No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

COVIA DZELL SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether trial counsel's ineffective assistance deprived Mr. Smith of the right to offer evidence in his defense.

II. Whether the district court's evidentiary errors denied Mr. Smith his right to a fair trial.

III. Whether the district court erroneously sentenced Mr. Smith under the career offender Guideline based on information in the presentence investigation report that was inadequate to establish that Mr. Smith had the required predicate convictions.

II. Whether the Fourth Circuit erred by concluding that a 300-month prison sentence was substantively reasonable for a non-violent drug offense in light of Mr. Smith's history and characteristics.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who was the Defendant-Appellant below, is Covia Dzell Smith.

Respondent, who was the Plaintiff-Appellee below, is the United States of America.

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CITATION OF PRIOR OPINION

The United States Court of Appeals for the Fourth Circuit decided this case by unpublished opinion issued 30 October 2020, in which it affirmed the judgment of the trial court. A copy of the Fourth Circuit's opinion is included in the Appendix to this petition.

JURISDICTIONAL STATEMENT

This petition seeks review of an opinion affirming Mr. Smith's convictions and sentence, following a jury verdict of guilty on one count of distribution of a quantity of a mixture and substance containing marijuana, in violation of 21 U.S.C. § 841(a)(1) (Count 1); and two counts of distribution of a quantity of a mixture and substance containing cocaine, also in violation of 21 U.S.C. § 841(a)(1) (Counts 2 and 3). The petition is being filed within the time permitted by the Rules of this Court, as extended by the Court's Order entered 19 March 2020. *See* S. Ct. R. 13. This Court has jurisdiction to review the Fourth Circuit's opinion pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Investigation and indictment of Covia Dzell Smith

In 2017, officers in the Brunswick County Sheriff's Office and the Bureau of Alcohol, Tobacco, Firearms, and Explosives jointly investigated reports that Covia Dzell Smith was selling cocaine. J.A. 114-17. As part of the investigation, the officers planned to attempt to make controlled purchases of cocaine from Mr. Smith using a confidential informant or undercover officers. J.A. 116. On 1 June 2017,

ATF Special Agent Travis Strickland and Task Force Officer Robert Simpson, acting in undercover roles, visited Mr. Smith's residence on Hale Swamp Road in Shallotte, North Carolina, purporting to be interested in a motorcycle Mr. Smith was selling. J.A. 135, 142-43. Agent Strickland and TFO Simpson left the residence with a small amount of marijuana. J.A. 151-52. On 7 June 2017, Agent Strickland and TFO Simpson visited Mr. Smith's residence again, this time with a confidential informant who purported to be interested in the motorcycle. J.A. 154. Later the same day, Agent Strickland conducted a controlled purchase of cocaine at a car wash, from a subject he identified as Mr. Smith. J.A. 163-64. On 20 June 2017, the confidential informant, unaccompanied by law enforcement officers, conducted a second controlled purchase of cocaine, purportedly at Mr. Smith's residence in Shallotte. J.A. 235.

On 22 March 2018, Mr. Smith was arrested on state charges of possession with intent to sell or deliver cocaine, and sell or deliver cocaine, arising from the June 2017 controlled purchases. J.A. 627; *see* J.A. 619. On 8 May 2018, he was federally indicted on one count of distribution, on or about 1 June 2017, of a quantity of a mixture and substance containing marijuana (Count 1); and two counts, on or about 7 June 2017 and 20 June 2017, of distribution of a quantity of a mixture and substance containing cocaine. J.A. 8-9.

Arraignment and pretrial proceedings

Mr. Smith pleaded not guilty to all three counts of the indictment and proceeded to trial. J.A. 3, 35. The Government filed a notice of its intention to seek

an enhanced penalty pursuant to 21 U.S.C. § 851, on the basis of a prior conviction of a serious drug felony. J.A. 55-64.

On 9 January 2019, one week before trial was set to begin, the Government filed a Notice of Intent to Present Evidence of Other Acts and Alternatively, Evidence Pursuant to Federal Rule of Evidence 404(b). J.A. 39-54. According to the notice, the Government planned to introduce evidence that law enforcement officers received information that Mr. Smith was regularly dealing cocaine in Brunswick County. J.A. 41. The Government also disclosed that it would offer the testimony of a cooperating witness who would testify that he made five purchases of cocaine from Mr. Smith, totaling five ounces. J.A. 42. The Government asserted in its notice that the evidence would provide context for Mr. Smith's relationship with the cooperating witness. J.A. 42. The Government also asserted that the evidence was admissible under Rule 404(b) because " it establishes motive, intent, preparation, plan, knowledge, identity, and absence of mistake, and is not more prejudicial than probative pursuant to Fed. R. Evid. 403." J.A. 42.

The Government also disclosed in the Rule 404(b) notice that it intended to offer recorded jail calls allegedly made by Mr. Smith using another inmate's personal identification number. J.A. 43. The Government provided its characterization of the calls, saying that the calls showed Mr. Smith instructing someone to gather money, collect debts owed to him, pick up "apparent contraband," and stop someone else from using a phone. J.A. 43. The Government argued that Mr. Smith's statements provided "context to the crimes charged" in the indictment,

and showed that Mr. Smith was attempting to "prevent additional evidence from being developed against him." J.A. 43. The Government also asserted that the evidence was admissible under Rule 404(b) because " it establishes motive, intent, preparation, plan, knowledge, identity, and absence of mistake, and is not more prejudicial than probative pursuant to Fed. R. Evid. 403." J.A. 44.

Mr. Smith filed an objection to the Government's Rule 404(b) notice. J.A. 70-77. Mr. Smith argued in the objection that the Government's notice was untimely. J.A. 73-74. Mr. Smith also argued that evidence was inadmissible. J.A. 74-76.

Before the trial began, the district court held argument on pretrial matters. *See* J.A. 80-91. The district court ruled that the Rule 404(b) notice was timely. J.A. 87. The district court also ruled that the Government could offer the testimony of the cooperating witness, Victor Watson, about his alleged cocaine dealings with Mr. Smith. J.A. 83-87. Turning to the jail calls, the district court ruled that one of the calls could be admitted, and excluded two others. J.A. 89.

Trial proceedings

The case was tried to a jury in the United States District Court for the Eastern District of North Carolina, before United States District Judge James C. Dever III, from 16 January 2019 to 18 January 2019. J.A. 3-4.

Both parties gave opening statements. J.A. 99-107. The Government presented the testimony of Sgt. Joseph Cherry, who supervised the investigation of Mr. Smith, TFO Simpson, Agent Strickland, confidential informant Markeith

Minor, two witnesses who were incarcerated with Mr. Smith at Brunswick County Detention Center, a records custodian, and three forensic scientists from the North Carolina State Crime Laboratory. *See* J.A. 113-259, 274-399.

Sgt. Joseph Cherry

The Government's first witness was Sgt. Cherry of the Brunswick County Sheriff's Office. *See* J.A. 114. Sgt. Cherry testified that in June 2017, he oversaw an investigation of Mr. Smith after receiving information that Mr. Smith was selling cocaine. J.A. 114-17. Sgt. Cherry testified that officers involved in the investigation decided to use confidential informants and undercover officers to conduct controlled purchases from Mr. Smith. J.A. 116.

Sgt. Cherry testified that controlled purchases were conducted on 1 June 2017, 7 June 2017, and 20 June 2017, and that law enforcement officers seized marijuana and cocaine as a result. J.A. 117-119. Sgt. Cherry identified three evidence bags, which he said contained marijuana and cocaine obtained from the controlled purchases. J.A. 121-22, 126-29.

