No.

in the

Supreme Court

of the

United States

Term,

MICHAEL MEADOWS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

Does drug profile testimony have any legitimate use as trial evidence?

II.

Does the cumulative error doctrine exist and, if so, can errors to which no objections are made be accumulated when they demonstrate a denial of due process?

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The Petitioner, Michael Meadows, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on August 7, 2020.

OPINION BELOW

The Sixth Circuit's opinion in this matter was not published and is attached hereto in Appendix 1.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on August 7, 2020. This petition is

timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner was accused of being a Felon in Possession of a Firearm and Possession with Intent to Distribute Fentanyl and Possession of a Firearm in furtherance of drug trafficking. Petitioner entered a not guilty plea and the case went to trial.

During the Voir Dire the Court instructed the jury, "Now, you hear 'United States of America' or 'State of Ohio' instead of an actual victim's name because … a crime against one person is a crime against everyone within that jurisdiction. … It would be the Governmental entity, United States of America or State of Ohio, and again because a crime against you is a crime against everyone within that jurisdiction.

"So that's why -- let's say for the sake of argument you were a victim of an aggravated robbery. It's not your name, John Doe or Jane Doe, versus the person that you allege committed the crime. It would be the Governmental entity, United States of America or State of Ohio, and again because a crime against you is a crime against everyone within that jurisdiction."

In opening statement, the Government told the jury that they would hear that a federal agent obtained a search warrant for Petitioner's residence and vehicle, seeking evidence of trafficking of fentanyl and heroin, and of possession of firearms. The Government said that based upon the "intelligence" the agent had gathered, the agent approached Petitioner at Petitioner's place of employment with a search

warrant. The Government said that the agent asked Petitioner to assist in prosecuting Petitioner's supplier, but Petitioner refused to name or to cooperate in prosecuting his supplier. In response to the agent's inquiry, Petitioner said, "I can't say that." The agent conducted the search and found heroin, a loaded handgun, over $8,600.00 in currency, a razor, and sleeping pills.

The Government told the jury that they would hear from an Akron detective with over 20 years of experience in drug trafficking investigations. The Government said the detective would explain guns and drug trafficking. The Government told the jury that they would hear that Petitioner's gun travelled in interstate commerce.

The Government's first witness was the case agent employed by the Food and Drug Administration, Office of Criminal Investigations. The agent testified to his extensive experience investigating drug trafficking offenses, having executed many drug trafficking search warrants. The agent testified to having investigated drug trafficking offenses involving illegal drugs which come into the Northern District of Ohio from the Caribbean.

The agent testified that he obtained a search warrant for Petitioner's residence looking for items associated with drug trafficking.

The agent was asked in general what "steps" he took in order to execute a search warrant. The agent mentioned conducting surveillance, criminal record check, other records, the criminal target's background, traffic to the place to be searched, concerns about safety including the safety of bystanders, and whether or

not there are co-conspirators.

The agent was asked about general safety concerns when executing a drug search warrant. In response, the agent indicated that airborne contaminants and guns were primary concerns because drugs and guns go together. The agent testified that based upon his training and experience, drug trafficking is typically a cash business where drug dealers fear being robbed.

The agent was asked about the search warrant. The agent testified, "When I -- the investigation culminated to the point where I had probable cause, I obtained a search warrant and determined that [Petitioner] was trafficking in heroin and drugs, and got the search warrant."

The agent was asked about the manner in which he executed Petitioner's search warrant. The agent testified that he did not want to make an exigent entry into the residence, stressing again that drug offenses and guns go hand-in-hand, with a high probability that there would be firearms present. The agent indicated that he wanted to acquire consent in executing the warrant, in part for reasons of safety. The agent indicated that he wanted to keep the warrant secret so that other individuals involved in illegal drugs with Petitioner would not be alerted to law enforcement's awareness of Petitioner's involvement in illegal drugs. The agent indicated that this type of investigation had a tendency to expand to encompass additional individuals. The agent indicated that he wanted the investigation of Petitioner to expand to encompass additional individuals.

The agent was asked what “steps” he took to execute the Petitioner’s search warrant. The agent indicated that all the agents and personnel who would assist in executing the warrant met at the local police station; everyone was briefed about their duties in different possible scenarios. The agent and two other FDA agents went to Petitioner's place of employment. The agent and the other FDA agents located Petitioner's supervisor and informed him of their reason for being there, i.e., a search warrant for Petitioner’s residence and vehicles and said that they wanted to talk to Petitioner.

Petitioner was confronted and informed that the agents did not intend to arrest him that day. The agent indicated that he was seeking Petitioner’s cooperation in executing the search warrant to avoid any damage to Petitioner's house. Petitioner provided a key to his residence and stated that he had heroin and a gun in his bedroom.

