No. __-____

IN THE

Supreme Court of the United States

ROYCE WADE LANDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. This Court has held a certificate of appealability ("COA") should issue where the petitioner has made a threshold showing that jurists of reason could disagree with the district court's holding or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. Accordingly, the issue presented is whether the Order of the United States Court of Appeals for the Fifth Circuit holding that Petitioner failed to make this threshold showing and refusing to grant a COA as to the District Court's denial of Petitioner's Motion for Reconsideration of the District Court's April 14, 2023 denial of his Motion to Vacate, Set Aside, or Correct a Sentence Under 28 U.S.C. § 2255 conflicts with this Court's precedent?

PARTIES TO THE PROCEEDING AND RELATED CASES

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

The following is a list of all proceedings in other courts that are directly related to this case:

- *United States v. Royce Wade Lander*, No. 2:18-mj-00068-BR-1, U.S. District Court for the Northern District of Texas. Terminated as merged with No. 2:18-CR-075-D on July 27, 2018.
- *United States v. Royce Wade Lander*, No. 3:18-mj-04206-DMF-1, U.S. District Court for the District of Arizona. Order entered August 2, 2018.
- *United States v. Royce Wade Lander*, No. 2:18-cr-00075-Z-BR-1, U.S. District Court for the Northern District of Texas. Judgment entered on November 6, 2019.
- *United States v. Royce Wade Lander*, No. 19-11234, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on October 15, 2020.
- *United States v. Royce Wade Lander*, No. 2:22-cv-00046-Z-BR, U.S. District Court for the Northern District of

Texas. Judgment entered on April 14, 2023.

- *United States v. Royce Wade Lander*, No. 23-10959, U.S. Court of Appeals for the Fifth Circuit. Order entered on March 8, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Royce Wade Lander ("Petitioner" and "Mr. Lander"), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

On February 16, 2024, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") entered an Order denying Petitioner's Motion for a Certificate of Appealability ("COA") (Petitioner's "Motion for a COA") as to an August 9, 2023 Order of the United States District Court for the Northern District of Texas ("District Court") denying Petitioner's Motion for Reconsideration (Petitioner's "Motion for Reconsideration") of the District Court's April 14, 2023 denial of his Motion to Vacate, Set Aside, or Correct a Sentence Under 28 U.S.C. § 2255 (Petitioner's "§ 2255 Motion").

On March 8, 2024, the Fifth Circuit entered an Order denying Petitioner's Petition for Rehearing En Banc.

These and all other Orders entered by the Fifth Circuit in this matter are attached herein, along with the District Court's August 9, 2023 Order denying Petitioner's Motion for Reconsideration and other relevant Orders entered by the District Court, and other filings which may be relevant to this Court's consideration of this Petition.

JURISDICTION

The Fifth Circuit entered its Order denying the Motion for a COA on February 16, 2024 and entered its Order denying Petitioner's timely Petition for Rehearing En Banc on March 8, 2024. 1a; 54a. This Petition is, therefore, timely filed pursuant to Supreme Court Rule 13.

This Court has proper jurisdiction pursuant to 28 U.S.C. § 1254(1) and *Hohn v. United States*, 524 U.S. 236, 253 (1998) (holding that the Supreme Court has jurisdiction to review denials of applications for a COA).

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231, and the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253 provides,

> "(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment

or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

28 U.S.C. § 2255 provides,

> "(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to

collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory

authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

STATEMENT OF THE CASE

I. District Court Conviction and Sentencing

Mr. Lander was convicted on November 6, 2019 after a jury trial before the District Court of one (1) count of transportation of a minor with intent to engage in sexual activity in violation of 18 U.S.C. § 2423(a) and was sentenced to two-hundred and

ninety-two (292) months' imprisonment and five (5) years' supervised release. 23a.

II. Petitioner's Fifth Circuit Appeal of His Conviction

On November 13, 2019, Mr. Lander submitted to the Fifth Circuit a Notice of Appeal challenging his conviction, which was affirmed by Fifth Circuit by way of an October 15, 2020 Judgment and Unpublished Opinion and a November 6, 2020 Mandate. 37a; 51a.

III. Petitioner's 28 U.S.C. § 2255 Motion

On March 14, 2022, Mr. Lander filed with the District Court a Motion to Vacate, Set Aside, or Correct a Sentence Under 28 U.S.C. § 2255 (Petitioner's "§ 2255 Motion"), in which he argued that his trial counsel was ineffective for:

1. Failing to advise him of a plea offer and failing to advise him of the risks involved with proceeding to trial versus accepting a plea offer;

2. Failing to impeach the complaining witness with prior inconsistent statements;

3. Calling Mr. Lander's wife as a defense witness and failing to object to the Government's use of evidence protected by the spousal privilege; and

4. Failing to object to improper remarks made by the Government during its closing argument regarding the highly publicized Elizabeth Smart case.

57a-78a.

The Government filed a response in opposition to Mr. Lander's § 2255 Motion on July 21, 2022, and Mr. Lander filed a reply on September 9, 2022.

An Evidentiary Hearing as to the § 2255 Motion was held by the District Court on November 15, 2022 (the "Evidentiary Hearing"), a transcript of which is enclosed herein.

IV. The District Court's Denial of Petitioner's § 2255 Motion

On March 23, 2023, the Magistrate recommended that the § 2255 Motion be denied because:

1. Mr. Lander admitted during the Evidentiary Hearing that he would not have accepted any plea offer because he was innocent.

2. Trial counsel did cross-examine the complaining witness about her "brain fog" during the alleged incident and attempted to impeach the complaining witness about her reasons for running away from home but was precluded from doing so by the Court's granting of the Government's in limine motion.

3. Trial counsel explained his decision to call Mr. Lander's wife as a defense witness, and testimonial evidence is a matter of trial strategy. Moreover, any error in failing to object to evidence which may have been protected by spousal privilege was harmless because the allegation supported by that evidence was also supported by other evidence.

4. Mr. Lander's claim that he was harmed by references to the Elizabeth Smart case made by the Government during its closing argument is merely speculative.

7a-15a.

The Magistrate's recommendation was adopted by the District Court on April 14, 2023. 16a.

V. Petitioner's Motion for Reconsideration

On June 21, 2023, Mr. Lander filed with the District Court a pro se letter Motion for Reconsideration of the District Court's denial of his § 2255 Motion. 149a.

The District Court denied Mr. Lander's Motion for Reconsideration on August 9, 2023. 19a.

On September 11, 2023, Mr. Lander filed a Notice of Appeal to the Fifth Circuit as to the District Court's denial of his Motion for Reconsideration.

On September 21, 2023, the District Court entered an Order denying the issuance of a certificate of appealability ("COA"). 21a.

VI. Petitioner's Appeal to the Fifth Circuit as to the District Court's Denial of the Issuance of a COA

By way of October 4, 2023 written correspondence, the Fifth Circuit instructed Mr. Lander to submit a motion for a COA and supporting brief by November 13, 2023.

Mr. Lander then retained new counsel ("Counsel") to represent him as to the Fifth Circuit appeal of the District Court's denial of the issuance of a COA. Said Counsel is also representing Mr. Lander as to this Petition.

The Fifth Circuit granted Counsel's request to extend the deadline for the filing of a motion for a COA and supporting brief (Petitioner's "Motion for a COA") to December 13, 2023.

Petitioner subsequently filed with the Fifth Circuit on December 11, 2023, through Counsel, a timely Motion for COA and supporting Brief, in which Petitioner submitted:

1. Mr. Lander made a substantial showing that his Constitutional right to counsel was violated when trial counsel failed to advise him of a plea offer and failed to discuss with him the risks of proceeding to trial versus

accepting a plea offer, resulting in Mr. Lander receiving a sentence of more than double the statutory maximum which would have applied under the plea offer.

2. Mr. Lander made a substantial showing that his Constitutional right to counsel was violated when trial counsel failed to impeach the complaining witness with prior inconsistent statements.

3. Mr. Lander made a substantial showing that his Constitutional right to counsel was violated when trial counsel called his wife as a defense witness, resulting in the disclosure of highly prejudicial spousal communications to the jury.

4. Mr. Lander made a substantial showing that his Constitutional right to counsel was violated when trial counsel failed to object to highly prejudicial and improper references to the wholly unrelated Elizabeth Smart case made by the Government during its closing argument and rebuttal at trial.

5. Reasonable jurists could, therefore, debate whether Mr. Lander's Motion for Reconsideration should have been granted.

6. Accordingly, the Fifth Circuit should issue a COA to enable Mr. Lander to proceed in appealing on the merits the District Court's denial of his Motion for Reconsideration.

VII. The Fifth Circuit's Denial of Petitioner's Motion for a COA

On February 16, 2024, the Fifth Circuit entered an Order denying Mr. Lander's Motion for a COA, in which it held that Mr. Lander's Notice of Appeal was untimely as to his § 2255 Motion but was timely as to his Motion for Reconsideration. 1a-5a.

The Fifth Circuit then held that Mr. Lander failed in his Motion for a COA to make a substantial showing of the denial of a Constitutional right, in that he failed to demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the [motion] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). 3a.

VIII. Petitioner's Petition for a Rehearing En Banc

On February 23, 2024, Mr. Lander filed, through Counsel, with the Fifth Circuit a Petition for a Rehearing En Banc in which Mr. Lander submitted that his Motion for a COA involves a question of exceptional importance, warranting en banc review

in accordance with Federal Rule of Appellate Producer 35(b)—namely, whether a defendant's declaration of innocence relieves his trial counsel of the duty to effectively communicate to the defendant a plea offer that could result in a probationary sentence instead of a 292-month sentence following a trial.

Mr. Lander further submitted in his Petition for a Rehearing En Banc that the Fifth Circuit's summary affirmance of the District Court's refusal to issue a COA is inconsistent with existing authoritative decisions on the issue.

IX. The Fifth Circuit's Denial of Petitioner's Petition for Rehearing En Banc

On March 8, 2024, the Fifth Circuit issued an Order: (a) treating the Petition for Rehearing En Banc as a motion for reconsideration pursuant to Fifth Circuit Rule 35 and denying the motion for reconsideration, with no further basis given for the denial; and (b) denying the Petition for Rehearing En Banc because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc pursuant to Federal Rule of Appellate Procedure 35 and Fifth Circuit Rule 35, with no further basis given for the denial. 54a-56a.

This timely Petition follows.