Sgt. Cherry testified that on June 7, he was conducting surveillance in preparation for an attempted controlled purchase. J.A. 124-25. Sgt. Cherry said he passed Mr. Smith, who was driving a gold Mercedes station wagon, on N.C. Highway 179, also known as Beach Drive. J.A. 125. Sgt. Cherry testified that he saw the gold Mercedes parked at a car wash on Beach Drive on June 7. J.A. 125.

TFO Robert Simpson

The Government also called TFO Simpson, an officer in the Wilmington

Police Department assigned to the ATF task force, to testify about his involvement in the investigation of Mr. Smith. *See* J.A. 141. TFO Simpson testified that Agent Strickland asked that he participate in an undercover investigation of Mr. Smith. J.A. 142. To perform the undercover investigation, TFO Simpson explained that he posed as an employee of a repossession company who drove a tow truck and bought and sold cars. J.A. 142. According to TFO Simpson, he and Agent Strickland planned to go to Mr. Smith's residence on Hale Swamp Road in Shallotte feigning interest in purchasing a motorcycle that Mr. Smith had for sale. J.A. 142. TFO Simpson testified that he visited Mr. Smith's residence on 1 June 2017, and again on 7 June 2017, and that he wore a hidden audio recording device on both occasions. J.A. 142-44, 153. He also identified discs that he said contained recordings of his conversations on those two dates, and a transcript that he said reflected some parts of the conversations on June 1 and June 7. J.A. 144-46, 153-54.

TFO Simpson testified that on June 1, he and Agent Strickland pretended to be interested in purchasing the motorcycle, and discussed with Mr. Smith what work might need to be done to repair the motorcycle. J.A. 150. According to TFO Simpson, Mr. Smith said he knew someone who could fix the motorcycle for $200, or who might even be willing to fix the motorcycle in exchange for a bag of marijuana. J.A. 150-51. TFO Simpson testified that Mr. Smith invited the officers into a gazebo on his property, which Mr. Smith called his "man cave," and offered Agent Strickland a small amount of marijuana, which Agent Strickland accepted. J.A. 151. The officers told Mr. Smith they might know someone else who was interested

in buying the motorcycle, and they agreed to talk further. J.A. 152. The officers then left Mr. Smith's residence. J.A. 152.

Throughout TFO Simpson's testimony about his June 1 encounter with Mr. Smith, the Government's counsel played portions, or clips, of his recorded conversation with Mr. Smith, and asked TFO Simpson questions after each clip. J.A. 147-52. There were not transcripts for every clip. J.A. 148. To present the recordings, the Government's counsel played clips, and then asked TFO Simpson to describe what he heard on the clips. *See* J.A. 147 ("Can you describe for the jurors what was that we just heard?"); J.A. 148 ("So if you can describe to the jurors what was that conversation?"); J.A. 149 ("So what was that?"). In response, TFO Simpson testified to his impressions of each recording. *See* J.A. 148-49.

TFO Simpson recounted that Agent Strickland set up a second meeting with Mr. Smith on 7 June 2017. J.A. 154. This time, the officers went to Mr. Smith's house accompanied by confidential informant Markeith Minor, who posed as the person who might be interested in buying the motorcycle. J.A. 154. Again, the Government's counsel elicited testimony about TFO Simpson's interaction with Mr. Smith by playing clips from TFO Simpson's recording, and asking TFO Simpson about each clip. J.A. 155-64. In response to the Government's counsel's question, "What's that part, what's happening right there?" TFO Simpson testified that Agent Strickland had thanked Mr. Smith for the marijuana he had given him the previous week. J.A. 158-59. TFO Simpson testified that Agent Strickland and Mr. Smith had "discussed purchasing future marijuana or even cocaine, which he referred to

as 'girl,' the street term for cocaine." J.A. 159. TFO Simpson listened to another clip of the recording, and the Government's counsel asked, "What was he saying right there?" J.A. 159. TFO Simpson testified that Agent Strickland and Mr. Smith were talking about the price and amounts of cocaine that Strickland might want to purchase. J.A. 159. TFO Simpson explained that the "cover story" was that he and Agent Strickland were "lower to mid-level dealers," looking to buy cocaine that they could resell and make money. J.A. 159-60. TFO Simpson testified that Agent Strickland asked Mr. Smith for an "eight ball" of cocaine, or 3.5 grams, and said that Mr. Smith said the price would be $200 because the cocaine was raw. J.A. 160-61.

After the conversation, Agent Strickland, TFO Simpson, and Mr. Minor left Mr. Smith's home. J.A. 163. TFO Simpson testified that later in the day on June 7, the officers conducted a controlled purchase of cocaine from Mr. Smith. J.A. 163. TFO Simpson testified that Agent Strickland had spoken to Mr. Smith by phone, and Mr. Smith had directed Agent Strickland to a car wash near Hale Swamp Road; Mr. Minor and TFO Simpson followed Agent Strickland to the car wash. J.A. 165, 167. TFO Simpson testified that he recognized a Mercedes parked at the car wash as the same car parked at Mr. Smith's home during their visit earlier that day. J.A. 168. He also testified that as he pulled into the car wash, he saw that the driver of the Mercedes was Mr. Smith. J.A. 168. TFO Simpson said he could not identify the passenger in the car. J.A. 168; *see* J.A. 186. TFO Simpson testified that Agent Strickland walked over to the driver's side of the Mercedes and, after a few minutes,

walked back toward his vehicle and TFO Simpson's vehicle with a bag of cocaine in his hand. J.A. 170-71.

The Government's counsel asked TFO Simpson what happened after the transaction at the car wash, and TFO Simpson said that Mr. Smith left the car wash, pulled into a parking lot a few buildings down, circled around, and stopped, looking in the direction of the road. J.A. 171. The Government's counsel asked TFO Simpson, "And what did that mean to you, if anything?" J.A. 171. TFO Simpson responded that he "became nervous that [Mr. Smith] may be conducting counter surveillance or looking for any vehicles that were following him or us so I broadcast that out and we continued to leave the area." J.A. 171-72. TFO Simpson testified that he, Mr. Minor, and Agent Strickland drove to a pre-determined location so they would have a chance to identify any vehicles following them or conducting counter surveillance. J.A. 172.

TFO Simpson testified that Mr. Minor was equipped with a hidden video recording device on June 7, but was unable to take any video of Mr. Smith. J.A. 164; *see* J.A. 154-55. TFO Simpson further testified that the officers were not able to take any video of Mr. Smith at any time during the operation. J.A. 164. On cross-examination, TFO Simpson confirmed again that he had not taken any pictures or video of Mr. Smith during the encounter on June 7. J.A. 185.

Also on cross-examination, TFO Simpson testified that no controlled purchase occurred on June 1; instead, he said Mr. Smith gave Agent Strickland some marijuana, and without Mr. Smith receiving anything in return. J.A. 180.

Regarding the visit to Mr. Smith's home on June 7, TFO Simpson testified that Agent Strickland had been the first person to bring up cocaine. J.A. 184. TFO Simpson testified that Mr. Smith responded that he did not deal with cocaine, but knew someone who did. J.A. 184. TFO Simpson testified that he never discussed the purchase of cocaine directly with Mr. Smith, and never heard him use the word cocaine. J.A. 188-89. Rather, TFO Simpson testified that he had only ever heard Mr. Smith use the term "girl," after Agent Strickland had used that term. J.A. 189; *see* J.A. 184.