The prosecutor asked if the agent had any further conversation with Petitioner in regards to seeking his cooperation. At that time the agent said that Petitioner volunteered that one of his biggest customers is a white male named Jim but would not elaborate. The agent said that he asked Petitioner to identify his supplier but that Petitioner said, "I can't say that." The interview was discontinued. The agent explained to Petitioner that his cooperation was imperative and that the cooperation had to be timely to encompass Petitioner’s drug suppliers.

The prosecutor asked if the agent made further attempts to obtain Petitioner’s

cooperation against his source. The agent said that he contacted Petitioner three weeks later to see if he would consider cooperating against his drug source but Petitioner remained silent.

The agent was asked about safety concerns regarding the dangers of Fentanyl in executing the search warrant for Petitioner's residence. The agent testified that airborne Fentanyl could penetrate through the skin, causing immediate serious health problems, such as cardiac arrest. The agent testified that was why the agents were issued Narcan, wore rubber gloves, leather gloves, and contaminant masks.

The agent testified to having found three bundles of currency totaling $8,600.00, a digital scale, a razor blade, a loaded firearm, sleepinall, rizzy (a possible cutting agent), and a chunky rock of off-brown substance in Petitioner ' bedroom. The agent testified that his knowledge of rizzy was based upon a police department-issued bulletin.

The agent was asked about procedures involving controlled purchases of drugs, which encompassed the need to know the street value of drugs. The agent testified concerning the danger to an informant sent to purchase illegal drugs if the informant were given the wrong amount of currency or if something occurred that's not customary, or that is out of the ordinary, that would raise suspicions which probably would result in the informant being hurt or killed. The agent testified that the street value of a gram of heroin was between one hundred to $130 per gram but that he did not know the street value of Fentanyl.

Cross examination of the agent disclosed: that Petitioner was not given Miranda rights; that although it is common for drug dealers to have throwaway cell phones, Petitioner had none; that Petitioner had no packaging materials for selling drugs, such as baggies or aluminum foil; that Petitioner's conversation with the agent was not recorded; that Petitioner had a scale which could be used by a drug user who was not selling drugs. The court prohibited inquiry concerning the confidential source who provided the "intelligence" that Petitioner was dealing drugs.

The government was allowed to present Petitioner's statements wherein he informed the agents regarding the location of the firearm and heroin which Petitioner admitted again at a pretrial. However, the court would not permit testimony concerning the remainder of Petitioner's statement in which he complained that the government was attempting to prove that he sold drugs facilitated with the use of a gun without any testimony that Petitioner had sold drugs or possessed a gun in connection therewith.

The Government's next witness was Detective Brian Callahan, Detective Narcotics Bureau with the Akron Police Department. The detective testified that he had worked 17 years in the Narcotics Bureau of the Akron Police Department and that the only crimes he investigated were drug traffickers.

The detective testified that he had absolutely nothing to do with the investigation of Petitioner and that he did not know why he had been called as a

witness. The detective could only guess at why he was called as a witness, whether or not he was being called as an expert, or even why he was asked the questions he was asked. The detective emphatically denied testifying to expert opinions.

The detective was asked what "steps" he took in the typical drug trafficking investigation. Those "steps" included: surveillance, collection of different types of records, bank records, utility records, traffic stops, long-term, short-term traffic, development of sources, the making of controlled buys, obtaining search warrants, the execution of search warrants.

The detective was asked how many drug trafficking search warrants he had executed. He responded, "Hundreds."

The detective was asked if he might investigate drug traffickers overseas or in other states. He answered in the affirmative.

Again, the detective was asked specifically what "steps" he took when preparing to execute a drug trafficking search warrant. The detective profiled the investigative techniques employed in drug trafficking investigations, to-wit: surveillance, controlled buys, traffic stops, utility records. This time the detective included the use of force, potential violence, firearms, and bullet-proof vests. The detective again testified to the profile of guns found in drug traffickers' bedrooms and other places. The detective was asked if, based upon his experience, he had learned from co-operating drug traffickers why firearms were typically present in their premises. The detective said that it was fear of robbery.

The prosecutor asked whether, after the detective executed drug trafficking search warrants, any of the targets turned and cooperated? The detective answered in the affirmative.

The prosecutor asked if the detective learned, given his experience, why firearms were typically present in a drug trafficker's residence. The detective answered "like I stated before" narcotics were like currency and oftentimes drug traffickers were robbed by other drug traffickers.

The prosecutor asked the detective to outline the precautions he typically took to prepare for execution of a fentanyl search warrant. The detective responded that his team are issued gloves and Narcan; gloves because fentanyl can be absorbed through the skin. The detective was asked: if he had ever seen fentanyl collected, the law enforcement policy in regards to fentanyl, and if he had ever before seen heroin and fentanyl trafficked together. He answered in the affirmative. The detective was asked about his experience regarding how often the drug dealers do not know what is in the drugs they deal. He answered that was not uncommon. The detective was asked about Carfentanil's dangerously addictive characteristics.

