.

7 Q. At this moment in time, what was happening that made  
8 you now ask the informant about the ounce of meth?

9 A. I had seen Mr. Delgado approaching the car so I figured  
10 the transaction was going to go down already.

11 Q. And I forgot to ask you earlier; but when you were  
12 talking with the defendant about the gun and the  
13 methamphetamine for this day, did he tell you how much the  
14 methamphetamine would cost for the ounce of meth?

15 A. Yes.

16 Q. How much did he say the ounce of meth would cost?

17 A. \$600.

18 Q. Had you relayed this information to the informant?

19 A. Yes.

20 Q. Now, when you say -- or when you ask the informant,  
21 rather: You got the funds for that already? You got the  
22 funds for that so I can pay this fool, what funds are you  
23 referring to?

24 A. Talking about the \$600 for the methamphetamine.

25 Q. And when you say: So I can pay this fool, who are you

1 referring to as this fool?

2 A. So I can pay Mr. Delgado.

3 Q. So this deal was very different from the previous three  
4 deals; right? The first two deals you were fronted the  
5 methamphetamine in that the defendant gave you the meth  
6 ahead of time and then you brought him the money?

7 A. Correct.

8 Q. And then the third time, you brought him the money  
9 first and then he gave you the methamphetamine that you  
10 delivered to the informant?

11 A. That's correct.

12 Q. And this time you brought the informant basically to  
13 meet with the defendant and you didn't have the meth and you  
14 always hadn't taken the money yet, right? You hadn't  
15 brought him the money?

16 A. Correct.

17 MR. KASSABIAN: Leading, Your Honor.

18 MS. CHOU: I'll move on.

19 I'm going to keep playing the excerpts.

20 (The videotape was played.)

21 BY MS. CHOU:

22 Q. Okay. I paused it right as the informant is counting  
23 one, two, three, four, five, six. What was he doing there?

24 A. He's counting the money.

25 Q. And at this particular moment in the excerpt where I've

1 paused it, you can see in the video that there's something  
2 at the bottom of the video screen. What is that?

3 A. Those are the \$600.

4 Q. What did he do, the informant, what did the informant  
5 do with the \$600 at this time?

6 A. He handed that over to me.

7 Q. And where was the defendant at this point?

8 A. Approaching the window.

9 MS. CHOU: All right.

10 I'm going to continue the excerpts.

11 (The videotape was played.)

12 BY MS. CHOU:

13 Q. All right. I have just paused it after you said: Did  
14 you convince that fool to get that or not. Now, it happened  
15 very fast, but did you see a hand go through the video  
16 screen?

17 A. Yes.

18 Q. Whose hand was that?

19 A. That was Delgado's hand.

20 MS. CHOU: I'm going to play it again. Okay?

21 (The videotape was played.)

22 MS. CHOU: Backing up pretty much to where I had  
23 stopped earlier as the informant was you counting to six.

24 (The videotape was played.)

25 THE WITNESS: That's my hand extending over.

1 BY MS. CHOU:

2 Q. Okay. So for the record I have paused the video just  
3 as the informant has said: What's up, my boy?

4 You've said: What's up, my boy?

5 And the person who is attributed in the transcript  
6 as Male 1 says: What's up; and there is a hand reaching  
7 across from the left side of the screen toward the right;  
8 and whose hand is that?

9 A. That's my hand.

10 Q. And what are you doing in that moment?

11 A. I'm greeting Mr. Delgado.

12 Q. Now, you see in the transcript that there's a voice  
13 that is identified as Male 1 who says: What's up. Who is  
14 that person?

15 A. That's Delgado.

16 Q. Do you recognize his voice?

17 A. Yes.

18 Q. And from your memory, he's the person that you were  
19 talking to in this moment?

20 A. Correct.

21 Q. Now, right after this, you ask or you say: Hey, so  
22 what's up? Did you convince that fool to get that or not?

23 Who are you talking to?

24 A. I'm talking to Delgado and I'm talking about George to  
25 see if he convinced him to get that. By that, I mean gun.

1 Q. And who's George?

2 A. "Big Dog."

3 Q. Is that the person you also described as Jorge earlier?

4 A. Correct.

5 Q. That's the person who resided at 7387 Clybourn that you

6 were parked outside of his house?

7 A. Yes.

8 Q. Why are you referring to Jorge, or "Big Dog," during

9 this conversation?

10 A. Because to my knowledge he was the person we were

11 waiting for to make the gun transaction.

12 Q. Who told you that?

13 A. Mr. Delgado did.

14 Q. So in your conversations with the defendant earlier

15 about the gun sale, what did he tell you about how the gun

16 sale would occur?

17 A. He said it would occur close to "Big Dog's" house, if

18 not in his house, but that we just had to wait for him to

19 come back.

20 Q. And why did -- according to the defendant and what he

21 told you, why did you have to wait for "Big Dog" to come

22 back to do the gun sale?

23 A. Because he wasn't around at the time.

24 Q. But why was he necessary to the gun sale?

25 A. Because he's the one that had the gun at the time.

1 Q. He had physical possession of the gun?

2 A. Correct.

3 Q. I see. Did you ever coordinate directly with

4 "Big Dog," or Jorge, about the gun sale? Did you talk to

5 him directly about it?

6 A. No.

7 Q. Who did you talk to about the gun sale?

8 A. Delgado.

9 Q. Did you talk to anybody else about the gun sale to

10 arrange it?

11 A. No.

12 Q. So the defendant was your only contact for the gun sale

13 as well?

14 A. Correct.

15 Q. And is that what you're talking about here in this

16 excerpt?

17 A. Yes.

18 MS. CHOU: Okay. So I'm going to keep playing.

19 *(The videotape was played.)*

20 MS. CHOU: All right. I actually would like to

21 play what's been admitted as the audio version of Exhibit 4,

22 Excerpt 1, which is audio only; and it picks up when the

23 defendant approaches the car and says: What's up, my boy?

24 *(The recording was played.)*

25

1 BY MS. CHOU:

2 Q. So when the defendant said: He had to take his cousin  
3 to the doctors, he'll be right back, who did you understand  
4 the defendant to be referring to?

5 A. Referring to Jorge.

6 Q. And that's a person that had the gun for sale?

7 A. Correct.

8 Q. And when the defendant said: When he comes back, it's  
9 going to happen. I'll let him know, what did you understand  
10 the defendant's role to be in this ongoing gun sale?

11 A. He had a say in it, so he was just waiting for Jorge to  
12 come back.

13 Q. You weren't in direct contact with Jorge about the gun;  
14 right?

15 A. No.

16 Q. All of your communications had to go through the  
17 defendant?

18 A. Correct.

19 Q. Now, I want to go back to what was happening at this  
20 moment during this conversation that we couldn't see on the  
21 video. When the defendant approached the car, what did he  
22 do?

23 A. He greeted me, I greeted him with a handshake, and I  
24 handed him over the money; and he put the methamphetamine in  
25 the informant's lap.

1 Q. How did he do that?

2 A. He dropped it through the window. Dropped it in his  
3 lap.

4 Q. When you say "he dropped it in his lap," can you be  
5 more specific about who he's are?

6 A. Yes. Mr. Delgado dropped it in the informant's lap.

7 Q. Through the open window?

8 A. Correct.

9 Q. And what did you do with the money that the informant  
10 had given you?

11 A. I handed it over to Mr. Delgado.

12 Q. Now, after this excerpt ends where you say: All right.

13 And he says, the defendant says: All right, my  
14 boys.

15 And he says: Gracias.

16 And the defendant says: Be safe.

17 And you say: Yeah.

18 Was there further conversation with the defendant  
19 or was that it?

20 A. That was it.

21 Q. And what did the defendant do at that point?

22 A. He continued -- I think -- he stepped away from the car  
23 and then I drove -- I drove away. I'm not too sure whether  
24 he walked back to his house or not. I couldn't tell because  
25 by that time I had driven away and I parked on Stagg.

1 Q. Did you park on Stagg to wait for the person with the  
2 gun to come back?

3 A. Correct.

4 Q. So this was the only in-person contact that the  
5 defendant had with you and the informant that afternoon;  
6 right?

7 A. Correct.

8 Q. Now, did you give the entire \$600 to the defendant that  
9 day?

10 A. Yes, I did.

11 Q. While you were waiting with the informant on Stagg for  
12 Jorge to come back with the gun, did you keep in touch with  
13 the defendant to get updates?

14 A. Yes, I did.

15 MS. CHOU: All right. I'd like to play the  
16 audio-only version of Excerpt 4-2, Excerpt 2 of Exhibit 4,  
17 and I ask the jury to follow along with the transcript  
18 binders.

19 (The videotape was played.)

20 MS. CHOU: Oh, excuse me.

21 (The recording was played.)

22 BY MS. CHOU:

23 Q. Now, who is this -- is this a recording of a portion of  
24 the conversation that occurred while you were waiting on  
25 Stagg with the informant?

1 A. Correct.

2 Q. Who are you talking to here?

3 A. Talking on my cellphone. I'm talking to Delgado.

4 Q. And so the person who's attributed as Male 1 and the UI

5 in the transcript indicates that's hard to hear what he's

6 saying on the recording but who was that?

7 A. That was Delgado.

8 Q. And the person who says: All right. You think I can

9 get a ball, who said that?

10 A. That was me.

11 Q. Now, what did you mean by "a ball"?

12 A. I meant an eighth of an ounce of crystal meth.

13 Q. Why were you asking the defendant for an eighth of an

14 ounce of meth?

15 A. Just to make sure that I had something coming.

16 Q. What was that eighth of an ounce of meth for?

17 A. For my broker fee.

18 Q. And what were you planning on doing with that eighth of

19 an ounce of meth?

20 A. Selling part of it, smoking part of it.

21 Q. Now, why were you asking the defendant for the

22 methamphetamine?

23 A. Because he was my source.

24 Q. And by "source," you mean your source of supply?

25 A. Correct.

1 Q. This obviously wasn't the first time you had asked the  
2 defendant for methamphetamine for your own personal use;  
3 right?

4 A. Right.

5 Q. How often during this period were you smoking  
6 methamphetamine?

7 A. Pretty often. Every day.

8 Q. And each time you would smoke meth, about how much  
9 methamphetamine would you consume at a time?

10 A. About a gram or two.

11 Q. Is that an average user dose per use?

12 A. Yes.

13 Q. Do you know how many grams are in an ounce?

14 A. Yes.

15 Q. How many?

16 A. 27, 28 grams.

17 Q. So one ounce of methamphetamine is almost 30 doses for  
18 user amounts?

19 A. Correct.

20 Q. And how many grams are in an eighth of an ounce, a  
21 ball?

22 A. 3.5.

23 Q. So that would be about three or four uses of meth?

24 A. Correct.

25 Q. When you would be smoking meth and under the influence

1 of methamphetamine, can you describe what kind of effect  
2 that has on you?

3 A. It was a sort of an adrenaline rush. Umm, heightened  
4 my senses. It gave me a sense of energy, a rush.

5 Q. Did it affect in any way your ability to perceive what  
6 was going on around you?

7 A. No.

8 Q. Like did it cause you to hallucinate or not see things?

9 A. No.

10 Q. Did it interfere with your ability or affect your  
11 ability at all to comprehend what was going on; like maybe  
12 you would see one thing but you thought it was something  
13 else?

14 A. No, I knew exactly what was going on.

15 Q. And what about your memory? Does being under the  
16 influence of meth or at this time when you were under the  
17 influence of meth, did it affect your ability to remember  
18 what was going on while you were under the influence?

19 A. No.

20 Q. And the fact that you could have been under the  
21 influence of methamphetamine at a particular time, did it  
22 have any affect on your ability later to remember what was  
23 going on at that time?

24 A. No. It's not like alcohol. I didn't black out.

25 Q. During this period, did you use any other kinds of

1 drugs?

2 A. Yes. I smoked marijuana every day, too.

3 Q. And can you describe what effect marijuana had on you,  
4 your ability to perceive, comprehend, and remember?

5 A. It was just the opposite effect. It would mellow me  
6 down, just to bring me down, but I could comprehend and  
7 perceive just fine.

8 Q. Did it have any affect on your ability to remember what  
9 was going on at the time?

10 A. No.

11 Q. What about later on as you're trying to remember back  
12 to a period while you were under the influence of marijuana?  
13 Did it make it harder for you to remember later on what was  
14 going on while you were under the influence?

15 A. No.

16 Q. Did you ever use both marijuana and methamphetamine at  
17 the same time?

18 A. Yes.

19 Q. And the fact that sometimes you'd be under the  
20 influence of both methamphetamine and marijuana, would that  
21 affect your ability to perceive, comprehend, or remember?

22 A. No.

23 Q. Do you remember whether the defendant agreed to supply  
24 you with an eighth of an ounce, a ball, during this  
25 conversation?

1 A. Yes, he did.

2 MS. CHOU: Okay. I'd like to play what's been  
3 admitted as Exhibit 4, Excerpt 3, the audio-only version;  
4 and I ask the jury to follow along on the transcript  
5 binders.

6 *(The recording was played.)*

7 BY MS. CHOU:

8 Q. Okay. Was this a recording of a moment that occurred  
9 while you and the informant were waiting on Stagg in your  
10 Acura?