ARGUMENT IN SUPPORT OF GRANTING THE PETITION

I. Precedent from this Court Makes Clear that a Circuit Court Should Issue a COA If a Mere Threshold Inquiry Is Satisfied

28 U.S.C. § 2253 provides that a final order issued in a habeas corpus proceeding under 28 U.S.C. § 2255 may not be appealed "[u]nless a circuit justice or judge issues a certificate of appealability." The statute further provides that a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."

Precedent from this Court, discussed below, makes clear that in deciding a motion for a COA, the circuit court should engage in a threshold inquiry only and should not address the merits of the underlying petition for post-conviction relief. This precedent holds that a COA should issue if the threshold inquiry indicates that reasonable jurists could debate whether the petition raises a constitutional issue, which does not require a finding that reasonable jurists would grant the requested post-conviction relief.

Specifically, this Court held in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), that "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debat-

able whether the district court was correct in its procedural ruling."

Subsequently, in *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003), this Court elaborated that the issuance of a COA requires a "substantial showing of the denial of a constitutional right", which requires the petitioner to "'show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* at 336, quoting *Slack*, 529 U.S. at 484.

This Court further noted that it "in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 337.

This Court reiterated:

> "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail."

Id. at 336-38.

This Court then held in *Miller-El* that the district court and the Fifth Circuit improperly denied the petitioner's motion for a COA, writing "we have no difficulty concluding that a COA should have issued. We conclude, on our review of the record at this stage, that the District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case." *Id.* at 341.

Likewise, in *Buck v. Davis*, 137 S. Ct. 759 (2017), this Court again reversed and remanded the Fifth Circuit's denial of the petitioner's motion for a COA. This Court reiterated in *Buck* that, "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* at 773, citing *Miller-El*, 537 U.S. at 557.

II. The Fifth Circuit Erred in Denying Petitioner's Motion for COA Because Petitioner Met the Threshold Inquiry Set by this Court's Precedent

Mr. Lander submits that the Fifth Circuit improperly denied his Motion for a COA because he met the threshold inquiry set forth by this Court in *Slack*, *Miller-El*, *Buck*, *et al.* of whether jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists

could conclude the issues presented are adequate to deserve encouragement to proceed further. *See Slack*, 529 U.S. 473; *Miller-El*, 537 U.S. 322; *Buck*, 137 S. Ct. 759.

As noted above, 28 U.S.C. § 2253 provides that a COA should issue if "if the applicant has made a substantial showing of the denial of a constitutional right." This Court has specified that this requires a showing that "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

This is merely a "threshold inquiry" and should not include an analysis of the merits of the underlying constitutional claim, which the circuit court in fact does not have jurisdiction to decide until a COA has issued. *Miller-El*, 537 U.S. at 336-37.

Here, Mr. Lander clearly established in his Motion for a COA that "jurists of reason would find it debatable whether [his] petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Specifically, the Sixth Amendment guarantees a criminal defendant the right to counsel to assist in his defense. U.S. CON., AMEND. VI.

This Court has long held that "'the right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984), citing *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970).

This Court further held in *Strickland* that in order establish ineffective assistance, a defendant must show: (a) counsel's performance fell below an objective standard of reasonableness; and (b) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id.* at 687.

Here, Mr. Lander has made at least a threshold showing that his Constitutional right to effective trial counsel was violated, and reasonable jurists could debate whether Mr. Lander's Motion for Reconsideration should have been granted. Accordingly, pursuant to the precedent set by this Court, the Fifth Circuit erred in failing to issue a COA. *See id.*

A. Mr. Lander Made at Least a Threshold Showing that His Trial Counsel Was Ineffective in Failing to Advise Him of a Plea Offer and Failing to Explain the Risks of Proceeding to Trial Versus Accepting a Plea

In *Missouri v. Frye*, 566 U.S. 134, 145, 147 (2012), this Court held that the Sixth Amendment right to effective counsel includes, among other things, "the duty to communicate formal offers from the prosecution to accept a plea on terms and

conditions that may be favorable to the accused" and that failure to do so meets the first prong of the *Strickland* test.

This Court further held in *Frye*,

> "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."

Id. at 147.

Federal courts have held that a defendant's insistence on innocence does not preclude a showing of prejudice due to counsel's failure to communicate a plea offer under *Frye*. *See*, *e.g.*, *Johnson v. United States*, 2023 U.S. App. LEXIS 25803, at *4 (2d Cir. 2023) (". . . the district court could not reject John-

son's claim for ineffective assistance of counsel because it failed to satisfy the second Strickland prong based solely on Johnson's consistent professions of innocence."); *Hines v. Ricci*, 2014 U.S. Dist. LEXIS 10801, at *29 (D. N.J. 2014) (". . . professions of innocence are not dispositive of the question of whether a petitioner has shown a reasonable probability that he would have accepted a plea offer, but for counsel's deficient advice."); *United States v. Penoncello*, 358 F. Supp. 3d 815, 825 (D. Minn. 2019) ("But after carefully considering the context in which Penoncello maintained his innocence, the Court finds that there is 'a reasonable probability [that he] would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel.'"), quoting *Frye*, 566 U.S. at 147.

Additionally, a defendant who maintains his innocence may have the option of entering an "Alford plea", whereby he "pleads guilty but affirmatively protests his factual innocence to the charged offense". *United States v. Harlan*, 35 F.3d 176, 180 n.1 (5th Cir. 1994).

In the instant matter, the District Court held that Mr. Lander failed to establish that he was prejudiced by his counsel's failure to communicate a plea offer to him because Mr. Lander maintained his innocence during the Evidentiary Hearing and stated under oath that he would not have accepted any plea agreement.

Mr. Lander's maintaining his innocence is not, however, dispositive of whether he suffered prejudice, as Mr. Lander may have ceased maintaining his innocence and/or sought to enter an Alford plea, had trial counsel discussed the plea agreement and the risks of proceeding to trial with him. Accordingly, there is a reasonable probability that Mr. Lander would have accepted the plea offer had it been communicated to him by his counsel, given the much lower maximum sentence which would have applied under the plea agreement than at trial.

This is especially true in light of Mr. Lander's testimony during the Evidentiary Hearing that:

1. Trial counsel failed to even advise him of the risks of proceeding to trial versus accepting a plea agreement;

2. He only met with trial counsel "two or three times", including the initial meeting where he retained trial counsel, a subsequent fifteen-minute (15) meeting, and a meeting the day before trial;

3. It was difficult to get ahold of trial counsel;

4. Trial counsel failed to pursue potentially exculpatory evidence, including potential gas station surveillance videos, after being notified of such by Mr. Lander;

5. Trial counsel failed to inquire about potential defense witnesses and failed to discuss potential defense strategies with Mr. Lander;

6. Trial counsel failed to discuss the Sentencing Guidelines with Mr. Lander; and

7. Trial counsel did not review discovery provided by the Government with Mr. Lander.

81a-148a.

Similarly, trial counsel testified during the Evidentiary Hearing that:

1. He only recalled interviewing Mr. Lander, Mr. Lander's wife, and Mr. Lander's mother, and did not recall interviewing any other potential witnesses;

2. He only recalled meeting with Mr. Lander three (3) times; and

3. He did not review the Sentencing Guidelines.

Id.

Although trial counsel testified during the Evidentiary Hearing that he did communicate the plea offer to Mr. Lander, he provided no further details or supporting evidence as to when and how the offer was communicated. *See id.* Nor is there any in-

dication on the record that trial counsel discussed pursuing an Alford plea with Mr. Lander.

Moreover, in an Attorney Affidavit from trial counsel, which was attached as an exhibit to the Government's response in opposition to Mr. Lander's § 2255 Motion, trial counsel stated that he responded *to the Government* regarding the plea offer but, notably, did not state that he ever communicated the offer to Mr. Lander. (emph. added). 79a-80a.

Trial counsel was clearly deficient in failing to notify Mr. Lander of the plea offer, failing to discuss an Alford plea with him, and failing to advise him of the risks of proceeding to trial versus accepting a plea, meeting the first prong of *Strickland*.

Had Mr. Lander been properly apprised by trial counsel of the plea offer and the potential risks of proceeding to trial versus accepting the plea offer, he may well have accepted the plea offer, pursuant to which he would have been subjected to a ten-year (10) statutory maximum sentence, which is less than half of the 292-month sentence that Mr. Landers received after conviction at trial.

This clearly indicates that Mr. Lander was prejudiced by his counsel's failure to communicate the plea offer and failure to explain the risks of proceeding to trial, in violation of his Constitutional right to effective counsel, meeting the second prong of *Strickland* and indicating at least a threshold

showing of a violation of Mr. Lander's Constitutional right to counsel, warranting a COA.

B. Mr. Lander Has Made at Least a Threshold Showing that His Trial Counsel Was Ineffective in Failing to Impeach the Complaining Witness with Prior Inconsistent Statements

Counsel's failure to impeach a witness with prior inconsistent statements may constitute ineffective assistance if there is a reasonable probability that impeaching the witness would have resulted in a different outcome. *See*, *e.g.*, *Rhodes v. Vannoy*, 751 Fed. Appx. 524 (5th Cir. 2018) (finding prejudice where, among other things, counsel failed to impeach a witness with prior inconsistent statements); *Reed v. Vannoy*, 703 Fed. Appx. 264, 270 (5th Cir. 2017) (holding failure to impeach was not prejudicial because Petitioner failed to show it would have resulted in a different outcome); *Smith v. Booker*, 2000 U.S. App. LEXIS 41101 (5th Cir. 2000) (same); *see also Hamilton v. Zant*, 466 U.S. 989, 991 (1984) (arguing that counsel's failure to investigate a witness for aspects of her background which could be used to impeach her "was even more indicative of his inadequate representation") (Marshall, J., dissenting).

In this matter, the District Court held that trial counsel was not ineffective in failing to impeach the complaining witness with prior inconsistent statements because the record indicated that Mr.

Lander's counsel cross-examined the complaining witness and her physician at trial about her "brain fog", argued during closing statement that the complaining witness did not have "brain fog" during the alleged incident, and pointed out her inconsistent statements in this regard.

The District Court further noted that trial counsel was precluded from cross-examining the witness about her motives for running away from home due to the District Court's order prohibiting discussion of the complaining witness's prior sexual behavior.

Petitioner submits, however, that although trial counsel made reference to the complaining witness' "brain fog", his failure to specifically cross-examine the complaining witness about her prior inconsistent statements, including by attempting to offer into evidence through the witness' testimony videotapes of those prior inconsistent statements, was deficient, meeting the first prong of *Strickland*.

Mr. Lander testified, moreover, during the Evidentiary Hearing that trial counsel failed to discuss with him the details of his cross-examination of the complaining witness prior to trial. 104a.