The detective could not give a personal usage quantity of illegal drugs.

The prosecutor again asked about the kinds of general "things" the detective typically seizes in these searches. The detective responded that narcotics, firearms, currency, scales, baggies, and money counters are what they search for in drug trafficking search warrants, but they do not always find them all.

The detective testified that he had no knowledge of sleepinall. The detective was asked profiling questions about the significance of sleeping pills possessed by drug traffickers in drug trafficking investigations. The detective responded that sleeping pills could be used as a cutting agent for illegal drugs.

The prosecutor closed his direct examination emphasizing that the detective knew nothing about Petitioner's case and had not viewed any exhibits.

Cross examination of the detective disclosed: that guns are not possessed only by drug dealers but that citizens possess guns for protection and usually keep them in their bedrooms as did Petitioner; that although it is usual for drug dealers to have throwaway cell phones Petitioner had none; that although it is usual for drug dealers to have multiple cell phones, Petitioner had none; that although it is usual for drug dealers to keep ledgers, Petitioner had none; that although it is usual for drug dealers to have baggies to package drugs for resale, Petitioner had none; that although it is usual for drug dealers, Petitioner had no other packaging materials, such as, a supply of aluminum foil for selling drugs; that Petitioner's conversation was not recorded; that Petitioner had a scale which could be used by a drug user who was not selling drugs; and that Petitioner worked a regular labor-intensive job.

The prosecutor asked how and when digital scales and razors are typically found during a search and used by a typical drug trafficker. The detective answered. The prosecutor asked if keeping currency was another way for a drug dealer to keep something akin to a ledger. The detective answered in the affirmative.

ATF Special Agent John Laurito testified to the identification and interstate nexus of the firearm and the ammunition.

Heather McCauley, FDA chemist, testified to the procedures during Lab identification of the drugs. The Lab report was introduced without objection.

The prosecutor again asked the exact nature of the items presented to the Lab, the Lab's safety procedures which were what had already been adduced, and analysis of same.

Petitioner did not testify and the defense did not put on a case, so there was no rebuttal case.

In the prosecution's closing argument, they stressed that the illegal substance Petitioner possessed was terribly dangerous to the public, such that breathing it if airborne or even touching it was deadly. The prosecution said that Petitioner was "... a person who is out there selling a substance so dangerous and so deadly that every single person who knows what it is involved in the investigation, from the law enforcement officers to the person who inspected it at the laboratory, had to take extra caution, extra safety measures to keep themselves from touching it, keep their hands protected, their mouths protected in case it went airborne, because just touching it could result in such a dangerous and possibly deadly reaction, they're doing everything they can to protect themselves but still investigate this case."

The prosecution argued that when Petitioner was asked to identify his drug source, Petitioner chose to remain silent.

The Defense pointed out in its closing argument that not one witness observed Petitioner sell drugs and that no packaging materials were found nor was Petitioner ever observed packaging drugs for sale, and also that no multiple cell phones or throwaway phones were found. Furthermore, that Petitioner's purported admission that he had one customer was unbelievable, whether it was made up or due to inaccuracy in hearing what Petitioner said was not specified.

In its rebuttal close the prosecution claimed they presented Callahan, not for expert opinions based upon the evidence, but for his experience dealing with drug trafficking investigations.

The prosecution argued that Petitioner's drugs were not just heroin, a poison which is bad enough, but that Petitioner had stronger drugs, such as Fentanyl, Carfentanil, and cocaine. The prosecution argued that Petitioner was "out there" selling "a substance so dangerous and so deadly" that experts had to take extra precautions to keep from touching it or even breathing the fumes. The prosecution argued that the detective had explained that the citizens of the Northern District of Ohio who used this drug, comprised of many compounds, were the "testers" regarding its lethality.

The prosecution maintained that the detective was brought in to testify because of what he has seen in thousands of drug trafficking search warrants, and that after drug traffickers are caught, law enforcement gathers intelligence. Some traffickers cooperate, as this opportunity was given to Petitioner. Law enforcement

learns from the cooperators.

The prosecution argued that "law enforcement are the experts, right?" The detective established that drug dealers have learned to keep firearms ready at hand, and all the other things to which the detective testified from his real-life experience. The agent also testified from his real-life experience. The prosecution conceded that they had presented no testimony of hand to hand drug transactions. However, the prosecution asked the jury to recall what the agent did to obtain the search warrant, calling to the jury's attention the undisclosed "intelligence" the agent obtained which indicated to the agent's satisfaction that Petitioner was a drug trafficker.

A verdict of guilty on all counts.

REASONS FOR GRANTING THE WRIT

1. Because drug profile testimony is in constant use and the parameters of its legitimate use are not clearly defined, as demonstrated by the caselaw and by the opinion of the Sixth Circuit in this case.