11 A. Yes.

12 Q. And what's happening during this excerpt?

13 A. We're waiting. Basically, he's stalling us. He's just  
14 making us wait.

15 Q. Well, I guess specifically in this conversation, who  
16 are you talking to?

17 A. I was talking to Mr. Delgado and I was talking to the  
18 informant.

19 Q. So at the beginning here, you heard a ring tone, and  
20 then you heard somebody say: Hello. Who's that person who  
21 said hello?

22 A. That's Delgado.

23 Q. Were you talking to him in person or on the phone?

24 A. Over the phone.

25 Q. Okay. So what was the purpose of this call when you

1 were talking to the defendant?

2 A. To see what was going on with the gun.

3 Q. And I guess I should note that the voice that said:

4 What up, player, who is that?

5 A. That's me.

6 Q. So when you said: This fool's got to go, to the  
7 defendant, who are you referring to?

8 A. The informant.

9 Q. And when you said: He's got the cash right here, who  
10 were you referring to?

11 A. The informant.

12 Q. And what did -- because it's hard to hear everything  
13 that the other voice is saying on the call -- what did the  
14 defendant tell you when you were giving him this information  
15 about how the customer had to go?

16 A. He's just basically stalling me. Just telling me to  
17 wait; that he's going to be back soon.

18 Q. And this is all still in the context of the pending gun  
19 deal?

20 A. Correct.

21 MS. CHOU: Now I'm going to play what's been  
22 admitted as Exhibit 4, Excerpt 4, the audio-only version;  
23 and, again, I invite the jury to follow along with the  
24 transcript.

25 *(The recording was played.)*

1 BY MS. CHOU:

2 Q. Now, is this a recording of part of the conversation  
3 that occurred while you were waiting on Stagg?

4 A. Correct.

5 Q. And who's the person who said: How come the *paisa*  
6 didn't leave it to the youngster?

7 A. The informant.

8 Q. And who's the person who said: Naw, that fool doesn't  
9 let people in the house?

10 A. That's me.

11 Q. So who is -- who does *paisa* refer to in this  
12 conversation?

13 A. Jorge.

14 Q. The person with the gun?

15 A. Correct.

16 Q. And who does the youngster refer to?

17 A. The defendant, Mr. Delgado.

18 Q. Was the informant referring to him as the youngster  
19 because he looked young at the time?

20 A. Correct.

21 Q. Now, when you said the youngster lives down the street,  
22 again who are you referring to?

23 A. Mr. Delgado.

24 Q. And he did live on the same street from where you were  
25 parked; right? Or thereabouts?

1 A. Yes.

2 Q. So what did you mean by: He lives down the street but  
3 he leaves all his straps and all the *jale* right there in  
4 that pad.

5                   Actually, first, let me ask you this: What did  
6 you mean by the term "straps"?

7 A. I meant guns.

8 Q. Is "straps" a slang word that you use for gun?

9 A. Yes.

10 Q. And *jale*, which is translated into English generally as  
11 work, is that a slang term for something?

12 A. For drugs.

13 Q. So what did you mean by: He lives down the street but  
14 he leaves all his straps and all the *jale* right there in  
15 that pad?

16 A. It meant that Delgado lives down the street but he left  
17 all his drugs and guns in Jorge's house.

18 Q. So "that pad" is referring to Jorge's residence?

19 A. Correct.

20 Q. Now, I know you said you were waiting for a while; but,  
21 ultimately, did a gun deal take place later that day?

22 A. Yes.

23 Q. Where did the gun deal occur?

24 A. At Jorge's residence.

25 Q. Did you participate in it as well? Did you go?

1 A. I went in, yes.

2 Q. Did the defendant go?

3 A. No.

4 Q. I'd like for you to take a look in the exhibit binder  
5 if you would turn to Exhibit 52; and this is what's been  
6 marked for identification as Government's Exhibit 52.

7 Do you recognize this picture?

8 A. Yes, I do.

9 Q. And how do you recognize this picture?

10 A. Because I -- I know it's me from the back of my -- the  
11 back of my hand.

12 Q. And so what is it a photo of?

13 A. It's a photo of me greeting Jorge.

14 Q. Is this a true and accurate depiction of you in that  
15 moment on October 1<sup>st</sup>, 2014?

16 A. Correct.

17 MS. CHOU: All right. Government moves for  
18 admission of Exhibit 52.

19 MR. KASSABIAN: No objection.

20 THE COURT: That's admitted.

21 (Exhibit 52 received in evidence.)

22 THE COURT: Thank you.

23 MS. CHOU: All right. I'm going to put Exhibit 52  
24 up on the screen.

25 (The exhibit was displayed on the screen.)

1 BY MS. CHOU:

2 Q. So this appears to be a screen still from a video;  
3 right?

4 A. Correct.

5 Q. Who's the person who you see in the picture who's  
6 wearing the baseball hat?

7 A. That's me.

8 Q. And where are you in this picture?

9 A. In Jorge's residence in his garage --

10 Q. I'm sorry. Go ahead.

11 A. In front of his garage.

12 Q. What was happening in this moment when this image was  
13 captured?

14 A. I was greeting Jorge.

15 Q. For what purpose?

16 A. For the purpose of the gun deal.

17 Q. All right. Go ahead and turn to the next tab, 53, and  
18 also the tab after that, what's been marked for  
19 identification as 54. Do you recognize these two?

20 A. Yes.

21 Q. How do you recognize these two?

22 A. Because I know the individual.

23 Q. What are the 53 and 54 pictures of?

24 A. They're pictures of Jorge.

25 MS. CHOU: Move for admission of government's

1 Exhibit 53 and 54.

2 MR. KASSABIAN: No objection.

3 THE COURT: Those are admitted. Thank you.

4 *(Exhibit 53 and 54 received in evidence.)*

5 MS. CHOU: I'm going to put 53 up on the screen.

6 *(The exhibit was displayed on the screen.)*

7 BY MS. CHOU:

8 Q. And who is this person that is in Exhibit 53?

9 A. That's Jorge.

10 Q. And this is how Jorge looked on October 1<sup>st</sup>, 2014?

11 A. Correct.

12 Q. Did he look like the defendant on that day?

13 A. No.

14 MS. CHOU: All right. I'd like to put Exhibit 54  
15 up on the screen.

16 *(The exhibit was displayed on the screen.)*

17 BY MS. CHOU:

18 Q. And who is this person that's in this picture?

19 A. That's the same person, Jorge.

20 Q. You can see his face and his left hand in this picture;  
21 right?

22 A. Correct.

23 Q. Do you see a tattoo on his left hand in this picture?

24 A. No, I don't.

25 Q. So who was it that sold the gun to the informant that

1 day?

2 A. Jorge did.

3 Q. How much did the informant pay for the firearm?

4 A. He paid 900.

5 Q. Was that a price that was negotiated through the

6 defendant?

7 A. Correct.

8 Q. So it was \$600 for the methamphetamine and \$900 for the

9 gun?

10 A. Yes.

11 Q. What does Jorge sound like when he talks?

12 A. His English is a little broken. He has a deep voice.

13 Q. Does his voice resemble the defendant's voice at all?

14 A. Not at all.

15 Q. Did you ultimately receive a broker's fee for setting

16 together or setting up this methamphetamine and firearm

17 deal?

18 A. Yes, I did.

19 Q. What did you receive?

20 A. An eight-ball of methamphetamine.

21 Q. And who gave that to you?

22 A. Mr. Delgado.

23 Q. Now, were you arrested for selling drugs, the drugs

24 that you just discussed selling here?

25 A. Yes, I was.

## **APPENDIX9**

CA NO. 22-50070

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ) D.C. No. 2:18-cr-00758-DSF  
Plaintiff-Appellee, )  
v. )  
CHRISTOPHER DELGADO, )  
Defendant-Appellant. )

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**APPELLANT'S EXCERPTS OF RECORD  
VOLUME 2 OF 3**

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE DALE S. FISCHER  
United States District Judge

CARLTON F. GUNN  
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Glendale, California 91202  
Telephone (323) 474-6366

Attorney for Defendant-Appellant

Mer

1/31/2020

**EXHIBIT 4-A, Excerpt 1**

Recording 1D139, Track 2 at 8:32; 1D137 at 23:55  
 October 1, 2014

Participants: Male 1 ("MALE 1")

Oscar Robert Rodriguez ("RODRIGUEZ")  
 Confidential Human Source ("CHS")

**LEGEND:** [U/I] = Unintelligible

Spanish words appear in italics, English translations follow in brackets

SPEAKER	TRANSCRIPTION
RODRIGUEZ	Hey, you wanna fucking take that shit with you already?
CHS	Hm.
RODRIGUEZ	The ounce so I don't carry it [U/I].
CHS	[U/I] Yeah, don't trip, fool.
RODRIGUEZ	You got the funds for that already?
CHS	Huh?
RODRIGUEZ	You got the funds for that, so I can pay this fool?
CHS	Yeah. How much you said, six, right?
RODRIGUEZ	Yeah.
CHS	Cool, good looking.
RODRIGUEZ	That way you make something, you know, 'cause that fucking nigga —

<b>SPEAKER</b>	<b>TRANSCRIPTION</b>
CHS	Good looking.
RODRIGUEZ	— <i>Se pasa de verga</i> [crosses the fucking line].
CHS	[U/I] Three, four, five, six. One, two, three, four, five, six. Six hundred.
RODRIGUEZ	For sure.
CHS	What's up, my boy?
RODRIGUEZ	What's up, my boy?
MALE 1	What's up?
RODRIGUEZ	Hey, so what's up? Did you convince that fool to get that or not?
MALE 1	That fool's fucking leaving right now, <i>güey</i> [dude], he, he . . . His, um, he had to take his cousin to the doctor's, right here on Saticoy and, um, some, some shit, but he'll be right back.
CHS	All right, all right.
MALE 1	He'll be right back.
RODRIGUEZ	So should we just wait, fucking, over here?
MALE 1	Yeah, want to just wait? Yeah, because —
RODRIGUEZ	Yeah.

SPEAKER	TRANSCRIPTION
MALE 1	<p>This bitch came out of nowhere. Like, "Hey, uh..."</p> <p>Well, he, honestly, he forgot. He was supposed to take her over there. He'll be right back, fool. Like, fifteen minutes, honestly.</p>
RODRIGUEZ	All right, that's cool, doggie.
MALE 1	Cool?
RODRIGUEZ	Yeah.
MALE 1	<p>He'll show up right now for sure, though, like, watch.</p> <p>He — When he comes back, it's gonna happen. I'll let him know.</p>
RODRIGUEZ	All right.
MALE 1	All right, my boys?
RODRIGUEZ	<i>Gracias</i> [Thanks]. Yeah.
MALE 1	Be safe.
RODRIGUEZ	Yeah.
	<b>[END OF EXCERPT]</b>

Mon 1/31/2020

**EXHIBIT 4-A-2**

Recording 1D139, Track 2 at 18:54, 1D137 at 35:18  
October 1, 2014

Participants: Oscar Robert Rodriguez ("RODRIGUEZ")  
Male ("MALE 1")

**LEGEND:** [U/I] = Unintelligible

SPEAKER	TRANSCRIPTION
MALE 1	[U/I]
RODRIGUEZ	What up, my boy?
MALE 1	[U/I]
RODRIGUEZ	Chilling, chilling. Hey, what-what —
MALE 1	[U/I]
RODRIGUEZ	Oh, all right, all right. Hey, you think I can get a, a fucking, uh, a ball?
	<b>[END OF EXCERPT]</b>

(Me) 1/31/2020

**EXHIBIT 4-A, Excerpt 3**

Recording 1D139, Track 3 at 4:52; 1D137 at 48:13  
 October 1, 2014

Participants: Male 1 ("MALE 1")

Oscar Robert Rodriguez ("RODRIGUEZ")  
 Confidential Human Source ("CHS")

**LEGEND:** [U/I] = Unintelligible

Spanish in italics, English translations follow in brackets

SPEAKER	TRANSCRIPTION
MALE 1	Hello?
RODRIGUEZ	What up, player?
MALE 1	Hello, hello? Yeah, he's fucking [U/I]. As soon as he gets back, I'll call you. [U/I], you know?
RODRIGUEZ	All right, but –
MALE 1	[U/I]
RODRIGUEZ	All right, yeah. No, 'cause, um, yeah, this fool's gotta go.
MALE 1	[U/I]
RODRIGUEZ	But he's got the cash right, he's got the cash right here, you know?
MALE 1	Okay, okay, that's good.
RODRIGUEZ	But fucking —

SPEAKER	TRANSCRIPTION
MALE 1	Let me call him right now and tell him. [U/I] No, I don't want to call him. Let me text him. Call you back.
RODRIGUEZ	All right, dog.
CHS	What'd he say?
RODRIGUEZ	That he wants to drop off his lady, then he's gonna come right back. And he's gonna call, you know. That he's gonna text him. Fucking <i>paisa</i> [countryman], fucking idiot.
	<b>[END OF EXCERPT]</b>

(me) 1/31/2020

## EXHIBIT 4-A, Excerpt 4

Recording 1D139, Track 3 at 11:00; 1D137 at 54:23  
October 1, 2014

Participants: Oscar Robert Rodriguez ("RODRIGUEZ")  
Confidential Human Source ("CHS")

**LEGEND:** [U/I] = Unintelligible  
English translations of Spanish words follow in brackets

SPEAKER	TRANSCRIPTION
CHS	How come the <i>paisa</i> [countryman] didn't leave it to the youngster?
RODRIGUEZ	Nah, that fool doesn't let, have people in the house. He kicked everybody out.
CHS	Oh, the youngster —
RODRIGUEZ	And the youngster lives down the street.
CHS	Oh, the youngster don't live right there?
RODRIGUEZ	Nah, he lives down the street, but he leaves all, he leaves all his straps and all the <i>jale</i> [work] right there in that pad.
CHS	Oh.
RODRIGUEZ	That fool don't mind. He gets a cut. You know? <i>Pinche paisa</i> [fucking countryman]. But when it comes to straps, that fool, the <i>paisa</i> 's [countryman's] got it, like.