Special Agent Travis Strickland

The Government called also Agent Strickland, a special agent with the ATF, to testify about his involvement in the investigation. *See* J.A. 209. Agent Strickland testified that he called Mr. Smith for the first time on 31 May 2017. J.A. 216. Agent Strickland testified that he called Mr. Smith saying he understood Mr. Smith had a motorcycle for sale, and Agent Strickland was interested in looking at it. J.A. 216-17. Agent Strickland explained to the jury that in his undercover role he was impersonating a repossession company employee, and he was driving a tow truck. J.A. 218.

The next day, on 1 June 2017, Mr. Smith called Agent Strickland and provided an address on Hale Swamp Road in Shallotte, where Mr. Smith said the motorcycle was located. J.A. 218-19. Agent Strickland testified that he and TFO Simpson drove together to the Hale Swamp Road address. J.A. 219-20. Agent Strickland testified that there was a gold Mercedes station wagon parked outside

the residence. J.A. 221. During Agent Strickland's testimony, the Government's counsel played audio clips from the recording TFO Simpson had identified. J.A. 220-23. As with TFO Simpson, the Government's counsel asked Agent Strickland to describe what was happening during various clips of the conversations played in court. J.A. 220-23.

Agent Strickland testified that while he and TFO Simpson were discussing the motorcycle with Mr. Smith, Mr. Smith invited them into an out building that he called a "man cave." J.A. 222. Agent Strickland testified that Mr. Smith offered Agent Strickland a small amount of marijuana during the conversation, which Agent Strickland accepted. J.A. 223. Agent Strickland explained that the conversation ended with TFO Simpson and Agent Strickland suggesting that they knew someone else who might be interested in the motorcycle, and they would bring him by on another day. J.A. 223.

Agent Strickland said he next contacted Mr. Smith on 6 June 2017. J.A. 224. This time, Agent Strickland told Mr. Smith he had a potential buyer for the motorcycle, and Agent Strickland could bring the potential buyer to Mr. Smith's home on June 7. J.A. 224. The purported buyer was Markeith Minor, a confidential informant who went by the nickname Spanky. J.A. 224-25.

Agent Strickland recounted that on June 7, he went back to Mr. Smith's home with Mr. Minor and TFO Simpson. J.A. 225. Agent Strickland testified that he introduced Mr. Minor to Mr. Smith. J.A. 226. The Government's counsel continued to play clips from TFO Simpson's recording, with Agent Strickland

describing what he heard after each clip. J.A. 225. Agent Strickland testified that during his conversation with Mr. Smith on June 7, he thanked Mr. Smith for giving him marijuana, and asked whether he could get some additional marijuana or cocaine from Mr. Smith. J.A. 226. Agent Strickland did not use the word "cocaine"; instead, he referred to cocaine as "girl," which Agent Strickland said he intended to mean powder cocaine. J.A. 226. According to Agent Strickland, Mr. Smith responded that "he really doesn't fuck with that girl"—meaning he did not sell cocaine—but he knew someone who might. J.A. 226. Agent Strickland and TFO Simpson told Mr. Smith they wanted to buy an eight ball of cocaine, which Agent Strickland said was 2.5 grams of cocaine. J.A. 227. Agent Strickland testified that Mr. Smith said he could get "raw," which Agent Strickland interpreted as high quality cocaine. J.A. 227. Agent Strickland testified that he told Mr. Smith that he was not looking to invest in "shit that wasn't shit," which Agent Strickland said meant that he would not pay for low quality cocaine that he could not resell to make money. J.A. 227.

Agent Strickland testified that he and TFO Simpson left the house without any cocaine. J.A. 227. Agent Strickland recounted asking Mr. Smith when he could purchase the cocaine, and Mr. Smith responding that he would have to see if he could get it from his "buddy." J.A. 227. Later the same day, Agent Strickland called Mr. Smith and said he was driving toward Mr. Smith's house. J.A. 227-28. According to Agent Strickland, Mr. Smith told him not to come to the house, and gave Agent Strickland directions to a car wash on Beach Road in Ocean Isle. J.A.

228-30. Agent Strickland testified that TFO Simpson and Mr. Minor followed in a separate vehicle behind him. J.A. 228. Agent Strickland testified that when he pulled into the car wash, he recognized the gold Mercedes station wagon he had seen at Mr. Smith's residence on Hale Swamp Road. J.A. 231. Agent Strickland testified that he saw Mr. Smith in the driver's seat of the Mercedes, with an unknown black male in the front passenger seat. J.A. 232. According to Agent Strickland, he approached the driver's side of the Mercedes and spoke to Mr. Smith, then paid Mr. Smith $200 in exchange for a bag of cocaine. J.A. 232.

Turning to the 20 June 2017 transaction, Agent Strickland testified that officers gave Mr. Minor $500, outfitted him with a recording device, and directed him to purchase cocaine from Mr. Smith. J.A. 235-36. The Government's counsel played clips from Mr. Minor's recording device, and Agent Strickland described the conversation between Mr. Minor and Mr. Smith. J.A. 242-43. Agent Strickland admitted that the recording was hard to hear, but he nevertheless summarized what he said was a conversation between Mr. Minor and Mr. Smith. J.A. 243. Although Agent Strickland was not present, he testified that Mr. Minor bought cocaine from Mr. Smith at his home on Hale Swamp Road. J.A. 243-44.

The Government's counsel played portions of a recorded call from the Brunswick County Detention Center inmate telephone system. J.A. 247. Agent Strickland testified that he recognized a male voice on the call as Mr. Smith. J.A. 247. Agent Strickland listened to clips of the call, and testified that he believed Mr. Smith was talking about the informant, Mr. Minor, recounting a conversation he

had with Mr. Minor and describing Mr. Minor's appearance to an unknown female on the other end of the call. J.A. 247-48.

On cross-examination, Agent Strickland testified that there was no video of the 20 June 2017 controlled purchase that Mr. Minor allegedly made from Mr. Smith. J.A. 295-98.

Confidential informant Markeith Minor

The Government called Markeith Minor, who testified that he worked as a confidential informant for Agent Strickland. J.A. 309. Mr. Minor testified that he went to Mr. Smith's residence on Hale Swamp Road on 7 June 2017, with Agent Strickland and TFO Simpson. J.A. 310-11. The Government's counsel played TFO Simpson's recording from the visit to Mr. Smith's residence, and asked Mr. Minor to describe parts of the conversation. J.A. 311-13. Mr. Minor testified that "girl" meant cocaine, that "ball" meant 3.5 grams of cocaine, and that "raw" referred to good quality cocaine. J.A. 313.

Mr. Minor testified that he and the officers left Mr. Smith's home without purchasing any cocaine, and that they met Mr. Smith at a car wash later that day. J.A. 313-14. Mr. Minor testified that he saw Mr. Smith in the driver's seat of his Mercedes at the car wash, and that he saw Agent Strickland walk up to the driver's side of the car while they were at the car wash. J.A. 314-15.

According to Mr. Minor, he returned to Mr. Smith's home alone on 20 June 2017. J.A. 315. Mr. Minor testified that someone else was there when he arrived, but he did not know the other person. J.A. 316. The Government's counsel played a

recording from a device Mr. Minor had worn during his encounter with Mr. Smith on June 20. J.A. 319. Mr. Minor testified that he bought $500 or $600 worth of cocaine from Mr. Smith, and that he understood Mr. Smith to say that the quality of the cocaine was good. J.A. 320.