Petitioner first submits that certiorari should issue because drug profile testimony constantly is presented across the nation even though the parameters of its legitimate use are not clearly defined. The Sixth Circuit's holding that drug profile testimony, when presented not as opinion but as substantive evidence of guilt, is nevertheless opinion, is an example. (Appendix 1, p.4) This holding is in conflict with

other circuits and even with the Sixth Circuit's own precedent. The proper use of profile evidence is not clearly understood.

While this Court long ago defined a drug courier profile as "a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics." Reid v. Georgia, 448 U.S. 438, 440, 100 S.Ct. 2752, 2753-54, 65 L.Ed.2d 890 (1979) (per curiam), its proper application is unclear. Similarly, drug profile evidence has been described as an "informal compilation of characteristics often displayed by those trafficking in drugs." United States v. McDonald, 933 F.2d 1519, 1521 (C.A.10, 1991), and United States v. Campbell, 843 F.2d 1089, 1091, n. 3 (C.A.8, 1988). As there is little difference between drug courier profile testimony and drug dealer profile testimony, they will be treated together.

Lower courts have struggled with the proper use of "drug profile" evidence. Courts have said that when it is presented as substantive evidence of guilt it is per se erroneous. United States v. Lewis, 556 F.2d 385, 389 (6th Cir. 1977). Courts similarly have said that: "Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officials in investigating criminal activity." United States v. Cruz, 981 F.2d 659, 663 (2d Cir.1992) and "guilt may not be inferred from the conduct of unrelated persons;" see also United States v. Jones, 913 F.2d 174, 177 cert. denied, 498 U.S. 1052 (1991).

Courts have deemed drug courier profiles to be inherently prejudicial because of the potential such inexact collections of characteristics have for including innocent citizens as profiled drug couriers and that the profiles represent nothing more than the opinion of the investigating officers. United States v. Beltran-Rios, 878 F.2d1208, at 1210 (9th Cir. 1989) (quoting United States v. Hernandez-Cuartas, 717 F.2d 552, 555 (11th Cir.1983)). See also Jones, supra; ("[T]he use of expert testimony as substantive evidence showing that the defendant 'fits the profile and, therefore, must have intended to distribute the cocaine in his possession' is error.") (quoting United States v. Quigley, 890 F.2d 1019, 1023-24 (8th Cir.1989), cert. denied, 493 U.S. 1091 (1990)); United States v. Carter, 901 F.2d 683, 684 (8th Cir.1990) ("Drug courier profiles are investigative tools, not evidence of guilt.")

In Quigley, the Eighth Circuit faced a situation similar to that which we find here. There "the drug courier profile was presented at trial through the testimony of a narcotics agent, in the guise of an expert, as a technique for identifying a drug offender." Id. at 1022. The agent delineated several characteristics of the profile and tied them to [the defendant] (purchasing tickets shortly before departure, paying for them with cash, checking no baggage, providing no local address, and exhibiting nervousness at an airport). The court noted that while the agent "did not directly say that he thought [the defendant] was guilty of the offense charged because he fit the profile, that was the clear implication of his testimony." Id. at 1024.

The Ninth Circuit explained the difficulties in using this evidence as follows:

"Drug courier profile evidence has been admitted, however, in certain limited circumstances. In Beltran-Rios, we allowed the use of drug courier profile evidence for impeachment purposes after the defendant opened the door to this line of questioning by emphasizing his apparent poverty. 878 F.2d at 1211. In United States v. Gomez-Norena, 908 F.2d 497, 501 (9th Cir.), cert. denied, 498 U.S. 947, (1990), we admitted the use of drug courier profile testimony as background material to explain how the arrest occurred. Significantly, in Gomez-Norena the district judge twice cautioned the jury to consider the testimony only for that purpose.

"The government argues that Agent Wood's testimony was admissible under a third exception: when the testimony is necessary to explain the modus operandi of the defendant. In United States v. White, 890 F.2d 1012, 1014 (8th Cir.1989), cert. denied, 497 U.S. 1010 (1990), the Eighth Circuit found no "clear abuse of discretion" when the district court admitted drug courier profile testimony for the limited purpose of explaining modus operandi. The court acknowledged, however, that it was 'not indicat[ing] any belief that the district court followed the best course in admitting all the evidence that was admitted, or that we favor admission of such evidence in general.' Id.

"The question of whether drug courier profile evidence may be admitted to show a modus operandi is a difficult one, since the purpose of modus operandi testimony, to "alert [the jury] to the possibility that combinations of seemingly innocuous events may indicate criminal behavior," United States v. Johnson, 735 F.2d 1200, 1202 (9th Cir.1984), is precisely the reason why drug courier profile testimony is so dangerous. See Beltran-Rios, 878 F.2d at 1210 ("Drug courier profiles are inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers."). While it may be appropriate to recognize a modus operandi exception in certain cases, such as those involving complex drug-smuggling conspiracies, we need not reach that issue because we conclude on the facts of this case that the admission of drug courier profile evidence was improper.