	<b>[END OF EXCERPT]</b>
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## **APPENDIX 10**

CA NO.22-50070

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ) D.C. No. 2:18-cr-00758-DSF  
Plaintiff-Appellee, )  
v. )  
CHRISTOPHER DELGADO, )  
Defendant-Appellant. )

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## APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE R. DALE S. FISCHER  
United States District Judge

CARLTON F. GUNN  
Attorney at Law  
1010 North Central Ave., #100  
Glendale, CA 91202  
Telephone (323) 474-6366

Attorney for Defendant-Appellant

III.

BAIL STATUS OF DEFENDANT

Mr Delgado is in custody serving the sentence imposed in this case, with a projected release date of December 5, 2026.

IV.

STATEMENT OF CASE

A. INVESTIGATION AND INDICTMENT.

On November 1, 2018, the government filed an indictment charging Mr. Delgado and three other defendants with conspiracy to distribute methamphetamine and cocaine and actual distribution of methamphetamine on four different dates more than four years earlier.<sup>1</sup> *See* 3-ER 432-42. The methamphetamine had been purchased by a confidential informant who first made contact with codefendants Jon Fifer and Hagop Tavitian, who obtained the methamphetamine from codefendant Oscar Rodriguez, who claimed he obtained the methamphetamine from Mr. Delgado. *See infra* pp. 7-11. The informant had initially met only with Mr. Fifer and Mr. Tavitian, subsequently dealt directly with Mr. Rodriguez, and on the fourth occasion received drugs from Mr. Rodriguez's supplier, whom the government claimed was Mr. Delgado. *See infra* pp. 7-11. After the third sale, the informant had asked Mr. Rodriguez about purchasing guns

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<sup>1</sup> There was also one count charging two of the defendants other than Mr. Delgado with distribution of cocaine on an earlier date. *See* 1-ER-437.

as well as methamphetamine, and Mr. Rodriguez and the man the government claimed was Mr. Delgado facilitated the informant's purchase of a gun from a man named Jorge Baraja. *See infra* pp. 8-9, 10-11.

The informant wore a video recording device during the transactions which showed Mr. Rodriguez, *see, e.g.*, 2-ER-221-22; Govt. Exs. 29, 52; RT(2/4/20 p.m.) 174-75, but did not show the man the government claimed was Mr. Delgado, *see* 2-ER-132; 3-ER-343. The recording devices captured only the voice of that man. *See* 3-ER-343. Agents surveilling the informant's meetings with the defendants also obtained photographs of only Mr. Rodriguez and not the man the government claimed was Mr. Delgado, *see* 2-ER-132; Govt. Exs. 28, 30, 31, 34, 35; RT(2/4/20 p.m.) 216-19, though one agent who quickly drove by saw the man and opined the man looked like Mr. Delgado, *see infra* p. 9.

Because the investigating officers had only the man's voice on the recordings, they attempted to develop additional evidence when they interrogated Mr. Delgado after arresting him. They played the recording of the meeting at which the fourth purchase took place and tried to get Mr. Delgado to admit it was his voice on the recording. *See* 2-ER-269-70; 3-ER-344-45, 360-61. The government claimed Mr. Delgado nodded affirmatively when the detectives played the recording and said, "That's you," *see* 3-ER-390-91, but the district court believed the nod was ambiguous, *see* 1-ER-48, 55. When the detectives followed up by asking Mr. Delgado if he recognized the voice, he admitted only that it "sounds familiar." 2-ER-270; 3-ER-361, 416.<sup>2</sup> Mr. Delgado did admit he had

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<sup>2</sup> While it is the recordings and not the transcripts that are the actual evidence, the defense has included the transcripts in the excerpts of record and cites to the transcripts (a) for ease of reference and (b) because the transcripts were

been using and selling drugs during the period in question, but did not remember this particular transaction and said he no longer sold drugs. *See* 3-ER-355-56, 359, 360-63, 367-68, 409, 414, 415-17, 418, 423-25, 428.

## B. PRETRIAL MOTIONS.

The defense filed a motion to exclude the post-arrest interrogation because the only way to explain why Mr. Delgado did not flatly deny the drug sale would be to introduce evidence of his general history of drug dealing. *See* 3-ER-340-75.

It argued:

Taken out of context, Mr. Delgado's non-admissions/non-denials are extremely misleading. Yet providing the context of Mr. Delgado's statements – that he could not confirm or deny one alleged drug sale as distinguished from others for which he was already convicted – would be extremely prejudicial. Telling the jury about Mr. Delgado's criminal history would invite the jury to judge Mr. Delgado on his other wrongful conduct, not on the specific charge before them. Therefore, admitting even a portion of Mr. Delgado's statement puts him in an impossible dilemma – either to let the misleading statements stand unexplained, or to explain it with extremely prejudicial evidence of other wrongs.

3-ER-349-50. The government opposed the motion, arguing Mr. Delgado's "repeated lack of denials" were relevant, that Mr. Delgado "unambiguously nodded 'yes' in response to Detective 1's statement, 'that's you,'" and concluded, "Defendant's failure to deny involvement in the transaction, coupled with his self-identification in the transaction video, are entirely relevant to the crimes charged, and they are not unduly prejudicial." 3-ER-391-92.

The government also filed its own motion – to admit evidence of the

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generally undisputed.

additional sale of the gun on the date of the fourth methamphetamine sale. *See* CR 127. It argued, first, that Rule 404(b) of the Federal Rules of Evidence, governing “other bad acts,” did not apply because the gun sale was “inextricably intertwined” with the methamphetamine sale, *see* CR 127, at 3-7, and, second, that the evidence was admissible under Rule 404(b) if the rule did apply, as evidence of identity and modus operandi, *see* CR 127, at 8-10. The defense opposed the motion, arguing that the evidence was neither inextricably intertwined nor admissible under Rule 404(b). *See* CR 134.

The district court granted the government’s motion and granted the defense motion in part. As to the government motion, the court rejected the government’s modus operandi argument, but agreed the gun sale was inextricably intertwined with the methamphetamine sale. *See* 1-ER-20 n.5, 21-22; *see also* 1-ER-32. As to the defense motion, the court excluded most, but not all, of the statements in the post-arrest interrogation. *See* 1-ER 45–51. It admitted the excerpt in which the government claimed Mr. Delgado had nodded and said the voice on the recording “sounds familiar.” *See* 1-ER-48. It “d[id not] agree that the defendant vigorously nodded,” 1-ER-55, and believed the nodding was “open to interpretation,” 1-ER-55, but also believed it was a question for “the jury to decide,” 1-ER-68.

### C. TRIAL.

The government’s witnesses at trial included the informant, an FBI agent who supervised the informant and participated in monitoring<sup>3</sup> and surveilling the

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<sup>3</sup> The informant was wearing a live microphone which the agent could use to listen in real time, in addition to audio and video recording devices. *See*

methamphetamine purchases, and Mr. Rodriguez, who had entered into a cooperation agreement with the government. The government also introduced excerpts of the audio and video recordings from three of the informant's meetings with the defendants, *see* Govt. Exs. 2, 3, 4, which were identified by the FBI agent and played during the agent's testimony, the informant's testimony, and Mr. Rodriguez's testimony, *see* 2-ER-123-26, 155-64, 177-78, 188, 203-12, 217-18; RT(2/4/20 p.m.) 164-65, 182-83, 246-47, 261. There were also the surveillance photos and/or video screenshots of Mr. Rodriguez, *see* Govt. Exs. 28-32, 34-35, 52, but no surveillance photos or video screenshots of the man the government claimed was Mr. Delgado. Finally, the government introduced the excerpt from the post-arrest interrogation that the court had ruled admissible. *See* 2-ER-269-70; Govt. Ex. 5.

1. Agent and Informant Testimony.

The agent and informant testified about the informant's meetings with the defendants and the purchases of methamphetamine. On the first occasion, the informant met with Mr. Fifer and Mr. Tavitian at a Home Depot; Mr. Fifer and Mr. Tavitian drove the informant to another location which the informant believed was Mr. Rodriguez's home; and Mr. Tavitian went into the house and came out with Mr. Rodriguez, who gave the methamphetamine to Mr. Fifer, who in turn gave it to the informant. *See* RT(2/4/20 p.m.) 158-62, 242-49. On the second occasion, Mr. Rodriguez came with Mr. Fifer and Mr. Tavitian to the Home Depot, and the

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RT(2/4/20 p.m.) 156.

transaction took place there. *See* RT(2/4/20 p.m.) 174-75, 256-58. On the third occasion, the informant met Mr. Fifer and Mr. Tavitian in their car near Mr. Rodriguez's house, *see* RT(2/4/20 p.m.) 180, and Mr. Rodriguez rode up to the three men on a bicycle, took the informant's money, rode away, and returned with the methamphetamine, *see* RT(2/4/20 p.m.) 183-84, 260-64. After the third purchase, the informant got Mr. Rodriguez's phone number from Mr. Rodriguez and asked Mr. Rodriguez if Mr. Rodriguez could get guns, to which Mr. Rodriguez replied that he could. *See* 2-ER-138; RT(2/4/20 p.m.) 184.

The informant and the agent then testified about the fourth meeting, at which the informant met the man the government claimed was Mr. Delgado. The informant called Mr. Rodriguez, at the direction of the FBI, and Mr. Rodriguez offered to sell the informant both methamphetamine and a gun. 2-ER-140. The informant met Mr. Rodriguez on the street in Mr. Rodriguez's neighborhood, *see* 2-ER-106-07, and Mr. Rodriguez drove him to another location in the neighborhood, where Mr. Rodriguez parked and made some phone calls, *see* 2-ER-108, 111-13, 141-43. The informant counted out money for the drugs and gave it to Mr. Rodriguez, *see* 2-ER-157, 262, and soon after that a man walked up to the car, shook Mr. Rodriguez's hand, and dropped the methamphetamine into the car, *see* 2-ER-146.

Mr. Rodriguez then asked the man, "Did you convince that fool to get that or not?" 2-ER-147, 262, which the informant testified was a reference to the gun the informant was going to purchase, *see* 2-ER-147. The man told Mr. Rodriguez and the informant to wait and Mr. Rodriguez and the informant went to another location, where Mr. Rodriguez made some more phone calls. 2-ER-160-61; *see* 2-ER-264-66. After "waiting a long time," 2-ER-163, Mr. Rodriguez and the

informant returned to the location where they had received the methamphetamine, 2-ER-160, and the informant “ultimately” purchased a gun, 2-ER-160.

2. Identification Testimony.

The government also elicited qualified identification testimony from the informant and the FBI agent who testified. The agent had driven by during the fourth purchase and radioed as he drove by that the man who had walked up to Mr. Rodriguez’s car “looked like Christopher Delgado,” 2-ER-115, whom the agent had previously met, 2-ER-116. But the agent admitted the man was on the other side of Mr. Rodriguez’s car and he had only “a matter of a few seconds” to observe the man. 2-ER-117; *see also* 2-ER-130–31.

The informant had been closer to the man, but even he was able to observe the man only “briefly,” 2-ER-145. And he did not attempt an identification until long after the meeting. He was shown a six-person photospread containing Mr. Delgado’s picture more than four years after the meeting and identified Mr. Delgado as only “maybe” the man who had supplied the methamphetamine at the fourth meeting. *See* 2-ER-255, 256. He was also shown part of the video of the post-arrest interrogation of Mr. Delgado being questioned about the drug sale and at that time said only that Mr. Delgado “looked like” the man who had supplied the drugs, even though Mr. Delgado was the only person in the video and was in handcuffs. *See* 2-ER-260. In his trial testimony, which was more than five years after the meeting – and after he had previously seen Mr. Delgado in the photospread and the interrogation video – he still said only that he was “pretty sure” Mr. Delgado was the man. *See* 2-ER-146. He did add a claim in his trial

testimony that he recognized a tattoo on Mr. Delgado's left hand, *see* 2-ER-158-59, 166, but what he had said when he looked at the post-arrest interrogation video was that he recalled tattoos on the man's left arm and could provide no details, *see* 2-ER-260.

Defense counsel argued in closing argument that these identifications were unreliable because of (a) the relatively short time the agent and informant saw the man at the time of the transaction; (b) in the case of the informant, the time which had passed before he attempted to make the identifications; (c) the suggestive impact of the photospread and the interrogation video on the informant's courtroom identification; and (d) the informant's inconsistent statements about the tattoo. *See* 2-ER-300-07.

### 3. Mr. Rodriguez's Testimony.

Mr. Rodriguez also testified about the four drug transactions. He claimed Mr. Delgado had supplied the methamphetamine on all four occasions. 2-ER-169. He claimed Mr. Delgado "fronted" the methamphetamine for the first two drug transactions and he brought the money back to Mr. Delgado after receiving it from the informant. *See* 2-ER-174-81, 185. As to the third occasion, he claimed Mr. Delgado did not want to "front" the drugs, so he took the money from the informant to Mr. Delgado and then brought the drugs back to the informant. *See* 2-ER-186-91. He also claimed Mr. Delgado was the man who walked up to the car and supplied the drugs himself on the fourth occasion. *See* 2-ER-198, 202-07, 210-11.