Trial counsel himself, likewise, testified during the Evidentiary Hearing that:

1. The complaining witness' testimony was the "crux of the case" because she "she couldn't tell the same story twice";

2. He failed to offer into evidence through the complaining witness three (3) video recordings of the complaining witness' prior inconsistent statements because he decided to offer the videos into evidence through a records custodian, which was denied by the District Court; and

3. His opinion "is that Mr. Lander was denied a fair trial because the jury did not get to see those videos" and that Mr. Lander "was denied the opportunity to put on his defense by us not being allowed to show the jury that she had made some wildly inconsistent statements and demonstrated some behavior that would have rendered her incredible".

123a; 125a-128a.

Mr. Lander, therefore, was prejudiced by trial counsel's failure to sufficiently impeach the complaining witness, meeting the second prong of *Strickland*, because there is a reasonable probability that the District Court would have admitted the video statements into evidence through the complaining witness, had trial counsel attempted to do so. There is, moreover, a reasonable probability Mr. Lander would not have been convicted had the jury been permitted to see the complaining witness' prior inconsistent statements on video.

In fact, as noted, trial counsel himself testified that Mr. Lander was denied a fair trial because the jury was not permitted to view these videos, which he deemed the "crux of the case", and yet he failed to attempt to introduce these videos through the complaining witness' testimony and instead chose to only try to introduce them through a records custodian. *Id.*

Accordingly, Mr. Lander made at least a threshold showing that his Constitutional right to effective counsel was violated when trial counsel failed to properly impeach the complaining witness by, among other things, failing to attempt to introduce videos of the complaining witness' prior inconsistent statements through the complaining witness' testimony. This warrants the issuance of a COA.

C. Mr. Lander Has Made at Least a Threshold Showing that His Trial Counsel Was Ineffective in Calling Mr. Lander's Wife as a Witness, Which Resulted in Highly Prejudicial Spousal Communications Being Admitted into Evidence

The failure to call a witness may constitute ineffective assistance of counsel if the defendant can "show not only that this testimony would have been favorable, but also that the witness would have testified at trial." *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985) (". . . to demonstrate the

requisite *Strickland* prejudice, the appellant must show not only that this testimony would have been favorable, but also that the witness would have testified at trial.").

The District Court denied Mr. Lander's claim that trial counsel was ineffective in failing to call his mother as a witness instead of his wife because trial counsel explained his decision, and testimonial evidence is a matter of trial strategy.

The District Court further held that any error by trial counsel in failing to object to evidence proffered by the Government which may have been protected by spousal privilege was harmless because the allegation supported by that evidence was also supported by other evidence.

Mr. Lander has made at least a threshold showing that trial counsel was ineffective in failing to call his mother as a defense witness, instead of his wife, because calling Mr. Lander's wife as a witness led to the admission of highly prejudicial text messages between Mr. Lander and his wife discussing Mr. Lander's sexual proclivities.

Had trial counsel chosen to call his mother, instead of his wife, as a witness, his mother could have provided similarly favorable testimony without the risk of highly prejudicial spousal communications being disclosed to the jury.

Mr. Lander testified during the Evidentiary Hearing that trial counsel did not discuss with him the decision to call his wife as a witness or the pos-

sibility that doing so might cause communications between Mr. Lander and his wife to come into evidence. 101a-102a.

Trial counsel testified during the Evidentiary Hearing, moreover, that:

1. He made the decision to call Mr. Lander's wife as a witness, despite the issue of marital communications having been flagged for review by the Court;

2. He cannot recall whether he objected when the Government read aloud text messages between Mr. Lander and his wife to refresh her recollection on cross-examination, despite those messages being arguably protected by spousal privilege and despite acknowledging that they were "problematic" and "not at all" helpful to the defense;

3. He called Mr. Lander's wife to testify as to, among other things, the common practice of picking up hitch hikers on the Native American reservation where Mr. Lander resided, despite acknowledging that Mr. Lander's mother could have provided this same testimony; and

4. To the best of his knowledge, the Government was not in possession of any problematic text messages between

> Mr. Lander and his mother, and yet trial counsel chose to call Mr. Lander's wife instead of his mother.

121a-127a; 130a-131a; 135a-136a.

Trial counsel's performance in this regard was clearly deficient, meeting the first prong of *Strickland*.

Mr. Lander has, moreover, made a threshold showing that he was prejudiced by trial counsel's decision to call his wife as a witness instead of his mother—a decision which Mr. Lander testified that trial counsel did not discuss with him beforehand and a decision which led to the admission of highly prejudicial communications between Mr. Lander and his wife, meeting the second prong of *Strickland*. This constitutes a further threshold showing that Mr. Lander's Constitutional right to counsel was violated, warranting the issuance of a COA.

D. Mr. Lander Has Made at Least a Threshold Showing that His Trial Counsel Was Ineffective in Failing to Object to Improper Remarks Made by the Government During Its Closing Argument Regarding the Highly Publicized Elizabeth Smart Case

Trial counsel's failure to object to improper statements during closing arguments may constitute ineffective assistance of counsel if the objec-

tion would likely have been meritorious and if there is a reasonable probability that the verdict would have been different if the objection had been made. *See Rivas v. Thaler*, 432 Fed. Appx. 395, 401 (5th Cir. 2011) ("Rivas has not demonstrated that an objection to the prosecutor's closing argument would have been meritorious had it been made. As such, Rivas's trial counsel cannot have rendered ineffective assistance by failing to object"); *Allen v. Collins*, 1993 U.S. App. LEXIS 38520, at **20-21 (5th Cir. 1993) (". . . even if the comment [during closing arguments] was prejudicial, it did not render his trial fundamentally unfair, because there is no reasonable probability that the verdict might have been different if an objection had been made.").

Mr. Lander has made at least a threshold showing that trial counsel was ineffective in failing to object to the Government's highly inflammatory references during its closing argument and again during its rebuttal to the well-publicized kidnapping of Elizabeth Smart, which is wholly unrelated to Mr. Lander or the instant matter.

The Government conceded that a timely objection to such statements would likely have been sustained. Additionally, the statements were highly prejudicial, given the inflammatory nature of the Elizabeth Smart case and its complete and total irrelevance to Mr. Lander's matter.

Trial counsel testified during the Evidentiary Hearing, moreover, that the Government's refer-

ences to the Elizabeth Smart case were "probably" improper and that, nonetheless, he failed to object to either reference. 121a-123a; 133a. Accordingly, trial counsel's failure to object to these references meets the first prong of *Strickland*.

Not only was Mr. Lander prejudiced by his trial counsel's failure to object to the Government's improper references to Elizabeth Smart, but such failure also caused the issue to be subject to "plain error" review on appeal, rather than the less stringent "abuse of discretion" standard, further prejudicing Mr. Lander. *See also United States v. Mares*, 402 F.3d 511, 515 (5th Cir. 2005) (noting that "plain error" review applies where defendant failed to object to improper remarks during closing at trial); *United States v. Flores-Dominguez*, 795 Fed. Appx. 310, 310 n.1 (5th Cir. 2020) (noting that "plain error" is "more deferential" and "abuse of discretion" is "less deferential").

Accordingly, because a timely objection by trial counsel to the Government's improper references to Elizabeth Smart during its closing argument and rebuttal would likely have been sustained, which the Government conceded, and because such remarks were highly prejudicial, Mr. Lander has made at least a threshold showing that he was prejudiced by trial counsel's failure to object, meeting the second prong of *Strickland* and warranting a COA. *See Thaler*, 432 Fed. Appx. at 401; *Collins*, 1993 U.S. App. LEXIS 38520, at **20-21.

III. Therefore, Certiorari Should Be Granted Because the Fifth Circuit's Decision Was Contrary to this Court's Precedent

Supreme Court Rule 10 provides, "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Pursuant to Rule 10, the "character of reasons the Court considers" in determining whether to grant certiorari includes, among others, situations where, "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court."

In this matter, for the reasons set forth above, the Fifth Circuit denied Petitioner's Motion for COA in a manner which conflicts with the clear precedent set by this Court in *Slack*, *Miller-El*, *Buck*, *et al. See Slack*, 529 U.S. 473; *Miller-El*, 537 U.S. 322; *Buck*, 137 S. Ct. 759.

In fact, reasonable jurists could disagree with the district court's resolution of Petitioner's constitutional claims or could conclude the issues presented are adequate to deserve encouragement to proceed further, warranting a COA pursuant to this Court's precedent. *See Slack*, 529 U.S. 473; *Miller-El*, 537 U.S. 322; *Buck*, 137 S. Ct. 759.

A COA is necessary so that Petitioner may have his Motion for Reconsideration and § 2255 Motion reviewed on the merits by the Fifth Circuit.

Accordingly, Petitioner submits that certiorari is warranted, the Fifth Circuit's February 16, 2024 Order denying Petitioner's Motion for COA should be reversed, and a COA should be issued to allow Petitioner to appeal the District Court's denial of his Motion for Reconsideration.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Dated: May 29, 2024

Respectfully submitted,

Patrick A. Mullin
Counsel of Record
THE LAW OFFICES OF
PATRICK A. MULLIN
Attorney for Petitioner
45 Rockefeller Plaza
Suite 2000
New York, New York 10111
212-639-1600
mullin@taxdefense.com

APPENDIX

[LETTERHEAD OF THE UNITED STATES
COURT OF APPEALS,
FIFTH CIRCUIT, OFFICE OF THE CLERK]

February 16, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 23-10959 USA v. Lander
USDC No. 2:22-CV-46

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/ LISA E. FERRARA
Lisa E. Ferrara, Deputy Clerk
504-310-7675

Mr. Brian W. McKay
Mr. Patrick Allen Mullin

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED February 16, 2024

No. 23-10959

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ROYCE WADE LANDER,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Northern District of Texas
USDC Nos. 2:22-CV-46, 2:18-CR-75

UNPUBLISHED ORDER

Before STEWART, GRAVES, and OLDHAM, *Circuit Judges.*

PER CURIAM:

Royce Wade Lander, federal prisoner # 97598-408, was convicted after a jury trial of transportation of a minor with intent to engage in criminal sexual activity in violation of 18 U.S.C. § 2423(a),

and he was sentenced to 292 months of imprisonment. He now requests a certificate of appealability (COA) to appeal the denial of his motion to vacate, correct, or set aside his sentence pursuant to 28 U.S.C. § 2255, and the denial of his motion for reconsideration. He raises several claims of ineffective assistance of counsel.