Detention center witnesses

The Government called Courtland Rogers, who testified that he was incarcerated at the Brunswick County Detention Center in March 2018, when Mr. Smith was assigned to be his cell mate. J.A. 339-40. Mr. Rogers testified that he allowed Mr. Smith to make telephone calls from the jail using Mr. Rogers's PIN, and that Mr. Smith made calls at breakfast time the morning he arrived at the jail. J.A. 341. Mr. Rogers also testified that Mr. Smith confessed to him that he was selling cocaine, and said he had "trusted the wrong person." J.A. 342. According to Mr. Rogers, Mr. Smith said he had sold cocaine to a "huge" white man, who "looked like a WWE wrestler." J.A. 343. Mr. Rogers testified that Mr. Smith said he had sold 3.5 grams of cocaine to the white man at a car wash, and had also sold him eight grams of cocaine at Mr. Smith's house. J.A. 343. The Government's counsel played a recorded telephone call made using Mr. Rogers's PIN, and Mr. Rogers identified the speaker as Mr. Smith. J.A. 344-45.

On cross-examination, Mr. Rogers testified that Mr. Smith first came into the cell in the early morning hours of 22 March 2018, and when they were let out for breakfast in the morning, Mr. Smith immediately went to the phone and made a call using Mr. Rogers's PIN. J.A. 348-49. Mr. Smith's counsel showed Mr. Rogers

the call logs the Government had introduced, and Mr. Rogers admitted that the logs showed calls made at 1:30 p.m., 1:44 p.m., and 5:00 p.m., but not at breakfast time. J.A. 349-50.

The Government also called Victor Watson, who testified pursuant to a plea agreement. J.A. 372-73. Mr. Watson testified that he bought cocaine from Mr. Smith twice in 2018. J.A. 374-75. He also testified that he was later housed with Mr. Smith in the Brunswick County Detention Center, and that Mr. Smith said he was in jail because he had sold cocaine to a white man whom he later discovered was an undercover agent. J.A. 375-76; *see* J.A. 377. Mr. Watson testified that Mr. Smith said one sale was conducted at a car wash, and one sale was made at Mr. Smith's house. J.A. 376-77.

North Carolina State Crime Lab witnesses

Lauren Adcox, a forensic scientist from the North Carolina State Crime Lab, testified that she tested the substance previously identified as the suspected marijuana Mr. Smith gave to Agent Strickland on 1 June 2017. *See* J.A. 363, 366. Ms. Adcox testified that she analyzed the substance in the laboratory and determined that it was marijuana weighing .96 grams. J.A. 366-67.

Courtney Dupper, also a forensic scientist from the North Carolina State Crime Lab, testified that she analyzed the substance previously identified as suspected cocaine that Mr. Minor purchased on 20 June 2017. J.A. 388-89. Ms. Dupper testified that, according to her analysis, the substance was cocaine, with a net weight of 7.12 grams. J.A. 390.

Carroll Pate, another forensic scientist from the North Carolina State Crime Lab, testified that she analyzed the substance previously identified as suspected cocaine that Agent Strickland purchased on 7 June 2017. J.A. 393-98. Ms. Pate testified that, in her opinion, the substance was cocaine weighing 3.28 grams. J.A. 399.

After Ms. Pate's testimony, the Government rested its case. J.A. 400. Mr. Smith did not put on evidence. J.A. 409. Both sides presented closing arguments, the district court charged the jury, and the jury retired to deliberate. *See* J.A. 410-66. On 18 January 2019, the jury returned a verdict of guilty on all three counts of the indictment. J.A. 482-83.

Sentencing and judgment

The Probation Office prepared a presentence investigation report. J.A. 619-33. The Probation Office found that Mr. Smith's total criminal history score was 12, establishing a criminal history category of V. J.A. 627. However, the Probation Office also determined that Mr. Smith was a career offender, and therefore his criminal history category was VI. J.A. 627. Counts 1, 2, and 3 were grouped for Guidelines calculation purposes. J.A. 630. Based on the career offender Guideline, the Probation Office determined that the offense level was 34. J.A. 631. The Probation Office calculated a Guidelines imprisonment range of 262 to 327 months. J.A. 631.

The Probation Office provided background information about Mr. Smith's childhood and education. J.A. 627-28. According to the presentence investigation

report, Mr. Smith had a difficult childhood and witnessed his cousins and uncles using crack cocaine when he was a young child. J.A. 628. He was also the victim of physical abuse during his childhood. J.A. 628. The Probation Office noted that Mr. Smith was not promoted to the tenth grade after three years. J.A. 629. The Probation Office also reported that intelligence quotient assessments from 1991 and 2005 yielded scores of 78 and 79, indicative of a low level of intellectual functioning. J.A. 629. Regarding Mr. Smith's mental and emotional health, the Probation Office reported that Mr. Smith has a history of depressive disorder, bipolar disorder, anxiety, and symptoms of post-traumatic stress syndrome. J.A. 628. The Probation Office also reported that Mr. Smith suffered from addiction to alcohol, marijuana, and cocaine. J.A. 628. The Probation Office suggested that the court may wish to downwardly vary pursuant to 18 U.S.C. § 3553(a), "in light of the defendant's troubled childhood and exposure to drugs at a young age." J.A. 633.

Neither party objected to the presentence investigation report. J.A. 634. The Government filed a sentencing memorandum. J.A. 484-93. Mr. Smith's counsel did not file a motion for downward variance or a sentencing memorandum. J.A. 5-7.

At a sentencing hearing held on 15 July 2019, the district court confirmed that the parties agreed that the Guidelines range was correct. J.A. 497-98. Mr. Smith's counsel discussed Mr. Smith's prior criminal convictions, and asked the court to consider that the undercover officers had reached out to Mr. Smith to buy drugs, instead of Mr. Smith initiating drug deals. J.A. 498-500. Mr. Smith's counsel argued that some of Mr. Smith's criminal conduct had de-escalated over

time. J.A. 500. Mr. Smith's counsel asserted that a sentence within the Guidelines range of 262 to 327 months would be "greater than necessary," and said Mr. Smith was asking the court "to consider a variance of less than the suggested sentence." J.A. 502. Mr. Smith made a statement to the court following his counsel's argument. J.A. 502-08. The Government's counsel argued that a sentence at the high end of the Guidelines range was appropriate. J.A. 512.

The district court imposed sentences of 12 months' imprisonment on Count 1, and 300 months' imprisonment on each of Counts 2 and 3, all to run concurrently, producing a total sentence of 300 months' imprisonment. J.A. 516. The district court imposed a one-year term of supervised release on Count 1, and six-year terms on each of Counts 2 and 3, all to run concurrently, producing a total term of supervised release of six years. J.A. 516. The district court entered judgment accordingly. J.A. 520-27.

Mr. Smith timely filed notices of appeal. J.A. 6, 528, 531, 535.

Fourth Circuit's opinion

On appeal, Mr. Smith argued that the district court's evidentiary errors denied him a fair trial, that the district court imposed a substantively unreasonable sentence, and that he was prejudiced by his trial counsel's constitutionally deficient assistance at trial and at sentencing. On 30 October 2020, the United States Court of Appeals for the Fourth Circuit issued an unpublished opinion rejecting Mr. Smith's arguments, and affirming the judgment below. App. 10. The Fourth Circuit concluded that the district court did not err in admitting a jailhouse

informant's testimony about uncharged drug transactions and police officers' testimony interpreting their conversations with Mr. Smith. App. 3-6. The Fourth Circuit also ruled that the 300-month sentence was substantively reasonable. App. 9. The Fourth Circuit declined to consider the ineffective assistance argument on direct appeal on the ground that counsel's ineffective assistance did not conclusively appear on the face of the record. App. 10.