There was no question about Mr. Rodriguez's ability to recognize Mr.

Delgado, since he had known Mr. Delgado for several years, *see* 2-ER-172, but he was testifying pursuant to a plea agreement and hoping for a favorable sentence recommendation from the government, *see* 2-ER-226–27. Defense counsel used this, a prior conviction, and false statements Mr. Rodriguez had made in the past to attack Mr. Rodriguez’s credibility in closing argument. *See* 2-ER-307–10.

Mr. Rodriguez also testified it was Mr. Delgado he contacted and spoke with about getting the gun the informant purchased. He claimed Mr. Delgado told him it would take some time, but he could get the gun. *See* 2-ER-194. Mr. Rodriguez claimed a plan was then made for Mr. Rodriguez and the informant to come over and pick up the drugs and the firearm. *See* 2-ER-194. The informant met Mr. Rodriguez at Mr. Rodriguez’s house, and the two men drove to and parked in front of the residence of a man Mr. Rodriguez knew as Jorge, or “Big Dog,” 2-ER-196–97, and whom agents identified as Jorge Baraja, *see* 2-ER-127. Mr. Rodriguez claimed Mr. Delgado had told him to park there because that was where the firearm transaction was going to take place. *See* 2-ER-198, 208. Mr. Rodriguez identified his voice on the informant’s recording as the one asking, “Did you convince that fool to get that or not?,” 2-ER-207, 262, claimed this referred to the gun, *see* 2-ER-207, and claimed Mr. Delgado was telling him they had to wait for Jorge “[b]ecause he’s the one that had the gun at the time,” 2-ER-208. Mr. Rodriguez also identified his voice making two phone calls that he said were calls to Mr. Delgado about the gun and then explaining the delay to the informant. *See* 2-ER-212–13, 217–20, 264–68. Finally, Mr. Rodriguez testified he and the informant met with Jorge in Jorge’s garage and Jorge sold the gun to the informant for \$900. *See* 2-ER-220–24.

4. The Post-Arrest Interrogation Excerpt.

The government also introduced the excerpt of the post-arrest interrogation excerpt the district court had ruled admissible. It included what the government claimed was the “unambiguous nod,” *supra* p. 5, but the court had opined was “open to interpretation,” *supra* p. 6. *See* Govt. Ex. 5.<sup>4</sup> It also included a question by the detective, “Do you, do you, remember this day?,” and Mr. Delgado’s response that he did not. 2-ER-269. Finally, it included Mr. Delgado’s statement that the voice “sounds familiar” and the detectives’ characterization of the voice as “nasally.” 2-ER-270.

The government then used both the alleged nod and the non-denial in its closing arguments. First, the prosecutor giving the opening argument argued:

And as I’m sure you already noticed, the defendant never denied during his interview that he was the person who dropped the meth inside the car. He never said that he wasn’t there that day and said – instead he recognized his own voice in the video.

He never denied that he was the person who supplied the meth on all four deals. In fact, he went on to poke fun of his voice as he heard it on this video. . . .

...  
But you can also and you should take the defendant’s own word for it when he nodded and said, yes, this was his voice. His first and immediate reaction is the true one.

2-ER-285–86. Second, the prosecutor giving the rebuttal argument argued:

And at [sic] last thing I want to talk about is this post-arrest interview where the defendant himself gives you evidence that you can take as admissions of his guilt.

So when he’s confronted with this information that he’s being charged with and being accused of selling methamphetamine, he doesn’t deny it. He doesn’t ever say:

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<sup>4</sup> The defense will be moving for an order that the government transmit relevant video recording exhibits to this Court pursuant to Circuit Rule 27-14.

No, I didn't. No, I haven't. That's not me.

What would you do in that situation if you had been arrested and asked or accused of committing a crime that you didn't do?

And not just that, it's not just the absence of a denial, a reasonable response when you're accused of doing something you didn't do, but there is the head nod.

...

*(The videotape was played.)*  
There it is. That's you. Nod.

...

Ask yourself then in the rest of this conversation what a reasonable person who hadn't engaged in this activity would have done.

2-ER-335-36.<sup>5</sup>

## V.

### SUMMARY OF ARGUMENT

The district court erred in ruling the evidence of the firearm sale was admissible as “inextricably intertwined” with evidence of the charged offenses. Evidence is admissible under the inextricably intertwined theory only if it comes within one of two categories. First, evidence may be admitted as inextricably intertwined if the uncharged offense and a charged offense are part of a single transaction. Second, evidence may be admitted as inextricably intertwined if evidence of the uncharged offense is necessary for the prosecutor to offer a coherent and comprehensible story of the charged offenses.

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<sup>5</sup> Defense counsel addressed the nod in his closing argument by arguing that the head nod was ambiguous, *see* 2-ER-299, as the court had recognized during the pretrial hearing on the defense motion, *see* 1-ER-55 (court stating, “I don't agree that the defendant vigorously nodded in affirmation when Detective Williams said ‘That's you.’”).

Neither of these justifications existed here. The uncharged offense – sale of the firearm – was not part of the same transaction as the charged offense – sale of the methamphetamine – because, while the gun purchase and purchase of methamphetamine were *discussed* at the same time, the actual transactions were separate in time, place, and participants. The purchase of methamphetamine took place when the man the government claims is Mr. Delgado walked up to Mr. Rodriguez’s car, took place at the car, and took place between the man who walked up and the informant, with Mr. Rodriguez as intermediary. The purchase of the firearm took place much later in the day, took place in Mr. Baraja’s garage, and took place between Mr. Baraja and the informant.

Evidence of the firearm purchase was also not necessary for the prosecutors to offer a coherent and comprehensible story of the methamphetamine purchases. The story of the first three methamphetamine purchases could be told with no mention of guns because there was no mention of guns. And while there was discussion of guns after the third methamphetamine purchase – and the actual purchase of a gun – evidence of that discussion and purchase was not necessary for the prosecutors to offer a coherent and comprehensible story about the fourth methamphetamine purchase. They simply had to have the witnesses testify about the request for and purchase of methamphetamine without mentioning the request for and purchase of the gun and then have the witnesses describe the meeting up to the point of the delivery of and payment for the methamphetamine without continuing on to the purchase of the gun.

The district court also erred in admitting the excerpt from the post-arrest interrogation, especially given the government’s use of the evidence. The government did not just point to Mr. Delgado’s ambiguous nodding and “sounds

familiar” response to the recording; it also pointed to his failure to deny guilt, by arguing any reasonable person would have denied guilt. This was grossly misleading in the present case because of Mr. Delgado’s history of drug dealing. For a person like Mr. Delgado who had been involved generally in drug dealing, a non-denial was not at all incriminating, because it is eminently reasonable such a person would not remember specific sales. But presenting the evidence of prior drug dealing to support this explanation would have been extraordinarily prejudicial. The prejudice created by the government’s misleading use of the evidence far outweighed the probative value of Mr. Delgado’s ambiguous nodding and “sounds familiar” response to the voice on the recording.

## VI.

### ARGUMENT

#### A. THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE OF THE FIREARM SALE.

##### 1. Reviewability and Standard of Review.

As noted *supra* pp. 5-6, the government made a motion in limine, which the defense opposed, to admit evidence of the firearm sale in which the government advanced both an “inextricably intertwined” theory and a Rule 404(b) theory. As part of its inextricably intertwined argument, the government asserted “the government in a conspiracy case may submit proof on the full scope of the conspiracy; it is not limited in its proof to the overt acts alleged in the indictment.”

CR 127, at 4 (quoting *United States v. Rizk*, 660 F.3d 1125, 1131 (9th Cir. 2011)).

As also noted *supra* p. 6, the district court rejected the government's Rule 404(b) theory, but agreed with its inextricably intertwined theory. It also relied on the conspiracy case cited by the government, noting that “the indictment alleges a conspiracy’ and evidence ‘to show the full scope of that conspiracy’ is “inextricably intertwined” with the conspiracy charge and [] not “other acts” subject to Rule 404(b).”” 1-ER-22 (quoting *United States v. Rizk*, 660 F.3d at 1132).

Whether evidence is inextricably intertwined with the charged offense and so not subject to the limitations of Rule 404(b) is reviewed *de novo*, and whether the evidence is admissible under Rule 404(b) if the rule applies is reviewed for abuse of discretion. *See, e.g., United States v. Carpenter*, 923 F.3d 1172, 1180-81 (9th Cir. 2019); *United States v. DeGeorge*, 380 F.3d 1203, 1219 (9th Cir. 2004). In addition, the district court “necessarily abuse[d] its discretion if it based its ruling on an erroneous view of the law.” *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc) (quoting *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990)).

## 2. The District Court Erred in Ruling Evidence of the Firearm Sale Was Admissible on a Theory It Was Inextricably Intertwined with the Charged Offense.

The inapplicability of Rule 404(b) to evidence that is “inextricably intertwined” with evidence of the charged offense was discussed at length in *United States v. Vizcarra-Martinez*, 66 F.3d 1006 (9th Cir. 1995). *Vizcarra-Martinez* recognized there are two categories of evidence that may be found to be

inextricably intertwined. First, “we have sometimes allowed evidence to be admitted because it constitutes a part of the transaction that serves as the basis for the criminal charge.” *Id.* at 1012. Put another way, “when it is clear that particular acts of the defendant are part of, and thus inextricably intertwined with, a single criminal transaction, we have generally held that the admission of evidence regarding those acts does not violate Rule 404(b).” *Id.*

Second, evidence of other acts is admissible as inextricably intertwined when it is “necessary . . . to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime.” *Id.* at 1012-13. This exception is “most often invoked in cases in which the defendant is charged with being a felon in possession of a firearm.” *Id.* at 1013. This is illustrated by three felon in possession of firearms cases cited by the government in the district court: *United States v. Butcher*, 926 F.2d 811 (9th Cir. 1991), in which the defendant possessed the gun he was actually charged with possessing in his truck and simultaneously possessed other guns in his home, *see id.* at 816; *United States v. Daly*, 974 F.2d 1215 (9th Cir. 1992), in which the defendant used the firearm in a shootout with police, *see id.* at 1216-17; and *United States v. Collins*, 90 F.3d 1420 (9th Cir. 1996), in which the defendant was attempting to commit a burglary at the building where the gun was found and that both provided context for the possession of the gun and rebutted a defense the defendant was in the neighborhood simply for dancing, *see id.* at 1428-29.

Evidence of the firearm sale in the present case was admissible under neither of these theories. First, to track the reasoning of *Vizcarra-Martinez*, “the [sale of the firearm] was, unquestionably, not a part of the transaction with which [Mr. Delgado] was charged – [sale of the methamphetamine].” *Id.*, 66 F.3d at

1013. The transactions may have been discussed at the same time, but, first, “[c]oincidence in time is insufficient,” *id.*; *see also United States v. Carpenter*, 923 F.3d at 1182 (quoting *Vizcarra-Martinez*), and, second, *planning* the transactions is not the same as the transactions themselves. The transactions themselves took place at separate times, in separate places, with separate participants. The drug sale took place when the man the government claims is Mr. Delgado walked up to Mr. Rodriguez’s car, took place at the car, and took place between the man who walked up and the informant, with Mr. Rodriguez as intermediary. The firearm sale took place much later, *see* 2-ER-163 (informant testimony that “like the longest purchase I ever did” and “[w]e were waiting a long time”); 2-ER-220 (testimony by Mr. Rodriguez that “were waiting for a while,” but “ultimately” gun deal took place “later that day”), took place in Mr. Baraja’s garage, and took place between Mr. Baraja and the informant. They were not the same “criminal episode,” 1-ER-21 (district court order quoting *United States v. Williams*, 989 F.2d 1061, 1070 (9th Cir. 1993), and *United States v. Soliman*, 813 F.2d 277, 279 (9th Cir. 1987)), because the “criminal episode” in the case of the drug sale was the transfer of the methamphetamine and the “criminal episode” in the case of the firearm sale was the transfer of the firearm. The transactions were also of completely different types, one for drugs, and one for a firearm. *Compare Williams*, 989 F.2d at 1070 (both charged transaction and uncharged transactions involved drugs and involved “established cocaine customer” of coconspirator).

This also is not a case in which evidence of the firearm sale was necessary to permit the prosecutor to offer a coherent and comprehensible story regarding the charged crimes. The story of the first three drug sales that were part of the conspiracy could be told with no mention of guns because there was no mention of

guns. Guns came up, initially as a completely separate topic, only after the third sale when, in the words of the informant, "I asked him if he can get some guns, and he said yeah." 2-ER-138. The informant subsequently contacted Mr. Rodriguez about meeting again, and, as described in his testimony:

Q. Did [the law enforcement agents] tell you to contact Oscar Rodriguez?  
A. Yes.  
Q. And did you?  
A. Yes.  
Q. Did Oscar Rodriguez offer to sell you methamphetamine?  
A. Yes.  
Q. Did he offer to sell you a gun?  
A. Yes.  
Q. And at the FBI's instruction, did you arrange to meet him?  
A. Yes.

2-ER-140.