Lander's notice of appeal was untimely as to the denial of his § 2255 motion. *See* 28 U.S.C. § 2107(b)(1); FED. R. APP. P. 4(a)(1)(B)(i). Accordingly, we lack jurisdiction to consider the denial of that motion. *See Bowles v. Russell,* 551 U.S. 205, 214 (2007); *United States v. Young,* 966 F.2d 164, 165 (5th Cir. 1992). Because the notice of appeal was filed within 60 days of the denial of his motion for reconsideration, Lander's appeal was timely as to that motion. *See* FED. R. APP. P. 4(a)(1)(B)(i).

To obtain a COA, Lander must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003). To meet that standard, he must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the [motion] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000) (internal quotation marks and citation omitted) (quote at 484); *see also Hernandez v. Thaler,* 630 F.3d 420, 428 (5th Cir. 2011). Lander fails to make this showing.

The appeal is DISMISSED IN PART for lack of jurisdiction, and the motion for a COA is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED February 16, 2024

No. 23-10959

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ROYCE WADE LANDER,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Northern District of Texas
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and he was sentenced to 292 months of imprisonment. He now requests a certificate of appealability (COA) to appeal the denial of his motion to vacate, correct, or set aside his sentence pursuant to 28 U.S.C. § 2255, and the denial of his motion for reconsideration. He raises several claims of ineffective assistance of counsel.

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The appeal is DISMISSED IN PART for lack of jurisdiction, and the motion for a COA is DENIED.

[LETTERHEAD OF THE UNITED STATES
COURT OF APPEALS,
FIFTH CIRCUIT, OFFICE OF THE CLERK]

March 18, 2024

Ms. Karen S. Mitchell
Northern District of Texas, Amarillo
United States District Court
205 E. 5th Street
Room F-13240
Amarillo, TX 79101

No. 23-10959 USA v. Lander
USDC No. 2:22-CV-46

Dear Ms. Mitchell,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/ LISA E. FERRARA
Lisa E. Ferrara, Deputy Clerk
504-310-7675

cc:
Mr. Brian W. McKay
Mr. Patrick Allen Mullin

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

2:22-CV-0046-Z-BR
(2:18-CR-0075-Z)

ROYCE WADE LANDER,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.

FINDINGS, CONCLUSIONS AND RECOMMENDATION TO DENY MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

Before the court is the motion of Royce Wade Lander, Movant, under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody. For the reasons that follow, the motion should be DENIED.

I. UNDERLYING FACTS AND PROCEEDINGS

The record in the underlying criminal case reflects the following:

On December 20, 2018, Movant was named in a two-count superseding indictment charging him in count one with transportation of a minor with

intent to engage in criminal sexual activity, in violation of 18 U.S.C. § 2423(a), and in count two with kidnapping, in violation of 18 U.S.C. §§ 1201(a)(1) and 1201(g)(1). (ECF[1] 21). The Court granted the government's motion for partial dismissal and dismissed count two of the superseding indictment. (ECF 36). Count one was tried to a jury, which returned a verdict of guilty. (ECF 50). Movant was sentenced to a term of imprisonment of 292 months. (ECF 59). He appealed (ECF 61), and the judgment was affirmed. *United States v. Lander,* 825 F. App'x 235 (5th Cir. 2020); (ECF 83). Movant did not file a petition for writ of certiorari.

Movant timely filed his motion under § 2255. He asserts four grounds in support of the motion, all alleging that he received ineffective assistance of counsel. He says that counsel was ineffective for (1) failing to present a plea offer made by the government to him, (2) failing to impeach the alleged victim with prior inconsistent statements, (3) calling Movant's wife to testify, and (4) failing to object to the prosecutor's improper remarks during closing argument. (CV ECF[2] 1).

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[1] The "ECF" reference is to the number of the item on the docket in the underlying criminal case, No. 2:18-CR-075-Z.

[2] The "CV ECF" reference is to the number of the item on the docket in this civil action.

II. APPLICABLE STANDARDS OF REVIEW

A. 28 U.S.C. § 2255

After conviction and exhaustion, or waiver, of any right to appeal, courts are entitled to presume that a defendant stands fairly and finally convicted. *United States v. Frady,* 456 U.S. 152, 164-165 (1982); *United States v. Shaid,* 937 F.2d 228, 231-32 (5th Cir. 1991). A defendant can challenge his conviction or sentence after it is presumed final on issues of constitutional or jurisdictional magnitude only, and he may not raise an issue for the first time on collateral review without showing both "cause" for his procedural default and "actual prejudice" resulting from the errors. *Shaid,* 937 F.2d at 232.

Section 2255 does not offer recourse to all who suffer trial errors. It is reserved for transgressions of constitutional rights and other narrow injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. *United States v. Capua,* 656 F.2d 1033, 1037 (5th Cir. Unit A Sept. 1981). In other words, a writ of habeas corpus will not be allowed to do service for an appeal. *Davis v. United States,* 417 U.S. 333, 345 (1974); *United States v. Placente,* 81 F.3d 555, 558 (5th Cir. 1996). Further, if issues "are raised and considered on direct appeal, a defendant is thereafter precluded from urging the same issues in a later collateral attack." *Moore v. United States,* 598 F.2d 439, 441 (5th Cir.

1979) (citing *Buckelew v. United States,* 575 F.2d 515, 517-18 (5th Cir. 1978)).

B. Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, movant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *see also Missouri v. Frye,* 566 U.S. 133, 147 (2012). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland,* 466 U.S. at 697; *see also United States v. Stewart,* 207 F.3d 750, 751 (5th Cir. 2000). "The likelihood of a different result must be substantial, not just conceivable," *Harrington v. Richter,* 562 U.S. 86, 112 (2011), and a movant must prove that counsel's errors "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Cullen v. Pinholster,* 563 U.S. 170, 189 (2011) (quoting *Strickland,* 466 U.S. at 686). Judicial scrutiny of this type of claim must be highly deferential and the defendant must overcome a strong presumption that his counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689. Simply making conclusory allegations of deficient performance and prej-

udice is not sufficient to meet the *Strickland* test. *Miller v. Johnson,* 200 F.3d 274, 282 (5th Cir. 2000).

III. ANALYSIS

On November 15, 2022, the undersigned conducted a hearing on Movant's motion. (CV ECF 18). Movant appeared in person and through counsel. At that time, he admitted under oath that he would not have accepted any plea offer because he was innocent (*id.* at 25–26, 28), thus admitting that he could not prevail on his first ground.

The allegation that counsel failed to impeach the victim with prior inconsistent statements is belied by the record. Counsel questioned the victim about her "brain fog," eliciting responses reflecting that she had often been in a brain fog, including during her trial testimony and when she spoke to officers regarding the incident. (ECF 74 at 171–72). Counsel also asked the victim's physician about "brain fog." (*Id.* at 239–40). And, he attempted to impeach the victim about her reason for running away from home, but was unable to elicit testimony regarding her fear that she was pregnant because the Court had granted the government's motion in limine precluding discussion of the victim's prior sexual behavior.[3] (*Id.* at 172–73; 217–19; ECF 72 at 20–23). At closing, counsel argued that the victim did not have "brain fog," noting her testimony and written statement and the testimony of her doctor

[3] That the Court ruled against Movant does not mean that his counsel was ineffective.

that he had never noted any issue with "brain fog," urging the jury not to believe her. (*Id.* at 400). He pointed out the victim's multiple inconsistent statements. (*Id.* at 390). That the jury convicted Movant does not mean that he received ineffective assistance of counsel. As the appellate court noted, there was strong and ample evidence of Movant's guilt. 825 F. App'x at 237.

In his third ground, Movant alleges that his trial counsel was ineffective in calling his wife, rather than another family member such as his mother, to testify at trial. (CV ECF 1 at 7). The Court first notes that complaints about uncalled witnesses are not favored, because presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have said are largely speculative. *Day v. Quarterman,* 566 F.3d 527, 528 (5th Cir. 2009). To prevail, Movant was required to name the witness, demonstrate that the witness would have testified, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable. *Gregory v. Thaler,* 601 F.3d 347, 352 (5th Cir. 2010). He has not presented any such evidence here. Even had he done so, he could not prevail on this ground. At the November 22, 2022 hearing, trial counsel explained his reasons for calling Movant's wife rather than his mother to testify. (CV ECF 18 at 36–37, 48). In particular, Movant's wife was more articulate and could personalize Movant in a way that his mother could not. His wife was not outraged about the allegation that Movant had had sex with a teenaged hitchhiker; she did not believe the allegation.

Movant's wife was the strongest witness in the case. Although the trial court allowed three photos depicting the feet of Movant's wife that she had sent to him to come into evidence, as the appellate court noted, Movant's foot fetish had been established by other evidence, including Movant's own admissions to police. *Lander,* 825 F. App'x at 236. Any error in admitting the photos into evidence was harmless. *Id.* Movant has not shown, and cannot show, that absent the decision to call his wife to testify, the result of the proceedings would have been different.

In his fourth ground, Movant alleges that his counsel was ineffective in failing to timely object to improper remarks of the prosecutor during closing argument referencing the kidnapping of Elizabeth Smart. (CV ECF 1 at 8). He can only speculate that he was harmed as a result. It seems just as likely that, had an objection been made, a curative instruction would have been given and that would have been the end of the matter. *See United States v. Murra,* 879 F.3d 669, 685 (5th Cir. 2018) (an immediate curative instruction cures any alleged harm from a prosecutor's improper remarks). In any event, as the appellate court noted, the prosecutor's comments were not so pronounced and persistent as to permeate the entire atmosphere of the trial. 825 F. App'x at 237. Moreover, the trial judge instructed the jurors both before and after closing arguments that what the attorneys said was not evidence. (*Id.;* ECF 74 at 368–69, 409). As trial counsel explained, an objection might have given more credence to the argument. (CV ECF 18 at 51).

The jurors may have been like Movant and not have known about Elizabeth Smart. (*Id.* at 25).

At the November 22 hearing, trial counsel explained his strategy with regard to each of the issues raised by Movant. Counsel's testimony was credible; Movant's testimony was not credible. In sum, Movant has not overcome a strong presumption that his counsel=s conduct falls within the wide range of reasonable professional assistance. *Strickland,* 466 U. S. at 689. Nor has he shown a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 687.

IV. RECOMMENDATION

For the reasons discussed herein, it is the RECOMMENDATION of the United States Magistrate Judge to the United States District Judge that the motion filed by Royce Wade Lander be DENIED.

V. INSTRUCTIONS FOR SERVICE

The United States District Clerk is directed to send a copy of this Findings, Conclusion and Recommendation to each party by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED March 23, 2023.