"Under Fed.R.Evid. 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert ... may testify thereto in the form of opinion or otherwise." Modus operandi evidence is admitted to help the jury "to understand complex criminal activities." Johnson, 735 F.2d at 1202. To prosecute Lui, however, the government had no need to explain a complex criminal scheme. On the contrary, Lui was caught red-handed with suitcases full of heroin.

> "There was thus little, if any, probative value to offset the potential prejudice caused by Agent Wood's testimony regarding drug courier profiles. By providing such testimony and tying it to Lui, Agent Wood took items that were perfectly innocent-use of a hard-sided suitcase, traveling for the stated purpose of visiting a relative-and turned them into evidence of guilt. Nor were the jurors provided with any limiting instruction to prevent them from using the profile evidence as a basis for finding guilt. By admitting the drug courier profile evidence, the district court abused its discretion." United States v. Lui, 941 F.2d 844, 847-48 (9th Cir. 1991).

Some courts view profile evidence "[as] inherently prejudicial to the defendant because the profile may suggest that innocuous events indicate criminal activity." United States v. Lim, 984 F.2d 331, 334–335 (C.A.9, 1993). In the same vein, a federal court held that a detective's testimony regarding the items in a bedroom was so intertwined with his explanation for why those items were indicative of drug dealing that he implicitly expressed his opinion that, based on the usual reasons for possessing the items, that the drugs were intended for sale. Jones v. Woods, No. 2:10–CV–14191, 2012 WL 4692999 (E.D. Mich Oct. 3, 2012) (unpublished).

Misuse of this evidence permits, perhaps encourages, prosecutorial misconduct.

The Sixth Circuit, in implicitly contradictory findings, held that a drug courier profile by itself provides no probable cause. United States v. McCaleb, 552 F.2d 717

(C.A. 6th, 1977). Yet, it later held that drug courier profile testimony is admissible to demonstrate why a defendant was stopped for investigation. United States v. Pearce, 912 F.2d 159, 163 (6th Cir.1990).

Courts have noted that often there is a very fine line between the probative use of profile evidence as background or modus operandi evidence and its prejudicial use as substantive evidence, thus, the admissibility of profile evidence must effectively be determined case by case. A difficulty arises in cases in which profiles are admitted because the evidence of a drug profile must resemble, to some degree, the defendant's own circumstances and characteristics in order to be relevant, MRE 401, but when the profile begins to resemble the defendant's circumstances and characteristics too closely, the profile appears increasingly as substantive evidence of guilt. See Quigley, 890 F.2d at 1023. Once the profile is found to be relevant, courts face a gray area in which it may be obvious that the criminal profile circumstances and characteristics so closely resemble those of the defendant as to be substantive evidence usurping the province of the jury, yet the use of the profile also may be the only way to explain to the jury the circumstantial evidence in the case.

Even where a police officer expert witness' testimony is "founded solely on observations of innocent conduct," courts have upheld admission of the expert's opinion that the "defendant's activities indicated that he acted in accordance with

usual criminal modus operandi." United States v. Espinosa, 827 F.2d 604, 612 (C.A.9, 1987).

Pre-packaging evidence as a profile is prejudicial and unnecessary. Rather than a litany of testimony that drug dealers/couriers do 1, 2, 3, 4, 5, and 6, followed by testimony that the defendant exhibits some or all of these factors, it would be better to present such testimony explaining that factor 1, say a digital scale, can be used by drug dealers and the defendant had one, without combining it with other factors. Pre-packaging evidence as a profile impinges upon the jury's objective assessment of the evidence. Facts and possible inferences indicating guilt drawn from them are more fairly presented piecemeal. If enough facts and inferences are presented and accepted by the jury, they will convict without a pre-made package of factors presented by law enforcement as sufficient to establish guilt.

The harm from the illicit use of profile testimony is two-fold; First, a jury's assessment of the applicability of inferences from proven facts and their combined sufficiency to establish criminal intent is irrevocably tainted by their presentation of the facts as a package, judged by law enforcement to be sufficient and presented with the approval and the apparent endorsement of the court. A jury cannot but be influenced by such a presentation and that jury's determination of the sufficiency of the evidence no longer can be objective. Criminal intent may be concluded by relying upon law enforcement's judgment from a pre-made profile package of innocuous facts

combined with the apparent endorsement of the court that the combination is legally sufficient. This bell cannot be un-rung.