This testimony would have been left perfectly coherent and comprehensible by simply omitting the testimony about the inquiry about guns after the third drug sale and questioning the informant only about the offer to sell drugs in the testimony about arranging the fourth meeting. And the informant's subsequent testimony about the actual meeting could have been similarly limited. In that testimony, the informant described talking about and counting out the money for the drugs, *see* 2-ER-143–44; described receiving the drugs, *see* 2-ER-146, 154; identified Mr. Delgado to the extent he could, *see* 2-ER-145–46, 156–57, 158–59; and only then testified, separately, about the phone calls Mr. Rodriguez made about the gun, talking with Mr. Rodriguez about those calls, and the purchase of the gun, *see* 2-ER-160–64.

Mr. Rodriguez's testimony about the fourth drug sale also could have been limited to just the drug sale and remained perfectly coherent and comprehensible.

His testimony as given at trial began with him contacting Mr. Delgado after the informant contacted him:

Q. And what did the informant ask you for when he reached out to you on the phone?

A. He asked me for a firearm and an ounce of methamphetamine.

Q. Did you agree to sell the ounce and the firearm to him?

A. Yes, I did.

Q. Did you have an ounce of methamphetamine and a firearm on you at the time?

A. No, I didn't.

Q. So then what did you do?

A. Then I called Mr. Delgado to let him know what's going on.

Q. What was his response, the defendant's?

A. He said it would take some time but that he would be able to do it.

Q. So he agreed to supply the firearm and an ounce of methamphetamine?

A. Correct.

Q. What was the plan for this deal?

A. Umm, that I was going to be for me to go over there, pick up the drugs, and hand it over to the informant. Also pick up the firearm.

Q. Is that what happened?

A. No.

2-ER-193-94.

Second, Mr. Rodriguez testified about the informant meeting him and driving the informant to a location Mr. Delgado had told him to drive to.

Q. But at some point the informant got into your Acura; is that right?

A. Yes.

Q. And who was driving that Acura?

A. I was.

Q. So you were seated in the driver's seat?

A. Correct.

Q. Where did the informant sit in the Acura?

A. In the passenger seat.

Q. Did you end up driving from Cohasset and Clybourn to somewhere else that day?

A. Yes, I did.

Q. Where did you end up driving?

A. I ended up driving to the front of 7837 Clybourn.

Q. So what happened after you parked in front of 7837 Clybourn?

A. I was waiting for a phone call or a text from Mr. Delgado because he told me to park by – to park there; and then I didn't get a call or a text.

Instead, after 20 minutes, I saw him walking towards my car through the rearview mirror of my car.

Q. I want to back up for a second. Why was it that you had decided to park your car at 7837 Clybourn?

A. Because defendant asked me to.

Q. He told you to park specifically there?

A. Close by, yeah.

2-ER-196, 197–98.<sup>6</sup>

Third, Mr. Rodriguez explained that this address was close to Mr. Delgado's home.

Q. Let me ask you about one of the other markers on this map, Exhibit 37, 7915 Clybourn Avenue. Are you familiar with that address??

A. 7915?

Q. Yes. Is the location marked at the top of the blue line on Clybourn?

A. Yes.

Q. You're familiar with that address?

A. Yes.

Q. At 2014 at this time, whose address was that?

A. Delgado's residence.

Q. So by parking at 7837 Clybourn, you were not at defendant's residence but you were pretty close; right?

A. Correct.

Q. Have you ever walked that distance between those two houses?

A. Yes.

Q. How long does it take to get from one point to another?

A. Two to three minutes.

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<sup>6</sup> The testimony omitted from this portion of Mr. Rodriguez's testimony explained this was in front of Jorge's, or "Big Dog's," residence, *see* 2-ER-196–97, and that the reason Mr. Delgado told him to park at this location was "that's where the transaction was going to take place for the firearm," 2-ER-198, but that testimony was not needed to make the story about the drug sale coherent and comprehensible. The location was also close to Mr. Delgado's home, as explained in the testimony quoted in the next paragraph. That eliminated any need for additional explanation of how the location was chosen.

2-ER-198-99.

Fourth, Mr. Rodriguez explained what happened after he saw Mr. Delgado walking toward his car.

Q. So what direction was the defendant walking on Clybourn Avenue?

A. South.

Q. So he was coming from north of your car?

A. Correct.

Q. He was coming from the direction of his residence?

A. Correct.

Q. And did he stop when he got to your car?

A. Yes, he did.

Q. Which side of your car did he stop at?

A. The passenger window.

Q. Was the window open or closed?

A. It was open.

2-ER-202-03. Mr. Rodriguez then explained an excerpt in the undercover recording which reflected the informant counting and giving him \$600 for the drugs, *see* 2-ER-203-06, and continued as follows:

Q. What did he do, the informant, what did the informant do with the \$600 at this time?

A. He handed that over to me.

Q. And where was the defendant at this point?

A. Approaching the window.

[PROSECUTOR]: All right.

I'm going to continue the excerpts.

*(The videotape was played.)*

BY [PROSECUTOR]:

Q. All right. I have just paused it after you said: Did you convince that fool to get that or not. Now, it happened very fast, but did you see a hand go through the video screen?

A. Yes.

Q. Whose hand was that?

A. That was Delgado's hand.

[PROSECUTOR]: I'm going to play it again.  
Okay?

*(The videotape was played.)*

[PROSECUTOR]: Backing up pretty much to where I had stopped earlier as the informant was you counting to six.

*(The videotape was played.)*

THE WITNESS: That's my hand extending over.

BY [PROSECUTOR]:

Q. Okay. So for the record I have paused the video just as the informant has said: What's up, my boy?

You've said: What's up, my boy?

And the person who is attributed in the transcript as Male 1 says: What's up; and there is a hand reaching across from the left side of the screen toward the right; and whose hand is that?

A. That's my hand.

Q. And what are you doing in that moment?

A. I'm greeting Mr. Delgado.

Q. Now, you see in the transcript that there's a voice that is identified as Male 1 who says: What's up. Who is that person?

A. That's Delgado.

Q. Do you recognize his voice?

A. Yes.

Q. And from your memory, he's the person that you were talking to in this moment?

A. Correct.

2-ER-206-07.

Fifth, there was testimony about the conversation Mr. Rodriguez had with Mr. Delgado about "that fool" getting "that" and the prior discussions in which Mr. Delgado had indicated that the gun would be coming from Mr. Baraja, whom Mr. Rodriguez knew as "Jorge" or "Big Dog." *See 2-Er-207-10.* The testimony then reverted to the drug transaction, as follows:

Q. . . . When the defendant approached the car, what did he do?

A. He greeted me, I greeted him with a handshake, and I handed him over the money; and he put the methamphetamine in the informant's lap.

Q. How did he do that?

A. He dropped it through the window. Dropped it in his lap.

Q. When you say "he dropped it in his lap," can you be more specific about who he's are?

A. Yes. Mr. Delgado dropped it in the informant's lap.

Q. Through the open window?

A. Correct.

Q. And what did you do with the money that the informant had given you?

A. I handed it over to Mr. Delgado.

Q. Now, after this excerpt ends where you say: All right.

And he says, the defendant says: All right, my boys.

And he says: Gracias.  
And the defendant says: Be safe.  
And you say: Yeah.  
Was there further conversation with the defendant  
or was that it?  
A. That was it.  
Q. And what did the defendant do at that point?  
A. He continued – I think – he stepped away from the car  
and then I drove – I drove away.

2-ER-210-11.

Just as the informant's testimony could tell a perfectly coherent and comprehensible story without any testimony about the gun, this testimony could tell a perfectly coherent and comprehensible story without any testimony about the gun. First, Mr. Rodriguez could have testified that the informant "asked me for an ounce of methamphetamine" instead of "asked me for a firearm and an ounce of methamphetamine," *supra* p. 20, and that Mr. Delgado "agreed to supply the ounce of methamphetamine" instead of "agreed to supply the firearm and the ounce of methamphetamine," *supra* p. 20. Second, Mr. Rodriguez could have described meeting the informant and driving him to 7837 Clybourn, driving there because that is where Mr. Delgado told him to go, and that this was near Mr. Delgado's house without the additional explanation that it was also going to be the location of the gun purchase. Third, Mr. Rodriguez could have described Mr. Delgado approaching the car, the informant counting out the money and handing it to him, exchanging greetings with Mr. Delgado, and Mr. Delgado dropping the drugs into the car and Mr. Rodriguez handing him the money. One can see this tells a perfectly coherent and comprehensible story by simply reading in order the portions of testimony quoted above.

The government's true concern may have been its desire to play the recordings which reference the firearm, or "that," in its effort to match the voice of

the man who approached the car to Mr. Delgado's voice. That did not justify admitting testimony about the actual gun transaction for three reasons. First, what matters for the government's purpose of voice identification was Mr. Rodriguez's testimony that the voice was Mr. Delgado's, not the content of what the voice said. Second, any ambiguity this created was a product of the government's choice to introduce the recordings, which it did not have to do. Third, the substance of what the voice said in the recordings (a) hardly made the story of the drug sale incoherent or incomprehensible and (b) by itself was not prejudicial. The voice Mr. Rodriguez claimed was Mr. Delgado simply responded to Mr. Rodriguez's reference to some "that" with an explanation that some "he" was taking his cousin to the doctor and would be back soon. *See* 2-ER-262-63. It did not matter what "that" was and who "he" was when the purpose of the recordings was identification of the voice as Mr. Delgado's.<sup>7</sup>

In sum, the testimony about the firearm sale does not come within either of the two categories of evidence which may be found to be inextricably intertwined. It was not part of the same transaction, but a separate transaction. It was also not necessary for the government to tell a coherent and comprehensible story, for the government's story would have been just as coherent and comprehensible with the testimony limited to the drug transaction.

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<sup>7</sup> There were also two additional recordings in which Mr. Rodriguez can be heard speaking with a person on the phone, whom the government claimed was the same man, but those had minimal probative value for voice identification because the other voice on the phone is so faint as to be virtually useless. *See* Govt. Ex. 4, Excerpts 2, 3; *see also* 2-ER-264-66 (transcripts acknowledging most of what other man said was unintelligible). Further, these recordings also make no explicit reference to a gun and so are also not prejudicial.

3. The District Court Erred in Ruling Evidence of the Firearm Sale Was Admissible on a Theory It Showed the Full Scope of the Conspiracy.

Several of the inextricably intertwined cases are conspiracy cases which have relied on principles of conspiracy law. As articulated in *United States v. Rizk*, 660 F.3d 1125 (9th Cir. 2011): “The rule is well established that the government in a conspiracy case may submit proof on the full scope of the conspiracy; it is not limited in its proof to the overt acts alleged in the indictment.” *Id.* at 1131. *See generally United States v. Bonanno*, 467 F.2d 14, 17 (9th Cir. 1972) (“In conspiracy prosecutions, the Government has considerable leeway in offering evidence of other offenses [not charged in the indictment].”), *quoted in Rizk*, 660 F.3d at 1131. The government cited *Rizk* and the district court relied upon it in adding the second rationale for its ruling, as noted *supra* pp. 15-16.

This ignored the limitations and rationale of this line of cases. The rationale is, as explained in a treatise this Court quoted in *United States v. Loftis*, 843 F.3d 1173 (9th Cir. 2016):

In cases where the incident offered is a part of *the conspiracy alleged in the indictment*, the evidence is admissible under Rule 404(b) because it is not an “other” crime. The evidence is offered as direct evidence of the fact in issue, not as circumstantial evidence requiring an inference as to the character of the accused. Such proof can be quite time-consuming and it may be extremely prejudicial to the defendant but the court would have no discretion to exclude it [under Rule 404(b)] because it is proof of the ultimate issue in the case. To the extent that these consequences may seem unfair, this is attributable to the nature of the *conspiracy charge*, not to any defect in the other crimes rule.

22B Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5239 (1st ed. 2016) (footnotes omitted), *quoted in Loftis*, 843 F.3d at 1176 (emphasis added).

This means the other act at issue must be within the scope of the charged

conspiracy. As articulated in a Second Circuit case cited in the *Rizk* case quoted above, “the Government may offer proof of acts not included within the indictment, *as long as they are within the scope of the conspiracy.*” *United States v. Thai*, 29 F.3d 785, 812 (2d Cir. 1994), *quoted in Rizk*, 660 F.3d at 1132 (emphasis added). *See also United States v. Montgomery*, 384 F.3d 1050, 1062 (9th Cir. 2004) (holding other acts inextricably intertwined with conspiracy and not subject to Rule 404(b) “because each occurred within the temporal scope of the conspiracy *and comprised the conspiracy*” (emphasis added)).

This was not true of the firearm sale in the present case. The charged conspiracy here was to “knowingly and intentionally distribute” (1) “at least five grams of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(B)(viii)” and (2) “cocaine, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(C).” 2-ER-433. It did not include selling or transferring firearms.

The sale of firearms was thus not “part of the conspiracy alleged in the indictment,” was not “within the scope of the conspiracy,” and did not “comprise the conspiracy.” It was therefore not admissible under this conspiracy line of cases.

\* \* \*

## **APPENDIX 11**

**No. 22-50070**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

v.