/s/ LEE ANN RENO
LEE ANN RENO
UNITED STATE MAGISTRATE JUDGE

*** NOTICE OF RIGHT TO OBJECT ***

Any party may object to these proposed findings, conclusions and recommendation. In the event parties wish to object, they are hereby NOTIFIED that the deadline for filing objections is fourteen (14) days from the date of filing as indicated by the "entered" date directly above the signature line. Service is complete upon mailing, Fed. R. Civ. P. 5(b)(2)(C), or transmission by electronic means, Fed. R. Civ. P. 5(b)(2)(E). **Any objections must be filed on or before the fourteenth (14th) day after this recommendation is filed** as indicated by the "entered" date. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)(2); *see also* Fed. R. Civ. P. 6(d).

Any such objections shall be made in a written pleading entitled "Objections to the Findings, Conclusions and Recommendation." Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on all other parties. A party's failure to timely file written objections shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge and accepted by the district court. *See Douglass v. United Services Auto. Ass'n,* 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc), *superseded by statute on other grounds,* 28 U.S.C. § 636(b)(1), *as recognized in ACS Recovery Servs., Inc. v. Griffin,* 676 F.3d 512, 521 n.5 (5th Cir. 2012); *Rodriguez v. Bowen,* 857 F.2d 275, 276-77 (5th Cir. 1988).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Filed April 14, 2023

2:22-CV-046-Z-BR
2:18-CR-075-Z

ROYCE WADE LANDER,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER ADOPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION AND DENYING MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

Before the Court are the findings, conclusions, and recommendation of the United States Magistrate Judge to dismiss the civil rights claim filed by Plaintiff. (ECF No. 19). No objections to the findings, conclusions, and recommendation have been filed. After making an independent review of the pleadings, files, and records in this case, the Court concludes that the findings, conclusions, and recommendation of the Magistrate Judge are correct.

It is therefore **ORDERED** that the findings, conclusions, and recommendation of the Magistrate Judge are **ADOPTED** and the motion is **DENIED.**

IT IS SO ORDERED.

April 14, 2023

/s/ MATTHEW J. KACSMARYK
MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

FILED April 14, 2023

2:22-CV-046-Z-BR
2:18-CR-075-Z

ROYCE WADE LANDER,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The undersigned United States District Judge has entered an order **ADOPTING** the findings, conclusions, and recommendation of the United States Magistrate Judge in this case and **DISMISSING** the civil rights complaint.

Judgment is entered accordingly.

April 14, 2023

/s/ MATTHEW J. KACSMARYK
MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

FILED August 9, 2023

2:22-CV-046-Z-BR
(2:18-CR-075-Z-BR-1)

ROYCE WADE LANDER,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

Before the Court is Royce Wade Lander's ("Movant") Motion for Reconsideration (ECF No. 22) ("Motion") of this Court's Order Adopting Findings, Conclusions, and Recommendation ("FCR") and Denying Lander's 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence (ECF No. 20), filed June 21, 2023. The Court finds its Order (ECF No. 20) was neither erroneous nor contrary to law. Movant has failed to articulate any legal error by the Court. The closest he comes to any basis is a vague reference to "the admission Mr. Wooldridge gave at my trial of not knowing what he was

doing." ECF No. 22 at 1. Such an objection was not raised in the pleadings regarding Movant's original Section 2255 motion, nor did Movant file objections to the FCR. Regardless, the Court has searched the transcripts—from trial, *voir dire,* and the pretrial conference—and has found no such admission. Thus, Plaintiffs Motion is **DENIED.**

SO ORDERED.

August 9, 2023

/s/ MATTHEW J. KACSMARYK
MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

2:22-CV-046-Z-BR
(2:18-CR-075-Z-BR-1)

ROYCE WADE LANDER,

Movant,

v.

UNITED STATES OF AMERIA,

Respondent.

ORDER

On September 11, 2023, Movant filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. *See* ECF No. 24. No motion for Certificate of Appealability ("COA") has been filed. "If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals." FED R. APP. P. 22(b)(2). Insofar as this Court retains jurisdiction to decide whether a COA should issue, the Court **DENIES** a COA.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court **DENIES** a COA. Having reviewed the pleadings,

records, relevant law, and orders of this Court, the Court finds Plaintiff has failed to show that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" or "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

If Plaintiff elects to proceed, he may either pay the appellate filing fee, move for leave to proceed *in forma pauperis* on appeal, or receive a COA from the appellate court.

SO ORDERED.

September 21, 2023

/s/ MATTHEW J. KACSMARYK
MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Filed November 6, 2019

UNITED STATES OF AMERICA

v.

ROYCE WADE LANDER

JUDGMENT IN A CRIMINAL CASE

Case Number: **2:18-CR-00075-D-BR(1)**
USM Number: **97598-408**
James E Wooldridge
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court

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

☒ was found guilty on count(s) after a plea of not guilty

1 of the superseding indictment filed on December 20, 2018

The defendant is adjudicated guilty of these offenses:

Title & Section/ Nature of Offense	**Offense Ended**	**Count**
18 U.S.C. § 2423(a) – Transportation of a Minor with Intent to Engage in Criminal Sexual Activity	06/01/2018	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

☒ Count 2 of the superseding indictment dismissed on the motion of the United States on 4/16/2019. Original indictment dismissed on the motion of the United States

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

November 6, 2019
Date of Imposition of Judgment

/s/ SIDNEY A. FITZWATER
Signature of Judge

SIDNEY A. FITZWATER
SENIOR JUDGE
Name and title of Judge

November 6, 2019
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

two hundred ninety two (292) months as to count 1.

☒ The court makes the following recommendations to the Bureau of Prisons: that the defendant be assigned to serve his sentence at a facility as close to Western New Mexico or Northeastern Arizona, as is consistent with his security classification.

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

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

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

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

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

RETURN

I have executed this judgment as follows:

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

UNITED STATES MARSHAL

By:

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **five (5) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (*check if applicable*)

5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)

6. ☒ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualify offense. (*check if applicable*)

7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

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

STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation office. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the pro-

bation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e. anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A. U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.
2. Without the prior permission of the probation officer, the defendant shall have no unsupervised contact with persons under the age of 18, nor shall the defendant loiter near places where children may frequently congregate. The defendant shall neither seek nor maintain employment or volunteer work at any location and/or activity where persons under the age of 18 congregate, and the defendant shall not date or befriend anyone who has children under the age of 18, without prior permission of the probation officer.
3. The defendant shall participate in sex offender treatment services, as directed by the probation officer, until successfully discharged. These services may include psycho-physiological testing (i.e. clinical polygraph, plethysmograph, and the ABEL screen) to monitor the defendant's compliance, treatment progress, and risk to the community. The defendant shall contribute to

the costs of services rendered (copayment) at a rate of at least $10 per month.

4. The defendant shall have no contact with the victim in this case.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
Totals	$100.00	$.00	$.00	$.00	

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Court (AO245C)* will be entered after such determination.

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

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

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

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

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

* Amy, Vicky and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

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

SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payments of $ 100.00 due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

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

C ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments $ _____ over a period of _____ (*e.g., months or years)*, to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D ☐ Payment in equal 20 (*e.g., weekly, monthly, quarterly*) installments of $ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

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

See special condition of supervision regarding restitution, as if set forth in full.

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

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

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Cases Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendants restituion obligation.

☐ The defendant shall pay the cost of prosecution.

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

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED October 15, 2020

No. 19-11234
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ROYCE WADE LANDER,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:18-CR-75-1

Before CLEMENT, HIGGINSON, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

A jury convicted Royce Wade Lander of transportation of a minor with intent to engage in crim-

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

inal sexual activity in violation of 18 U.S.C. § 2423(a). At trial, the Government alleged Lander drove 15-year-old G.C. from Texas to New Mexico and sexually assaulted her during the drive. He now appeals, arguing (1) the trial court erred by admitting privileged evidence; (2) the Government committed prosecutorial misconduct; and (3) he received ineffective assistance from his trial counsel.

Lander first argues the district court erred in ruling that three photos sent to him by his wife via text message were not privileged marital communications. This court reviews evidentiary rulings for abuse of discretion, subject to harmless error analysis. *See United States v. Miller,* 588 F.3d 897, 903 (5th Cir. 2009). The marital communications privilege protects private communications between spouses. *United States v. Koehler,* 790 F.2d 1256, 1258 (5th Cir. 1986). The parties agree the photos were exchanged privately between Lander and his wife, but they disagree as to whether the photos constitute communications. This court need not resolve the dispute because any error in admitting the photos was harmless. Lander argues the photos, which depicted his wife's feet, lent credibility to G.C.'s testimony, from which it could be inferred Lander had a foot fetish. However, Lander's fetish had been established by other evidence, including testimony that Lander told police he had a foot fetish and a photograph of Lander with his arm around a woman's foot.[1] The photos that Lander's

[1] This photograph was not sent to Lander by his wife, and Lander does not assert that it was improperly admitted.

wife sent to him were therefore cumulative, and any error in admitting them was harmless. *See United States v. El-Mezain,* 664 F.3d 467, 526 (5th Cir. 2011).

Lander next argues the Government committed prosecutorial misconduct in its closing argument by referencing the kidnapping of Elizabeth Smart. Because Lander "failed to make a contemporaneous objection to the prosecutor's closing remarks in the trial court," plain error review applies. *United States v. Mares,* 402 F.3d 511, 515 (5th Cir. 2005). To succeed on plain error review, Lander must show a clear or obvious error that affected his substantial rights. *See United States v. Aguilar,* 645 F.3d 319, 323 (5th Cir. 2011). Even if he meets his burden, this court will generally not exercise its discretion to correct the error unless it "seriously affected the fairness, integrity, or public reputation of the judicial proceeding." *Id.*

Our law is clear that prosecutors may not refer or allude to evidence not introduced at trial, *United States v. Murrah,* 888 F.2d 24, 26 (5th Cir. 1989), and may not appeal to passion and prejudice in a way meant to inflame the jury, *United States v. Raney,* 633 F.3d 385, 395 (5th Cir. 2011). Although the references to the Smart case could be viewed as violating these prohibitions, we need not reach whether they clearly or obviously did so, because Lander has not shown his substantial rights were affected. *See United States v. Olano,* 507 U.S. 725, 734-35 (1993). To do so, he must show the error affected the outcome of the district court proceedings, *id.* at 734, and the "determinative question is

whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict," *United States v. Smith,* 814 F.3d 268, 276 (5th Cir. 2016). To make this determination, this court considers "(1) the magnitude of the prejudicial effect of the prosecutor's remarks, (2) the efficacy of any cautionary instruction by the judge, and (3) the strength of the evidence supporting the conviction." *Id.* (internal quotation marks and citation omitted).