Second, law enforcement may present a profile with factors which go beyond provable facts, inviting that guilt be inferred from facts that have not been proven at trial and (unknown to the jury) cannot be proven. In the case at bar the court confused modus operandi expert opinion testimony with profile testimony improperly presented as substantive evidence of guilt including inferences not tied to provable facts.

The jury was fed factors that are part of a model of a prototypical drug dealer with intent to distribute drugs, when only some of the evidence fit that model. The jury was asked to draw inferences of intent to distribute from a sloppy mix of profile factors, only some of which had evidentiary support.

The following factors were recounted over and over again by the prosecution without evidentiary support in Petitioner's case:

1) use of force,

2) potential violence,

3) execution of search warrants when the targets are known to be violent,

4) battering rams to violently smash down doors,

5) bullet-proof vests,

6) uncertainty whether there is violence on the other side of a drug trafficker's door,

7) guns found in nightstands,

8) guns found in closets,

9) guns found under beds,

10) drug ledgers,

11) co-conspirators,

12) traffic stops,

13) long-term, short-term traffic surveillance,

14) development of background for investigatory stops,

15) other targets of drug trafficking search warrants who turn and cooperate with the government,

16) development of sources,

17) making controlled buys,

18) baggies and aluminum to package drugs for sale,

19) drugs packaged for sale,

20) money counters,

21) obtaining multiple search warrants,

22) execution of other search warrants,

23) various records to establish probable cause,

24) bank records,

25) utility records,

26) making controlled buys, and

27) the danger of death for an informant who offers an incorrect amount of money to purchase drugs.

By means of the profile, Petitioner was disingenuously portrayed by the prosecutors as a dangerous drug kingpin, whereas it is more likely prosecutors viewed Petitioner as so insignificant that they were unwilling to identify a valuable undercover source in order to convict him. Instead the strategy was to smear him with a profile the jury would find reprehensible. This attitude could explain why the prosecution pushed so hard from the beginning to obtain Petitioner's cooperation against his drug source, even offering cooperation to him at pre-trials and at the final pretrial, and why the prosecution was vindictive when they did not obtain Petitioner's cooperation.

Petitioner admitted possession of drugs but never admitted to trafficking drugs or to possession of a gun in furtherance thereof.

The evidence was not overwhelming.

The sole issue in Petitioner's trial concerned intent to distribute the drugs he possessed, i.e., whether or not he was a drug trafficker, and, as a consequence, whether or not Petitioner possessed the gun in furtherance of such drug trafficking. The agent claimed Petitioner made one illogical admission to having a single drug customer in an interview which was not recorded nor corroborated either by Petitioner's subsequent actions or by other testimony or items of evidence (raising the possibility that it could have been a miscommunication). It is illogical for a person to make an admission which will convict him of drug dealing and then not pursue the benefits of cooperation. At the very worst for Petitioner, this single, illogical, undocumented, and uncorroborated admission should have been evaluated by the jury on its own merits, not against the backdrop of an avalanche of pre-packaged profile factors demanding that Petitioner be treated as a drug dealer, especially when most of those factors did not apply to Petitioner.

It was prosecutorial misconduct for the prosecutor to base his case upon profile evidence. This error was so flagrant as to warrant reversal. Throughout the trial, the prosecutor jumped back and forth between facts in profile factors and actions taken in the investigation of Petitioner so as to blur distinction between the evidence and profile factors, thereby misleading the jury and prejudicing Petitioner. It was extensive. It was deliberate. Calling a detective as a star witness who had nothing to offer except profile testimony, demonstrates that the error was part of a deliberate smear to portray Petitioner as the quintessential drug dealing kingpin.

Most of the trial concerned drug profiles in the context of obtaining drug trafficking search warrants and the dangers associated with executing them. None of this proved nor was relevant to the elements of the crimes charged; its only conceivable purpose was to prejudice Petitioner's right to due process of law.

The overall strength of the evidence of intent to distribute was far from overwhelming. Aside from the one illogical undocumented uncorroborated purported admission, the remainder of the evidence showed a drug addict in possession of drugs. The other items were more consistent with personal drug use than with intent to distribute.

This Court has recognized that prosecutorial misconduct may "so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). To constitute a due process violation, the prosecutorial misconduct must be " 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' " United States v. Bagley, 473 U.S. 667, 676 (1985) (quoting United States v. Agurs, 427 U.S. 97, 108 (1976)). Such was the case here.

The prosecution's tactics also constituted plain error as: (1) there was legal error (admission of profile testimony as substantive evidence of guilt); (2) the error was clear; (3) the error affected substantial rights (evidence of intent to distribute was

weak); and (4) the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

This trial represents another example of an African American who knows he was given unfair treatment and knows the courts do not seem to care. Such treatment when repeated breeds rage and disrespect for the entire criminal justice system.