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall . . . be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend V.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. Const. amend VI.

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The questions presented in sections II and IV were argued and reviewed below because Mr. Smith argued on appeal that the district court made the evidentiary errors described below, and erred by imposing a substantively unreasonable sentence. *See* App. 2-9. The Fourth Circuit concluded that there was no error in admission of evidence, and that the sentence imposed was substantively reasonable. *See* App. 3-5, 9. Mr. Smith raised the question presented in section I by arguing on appeal that his trial counsel rendered ineffective assistance; the Fourth Circuit declined to consider this argument on direct appeal. *See* App. 9-10. The question presented in section III was not argued and reviewed below, but this Court can grant the writ of certiorari to consider the question. *See* App. *passim*.

REASONS FOR GRANTING THE WRIT

Mr. Smith contends that there are "compelling reasons" for granting his petition for writ of certiorari, *see* S. Ct. R. 10, because the ineffective assistance of his trial counsel resulted in the denial of Mr. Smith's right to put on a defense.

Further, the district court denied Mr. Smith the right to a fair trial by allowing the law enforcement officers to tell the jury what was said in recorded conversations, instead of letting the jury decide for itself, and made other evidentiary errors. Mr. Smith was sentenced under the career offender Guideline based on the alleged predicate convictions identified in the presentence investigation report, when the information in the report was insufficient to establish that Mr. Smith had two predicate convictions. Finally, Mr. Smith is serving a 300-month federal prison sentence for a non-violent offense in the face of undisputed evidence that he suffers from severe mental health issues that diminish his culpability. Mr. Smith respectfully requests that the Court exercise its discretion to review his case and remedy the injustice of the district court's trial errors and sentence. *See id.*

DISCUSSION

I. TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE DEPRIVED MR. SMITH OF THE RIGHT TO OFFER EVIDENCE IN HIS DEFENSE.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations omitted) (quoting *California v. Trombetta*, 467 U.S. 479*,* 485 (1984)). This Court has also made clear that the Sixth Amendment's "right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S.

759, 771 n. 14 (1970)). The "overarching duty" of a criminal defendant's counsel is to "advocate the defendant's cause," and defense counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). In this case, Mr. Smith's trial counsel was so ineffective that he failed to present any coherent defense theory, thus violating Mr. Smith's Due Process and Sixth Amendment rights. The lack of a defense theory "upset the adversarial balance" and prejudiced Mr. Smith, because it practically guaranteed that the jury would believe the Government's theory of the case. *See id.*

Mr. Smith needed a defense theory that could give the jury a reason not to believe three witnesses—Agent Strickland, TFO Simpson, and Mr. Minor—who said they were present and received drugs from Mr. Smith. There was evidence that Agent Strickland asked Mr. Smith during their first meeting whether Mr. Smith would sell "girl," and that Mr. Smith responded that "he really doesn't fuck with that girl"—meaning he did not sell cocaine—but he knew someone else who might sell cocaine. J.A. 226. There was also evidence that when Agent Strickland said he bought cocaine on June 7, there was another person in addition to Mr. Smith present. Similarly, when Mr. Minor said he bought cocaine on June 20, he acknowledged that there was another person in addition to Mr. Smith present. J.A.

316. These facts are consistent with Mr. Smith's statement that he did not sell cocaine, and tend to suggest an alternative theory—that Mr. Smith did not sell cocaine, but that the unidentified third person did sell cocaine, and was the person who distributed cocaine on June 7 and June 20.

Mr. Smith's counsel did not attempt to argue that the other, unidentified person could have been the source of the cocaine from the June 7 and June 20 controlled purchases. *See* J.A. 422-33. He did not point out how the presence of that third person tended to corroborate what Mr. Smith said—that he did not sell cocaine, but knew someone who did. Mr. Smith's counsel told the jury in closing argument that the "legal evidence" showed that Mr. Smith was not guilty. J.A. 422. Mr. Smith's counsel then commented on some of the evidence, but did not give the jury any reason to think that the evidence did not show that Mr. Smith was guilty of distributing marijuana and cocaine. *See* J.A. 422-33. Mr. Smith contends that the closing argument illustrates that his counsel did not have a trial strategy, and was therefore ineffective in his representation of Mr. Smith. *See generally Groseclose v. Bell*, 130 F.3d 1161, 1169 (6th Cir. 1997) (concluding, in death penalty case, that counsel's "failure to have any defense theory whatsoever" indicated ineffective assistance).

Where, as here, defense counsel provided "no actual 'Assistance' 'for' the accused's 'defence,'" the Sixth Amendment has been violated. *See United States v. Cronic*, 466 U.S. 648, 654 (1984) (quoting U.S. Const. amend. VI). Mr. Smith's counsel's failure to effect his "right to present the defendant's version of the facts as

well as the prosecution's to the jury so it may decide where the truth lies" violated a "fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Mr. Smith respectfully requests that the Court grant this petition so it can correct the Fourth Circuit's failure to grant Mr. Smith relief for these violations of his constitutional rights.

II. THE DISTRICT COURT'S EVIDENTIARY ERRORS DENIED MR. SMITH A FAIR TRIAL.

The Due Process Clause of the Fifth Amendment guarantees every criminal defendant the right to receive a fair trial. *See Estes v. Texas*, 381 U.S. 532, 540-43 (1965) ("A fair trial in a fair tribunal is a basic requirement of due process."). There are compelling reasons for this Court to grant the writ of certiorari because the district court made numerous evidentiary errors that, taken together, denied Mr. Smith a fair trial.

A. The District Court Erred In Admitting Over Mr. Smith's Objection Evidence Of Other Crimes Allegedly Committed By Mr. Smith.

Rule 404(b)(1) of the Federal Rules of Evidence provides that "[e]vidence of a crime, wrong, or other 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." *See* Fed. R. Evid. 404(b)(1). Rule 404(b) "generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge." *Huddleston v. United States*, 485 U.S. 681, 685 (1988). This rule reflects the longstanding principle that "propensity would be an

improper basis for conviction." *Old Chief v. United States*, 519 U.S. 172, 182 (1997) (quotation omitted).

"The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." *Huddleston v. United States*, 485 U.S. at 686. The Fourth Circuit has established a four-prong test for the admissibility of prior act evidence: "(1) the prior act evidence must be relevant to an issue other than character, such as intent; (2) it must be necessary to prove an element of the crime charged; (3) it must be reliable; and (4) as required by Federal Rule of Evidence 403, its probative value must not be substantially outweighed by its prejudicial nature." *United States v. Queen*, 132 F.3d 991, 995 (4th Cir. 1997).

Rule 404(b)(2) provides that upon request by the defendant, the Government must "provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial," and must "do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice." Fed. R. Evid. 404(b)(2)(A). Such a notice "is intended to reduce surprise and promote early resolution on the issue of admissibility." Fed. R. Evid. 404(b) advisory committee's note to 1991 amendments. Accordingly, if the Government does not comply with the notice requirement of Rule 404(b)(2), the proffered evidence is inadmissible. *See id.* ("[T]he notice requirement serves as condition precedent to admissibility of 404(b) evidence.").

1. The Government did not provide reasonable notice before trial.

The prior bad acts evidence proffered by the Government was inadmissible because the Government did not provide the reasonable notice in advance of trial as required by Rule 404(b)(2). Mr. Smith filed a discovery request in June 2018 requesting notice of any evidence that the Government intended to offer pursuant to Rule 404(b). J.A. 71. The district court set the trial to begin on 16 January 2019 by order entered on 4 December 2018. J.A. 3. The Government had not provided any Rule 404(b) notice at that time.