The prosecutor's comments were not "so pronounced and persistent as to permeate the entire atmosphere of the trial," and it is unlikely they had a significant prejudicial effect. *See United States v. Ramirez-Velasquez,* 322 F.3d 868, 875-76 (5th Cir. 2003) (internal quotation marks and citation omitted). Further, the district court instructed the jury before and after closing arguments that the attorneys' statements were not evidence, which reduced any prejudicial effect. *See id.* at 875. Finally, there was strong evidence of Lander's guilt. The findings of G.C.'s sexual assault examination were consistent with her assertion that Lander had digitally penetrated her. Lander expressed concern when investigators told him G.C. was only 15 years old, he admitted to discussing his foot fetish with G.C., and he did not tell his wife he had given G.C. a ride from Texas to New Mexico, even though he had been texting with her while he was with G.C. The ample evidence of Lander's guilt, combined with the district court's curative instructions, outweighs any prejudice stemming from the prosecutor's com-

ments. *See id.* at 876. Thus, Lander cannot show his substantial rights were affected. *See id.*

Finally, Lander argues for the first time on appeal that his trial counsel was ineffective. Generally, an ineffective assistance of counsel claim cannot be resolved on direct appeal if it was not first raised in the district court since "no opportunity existed to develop the record on the merits of the allegations." *United States v. Cantwell,* 470 F.3d 1087, 1091 (5th Cir. 2006) (internal quotation marks and citation omitted). This is not one of those "rare cases" where the record allows this court to fairly evaluate the merits of the claim. *See United States v. Navejar,* 963 F.2d 732, 735 (5th Cir. 1992) (internal quotation marks and citation omitted). Accordingly, we decline to consider Lander's ineffective assistance of counsel claim without prejudice to his right to seek collateral review.

The district court's judgment is AFFIRMED.

[LETTERHEAD OF UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT, OFFICE OF THE CLERK]

October 15, 2020

MEMORANDUM TO COUNSEL OR
PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 19-11234 USA v. Royce Lander
USDC No. 2:18-CR-75-1

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for *certiorari* in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, ***and advise them of the time limits for filing for rehearing and certiorari.*** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/ CHARLES B. WHITNEY
Charles B. Whitney, Deputy Clerk

Enclosure(s)

Mr. Slater Chalfant Elza
Ms. Emily Baker Falconer
Mr. Christopher Jason Fenton
Ms. Leigha Amy Simonton

UNITED STATES COURT OF APPEAIS
FOR THE FIFTH CIRCUIT

FILED October 15, 2020

No. 19-11234
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ROYCE WADE LANDER,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:18-CR-75-1

Before CLEMENT, HIGGINSON, and ENGELHARDT, *Circuit Judges.*

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED October 15, 2020

No. 19-11234
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Plaintiff—Appellee,

versus

ROYCE WADE LANDER,

Defendant—Appellant.

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USDC No. 2:18-CR-75-1

Before CLEMENT, HIGGINSON, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

A jury convicted Royce Wade Lander of transportation of a minor with intent to engage in crim-

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inal sexual activity in violation of 18 U.S.C. § 2423(a). At trial, the Government alleged Lander drove 15-year-old G.C. from Texas to New Mexico and sexually assaulted her during the drive. He now appeals, arguing (1) the trial court erred by admitting privileged evidence; (2) the Government committed prosecutorial misconduct; and (3) he received ineffective assistance from his trial counsel.

Lander first argues the district court erred in ruling that three photos sent to him by his wife via text message were not privileged marital communications. This court reviews evidentiary rulings for abuse of discretion, subject to harmless error analysis. *See United States v. Miller,* 588 F.3d 897, 903 (5th Cir. 2009). The marital communications privilege protects private communications between spouses. *United States v. Koehler,* 790 F.2d 1256, 1258 (5th Cir. 1986). The parties agree the photos were exchanged privately between Lander and his wife, but they disagree as to whether the photos constitute communications. This court need not resolve the dispute because any error in admitting the photos was harmless. Lander argues the photos, which depicted his wife's feet, lent credibility to G.C.'s testimony, from which it could be inferred Lander had a foot fetish. However, Lander's fetish had been established by other evidence, including testimony that Lander told police he had a foot fetish and a photograph of Lander with his arm around a woman's foot.[1] The photos that Lander's

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Our law is clear that prosecutors may not refer or allude to evidence not introduced at trial, *United States v. Murrah,* 888 F.2d 24, 26 (5th Cir. 1989), and may not appeal to passion and prejudice in a way meant to inflame the jury, *United States v. Raney,* 633 F.3d 385, 395 (5th Cir. 2011). Although the references to the Smart case could be viewed as violating these prohibitions, we need not reach whether they clearly or obviously did so, because Lander has not shown his substantial rights were affected. *See United States v. Olano,* 507 U.S. 725, 734-35 (1993). To do so, he must show the error affected the outcome of the district court proceedings, *id.* at 734, and the "determinative question is

whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict," *United States v. Smith,* 814 F.3d 268, 276 (5th Cir. 2016). To make this determination, this court considers "(1) the magnitude of the prejudicial effect of the prosecutor's remarks, (2) the efficacy of any cautionary instruction by the judge, and (3) the strength of the evidence supporting the conviction." *Id.* (internal quotation marks and citation omitted).

The prosecutor's comments were not "so pronounced and persistent as to permeate the entire atmosphere of the trial," and it is unlikely they had a significant prejudicial effect. *See United States v. Ramirez-Velasquez,* 322 F.3d 868, 875-76 (5th Cir. 2003) (internal quotation marks and citation omitted). Further, the district court instructed the jury before and after closing arguments that the attorneys' statements were not evidence, which reduced any prejudicial effect. *See id.* at 875. Finally, there was strong evidence of Lander's guilt. The findings of G.C.'s sexual assault examination were consistent with her assertion that Lander had digitally penetrated her. Lander expressed concern when investigators told him G.C. was only 15 years old, he admitted to discussing his foot fetish with G.C., and he did not tell his wife he had given G.C. a ride from Texas to New Mexico, even though he had been texting with her while he was with G.C. The ample evidence of Lander's guilt, combined with the district court's curative instructions, outweighs any prejudice stemming from the prosecutor's comments. *See id.* at 876. Thus, Lander cannot show his substantial rights were affected. *See id.*

Finally, Lander argues for the first time on appeal that his trial counsel was ineffective. Generally, an ineffective assistance of counsel claim cannot be resolved on direct appeal if it was not first raised in the district court since "no opportunity existed to develop the record on the merits of the allegations." *United States v. Cantwell,* 470 F.3d 1087, 1091 (5th Cir. 2006) (internal quotation marks and citation omitted). This is not one of those "rare cases" where the record allows this court to fairly evaluate the merits of the claim. *See United States v. Navejar,* 963 F.2d 732, 735 (5th Cir. 1992) (internal quotation marks and citation omitted). Accordingly, we decline to consider Lander's ineffective assistance of counsel claim without prejudice to his right to seek collateral review.

The district court's judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED October 15, 2020

No. 19-11234
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ROYCE WADE LANDER,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:18-CR-75-1

Before CLEMENT, HIGGINSON, and ENGELHARDT, *Circuit Judges.*

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is Affirmed.

[SEAL]

Certified as a true copy and issued as the mandate on Nov 06, 2020

Attest:

/s/ LYLE W. CAYCE

Clerk, U.S. Court of Appeals, Fifth Circuit

[LETTERHEAD OF UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT, OFFICE OF THE CLERK]

November 06, 2020

Ms. Karen S. Mitchell
Northern District of Texas, Amarillo
United States District Court
205 E. 5th Street
Room F-13240
Amarillo, TX 79101

No. 19-11234 USA v. Royce Lander USDC
No. 2:18-CR-75-1

Dear Ms. Mitchell,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/ RENEE S. MCDONOUGH
Renee S. McDonough, Deputy Clerk
504-310-7673

cc:
Mr. Slater Chalfant Elza
Ms. Emily Baker Falconer
Mr. Christopher Jason Fenton
Ms. Leigha Amy Simonton

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10959

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ROYCE WADE LANDER,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:22-CV-46

ON PETITION FOR REHEARING EN BANC

UNPUBLISHED ORDER

Before STEWART, GRAVES, and OLDHAM, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a motion for reconsideration (5th Cir. R. 35 I. O. P.), the motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on

rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

[LETTERHEAD OF UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT, OFFICE OF THE CLERK]

March 08, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 23-10959 USA v. Lander
USDC No. 2:22-CV-46

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/ Lisa E. Ferrara
Lisa E. Ferrara, Deputy Clerk
504-310-7675

Mr. Brian W. McKay
Mr. Patrick Allen Mullin

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court

District
Northern District of Texas, Amarillo Division

Name *(under which you were convicted):*
Royce Wade Lander

Docket or Case No.:
2:18-CR-75-1

Place of Confinement:
Pekin FCI

Prisoner No.:
97598-408

UNITED STATES OF AMERICA
Movant *(include name under which convicted)*

V.

Royce Wade Lander

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:

   U.S. District Court for the Northern District of Texas, Amarillo Division

   (b) Criminal docket or case number (if you know): 2:18-CR-75-1

2. (a) Date of the judgment of conviction (if you know): 11/6/2019

   (b) Date of sentencing: 11/6/2019

3. Length of sentence: 292 months

4. Nature of crime (all counts):

   Count 1- 18 U.S.C. Section 2423(a)

5. (a) What was your plea? (Check one)

   (1) Not guilty ☑ (2) Guilty ☐ (3) Nolo contendere (no contest) ☐

6. (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

   _____

6. If you went to trial, what kind of trial did you have? (Check one)

   Jury ☑ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing?

   Yes ☐ No ☑

8. Did you appeal from the judgment of conviction?

   Yes ☑ No ☐

9. If you did appeal, answer the following:

(a) Name of court: U.S. Court of Appeals for the Fifth Circuit

(b) Docket or case number (if you know): 19-11234

(c) Result: Judgment affirmed

(d) Date of result (if you know): 10/15/2020

(e) Citation to the case (if you know): U.S. v. Royce Lander, No. 19-11234 (5th Cir. 2020)

(f) Grounds raised:

_____

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☑ No ☐

If "Yes," answer the following:

_____

(1) Docket or case number (if you know):

_____

(2) Result:

_____

(3) Date of result (if you know):

_____

(4) Citation to the case (if you know):

_____

(5) Grounds raised:

_____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes ☐ No ☑

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

_____

(2) Docket or case number (if you know):

_____

(3) Date of filing (if you know):

_____

(4) Nature of the proceeding:

_____

(5) Grounds raised:

_____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result:

_____

(8) Date of result (if you know):

_____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court:

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(2) Docket or case number (if you know):

---

(3) Date of filing (if you know):

---

(4) Nature of the proceeding:

---

(5) Grounds raised:

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(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result:

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(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE: Counsel was ineffective for failing to present plea offer made by the Government to client and client have accepted Government's plea offer

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

My attorney did not tell me that the Government offered to let me plead guilty to on count of violating 18 USC Section 2421 which had a maximum penalty of 10 years and no minimum penalty. My attorney did not tell me that the Government made this offer prior to the superseding indictment. My attorney did not discuss the risks of going to trial with me versus the potential benefit of accepting a guilty plea to one count of violating 18 USC Section 2421.