Lower courts need guidance. The proper use of profile evidence needs to be delineated. This trial was a travesty. Petitioner's convictions for Drug Possession with Intent to Distribute and Possession of a Firearm in furtherance of a Drug Trafficking Offense were obtained by the misuse of profile evidence in violation of Petitioner's right to due process as guaranteed by the Fifth Amendment to the United States Constitution and should be vacated.

2. Because this court has not determined if the cumulative error doctrine exists and whether errors to which no objections are made may be accumulated.

Here there was an accumulation of error through deliberate prosecutorial misconduct by the illegitimate use of profile evidence (as described in Reason 1), by bolstering, and by an impermissible "community protection" argument. These errors so infected the trial with unfairness as to make the resulting conviction a denial of due process by inducing the jury to decide Petitioner's guilt or innocence from impermissible factors, not from admissible evidence, calling into question the integrity of the process.

The body of law that affirms convictions if there is significant evidence of guilt, no matter how severe a prosecutor's misconduct, is susceptible to abuse. In such a situation, Prosecutors have learned that they can "get away with" almost anything. The result is a criminal justice system that is dirty and denies defendants a fair trial breeding disrespect and rage. Petitioner asks the court to review other petitions seeking certiorari over the last few years to appreciate the prosecutorial abuses which have become commonplace. This Court's opinion delineating the proper duties of a prosecutor in Berger v. United States, 295 U.S. 78 (1935), has become in practice, perhaps, one of the most irrelevant documents in American criminal jurisprudence.

Present counsel could find no decision by this Court concerning cumulative error. Lower courts have acknowledged the doctrine. See, e.g., Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir.1988); Walker v. Engle, 703 F.2d 959, 968 (6th Cir.1983). However, if only errors to which objection is made can be accumulated the doctrine becomes all but meaningless, as presumably, such errors have been ameliorated already. By the same token if errors to which no objection is made can only be accumulated if they amount to plain error, again the doctrine becomes meaningless because if errors amount to plain error the conviction is reversed without the need for a cumulative error doctrine. A decision by this Court would clarify the doctrine of cumulative error for lower courts.

As referenced above, this Court has recognized that prosecutorial misconduct

may so infect the trial with unfairness as to make the resulting conviction a denial of due process." DeChristoforo, supra.

Petitioner's constitutional right to a fair trial was violated, not only by the prosecutor eliciting massive amounts of profiling evidence as substantive evidence of guilt as referenced in reason 1 and obsessing over the dangers of drug investigations and drug search warrants presented, but also by a flagrant "community protection" argument and by bolstering.

Just as the prosecution had obsessed over the dangers of drug investigations and drug search warrants, throughout the trial the prosecution stressed Petitioner's non-cooperation in helping to prosecute his drug source as a danger to the jury. Petitioner's cooperation or non-cooperation had nothing to do with the elements of the crimes charged. It could not advance the government's legitimate proof. It could only serve to prejudice Petitioner in the eyes of the jury.

The court unwittingly set the stage for a "community protection" argument by instructing the jury in Voir Dire as follows: "Now, you hear 'United States of America' or 'State of Ohio' instead of an actual victim's name because … a crime against one person is a crime against everyone within that jurisdiction. … It would be the Governmental entity, United States of America or State of Ohio, and again because a crime against you is a crime against everyone within that jurisdiction.

"So that's why -- let's say for the sake of argument you were a victim of an aggravated robbery. It's not your name, John Doe or Jane Doe, versus the person

that you allege committed the crime. It would be the Governmental entity, United States of America or State of Ohio, and again because a crime against you is a crime against everyone within that jurisdiction."

In its opening statement, the prosecution told the jury that Petitioner had refused to name his drug source or to cooperate. The agent testified that he attempted to acquire Petitioner's cooperation at their initial confrontation and again a month later. Both times Petitioner refused.

The theme of danger to the community was continued when the prosecution hammered away at the dangers of drug dealing. The agent and the detective testified at great length supra to all sorts of dangers resulting from drugs and investigations of drug cases. These dangers were repeated over and over again throughout the trial. This was the backdrop for the prosecution's closing arguments.

In its closing argument, the prosecutor flagrantly argued that Petitioner was a threat to the jury's safety and implied that because of Petitioner's non-cooperation the drug problem facing the jurors' community would continue.

The prosecution argued in its close that Petitioner's drugs were not just heroin, a poison which is bad enough, but that Petitioner had stronger drugs, such as Fentanyl, Carfentanil, and cocaine. The prosecution continued that Petitioner was "out there" selling "a substance so dangerous and so deadly" that experts had to take extra precautions to keep from touching it or even breathing its fumes. The prosecution argued that the Detective had explained that the citizens of the

Northern District of Ohio who used this drug, comprised of many compounds, were the "testers" regarding its lethality.

The jury inevitably must have been left with the impression that Petitioner was a threat to their safety and that his refusal to cooperate put them at risk, which was an impermissible "community protection" argument.