CHRISTOPHER DELGADO,  
Defendant-Appellant.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE CENTRAL DISTRICT OF CALIFORNIA, NO. 2:18-cr-758  
(THE HONORABLE DALE S. FISCHER, UNITED STATES DISTRICT JUDGE)

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**REDACTED ANSWERING BRIEF  
FOR THE UNITED STATES**

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[REDACTED]

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## STATEMENT OF THE CASE

### A. Procedural History

Following a three-day trial, a jury found Delgado guilty of conspiring to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 846, and distributing at least five grams of methamphetamine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(viii). 3-ER-432-36, 441, 444. He was sentenced to 110 months of imprisonment, to be followed by five years of supervised release. 3-ER-444.

### B. Statement of Facts

#### 1. Delgado conspires with others to sell methamphetamine to an informant.

Between September 11, 2014, and October 1, 2014, Delgado supplied methamphetamine for four drug sales. SER-57-61, 65, 75-76, 81-84, 87-89, 105. Delgado and his co-conspirators sold methamphetamine to an informant for the Federal Bureau of Investigation (FBI). For all four sales, the FBI outfitted the informant with audio and video recording devices and audio transmitting devices, and also observed the transactions. SER-7-8, 11.

1. The first sale occurred on September 11, 2014, when the informant asked Jon Fifer for an ounce of methamphetamine. SER-6. Fifer in turn asked Oscar Rodriguez, who asked his supplier—Delgado—for an ounce of methamphetamine. SER-65-67. Rodriguez and Delgado met at Delgado's house, where Delgado agreed to "front" the methamphetamine, meaning that Delgado would give the methamphetamine to Rodriguez, and Rodriguez would pay Delgado for the drugs later. SER-68-70. Rodriguez left with the methamphetamine. SER-70. Later that same day, the informant, Fifer, and Hagop Tavitian drove to Rodriguez's house where Rodriguez sold the informant 26.81 grams (approximately 0.95 ounces) of methamphetamine. SER-5, 12, 60, 71. After the sale, Rodriguez returned to Delgado's house and gave Delgado the cash the informant paid. SER-73. Delgado gave Rodriguez some methamphetamine as a "broker's fee." SER-73-74.

2. The second sale occurred on September 17, 2014, when the informant contacted Fifer about purchasing a quarter ounce of methamphetamine. SER-12. Fifer again called Rodriguez, who again called Delgado. SER-75. Rodriguez went to Delgado's house where Delgado agreed to front a quarter-ounce of methamphetamine. SER-75-78. Rodriguez left with the methamphetamine. SER-78. That same day, Fifer, Tavitian, and Rodriguez met the informant in a car in a parking lot. SER-15. Rodriguez sold the

informant 9.85 grams (approximately 0.35 ounces) of methamphetamine. SER-19, 35, 60. Later, Rodriguez gave Delgado the cash from the sale; Delgado let Rodriguez keep \$15 and gave him some methamphetamine as a “broker’s fee.” SER-81.

3. The third sale occurred on September 24, 2014, when the informant asked Fifer for an ounce of methamphetamine. SER-19. Fifer again called Rodriguez, who again contacted Delgado. SER-81-82. Delgado agreed to supply an ounce of methamphetamine, but this time he insisted on receiving payment first. SER-81. That same day, Fifer, Tavitian, and the informant parked outside of Rodriguez’s house. SER-20, 82. Rodriguez biked up to their car, took the cash from the informant, and biked the money to Delgado’s house. SER-39-40, 83-85. Delgado took the cash and handed Rodriguez the methamphetamine. SER-86. Rodriguez biked back to the car, now parked closer to Delgado’s house, and handed over 27.59 grams (approximately 0.97 ounces) of methamphetamine to Fifer. SER-60, 84-86.

At the third sale, the informant asked Rodriguez for a gun and more methamphetamine. SER-86-88. Rodriguez subsequently called Delgado, who agreed to supply a gun and an ounce of methamphetamine. SER-89.

4. On October 1, 2014, Rodriguez drove the informant from Rodriguez’s house to meet Delgado. SER-89-93. Rodriguez drove in a “roundabout way,”

apparently to avoid surveillance. SER-23-24, 26-27, 90. Delgado told Rodriguez to park a few doors down from Delgado's house at Jorge Baraja's house because Baraja stored Delgado's gun for him. SER-24-25, 91-94, 103-04.

Approximately 20 minutes after Rodriguez parked, Delgado walked from the direction of his house up to the passenger side of Rodriguez's car. SER-93, 97-98. Rodriguez and Delgado greeted each other, Rodriguez reached across the informant in the passenger's seat to hand Delgado cash from the informant, and Delgado dropped 26.58 grams (approximately 0.94 ounces) of methamphetamine through the open car window into the informant's lap. SER-61, 98-106; Exhibit 4-1 (video version); Exhibit 4-1 (audio version); 2-ER-261-63.<sup>2</sup> As the drug sale took place, Rodriguez asked Delgado, "Did you convince that fool to get that or not?" SER-102-03; Exhibit 4-1 (video version); Exhibit 4-1 (audio version); 2-ER-262. At trial, Rodriguez clarified, "I'm talking about [Baraja] to see if [Delgado] convinced him to get that. By that, I mean gun." SER-102-03. In the video, Delgado replied that Baraja had to take a family member to the doctor but would "be right back" and told Rodriguez and the informant to wait. SER-103; Exhibit 4-1 (video version); Exhibit 4-1 (audio version); 2-ER-262.

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<sup>2</sup> The transcripts were not admitted into evidence but were shown to the jury and are included in the record. SER-98, 157; 2-ER-261-70.

Rodriguez and the informant drove a short distance and parked. SER-106-07. After waiting for some time, Rodriguez called Delgado “to see what was going on with the gun.” SER-112-13; Exhibit 4-1 (audio version); 2-ER-265-66. Delgado told him to keep waiting. SER-113; 2-ER-265-66. As Rodriguez and the informant waited, the informant asked Rodriguez, “How come the *paisa* didn’t leave it to the youngster?” SER-114; 2-ER-267, Exhibit 4-4 (audio version). At trial, Rodriguez clarified that “paisa” referred to Baraja and “youngster” referred to Delgado. SER-114. Rodriguez replied, “He lives down the street but he leaves all his straps and all the *jale* right there in that pad.” SER-115; 2-ER-267-68. At trial, Rodriguez clarified that “jale” is slang “[f]or drugs” and “straps” is slang for guns, so he “meant that Delgado lives down the street but he left all his drugs and guns in [Baraja’s] house.” SER-115.

Approximately one hour later, the informant purchased a gun at Baraja’s residence. SER-32, 115-16. Delgado was not present. SER-115-16. Sometime after the sale, Delgado gave Rodriguez methamphetamine as a “broker’s fee” for the drug sale and the gun sale. SER-119.

2. Delgado nods when asked if he recognizes his voice on a recording of the October 1, 2014 drug sale.

In 2019, Los Angeles Police Department (LAPD) detectives arrested Delgado and recorded his post-arrest interview. SER-121; 1-ER-46. During the interview, the detectives showed Delgado the video that the informant took of

the October 1 drug sale. SER-124-25. Though the informant's video did not show the seller's face as he stood next to the front passenger door of the car, it captured his voice. SER-34; 1-ER-16. One of the detectives asked, "Do you recognize that's your voice?" SER-125; 2-ER-269. In response, "Delgado shook his head up and down as if indicating yes." SER-125; Exhibit 5-1 at 0:10. A few seconds later, one of the detectives asked, "Do you recognize that? That's your voice?", to which Delgado said, "I mean, [it] sounds familiar." SER-125-26; 2-ER-269-70; Exhibit 5-1 at 0:35-0:38.

3. At trial, witnesses identify Delgado, and the jury finds him guilty on all counts.

A federal grand jury charged Delgado with conspiring to distribute at least five grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 846, and distributing at least five grams of methamphetamine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(viii). 3-ER-432-42.

At trial, the government introduced audio and video recordings of the four drug sales and of Delgado's post-arrest interview. Rodriguez, who testified pursuant to a cooperation agreement, identified Delgado as the supplier for all four drug sales, SER-64, and specifically identified Delgado's voice as that of the seller in the October 1 video, SER-102. The informant, too, identified Delgado's voice as that of the seller in the October 1 video. SER-41-42, 45, 55-56. He also recalled that Delgado "pulled up into the passenger side where I was sitting,

shook [Rodriguez's] hand[.]” SER-46-47. Additionally, the informant recalled seeing a tattoo on the seller's left hand that matched Delgado's tattoo. SER-55-56. The jury also heard that the informant identified Delgado from a photo array in 2018. SER-128-30.

Law enforcement officers also identified Delgado as the seller on October 1, 2014. An FBI agent testified that (1) he had previously met Delgado and seen photographs of him, (2) he surveilled the October 1, 2014, drug sale, and (3) he recognized Delgado as the person who leaned over the passenger's side window. SER-4, 21-22, 30-31. An LAPD detective testified that he recognized Delgado's voice at his post-arrest interview because the detective had previously watched the informant's recording of the October 1 drug sale and had spoken “face to face” with Delgado on “prior occasions.” SER-120, 122-23.

Delgado called two FBI agents in his defense. SER-133-39. One of the agents, Special Agent Haro, testified that in 2019, the informant watched a clip of Delgado's post-arrest interview. According to Special Agent Haro, the informant said that the person in the post-arrest interview (Delgado) looked like the “youngster . . . at the buy” and the informant “recalled seeing tattoos on the person's left arm[.]” SER-137-38.

After approximately three hours of deliberations, the jury found Delgado guilty on all counts. SER-156, 159-61.<sup>3</sup>

## **SUMMARY OF ARGUMENT**

1. Delgado's claims of evidentiary error are unpersuasive.
  - a. The district court did not abuse its discretion in admitting evidence of the gun sale on October 1, 2014, as inextricably intertwined with the drug sale that took place on the same day for any of three reasons: (1) the gun sale was part of the same transaction as the drug sale; (2) the gun sale was within the scope of the charged conspiracy; or (3) the gun sale was integral to the narrative of the October 1 drug sale. Alternatively, this Court can affirm under Federal Rule of Evidence 404(b) because the evidence of the gun sale went to the disputed issue of the drug seller's identity. In any event, any error was harmless because the evidence of Delgado's guilt was overwhelming: Rodriguez, the informant, an FBI agent, and an LAPD officer identified Delgado as the drug seller, and the jurors heard and saw recordings of the drug sales.
  - b. The district court did not abuse its discretion by admitting a clip of Delgado's post-arrest interview under Federal Rule of Evidence 403. In the clip,

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<sup>3</sup> The district court denied Delgado's motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. 1-ER-7-14. He does not challenge that ruling on appeal.

## ARGUMENT

### I. THE DISTRICT COURT DID NOT ERR BY ADMITTING EVIDENCE OF THE GUN SALE OR A CLIP OF DELGADO'S POST-ARREST INTERVIEW.

Delgado asserts that the district court abused its discretion by (1) admitting evidence of Delgado's gun sale on October 1, 2014 (Br. 16-27), and (2) admitting a clip of Delgado's post-arrest interview (Br. 28-32). His arguments lack merit.

#### A. Standard of Review

This Court reviews a "district court's evidentiary rulings for an abuse of discretion and its interpretation of the Federal Rules of Evidence *de novo*." *United States v. Anderson*, 741 F.3d 938, 949 (9th Cir. 2013) (internal quotation marks omitted). But if a defendant fails to object to the admission of evidence at the time of trial or raises a new theory on appeal, this Court reviews for plain error. *United States v. Banks*, 514 F.3d 959, 975-76 (9th Cir. 2008).

#### B. The District Court Did Not Abuse Its Discretion in Admitting Evidence of Delgado's Gun Sale.

##### 1. Background

Before trial, the government moved in limine to admit four clips from the informant's video from October 1, 2014, in which Rodriguez, the informant, and Delgado discuss the sale of a gun. The government moved for admission on two grounds: (1) evidence of the gun sale was inextricably intertwined with

the drug sale on October 1, and (2) the evidence was admissible to prove Delgado's identity and modus operandi under Rule 404(b). D. Ct. Dkt. 127 at 3, 8. Delgado opposed the motion, arguing that the gun and methamphetamine sales were not inextricably intertwined and that the gun sale was not distinctive enough to establish identity or modus operandi. D. Ct. Dkt. 134 at 1-3. He further argued that portions of the video were inadmissible hearsay. *See* 1-ER-20 (referring to D. Ct. Dkt. 139).

Following a hearing, 1-ER-30-71, the court issued a written order permitting the government to introduce the four clips of the October 1 drug and gun sale. 1-ER-18-27. The court explained that the video clips of the gun sale were inextricably intertwined with the drug distribution conspiracy because (1) the evidence of the gun sale ““constitutes a part of the transaction that serves as the basis for the criminal charge,”” and (2) ““the October 1, 2014 firearm sale is reasonably asserted to be part of the larger conspiracy[.]”” 1-ER-21-22 (quoting *United States v. DeGeorge*, 380 F.3d 1203, 1220 (9th Cir. 2004)). Thus, although the court agreed with Delgado that the clips were ““not proper modus operandi evidence”” under Rule 404(b), 1-ER-20 n.5, and although the court did not address the government’s identity argument, the court held that the clips were admissible. 1-ER-21. The government introduced the four clips at trial. SER-44, 50-51, 98, 104, 107, 112-13; 2-ER-261-68 (transcripts of clips).