Had my attorney discussed the Government's plea offer with me and the risks/benefits I would have accepted that deal and pleaded guilty instead of going to trial. I would have wanted to accept this deal and avoid the much greater sentencing exposure that the Government was threatening with the superseding indictment.

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☑

(2) If you did not raise this issue in your direct appeal, explain why:

Claims of ineffective assistance of counsel are more appropriately reserved for collateral review.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

_____

Name and location of the court where the motion or petition was filed:

_____

Docket or case number (if you know):

_____

Date of the court's decision:

_____

Result (attach a copy of the court's opinion or order, if available):

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you **raise** the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

_____

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO: Counsel was ineffective for failing to impeach the alleged victim with prior inconsistent statements and but for counsel's failure their is a reasonable probability Lander would have been acquitted

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The alleged victim gave multiple contradictory and inconsistent statements about relevant facts to investigators before trial. Alleged victim was a minor and testified to suffering from medical conditions which produced brain fog and required special needs services. Alleged victim provided multiple contradictory statements to police and investigators about the circumstances surrounding her interactions with Lander prior to trial. These interviews were recorded and counsel intended to impeach the

alleged victim with them. Counsel did not attempt to introduce these prior inconsistent statements during the alleged victim's cross-examination. Counsel did not attempt to impeach the alleged victim on other areas such as brain fog or her reported pregnancy as the basis for running away when she spoke to polic. Counsel was unable to get these items into evidence and counsel's later request to recall the alleged victim was denied.

Had counsel impeached the alleged victim with the prior inconsistent statements there is a reasonable probability that the outcome of the proceedings would have been different.

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☑ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

_____

Docket or case number (if you know):

_____

Date of the court's decision:

_____

Result (attach a copy of the court's opinion or order, if available):

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

_____

Docket or case number (if you know):

_____

Date of the court's decision:

_____

Result (attach a copy of the court's opinion or order, if available):

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(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE: Counsel was ineffective for calling Landers wife to testify and for failing to object to prosecutor's use of evidence covered by marital communication privilege

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Counsel called Lander's wife to testify in the defense case in chief for the purpose of establishing that Lander lived on a reservation and it was common practice to pick up hitchhikers. Counsel could have established this same point through another member of Lander's family such as Alta Begay, Lander's mother, without calling Lander's wife to the stand.

By calling Lander's wife to the stand, counsel risked the Government bringing up Lander's sexual proclivities in a way that made it appear more likely he assaulted the alleged victim. Lander's wife was cross-examined about his

supposed rape fantasies and sexual preferences that appeared to corroborate the alleged victim's testimony. But for counsel's error in calling Lander's wife, there would have been no direct evidence corroborating this important contested piece of evidence. Counsel was also deficient in failing to object on the grounds of privilege while the Government had Lander's wife read aloud from text messages that were used to refresh her recollection. These items were subject to privilege as the court recognized prior to Lander's wife testifying. Had counsel not called Lander's wife to testify or timely objected to the use of privileged text messages there is a reasonable probability that the outcome of the proceedings would have been different.

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☑ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

---

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

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(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR: Counsel was ineffective for failing to object to prosecutor's improper remarks during closing argument

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

During closing argument counsel for the Government made multiple references to a highly publicized case involving Elizabeth Smart to the jury. There was no evidence presented at trial concerning Elizabeth Smart. These remarks were made in an effort to tie Lander's conduct to the conduct charged in the Elizabeth Smart case. These remarks were made during initial

closing arguments and during rebuttal. These remarks were improper attempts to inflame the passions of the jury and obtain a conviction by association.

Trial counsel was ineffective for failing to timely object to these remarks. As a result of trial counsel's failure to timely object, Lander was forced to seek review on appeal of this error under the onerrous plain error review standard. Had counsel timely objected, Lander would have prevailed on appeal under a more favorable standard of review and obtained a new trial. Counsel's failure to object caused Lander prejudice by allowing the jury to consider conviction based on guilty by association where no association existed.

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☑ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

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(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

_____

Date of the court's decision:

_____

Result (attach a copy of the court's opinion or order, if available):

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

_____

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Ground one. Claims of ineffective assistance of counsel which are not apparent from the record on appeal are more appropriately reserved for collateral review under 28 U.S.C. Section 2255.

14. Do you have any motion, petition, or appeal *now pending* (filed and not decided yet) in any court for the you are challenging?

Yes ☐ No ☑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

_____

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At the preliminary hearing:

Bonita Gunden, FPD, 500 S. Taylor, Ste. 110, Amarillo, TX 79101

(b) At the arraignment and plea:

(c) At the trial:

James E Woolridge, 600 S Tyler St., STE 1905, Amarillo, TX 79101

(d) At sentencing:

James E Woolridge, 600 S Tyler St., STE 1905, Amarillo, TX 79101

(e) On appeal:

Slater Elza, PO Box 9158, Amarillo, TX 79105

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

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16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☐ No ☑

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging?

Yes ☐ No ☑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

_____

(b) Give the date the other sentence was imposed:

_____

(c) Give the length of the other sentence:

_____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future?

Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

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* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

> A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> > (1) the date on which the judgment of conviction became final;

> Pursuant to 28 U.S.C. § 2255, Mr. Lander's 28 U.S.C. § 2255 motion is timely if filed within one year of his judgment of conviction becoming final. 28 U.S.C. § 2255(f)(1). The Fifth Circuit affirmed the Court's judgment on October, 15 2020. From that date, Mr. Lander had 150 days to petition the United States Supreme Court for a writ of certiorari.
>
> On March 19, 2020, the United States Supreme Court entered an order in light of COVID-19 extending the deadline to file any petition for a writ of certiorari to 150 days from the date of the lower court judgment.
>
> Because he did not seek certiorari, Mr. Lander's judgment of conviction became final on March 14, 2021. Accordingly, this motion is timely if filed on or before March 14, 2022.

Therefore. movant asks that the Court grant the following relief:

> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Vacate sentence, grant new trial, and all other relief available under 28 U.S.C. Section 2255

or any other relief to which movant may be entitled.

/s/ Zachary Newland
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on _____.
(month, date, year)

Executed (signed) on (date)

_____
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

STATE OF TEXAS §

COUNTY OF POTTER §

ATTORNEY'S AFFIDAVIT

JAMES EDD WOOLDRIDGE appeared in person before me today and stated under oath:

"My name is James Edd Wooldridge. My date of birth is July 13th, 1964. I am fifty-eight years of age, and I am fully competent to make this affidavit. I have been licensed to practice law in the State of Texas since 1999 and have been admitted to practice in the United States District Court for the Northern District of Texas since 2002. The facts stated in this affidavit are within my personal knowledge and are true and correct.

I was retained in the Fall of 2018 by Royce Wade Lander to represent him against a criminal charge of Kidnapping in the United States District Court for the Northern District of Texas, Amarillo Division, styled and numbered as Cause 2:18-CR-0075-D-BR, United States of America v. Royce Wade Lander. Subsequently the Superseding Indictment added a count of Interstate Transport. Following substitution for the Public Defender's Office, I entered into a series of conversations with Sean Taylor, the United States Attorney prosecuting the matter, to include discussion as to plea offers extended to Mr. Lander. Mr. Taylor conveyed the offer both formally via letter, and informally via email, and I responded via email as to Mr. Lander's decision to reject the offer, and also orally in person on later occasions

as trial drew near that there was no change in Mr. Lander's decision. The letter and emails are attached and incorporated to this affidavit. Mr. Lander's position throughout was that he had done nothing illegal and there was therefore nothing to which he would plead and no reason to say he had done something he had not done. Accordingly the matter was put to trial after exhaustive preparation with Mr. Lander and his potential witnesses and development of a very sound trial strategy that was ultimately derailed by the presiding judge primarily in his disallowance of entry into evidence of the recorded interviews with the putative victim demonstrating her inconsistencies and dishonesty, and secondarily through his allowance over objection of discussion of privileged matters with Mr. Landers wife. Were I to try the matter again, I would adopt the exact same strategy as calculated to be the most likely to effect the desired outcome."

/s/ JAMES EDD WOOLDRIDGE
JAMES EDD WOOLDRIDGE

SUBSCRIBED AND SWORN under oath before me on this, the 20th day of July, 2022.

[NOTARY SEAL]
LISA DRAPER BAKER
Notary Public, State of Texas
Comm. Expires 07-12-2024
Notary ID 1818527

/s/ Lisa Draper Baker
Notary Public, State of Texas

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Cause No. 2:22-cv-046-D-BR

ROYCE WADE LANDER,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

EVIDENTIARY HEARING
BEFORE THE HONORABLE LEE ANN RENO,
UNITED STATES MAGISTRATE JUDGE

NOVEMBER 15, 2022
AMARILLO, TEXAS

A P P E A R A N C E S

FOR THE PETITIONER:

ZACHARY L. NEWLAND
ATTORNEY AT LAW
P.O. BOX 3610
EVERGREEN, COLORADO 80437

FOR THE RESPONDENT:

UNITED STATES ATTORNEY'S OFFICE
1205 TEXAS AVENUE, SUITE 700
LUBBOCK, TEXAS 79401
BY: AMANDA R. BURCH

FEDERAL OFFICIAL COURT REPORTER: MECHELLE DANIEL, 1205 TEXAS AVENUE, LUBBOCK, TEXAS 79401, (806) 744-7667.

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

INDEX

PETITIONER'S EXHIBITS

NO.	DESCRIPTION	OFFERED	ADMITTED
None			

RESPONDENT'S EXHIBITS

NO.	DESCRIPTION	OFFERED	ADMITTED
None			

* * * * *

P R O C E E D I N G S

THE COURT: The Court calls Cause Number 2:22-cv-046-D-BR with regard to Royce Wade Lander.

MS. BURCH: The United States is present and ready.