The Government provided notice of its intent to offer Rule 404(b) evidence only on 9 January 2019, eight months after Mr. Smith had requested such information, more than a month after the trial date had been set, and just one week before trial. J.A. 39-45. The Government advised that it intended to offer evidence from an unidentified cooperating witness[1] that Mr. Smith allegedly had engaged in drug transactions with that witness, and that it intended to offer evidence of a recorded jail call. J.A. 42-44. Mr. Smith objected that the Government's notice was untimely. J.A. 72.

Prior to jury selection, the district court heard argument on Mr. Smith's objection. J.A. 83-91. Upon inquiry from the district court, the Government advised that it had produced a statement from the cooperating witness in the fall of

[1] The cooperating witness was Victor Watson. J.A. 83.

2018. J.A. 85.[2] The district court ruled that the Rule 404(b) notice was timely. J.A. 85, 87. Mr. Smith's counsel asked to be heard further on the matter and told the court that the Government initially had produced the statement with identifying information redacted, and had produced the unredacted statement only one week before trial, leaving Mr. Smith no time to seek to interview the witness or otherwise plan his defense to that evidence. J.A. 86-87. Although the Government offered no explanation for its delayed transmittal of the Rule 404(b) notice or, specifically, its delayed transmittal of the unredacted statement, the district court nevertheless found the notice was sufficient and overruled Mr. Smith's objection. J.A. 87.

The Government's notice of intent to introduce evidence of the recorded jail call was also untimely. The phone call Mr. Smith allegedly made from jail occurred on 27 March 2019. J.A. 46-49. Again, the Government offered no explanation for its delayed notice of intent to introduce evidence of the phone call it had, or could have had, for more than nine months before its Rule 404(b) notice. Under Rule 404(b), the Government's notice was untimely and the evidence was, therefore, inadmissible.

The Fourth Circuit erroneously ruled that the Government met its burden to disclose Rule 404(b) evidence because it "disclosed to counsel 'the general nature'" of

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[2] The Assistant United States Attorney stated to the district court that the Government had provided the statement in the "fall of 2017." J.A. 85. Mr. Smith was not indicted until May 2018. J.A. 8-11. Mr. Smith believes that the Assistant United States Attorney intended to say that the statement was provided in the fall of 2018.

that evidence months before trial, and defense counsel "was aware of the jailhouse informant's identity by the time of trial." App. 5. In doing so, the Fourth Circuit ignored that defense counsel received the informant's unredacted statement shortly before trial and thus could not attempt to interview the informant and plan a defense strategy. *See* J.A. 86-87. This Court also can reject the Fourth Circuit's decision, in an unpublished opinion, that providing Rule 404(b) notice one week in advance of trial was not untimely. *See United States v. Armstrong*, 257 F. App'x 682, 685-86 (4th Cir. 2007) (per curiam). Mr. Smith respectfully contends that in this case, when the Government had the evidence long before trial, provided no explanation for the late notice, and Mr. Smith was surprised and prejudiced in his ability to investigate and contest the evidence because of the delay in providing notice, the district court and the Fourth Circuit erred in ruling that the Government's notice was sufficient.

2. The prior act evidence was inadmissible.

Even if the Government had provided timely notice of its intent to proffer prior bad acts evidence, the evidence was properly excluded because it did not meet the Fourth Circuit's four-prong test for admissibility. *E.g.*, *United States v. Queen*, 132 F.3d at 995. Contrary to the Fourth Circuit's conclusion, the evidence was not relevant to an issue other than character. *See* App. 3. Rather, Victor Watson's testimony about other alleged drug transactions with Mr. Smith was prototypical inadmissible bad character evidence intended to persuade the jury that Mr. Smith was a drug dealer and, therefore, must be guilty of the crimes charged. *See* Fed. R.

Evid. 404(b)(1). Mr. Smith was charged with distributing marijuana and cocaine, and the Government presented witnesses who offered direct evidence of their involvement in the acts of distribution. J.A. 8-9, 141-196, 209-336. Thus, Victor Watson's testimony could not have been offered for a legitimate purpose like proving intent, identity, or knowledge. *See* J.A. 374 (district court's limiting instruction). Moreover, the Mr. Watson's testimony was not reliable and its prejudicial effect substantially outweighed its probative value. *See United States v. Queen*, 132 F.3d at 995. Mr. Watson had multiple felony convictions for obtaining property by false pretenses, showing his propensity for false statements. J.A. 370. The district court erred in permitting the Government to introduce Mr. Watson's testimony.

The district court also erred in admitting evidence of the jailhouse phone call where the Government did not make the showing required to admit Rule 404(b) evidence. *See United States v. Queen*, 132 F.3d at 995. The Fourth Circuit's ruling that the Government did not have to satisfy the Rule 404(b) requirements because the call was admitted as "highly relevant" instrinsic evidence is also erroneous. *See* App. 4. The evidence was not relevant because it had no tendency to prove any fact in issue—there was no discussion of any of the alleged drug transactions on June 1, 7, or 20. *See* J.A. 46-49. Further, the coarse, vulgar language used during the call was prejudicial, and that prejudicial effect substantially outweighed any probative value that the Government could claim. *See United States v. Queen*, 132 F.3d at 995. The district court erred when it allowed the evidence to be admitted. *See*

United States v. Barletta, 652 F.2d 218, 220 (1st Cir. 1981) (trial court properly excluded evidence of taped phone call involving defendant where conversation included "obscenities, ethnic slurs, and otherwise coarse language, warped and suffused with an aura of nonspecific criminality").

B. The District Court Erred By Permitting The Government's Witnesses To Interpret What Was Being Said In Recorded Conversations.

Rule 701 of the Federal Rules of Evidence governs the admission of lay opinion testimony. Under Rule 701, a lay witness may give opinion testimony only if it is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701; *see generally Beech Aircraft Corp v. Rainey*, 488 U.S. 153, 169 (1988) ("Rule 701 permits even a lay witness to testify in the form of opinions or inferences drawn from her observations when testimony in that form will be helpful to the trier of fact."). "The important limitations are (1) that the opinion testimony be based on the witness' actual perception of events and (2) that it be helpful to the jury in understanding those events." *United States v. Offill*, 666 F.3d 168, 177 (4th Cir. 2011). If "attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule." Fed. R. Evid. 701 advisory committee's note to 1972 proposed rules; *see United States v. Offill*, 666 F.3d at 177 (quoting advisory committee's note). Thus, "[l]ay opinion testimony will not be helpful to the jury

when the jury can readily draw the necessary inferences and conclusions without the aid of the opinion." *United States v. Diaz-Arias*, 717 F.3d 1, 12 (1st Cir. 2013) (quotations and emphasis omitted); *see United States v. Fulton*, 837 F.3d 281, 291 (3d Cir. 2016) (lay opinion testimony is permitted "because it has the effect of describing something that the jurors could not otherwise experience for themselves by drawing upon the witness's sensory and experiential observations that were made as a first-hand witness to a particular event" (quotations omitted)).