After the jury found Delgado guilty, Delgado moved for a new trial, arguing that (1) the court erred in admitting the clips involving the gun sale on the theory that the gun sale was “‘other act’ evidence” that is admissible “only to the extent . . . necessary to offer a coherent story regarding the charged offense” under Rule 404(b), and (2) the evidence was unfairly prejudicial under Rule 403. 2-ER-75-77 (emphasis omitted). The district court denied the motion, holding in relevant part that “nothing has changed” to cause it to reconsider and that Delgado had not shown prejudice to warrant a new trial. 1-ER-9.<sup>4</sup>

## 2. Legal principles

Federal Rule of Evidence 404(b) states that “[e]vidence of any other crime, wrong, or act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” Fed. R. Evid. 404(b)(1). However, “[o]ther act” evidence that is ‘inextricably intertwined’ with a charged offense is independently admissible and is exempt from the requirements of Rule 404(b),” *Anderson*, 741 F.3d at 949, because it is ““intrinsic to the charged offense,””” *ibid.* (quoting Fed. R. Evid. 404(b) advisory committee notes (1991)). There are two ways evidence can be inextricably intertwined with a charged offense. First, evidence is “inextricably

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<sup>4</sup> Delgado has not raised a Rule 403 argument on appeal.

intertwined” if it is “part of the transaction that serves as the basis for the criminal charge.” *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012 (9th Cir. 1995). Consequently, in conspiracy cases, evidence of conduct that occurs “within the temporal scope of the conspiracy and comprised the conspiracy” is intrinsic evidence. *United States v. Rizk*, 660 F.3d 1125, 1131 (9th Cir. 2011) (internal quotation marks omitted); *ibid.* (the government “may submit proof on the full scope of the conspiracy; it is not limited in its proof to the overt acts alleged in the indictment”). Second, evidence that is “necessary” for “the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime” is inextricably intertwined. *Vizcarra-Martinez*, 66 F.3d at 1012-13.

3. The gun sale was inextricably intertwined with the drug sale.

For any of three reasons, the evidence of the gun sale on October 1 was inextricably intertwined with the drug sale that occurred on the same day: (1) it was part of the same transaction; (2) it was within the scope of the charged conspiracy; and (3) it was necessary to tell a coherent story of the drug sale.

a. *The gun sale was part of the same transaction as the drug sale.*

The evidence of the gun sale was inextricably intertwined with the drug sale that formed the basis of Delgado’s distribution count because, as the district court explained, the evidence “related to the gun sale [was] ‘part of the same

transaction' as the charged drug sale[.]” 1-ER-21-22. First, the informant, via Rodriguez, asked about buying a gun and methamphetamine in the same conversation immediately after the third drug sale. SER-86-87. Second, Delgado established the price for the drugs and the gun. SER-99, 119. Third, Delgado directed Rodriguez to park outside Baraja’s house “[b]ecause that’s where the transaction was going to take place for the firearm” and it is where the drug sale took place. SER-92-93, 103. Fourth, the parties anticipated that Delgado would sell the informant methamphetamine and a gun in a single transaction on October 1; Delgado explained that the reason they had to wait after completing the drug sale was that Baraja—who had possession of Delgado’s gun—had to take a family member to a doctor unexpectedly. *See* Exhibit 4-1 (audio); 2-ER-262; SER-103-05. Fifth, Delgado “purportedly stored his drugs and firearms together[]” at Baraja’s house. 1-ER-21-22; 2-ER-267; SER-115. Sixth, and as the district court explained and as the jury saw and heard, the conversation between Rodriguez and Delgado about the gun “occurs immediately after Mr. Delgado delivers the drugs and in the same location (standing outside Mr. Rodriguez’s car).” 1-ER-21 (referring to Exhibit 4-1). Seventh, after the drug sale, Rodriguez stayed in contact with Delgado to coordinate the gun sale. SER-107. Eighth, the gun sale took place approximately one hour after the drug sale, at the same address where Delgado

directed Rodriguez to park earlier in the day. SER-32-33, 92-94. Finally, sometime after the sale, Delgado gave Rodriguez methamphetamine as a “broker’s fee” for the drug sale and the gun sale. SER-119.

More generally, evidence involving guns and drugs is often inextricably intertwined because guns “are known tools of the trade of narcotics dealing because of the dangers inherent in that line of work.” *United States v. Butcher*, 926 F.2d 811, 815-16 (9th Cir. 1991) (internal quotation marks omitted) (drug evidence was inextricably intertwined with possessing firearm); *United States v. Gordon*, 851 F. App’x 89, 90 (9th Cir. 2021) (unpublished) (same); *United States v. Cain*, 754 F. App’x 538, 540-41 (9th Cir. 2018) (unpublished) (same); *United States v. Thomas*, 242 F.3d 1028, 1032 & n.5 (11th Cir. 2001) (collecting cases).

And courts have affirmed where uncharged conduct related to charged conduct took place shortly after or before the charged conduct. *See Butcher*, 926 F.2d at 813 (guns found during parole search of residence after arrest from traffic stop were inextricably intertwined with gun found in car); *United States v. Liesse*, No. 20-10096, 2021 WL 5275819, at \*2 (9th Cir. Nov. 12, 2021) (unpublished) (conduct within hours of making threatening statements inextricably intertwined); *United States v. Chealy*, 185 F. App’x 928, 933-34 (11th Cir. 2006) (per curiam) (unpublished) (drug sale one week before arrest for firearms possession was inextricably intertwined).

*b. The gun sale was within the scope of the conspiracy.*

The government may introduce evidence of uncharged conduct that “show[s] the full scope of th[e] conspiracy.” *Rizk*, 660 F.3d at 1132. Uncharged conduct does not become “other acts simply because the defendant is indicted for less than all [the defendant’s] actions.” *United States v. Williams*, 989 F.2d 1061, 1070 (9th Cir. 1993) (internal quotation marks omitted) (evidence of uncharged drug sales intrinsic to charged drug conspiracy); *United States v. Bonanno*, 467 F.2d 14, 17 (9th Cir. 1972) (“In conspiracy prosecutions, the Government has considerable leeway in offering evidence of other offenses.”); *United States v. Serang*, 156 F.3d 910, 915 (9th Cir. 1998) (same).

The gun sale was within the scope of the charged conspiracy. Here, the government charged Rodriguez’s agreement to sell drugs and a gun to the informant as an overt act. *See* 1-ER-22; 3-ER-435. The clips showed that Delgado coordinated the drug and gun sale on October 1; paid Rodriguez a “broker’s fee” for selling the gun and methamphetamine; and kept his gun and some drugs at Baraja’s house. 1-ER-22; 2-ER-220, 224, 229-30, 267. *See, e.g.*, *United States v. Sitton*, 968 F.2d 947, 958 (9th Cir. 1992) (guns and methamphetamine not charged as overt act in conspiracy but within the time scope of drug conspiracy inextricably intertwined), *abrogated on other grounds by* *Koon v. United States*, 518 U.S. 81, 116 (1996); *United States v. Lillard*, 354 F.3d

850, 854 (9th Cir. 2003) (conversations among witnesses identifying defendant as driver during cocaine shipment admissible as intrinsic evidence in conspiracy); *United States v. Guzman*, 926 F.3d 991, 1000 (8th Cir. 2019) (references to defendant’s “involvement with marijuana and two firearms” inextricably intertwined with conspiracy to distribute methamphetamine); *United States v. Cooper*, 624 F. App’x 819, 821 (4th Cir. 2015) (per curiam) (unpublished) (evidence of gun possession intrinsic evidence of ongoing drug conspiracy).

c. *The gun sale was integral to the narrative.*

Additionally, the gun sale evidence was admissible as necessary to complete the narrative.<sup>5</sup> In particular, the jury needed to understand what happened when Delgado walked up to the car with Rodriguez and the informant, why Rodriguez and the informant waited after the completed drug sale, and why Rodriguez called Delgado several times that afternoon. The clips also showed the relationship between Rodriguez and Delgado: Rodriguez connected Delgado to a willing buyer, and Delgado supplied the contraband. See *United States v. Dorsey*, 677 F.3d 944, 952 (9th Cir. 2012) (testimony that

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<sup>5</sup> Though the district court did not admit the evidence on this basis, this Court can affirm the admission of evidence on any basis supported by the record. *United States v. Ramirez-Robles*, 386 F.3d 1234, 1245 (9th Cir. 2004).

defendant possessed gun on prior occasion formed part of ““coherent and comprehensible story”” that defendant engaged in witness tampering and discharging a firearm); *United States v. Spears*, 60 F. App’x 671, 673 (9th Cir. 2003) (unpublished) (evidence that co-conspirator committed homicide admissible as intrinsic evidence in cocaine conspiracy to allow government to present coherent picture of conspiracy and relationship among co-conspirators); *United States v. Johnson*, 327 F. App’x 748, 750 (9th Cir. 2009) (unpublished) (pre-arrest surveillance video admissible to show context of crime); *United States v. McRath*, 860 F. App’x 414, 415-16 (6th Cir. 2021) (unpublished) (evidence of defendant’s actions before and after controlled buy—robbing informant—completed story of conspiracy).

*d. There was no error because the court gave a limiting jury instruction.*

The district court gave a limiting instruction that “[t]he defendant is not on trial for firearms. You may not consider this [gun] evidence as proof that the defendant has a bad character or any propensity to commit crimes.” SER-146. This kind of instruction goes far toward alleviating any unfair prejudice that the testimony could have caused Delgado. *United States v. Hardrick*, 766 F.3d 1051, 1056 (9th Cir. 2014) (district court limited prejudicial effect of prior bad acts by giving jury instruction to consider acts for limited purpose); *United States v. Stanley*, 859 F. App’x 104, 105 (9th Cir. 2021) (unpublished) (no error in

admitting prior bad acts where court gave limiting instruction); *Thomas*, 242 F.3d at 1033 (no abuse of discretion in admitting drug sales in firearms possession case where court instructed jury to use drug sales only for determining whether defendant knowingly possessed firearm).

4. Alternatively, this Court can affirm under Rule 404(b).

Though the district court did not rule on the government's Rule 404(b) identity theory, this Court can affirm on any basis supported by the record. *United States v. Ramirez-Robles*, 386 F.3d 1234, 1245 (9th Cir. 2004); *Gordon*, 851 F. App'x at 90 (inextricably intertwined evidence was alternatively admissible under Rule 404(b)). Since the government's motion provided the required notice to Delgado, *see* D. Ct. Dkt. 127 at 3, there is no procedural bar to this Court affirming on 404(b) grounds. *See* Fed. R. Evid. 404(b)(3)(A).

Under Rule 404(b), evidence of other crimes, wrongs, or acts is inadmissible to show that a person acted in accordance with a character trait. It is, however, admissible for another purpose, such as proving identity. Fed. R. Evid. 404(b)(2). "Rule 404(b) is a rule of inclusion—not exclusion[.]" *United States v. Lague*, 971 F.3d 1032, 1042 (9th Cir. 2020) (internal quotation marks omitted), *cert. denied*, 141 S. Ct. 1695 (2021).

Recordings of a defendant's voice that either discuss or are themselves prior bad acts are admissible to show identity. *See United States v. Gallo-Moreno*,

584 F.3d 751, 756-57 (7th Cir. 2009) (no abuse of discretion under 404(b) in admitting testimony about similarities in speech between unknown drug distributor and defendant); *United States v. Eckhardt*, 466 F.3d 938, 946-47 (11th Cir. 2006) (recordings of threatening phone call admissible to prove identity); *United States v. Brooks*, 161 F.3d 1240, 1243 (10th Cir. 1998) (voice recording of uncharged drug transactions admissible under 404(b) to establish identity).

Here, as the government explained in its motion to admit the gun sale evidence, “[t]he recording of October 1, 2014, helps identify [Delgado] as the drug and gun [supplier]. Identity in this case is a central issue, as the undercover recording captured the supplier’s voice but not his face.” D. Ct. Dkt. 127 at 10. The first clip captured Delgado’s voice, which was central to establishing Delgado as the seller on October 1. The clip (1) confirmed Rodriguez’s and the informant’s account and (2) allowed jurors to hear the seller’s voice and compare it to Delgado’s voice in his post-arrest interview.

5. Any error was harmless.

Even if there was error in admitting the gun sale evidence, the error was harmless. If a district court errs in admitting evidence, this Court will affirm a conviction if “it is more probable than not that the error did not materially affect the verdict.” *United States v. Spangler*, 810 F.3d 702, 708 (9th Cir. 2016) (internal quotation marks omitted).

In light of the government's overwhelming evidence, any error was harmless. *See* 1-ER-9 (district court denying motion for new trial because Delgado "fail[ed] to show that the admission of [the gun] evidence prejudiced Mr. Delgado enough to warrant a new trial"). At trial, the informant (who had previously and consistently identified Delgado as the seller), Rodriguez, an FBI agent, and an LAPD detective all identified Delgado as the seller based on prior interactions with him, his face, his tattoo, and his voice. And the jurors saw and heard recordings of the drug transactions. *See United States v. Carpenter*, 923 F.3d 1172, 1183 (9th Cir. 2019) (evidentiary error harmless where other evidence of guilt was overwhelming).