Such argument directs jurors' desires to end a social problem or to deter future lawbreaking to persuade them to convict a particular defendant, and thus is error and highly prejudicial

The obvious evil lurking in such an appeal is that the defendant will be convicted for reasons wholly irrelevant to the evidence of his guilt or innocence, as with improper drug profile evidence.

A constant theme of the prosecution was to obtain a conviction based upon reasons which were not founded upon legitimately presented evidence.

Lower courts have prohibited appeals to a jury to combat the drug problem in the ongoing war on drugs, as they are inflammatory in the contemporary climate. See, e.g., United States v. Solivan, 937 F.2d 1146, 1153 (6th Cir.1991), despite a curative instruction by the court; United States v. Hawkins, 595 F.2d 751 (D.C.Cir.1978), cert. denied, 441 U.S. 910 (1979); United States v. Barlin, 686 F.2d 81 (2d Cir.1982).

Petitioner's constitutional right to a fair trial was also violated when the prosecutor unfairly bolstered the prosecution's evidence. Lower courts have held that

bolstering occurs when a prosecutor implies that the witness's testimony is corroborated by evidence known to the government but not known to the jury. United States v. Sanchez, 118 F.3d 192, 198 (4th Cir.1997). Lower courts have held that a prosecutor may ask a government agent whether he was able to corroborate what he learned in the course of a criminal investigation but if the prosecutor pursues this line of questioning, he/she must also draw out testimony explaining how the information was corroborated and where it originated. United States v. Francis, 170 F.3d 546, 551 (6th Cir. 1999). See also United States v. Lewis, 10 F.3d 1086, 1089 (4th Cir.1993).

In its opening statement the Government told the jury that they would hear that, based upon intelligence the agent had gathered (which was never disclosed), the agent obtained a search warrant for Petitioner's residence and vehicle seeking evidence of trafficking of fentanyl and heroin, and possession of firearms.

The agent testified that he determined from "sources" and "information" (which "sources" and "information" were never disclosed) that Petitioner was trafficking in heroin and drugs. Thus, the agent testified that he obviously was able to persuade a court that Petitioner was trafficking, which was the basis upon which he obtained the search warrant.

The court prohibited any inquiry concerning the confidential source that provided "intelligence" that Meadows was dealing drugs by the following.

[Prosecutor]: Mr. Meadows said in open court "I told you where the gun

were and I told you where the drugs were. My problem is about the confidential source, why they aren't here," is what he said in open court. I'm not going to talk about the source.

[Defense counsel]: That's what I was talking about.

[THE COURT]: No, you cannot, you cannot talk about the confidential source.

[Defense counsel]: Okay. All right.

[Prosecutor]: And, listen, I've not prepared him that I'm going to ask him that question. If he starts to go into it, just object because I'm not going to ask him about the confidential source.

[THE COURT]: I'll stop him.

In his testimony the agent was asked how he handled Petitioner's case and testified, "When I -- the investigation culminated to the point where I had probable cause, I obtained a search warrant and determined that [Petitioner] was trafficking in heroin and drugs, and got the search warrant."

In its rebuttal closing argument, the prosecution argued that "law enforcement are the experts, right?" thus implying that the testimony of law enforcement should not be weighted for credibility like other testimony but simply accepted as true. Then, after conceding that the prosecution presented no testimony of hand to hand drug transactions, the prosecution asked the jury to recall what the agent did to obtain the search warrant, calling to the jury's attention the undisclosed

"intelligence" the agent obtained which indicated to the agent's satisfaction that Meadows was a drug trafficker.

This Court held that in this situation it is incumbent upon the government to demonstrate that a constitutional error, resulting from the admission of highly prejudicial evidence or comment, is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, at 24, (1967). If there is any reasonable possibility that the evidence or comment complained of might have contributed to the conviction, then such error cannot be harmless beyond a reasonable doubt. The government has not done so.

Accumulating errors, it is apparent that Petitioner's due process right to a fair trial was violated by deliberate prosecutorial misconduct. The essence of the prosecution strategy was to establish intent to distribute based upon factors which were prohibited or not established by the evidence. There is, at the very least, a reasonable possibility that this prosecutorial misconduct might have contributed to the conviction of Petitioner in a trial containing only ambiguous evidence of drug trafficking.

Petitioner's convictions for Drug Possession with Intent to Distribute and Possession of a Firearm in furtherance of a Drug Trafficking Offense were obtained in violation of Petitioner's right to due process as guaranteed by the Fifth Amendment to the United States Constitution and should be vacated.

CONCLUSION

Petitioner, Michael Meadows, requests that this Court grant certiorari, reverse the Sixth Circuit's affirmance, and remand for further proceedings.

Respectfully submitted,

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APPENDIX

1. COURT OF APPEALS OPINION August 7, 2020.