The district court erred when it repeatedly permitted the Government to elicit improper lay opinion testimony from TFO Simpson and Agent Strickland after they listened to audio recordings. TFO Simpson and Agent Strickland were allowed to repeat or "summarize" what they claimed they heard when the Government's counsel had an excerpt of an audio recording played. *See* J.A. 151, 156, 222, 243. Although Agent Strickland was not present for Mr. Minor's visit to Hale Swamp Road on June 20, Agent Strickland also summarized and repeated what he heard on Mr. Minor's audio recording for that date. J.A. 242-44. The witnesses' testimony was not based on their recollection of their actual perception of the conversations at the time of those events; rather, the witnesses simply repeated what they claimed they heard when the recording was played. *See* J.A. 151, 156, 222, 243, 312, 316-17, 319-20. Listening to the recordings was something the jurors could and did experience for themselves; the lay opinions of TFO Simpson and Agent Strickland were not helpful to the jury where the jury could readily draw the inferences and conclusions about what the participants in the conversations said by listening to the

recordings, without the aid of the lay opinion testimony. *See United States v. Fulton*, 837 F.3d at 291; *United States v. Diaz-Arias*, 717 F.3d at 12.

Contrary to the Fourth Circuit's conclusion, the officers did not merely "clarify" a "muddled recording." App. 5-6. The improper testimony gave the witnesses the opportunity to add to or vary from what was actually audible on the recordings. Mr. Smith contends that it was plain error to allow the witnesses to repeat, characterize, or summarize what the jurors could and did hear for themselves. The error affected Mr. Smith's substantial rights because it infected the jury's consideration of the audio recordings—the unadorned, contemporaneous evidence of what happened during the alleged drug transactions—with the witnesses' characterizations of the recordings. *See generally United States v. Ramirez-Castillo*, 748 F.3d 205, 212 (4th Cir. 2014). TFO Simpson and Agent Strickland testified about what they said happened on June 1 and June 7, the dates that they were personally involved in the investigation, and Mr. Minor testified about what he said happened on June 20. *See supra* pp. 11-16. To avoid a conviction, Mr. Smith needed the jury to disbelieve the testimony of TFO Simpson and Agent Strickland that Mr. Smith distributed marijuana to Agent Strickland on June 1 and cocaine to Agent Strickland on June 7, and the testimony of Mr. Minor that Mr. Smith distributed cocaine to him on June 20. The district court erroneously permitted the Government to bolster the testimony of TFO Simpson and Agent Strickland by allowing testimony of those witnesses purporting to repeat or summarize what was on the audio recordings, rather than letting the jurors just

listen to the recordings for themselves. Mr. Smith further respectfully contends that the plain error here seriously affected the fairness and integrity of the trial where it prevented Mr. Smith from being able effectively to rebut the testimony of TFO Simpson and Agent Strickland that Mr. Smith had distributed drugs as charged.

C. The District Court Erred By Permitting The Government To Introduce Opinion Testimony By Law Enforcement Witnesses Not Disclosed As Experts.

Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure provides that "[a]t the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, and 705 of the Federal Rules of Evidence during its case-in-chief at trial." Fed. R. Crim. P. 16(a)(1)(G). The summary "must describe the witness's opinions the bases and reasons for those opinions, and the witness's qualifications." *Id.*

Where a party fails to comply with the expert disclosure requirements, the district court may: "(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances." Fed. R. Crim. P. 16(d)(2).

The expert disclosure provisions of Rule 16 are "intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit

of the expert's testimony through focused cross-examination." Fed. R. Crim. P. 16 advisory committee's note to 1993 amendment. As the Advisory Committee has explained, the requirement that the Government provide a summary of the bases for an expert's opinion is "perhaps [the] most important" requirement in the rule. *Id.* The summary "should cover not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a legitimate basis for an opinion under Federal Rule of Evidence 703, including opinions of other experts." *Id.* Although an expert witness may be qualified on the basis of experience, "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" Fed. R. Evid. 702 advisory committee's note to 2000 amendments.

Prior to trial, the Government gave notice of three expert witnesses, the forensic scientists who testified to their opinions regarding the weight and identity of drugs seized on 1 June 2017, 7 June 2017, and 20 June 2017. J.A. 38.1-38.2. The Government did not disclose any of the law enforcement officers involved in investigating Mr. Smith as experts. *See* J.A. 38.1-38.2.

Nevertheless, at trial, the Government elicited testimony from Agent Strickland as if he was an expert witness on drug investigations. *See* J.A. 210. At the outset of the direct examination, the Government's counsel asked: "And as part

of your training and experience, have you investigated drug cases?" J.A. 210. Agent Strickland answered in the affirmative, discussed his experience, and proceeded to testify about tactics in conducting undercover investigations, and his involvement in the investigation of Mr. Smith. *See* J.A. 210-48. Agent Strickland testified to his opinion that "'[g]irl' on the street means powder cocaine." J.A. 226. He also testified that "eight ball" means 3.5 grams of cocaine and that, based on his experience, "raw" referred to high quality cocaine. J.A. 226-227.

The Government's counsel elicited similar testimony from TFO Simpson. *See* J.A. 159. TFO Simpson also testified that, based on his experience, "girl" means cocaine, and "ball" means an eight ball of cocaine, or 3.5 grams. J.A. 159-60. TFO Simpson testified that, in his experience, "raw" means "that it's higher quality cocaine." J.A. 161.

Contrary to the Fourth Circuit's ruling that the officers gave lay opinion testimony, App. 7-8, the record reflects that the officers testified based on their training and experience. *See supra* pp. 36-37. Opinion testimony based on training and experience in law enforcement is expert testimony. *See* Fed. R. Evid. 702 (witness may be qualified as an expert by "knowledge, skill, *experience*, *training*, or education" (emphasis added)); *see also, e.g.*, *United States v. Baptiste*, 596 F.3d 214, 222 n.5 (4th Cir. 2010) (recognizing that "experienced narcotics officers are qualified to testify as expert witnesses regarding drug trafficking, code interpretation, and similar matters"); *United States v. Wilson*, 484 F.3d 267, 275 (4th Cir. 2007) (discussing law enforcement expert testimony based on extensive experience in drug

cases). Because the Government failed to disclose such expert testimony, the district court erred by allowing Agent Strickland and TFO Simpson to offer expert opinions at trial. *See* Fed. R. Crim. P. 16(a)(1)(G).

Although Rule 16 gives the district court discretion in responding to a disclosure violation, each of the remedial options recognizes that fairness requires that a party have the right to respond effectively to expert evidence. *See* Fed. R. Crim. P. 16(d)(2). As this Court has noted, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty of evaluating it." *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) (citation omitted). Because the Government provided no notice of experts other than the forensic scientists, and no information regarding Agent Strickland's or TFO Simpson's opinions or the bases and reasons for their opinions, the Government frustrated a central purpose of the disclosure rule. *See* Fed. R. Crim. P. 16 advisory committee's note to 1993 amendment. Mr. Smith's trial counsel could not prepare to cross-examine Agent Strickland or TFO Simpson about their opinions, unfairly hindering Mr. Smith's ability to test Agent Strickland's and TFO Simpson's testimony. *See id.* The officers' testimony encouraged the jury to convict Mr. Smith, because both officers testified that they were directly involved in a drug transaction with Mr. Smith. *See* J.A. 151, 170, 223, 232.

D. The Cumulative Effect Of The District Court's Evidentiary Errors Denied Mr. Smith A Fair Trial.

This Court has recognized that "erroneous evidentiary rulings can, in

combination, rise to the level of a due process violation." *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996). "Pursuant to the cumulative error doctrine, the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *United States v. Lighty*, 616 F.3d 321, 371 (4th Cir. 2010). A defendant is entitled to relief under the cumulative error doctrine when errors "so fatally infect the trial that they violated the trial's fundamental fairness." *Id.* The defendant may meet the plain error standard by showing that two or more errors, considered together, affected a substantial right. *See United States v. Martinez*, 277 F.3d 517, 532 (4th Cir. 2002).