**C. The District Court Did Not Abuse Its Discretion in Admitting the Clip of Delgado's Post-Arrest Interview Where the Detectives Ask If He Recognizes His Voice and Delgado Nods.**

Delgado argues (Br. 28) that the district court abused its discretion under Rule 403 in admitting the clip of his post-arrest interview where he nodded in response to the detectives' questions about whether he recognized the voice in the informant's video of the October 1 drug sale. Specifically, Delgado contends that the prejudice stems from his explanation of the evidence, not the evidence itself. Delgado argues that he could not explain to the jury that he could not affirmatively deny his presence at *this particular* drug sale on October 1 because

## **A P P E N D I X 12**

CA NO.22-50070

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ) D.C. No. 2:18-cr-00758-DSF  
Plaintiff-Appellee, )  
v. )  
CHRISTOPHER DELGADO, )  
Defendant-Appellant. )

**REDACTED APPELLANT'S REPLY BRIEF**

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE R. DALE S. FISCHER  
United States District Judge

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CA NO.22-50070

IN THE UNITED STATES COURT OF APPEALS  
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UNITED STATES OF AMERICA, ) D.C. No. 2:18-cr-00758-DSF  
Plaintiff-Appellee, )  
v. )  
CHRISTOPHER DELGADO, )  
Defendant-Appellant. )

I.

## ARGUMENT

A. IT WAS ERROR TO ADMIT EVIDENCE OF THE GUN SALE.

## 1. Review Is De Novo.

Though reversal is required under any standard of review, it is the de novo standard of review that applies to the question of whether the gun sale evidence is inextricably intertwined evidence and/or evidence of the charged conspiracy and so not subject to Rule 404(b). As this Court reiterated in the “inextricably intertwined” case of *United States v. Carpenter*, 923 F.3d 1172 (9th Cir. 2019), “We review de novo whether evidence is other act evidence within the meaning of Fed. R. Evid. 404(b).” *Id.* at 1180-81.

2. The Evidence Was Not Inextricably Intertwined with the Evidence of the Drug Sale.

Neither of the “inextricably intertwined” rationales apply here.

a. The “part of the same transaction” rationale.

First, the gun sale was not part of the same transaction as the drug sale. The cases the government cites as “generally” recognizing that guns and drugs are “often” (but therefore not always) inextricably intertwined are all distinguishable. In one of the cases, the gun and the drugs were inextricably intertwined because the gun was to be used as payment for drugs. *See United States v. Gordon*, 851 Fed. Appx. 89, 90 (9th Cir. 2021) (unpublished). In the other cases, the guns and drugs were inextricably intertwined because the guns were possessed by drug dealers to protect their drugs, and guns are “tools of the trade of narcotics dealing,” *United States v. Butcher*, 926 F.2d 811, 816 (9th Cir. 1991) (quoting *United States v. Simon*, 767 F.2d 524, 527 (8th Cir. 1985)). *See United States v. Cain*, 754 Fed. Appx. 538, 540-41 (9th Cir. 2018) (unpublished); *United States v. Thomas*, 242 F.3d 1028, 1032 (11th Cir. 2001); *Butcher*, 926 F.2d at 816. Such “tools of the trade” possession is not what there was in this case.

Turning from this inapplicable generality to the specific facts of the present case, there are sales that were separate in time, were in different locations, and had different sellers. The drug sale took place when Mr. Delgado walked up to the car, while the gun sale took place later in the afternoon. The drug sale took place at the car, while the gun sale took place in Mr. Baraja’s garage. The seller who took

the money for the drugs and provided the drugs was Mr. Delgado, while the seller who took the money for the gun and provided the gun was Mr. Baraja.

In challenging the defense argument, the government exaggerates and/or mischaracterizes the record or overlooks important caveats. The claim that the informant asked to buy a gun and buy more drugs in the same conversation, *see* Govt. Brief, at 17, overlooks the fact that there were two separate requests. *See* SER-87 (question, “What did he ask for?,” and answer, “He asked for a firearm,” then second question, “Did he ask for more drugs?,” and second answer, “Yes.”). The claim that Mr. Delgado “established” the price for the drugs and the gun, Govt. Brief, at 17, is a mischaracterization because, while Mr. Rodriguez testified Mr. Delgado did “tell” him the price of the methamphetamine, SER-99, the price of the gun was simply “negotiated through” Mr. Delgado, SER-119, as if Mr. Delgado was simply a middleman.

The claim that “the parties” anticipated Mr. Delgado would sell the drugs and gun in a single transaction, Govt. Brief, at 17, may describe what Mr. Rodriguez anticipated – though he never expressly stated this – but what Mr. Delgado said was that they had “to wait for [Mr. Baraja] to come back,” SER-103. The claim that Mr. Delgado “purportedly stored his drugs and firearms together” at Mr. Baraja’s house, Govt. Brief, at 17, simply reflects what Mr. Rodriguez told the informant while they were waiting for the gun, *see* 2-ER-267, as evidenced by the district court’s qualifying word of “purportedly,” 1-ER-22. Further, this claim was inconsistent with the fact that it was only the gun, not the drugs, that had to await Mr. Baraja’s return, and Mr. Rodriguez’s question about whether Mr. Delgado had convinced “that fool,” i.e., Mr. Baraja, to “get that,” i.e., the gun, 2-ER-207–08, as if the decision about the gun was Mr. Baraja’s.

The claim that the *conversation* about the gun took place immediately after the delivery of the drugs, *see* Govt. Brief, at 17, omits the facts that (a) it was Mr. Rodriguez who brought up the subject of the gun, *see* 2-ER-262, and (b) the actual sale of the gun took place much later, took place in the garage rather than at the car, and was by Mr. Baraja, not Mr. Delgado, with Mr. Delgado not even present. Related to this, the claim that the gun sale took place approximately one hour after the drug sale and “at the same address,” Govt. Brief, at 17, brushes over the fact that an hour later is a different time and the drug sale was on the street in front of the residence while the gun sale was in the residence’s garage.

In sum, the great majority of the government’s claims either exaggerate or mischaracterize the record or overlook important caveats. What really took place here were two separate transactions separated by an hour or more in time, in two different locations, with different sellers.

b. The “coherent and comprehensible story” or “integral to the narrative” rationale.

Glaringly absent from the government’s “integral to the narrative” argument is a response to the perfectly coherent and comprehensible story outlined in Appellant’s Opening Brief that leaves out the gun sale. *See* Appellant’s Opening Brief, at 18-24.<sup>1</sup> The government offers absolutely no explanation of why this

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<sup>1</sup> The story could not be parsed in this way in the cases cited by the government. In *United States v. Dorsey*, 677 F.3d 944 (9th Cir. 2012), the gun that witnesses testified the defendant had previously possessed appeared to be the gun used in the charged shooting. *See id.* at 952. *See also United States v. Wells*, 879 F.3d 900, 928-29 (9th Cir. 2018) (distinguishing *Dorsey* on this basis). In

suggested story is not coherent and comprehensible. The government's concern that the jury would not understand "why Rodriguez and the informant waited after the completed drug sale, and why Rodriguez called Delgado several times that afternoon," Govt. Brief, at 20, is misplaced because the jury did not have to hear about the wait and the calls.

3. The Evidence Was Not Admissible as Within the Scope of the Charged Conspiracy.

The government's claim that "the gun sale was within the scope of the charged conspiracy," Govt. Brief, at 19, is simply wrong. It is true there was a passing reference in one of the *overt act* paragraphs to Mr. Rodriguez's "agree[ment] to sell drugs and the firearm to the confidential informant." 3-ER-435. But the *charge* was solely about drugs. As set forth in the first paragraphs of the indictment:

[The defendants] conspired and agreed with each other to knowingly and intentionally distribute the following:

1. at least five grams of methamphetamine, a schedule II controlled substance, in violation of Title 21, United States Code Sections 841(a)(1), (b)(1)(B)(viii); and

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*United States v. Spears*, 60 Fed. Appx. 671 (9th Cir. 2003) (unpublished), which is improperly cited under Circuit Rule 36-3(c) governing citation of unpublished opinions, the homicide witnesses testified about appears to have been committed in furtherance of the charged conspiracy. *See id.* at 673. In *United States v. Johnson*, 327 Fed. Appx. 748 (9th Cir. 2009) (unpublished) there was an ongoing story about why the defendant had the gun he was charged with possessing. *See id.* at 750. In *United States v. McRath*, 860 Fed. Appx. 414 (6th Cir. 2021) (unpublished), the testimony about the other conduct "completed the story of" this particular episode in the conspiracy." *Id.* at 415 (quoting *United States v. Marrero*, 651 F.3d 453, 471 (6th Cir. 2011)).

2. cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code Sections 841(a)(1), (b)(1)(C).

3-ER-432-33.

It is this conspiracy solely to distribute methamphetamine and cocaine that was alleged in the indictment. It is not a conspiracy to distribute drugs and guns that was alleged in the indictment.<sup>2</sup>

4. The Government's Alternative Rule 404(b) Ground for Affirmance Fails.

The government's alternative argument that this Court can affirm on the ground that evidence of the gun sale was admissible under Rule 404(b) to prove Mr. Delgado's identity also fails. To begin, this is not a rationale the district court relied upon. While this Court could consider it independently, the Court is not obliged to.

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<sup>2</sup> Once again, the cases the government cites are distinguishable. *United States v. Sitton*, 968 F.2d 947 (9th Cir. 1992), is distinguishable because both drugs and weapons were “the alleged purposes and means of the conspiracy” in that case. *Id.* at 958. *United States v. Lillard*, 354 F.3d 850 (9th Cir. 2003), is distinguishable because the defendant had stolen the eight kilograms of cocaine at issue from “the very shipment that provided the basis for his involvement in the conspiracy to possess and distribute cocaine.” *Id.* at 854. *United States v. Guzman*, 926 F.3d 991 (8th Cir. 2019), is distinguishable because it is an “inextricably intertwined” case in which the evidence of firearms and other drugs “merely ‘completes the story’ or provides context to the charged crime.” *Id.* at 1000 (quoting *United States v. Young*, 753 F.3d 757, 770 (8th Cir. 2014)). *United States v. Cooper*, 624 Fed. Appx. 819 (4th Cir. 2015) (unpublished), is simply another case where evidence of drugs was admitted to prove knowing possession of a gun under the “tools of the trade” theory discussed *supra* p. 2. *See id.* at 821.

More important, the only part of the gun sale evidence which the government claims shows identity is the first of the recording clips, in which there are only vague references – by Mr. Rodriguez – to whether Mr. Delgado had convinced “that fool” to get “that.” *See* 2-ER-261-63. But the evidence which was prejudicial was the testimony specifically referencing “guns” and describing the actual sale of a gun. This first recording clip could have been introduced without testimony about “guns” and the gun sale, and the government story would still have been left perfectly “coherent and comprehensible.” *See* Appellant’s Opening Brief, at 24-25. Any arguable need for the first recording clip to buttress the government’s identity argument is not a justification for admitting the testimony referencing “guns” and describing the actual gun sale.

5. The District Court’s Limiting Instruction Did Not Cure the Error.

Finally, the government’s additional argument that “[t]here was no error because the government gave a limiting jury instruction,” Govt. Brief, at 21, puts the cart before the horse. What a limiting instruction does is offset prejudice from Rule 404(b) or “inextricably intertwined” evidence that is properly admitted, as the evidence in the three cases cited by the government was, *see United States v. Stanley*, 859 Fed. Appx. 104, 105 (9th Cir. 2021) (unpublished), *cert. denied*, 142 S. Ct. 842 (2022); *United States v. Hardrick*, 766 F.3d 1051, 1056 (9th Cir. 2014); *United States v. Thomas*, 242 F.3d at 1033. But “evidence that fails to satisfy the [requirements for admissibility] cannot be rendered admissible simply because the district court provides a limiting instruction.” *United States v. Hall*, 858 F.3d 254, 279 (4th Cir. 2017). A limiting instruction is for admissible evidence, not

inadmissible evidence.

B. IT WAS ERROR TO ALLOW THE GOVERNMENT TO INTRODUCE THE EXCERPT OF THE POST-ARREST INTERROGATION.

None of the five points made in the government's response to the defense argument about the excerpt of the post-arrest interrogation, *see* Govt. Brief, at 32-35, hold water. First, the absence of case law clearly addressing the question of whether the prejudicial nature of evidence a defendant would have to introduce to explain government evidence is a proper consideration under Rule 403 does not mean there cannot have been an abuse of discretion. Whether the prejudicial nature of explanatory evidence is a proper consideration is a *legal* question, and *legal* aspects of an evidentiary ruling are reviewed *de novo*. *See United States v. Fryberg*, 854 F.3d 1126, 1130 (9th Cir. 2017) (evidentiary rulings reviewed *de novo* when “issues of law predominate” and for abuse of discretion “when the inquiry is essentially factual” (quoting *United States v. Mateo Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000)). *See also United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc) (district court “necessarily abuse[d] its discretion if it based its ruling on an erroneous view of the law” (quoting *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990)).

Second, the government focuses too narrowly on just one Rule 403 consideration in discussing the balancing of probative value against unfair prejudice. “Unfair prejudice” is just one of the concerns that Rule 403 requires courts to weigh against the probative value of evidence. Another concern courts must weigh is “misleading the jury.” Fed. R. Evid. 403. It is that concern

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No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES  
  
**CHRISOPHER DELGADO, PETITIONER,**  
**vs.**  
**UNITED STATES, RESPONDENT.**

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**CERTIFICATE OF SERVICE**

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I, Carlton F. Gunn, hereby certify that on this 28th day of June, 2023, a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

June 28, 2023

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s/ Carlton F. Gunn  
CARLTON F. GUNN  
Attorney at Law