As shown above, the district court made numerous evidentiary errors. *See supra* section II. Mr. Smith respectfully contends that there are compelling reasons to grant the writ of certiorari because the cumulative effect of the evidentiary errors denied him the fair trial guaranteed by the Due Process Clause. *See Egelhoff*, 518 U.S. at 53.

III. THE INFORMATION PRESENTED AT SENTENCING DID NOT ESTABLISH THAT THE CAREER OFFENDER GUIDELINE APPLIED.

Mr. Smith was sentenced as a career offender based on a Louisiana state court conviction as one of the predicate convictions. A decision from the United States Court of Appeals for the Fifth Circuit that post-dates the Fourth Circuit's opinion in this case calls into question whether that conviction can be a career offender predicate. Although this issue could not have been raised below, Mr. Smith respectfully requests that the Court grant this petition so that he can

immediately obtain relief for the improper sentence imposed by the district court.

The Probation Office found that the career offender Guideline applied to Mr. Smith, based on consolidated North Carolina state court drug trafficking convictions from 2005, and a Louisiana state court drug trafficking conviction from 2010. J.A. 624, 626, 627, 631. Where neither the Government nor Mr. Smith objected to the presentence investigation report, the district court established the advisory Guidelines sentencing range based on the career offender Guideline. *See* J.A. 497-89. The district court sentenced Mr. Smith to 300 months' imprisonment, within the Guidelines sentencing range based on the career offender Guideline. J.A. 516.

In *United States v. Frierson*, 981 F.3d 314, 316-18 (5th Cir. 2020), the Fifth Circuit held that Louisiana Revised Statute § 40:967(A), applicable to Schedule II controlled substances, is a divisible statute. Therefore, the modified categorical approach must be applied to determine whether a defendant's conviction under Louisiana's controlled substances statute is a "controlled substance offense" under U.S.S.G. § 4B1.2(b). *United States v. Frierson*, 981 F.3d at 318.

Because the opinion in *United States v. Frierson* post-dates Mr. Smith's sentencing, his appeal, and the Fourth Circuit's decision, he did not challenge the Louisiana conviction as a career offender predicate. Mr. Smith respectfully contends that he is entitled to resentencing so he can challenge that conviction as a career offender predicate.

IV. THE DISTRICT COURT'S 300-MONTH SENTENCE FOR A NON-VIOLENT DRUG CRIME IS SUBSTANTIVELY UNREASONABLE.

The district court imposed a substantively unreasonable sentence of 300 months' imprisonment for a non-violent drug crime in the face of substantial evidence that Mr. Smith suffered from serious mental health issues. Applying a presumption of reasonableness, the Fourth Circuit affirmed the sentence with scant analysis. The nature and circumstances of the offenses—three drug distribution offenses involving small quantities of marijuana and cocaine—taken together with Mr. Smith's history and characteristics showed that the sentence imposed was greater than necessary to advance the purposes of sentencing. Mr. Smith's history of abuse and neglect, drug addictions, and mental health issues, together with his age, were characteristics that, if properly considered, make clear that a sentence of 300 months' imprisonment was greater than necessary.

Pursuant to § 3553(a), the district court "shall impose a sentence sufficient, but not greater than necessary, . . . (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a), (a)(2). As relevant here, the district court is required to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." *See id.* § 3553(a)(1).

Application of the § 3553(a) factors shows that Mr. Smith's sentence of 300 months' imprisonment is substantively unreasonable because it is "greater than necessary" to comply with the purposes of sentencing. *See id.* § 3553(a).

The "nature and circumstances of the offense," taken with Mr. Smith's "history and characteristics," do not support the 300-month sentence. *See id.* § 3553(a)(1). Mr. Smith suffered from abuse and neglect as a child, and was exposed to drug use by family members beginning at a very young age. J.A. 628. He developed his own drug addictions and suffered from serious mental health problems. J.A. 628. IQ testing also showed that Mr. Smith had a low level of intellectual functioning. J.A. 629. Mr. Smith's mental health conditions and low level of intellectual functioning may make him particularly susceptible to the influence of others, providing an explanation for the circumstances leading to his indictment—undercover officers initiated criminal conduct, and Mr. Smith acted in response to the officers' requests. *See* J.A. 184.

Given that Mr. Smith was forty-six years old at the time of sentencing, J.A. 620, a 300-month sentence is greater than necessary to protect the public from Mr. Smith committing further crimes. *See* 18 U.S.C. § 3553(a)(2)(C). "[S]tudies demonstrate that the risk of recidivism is inversely related to an inmate's age." *United States v. Howard*, 773 F.3d 519, 533 (4th Cir. 2014); *see also* U.S. Sentencing Comm'n, *The Effects of Aging on Recidivism Among Federal Offenders* at 3 (Dec. 7, 2017) ("Older offenders were substantially less likely than younger offenders to recidivate following release."). If he serves a sentence of 300 months, Mr. Smith

will be over age 70 at the time of release. *See* J.A. 620. The Sentencing Commission has found that federal prisoners who are 65 years of age or older at the time of release are drastically less likely to recidivate than younger prisoners. *See The Effects of Aging on Recidivism* at 3. A lesser sentence would be sufficient to incapacitate Mr. Smith until a time when he is statistically much less likely to commit another offense.

A sentence of less than 300 months' imprisonment also would be sufficient "to provide [Mr. Smith] with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." *See* 18 U.S.C. § 3553(a)(2)(D). The record shows that Mr. Smith suffers from significant substance abuse problems and mental health conditions. J.A. 628-29. Mr. Smith reported that he starting abusing alcohol at age 9, marijuana at age 10, and cocaine at age 15. J.A. 628. Mr. Smith reported being addicted to all three substances, and continued to use each of them until the time of his arrest. J.A. 628. Mr. Smith has not had the opportunity for sufficient treatment for his substance abuse struggles. *See* J.A. 628. According to the presentence investigation report, Mr. Smith recalled participating in drug treatment while in state custody, but the Probation Office did not receive any records documenting such treatment, and Mr. Smith expressed a desire to seek drug treatment in federal prison. *See* J.A. 629. With proper treatment, Mr. Smith may be able to overcome his substance abuse problem, and in turn, substantially reduce the risk of recidivism. *See generally* H.R. Rep. No. 103-320, 1993 WL 537335 (finding, in connection with legislation establishing

residential substance abuse treatment program in federal prisons, that "[w]ith appropriate treatment, the recidivism rate of substance abusers can be dramatically reduced").

The individual circumstances of Mr. Smith's case therefore demonstrate that the 300-month sentence is "greater than necessary" to comply with the purposes of sentencing. *See* 18 U.S.C. § 3553(a).

CONCLUSION

For the foregoing reasons, Petitioner Covia Dzell Smith respectfully requests that the Court grant his petition for writ of certoriari, reverse the decision of the Fourth Circuit, and remand for further proceedings.

This the 29th day of March, 2021.

/s/ Paul K. Sun, Jr.
Paul K. Sun, Jr.
N.C. State Bar No. 16847
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CERTIFICATE OF SERVICE

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

Jennifer P. May Parker, Esq.
Assistant United States Attorney
150 Fayetteville Street, Suite 2100
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This the 29th day of March, 2021.

/s/ Paul K. Sun, Jr.
Paul K. Sun, Jr.