MR. NEWLAND: Your Honor, I'm present. I don't know where Mr. Lander is. I know he's been in Randall County, so I don't know if the marshals have him, he's just hanging out. I saw him last night, so he's around.

THE COURT: I don't know—

MR. NEWLAND: My apologies, Your Honor.

THE COURT: No, that's okay. You're not in charge of transporting him.

MR. NEWLAND: Very fair, Your Honor.

THE COURT: All right. Go ahead and be seated, and we'll see what happens.

MR. NEWLAND: Thank you, Your Honor.

Your Honor, if I may, I did confirm about a week ago they did know about the writ, because I reached out to say, you know, do you need anything special. So I apologize. The Court did tell us it could be two days, so we're here and we're ready, whenever the Court needs.

THE COURT: We'll figure it out. I guess, just for planning purposes—because I don't recall having witness lists or anything like that filed. Sometimes when we know there will be a lot of witnesses, we will do that. This did not appear to be that type of hearing. But what do each of you anticipate in terms of witnesses?

MR. NEWLAND: Your Honor, we only anticipate Mr. Lander for our side. We have heard opposing counsel; I believe they're going to call former counsel, Mr. James Wooldridge. Both of us spoke prior to the hearing, last week as well as this morning. We actually don't anticipate there being even any paper exhibits. It should be a relatively straightforward hearing, Your Honor, with just two witnesses, from our perspective.

MS. BURCH: We anticipated, when we visited last week, that it would go through the morning, possibly into the afternoon, but certainly not into tomorrow on either side.

THE COURT: Okay. Well, and I—As Ms. Burch knows from some of the hearings we've had this

summer, I learned the hard way, it's better just to set aside two days to begin with.

(PAUSE)

THE COURT: The marshals are leaving ASAP to go get Mr. Lander from Randall County. I anticipate that will be probably no sooner than a 45-minute turnaround, maybe an hour; I don't know. I would say we'll just be in recess until 10:00 and kind of be ready to go after that. We will—I had planned a lunch break, and so I think we'll still go ahead and do that. I know I get grumpy if I don't eat, and so everybody else probably would be well-served to have a lunch break as well. And if we don't finish at the end of the day, that is perfectly fine with the Court. But we'll just get started when we can.

MR. NEWLAND: Thank you, Your Honor.

THE COURT: All right. We'll be in recess.

(RECESS TAKEN)

THE COURT: After a brief recess, we are back with regard to Cause Number 2:22-cv-046-D-BR, and Mr. Lander is present with us in the courtroom. I do not see Mr. Wooldridge in the courtroom at this time, which is fine. I'll go ahead and administer the oath to Mr. Lander, and then, for counsel's benefit, we'll cover with him the matter of waiver of privilege so that we have that on the record.

Mr. Lander, could you stand for me and raise your right hand.

(THE OATH IS ADMINISTERED TO MR. LANDER BY THE COURT)

THE COURT: Go ahead and remain standing, but you don't have to keep your hand raised.

I do want to cover with you, as I'm sure your attorney has, that the case we are here on today, we are having a hearing on one of the issues you have raised in your petition, which has to do with your claim that your attorney in the underlying criminal case was ineffective. Within the court system, it is what we call ineffective assistance of counsel.

It is my understanding, from what your attorney said previous to you being in the courtroom, that he did intend to call you as a witness, and I am assuming that some of those questions will deal with things that you and your former attorney, Mr. Wooldridge, talked about, maybe correspondence you received, those type of things.

And I don't want to get into what you and your current attorney have talked about, but generally, have you gone over the fact, with your attorney, that those are the types of things that might be covered in the hearing today?

MR. LANDER: Mr. Newland, or—

THE COURT: Yes, yes, with Mr. Newland.

MR. LANDER: Yes.

THE COURT: Okay. And do you understand that, by testifying as to what you and Mr. Wooldridge would have talked about or any letters you would have received from him, you are waiving your attorney/client privilege with him in order to be

able to testify about the advice he gave you that you now claim is ineffective?

MR. LANDER: Yes.

THE COURT: Okay. Go ahead and speak up for me. I'm not sure if our court reporter is able—

MR. LANDER: Yes.

THE COURT: —to hear you. Thank you.

All right. And are you in agreement that you do want to waive that attorney/client privilege with respect to the advice and the various things Mr. Wooldridge had told you about your criminal case—

MR. LANDER: Yes.

THE COURT: —that you think are ineffective?

MR. LANDER: Yes.

THE COURT: Okay. All right. Very good.

I see that Mr. Wooldridge is in the courtroom. If the government does call you to testify, I will just administer the oath to you at that point in time, sir.

There aren't any other housekeeping-type matters that the Court needs to cover. Is there anything from either of the attorneys before we proceed with calling witnesses?

MS. BURCH: No, Your Honor.

MR. NEWLAND: No, Your Honor.

THE COURT: Okay. All right. Very good. Then, as the petitioner, you may proceed, Mr. Newland.

MR. NEWLAND: Thank you, Your Honor. We call Mr. Lander to the stand.

THE COURT: All right. If you'll just walk around in front of the tables, and you're coming right over here to my left. There are a couple of stairs as you come over to the witness stand, so just be careful of those.

MR. LANDER: Thank you.

MR. NEWLAND: Would you prefer the podium, Your Honor, or the table? Whatever is best for the Court.

THE COURT: After COVID, all of our rules have kind of gone out the window, so the table is fine.

MR. NEWLAND: Okay. Fair enough. Thank you, Your Honor.

ROYCE WADE LANDER,

PETITIONER, HAVING PREVIOUSLY BEEN DULY SWORN, TESTIFIED ON HIS OATH AS FOLLOWS:

DIRECT EXAMINATION

BY MR. NEWLAND:

Q. Mr. Lander, could you introduce yourself to the Court and state your name.

A. I'm Royce Wade Lander, thirty-five years old.

Q. And, Royce, where were you born?

A. Gallup, New Mexico.

Q. And prior to this case, did you live in Gallup, New Mexico?

A. I lived about 30 miles from there.

Q. Okay. And where did you live?

A. Continental Divide.

Q. Okay. And—the Continental Divide. Did you live on an Indian Reservation?

A. Yes.

Q. And are you an enrolled remember of a tribe?

A. Yes.

Q. What tribe is that?

A. Navajo Nation.

Q. Prior to this case, what did you do for a living?

A. I worked for the railroad.

Q. Okay. At some point, did you start driving trucks?

A. No.

Q. Okay. When was the last time you were in Amarillo before this case?

A. May 1st, 2000. No—well, actually, November 6th, 2019.

Q. And if you are giving me specific dates, are you trying to just remember off the top of your head those dates?

A. Well, that was when I was sentenced.

Q. Okay. How did you first meet Mr. Wooldridge?

A. We went to his office.

Q. Okay. You went with your family to Mr. Wooldridge's office?

A. Yes.

Q. Okay. And when you say "we," who all went to Mr. Wooldridge's office?

A. My uncle, my mom, my wife, her family.

Q. Okay. And I'm sorry for being slow here, but I do want to be specific about, like, who went to Mr. Wooldridge's office. So when you say your uncle, what's your uncle's name?

A. Roy, Roy Begay.

Q. Okay. And your mom? What's your mother's name?

A. Alta Begay.

Q. And what is your wife's name?

A. Claudia Lander.

Q. Okay. And you said her family. Who else—can you give the names of the people who went to meet Mr. Wooldridge?

A. Her mom, Sadie Perry.

Q. Okay. Anybody else?

A. I think that was it.

Q. And did you find Mr. Wooldridge before you went to meet him? Did you, like, look him on up online? How did y'all get in touch with him?

A. I think it was my family that did it.

MR. NEWLAND: And, Your Honor, I apologize for stopping now. You did ask if there were any housekeeping matters. I would like to invoke the rule, if we could, if Mr. Wooldridge is still in the room.

THE COURT: Yes. The rule against witnesses has been invoked. It's my understanding, Mr. Wooldridge, that the government intends to call you as a witness, so if you can just wait outside, please.

MR. WOOLRIDGE: May I approach just for a moment and address the Court?

THE COURT: Yes.

(MR. WOOLRIDGE APPROACHES THE BENCH)

MR. NEWLAND: Your Honor, if I could stop. Could we ask that this be on the record?

THE COURT: Yes—

MR. WOOLRIDGE: Sure.

THE COURT: —it is on the record. Go ahead and speak up.

MR. NEWLAND: Okay. I just wanted to be—That's fine.

MR. WOOLRIDGE: Per the subpoena, I did attempt to bring as much of the electronic file as possible. What I had by way of documents and things, I did

download on a CD. Emails, I was not able to find a way to electronically download them, so I printed out the emails that I thought were relevant to this. But everything else, I can't get to while we're here unless I'm allowed to have a phone. So if you want to allow me to have the phone, then I can have that available. But if you don't think that's worth anything, then that's fine too.

MR. NEWLAND: At this point, I'll defer to Ms. Burch, as I believe that you are her witness, and the Court really doesn't have control over what exhibits are offered or talked about, although I do understand what the subpoena said.

MS. BURCH: Yes, Your Honor. I think at this time, it's fine. Mr. Newland and I discussed the contents of the record and that he printed out the emails that are relevant. I don't anticipate offering any exhibits at this time, so I think what he has brought is responsive to the Court's subpoena to the best of his ability, and I don't anticipate that the Court will need any of the other emails that don't relate to these claims.

THE COURT: Okay. Do you have any comment, Mr. Newland, at this time?

MR. NEWLAND: We don't have any objection at this time. I just—when he is called to the stand, I assume that we'll just take a look at those matters if he intends to reference them, you know, to refresh his recollection while he is testifying, but we don't have any problem with that right now.

THE COURT: Then so I'm clear, when you say have your phone, I'm assuming, like most of us, your phone is going to have your emails on there, and that would give you the ability, if you are allowed to have your phone with you in the courtroom, to pull up any emails. Was that what your reference was to?

MR. WOOLRIDGE: That is correct. I have an incomplete electronic record without the phone.

THE COURT: Okay.

MR. NEWLAND: Well, I think we can address that at this time, Your Honor. We would object to him having his phone and referencing his phone while he's on the stand at this time, if that's all right with the Court. We can take that up when he testifies.

THE COURT: We'll just—we'll wait and see where we are at the time you testify. I appreciate you telling me what you have and what you don't have in your effort to comply with the subpoena. And in this day and age of phones, I understand that, and so we'll just wait and see what comes up.

MR. WOOLRIDGE: Okay.

THE COURT: Thank you, Mr. Wooldridge.

MR. WOOLRIDGE: Is there any particular place I'm supposed to wait?

THE COURT: No. Just the benches right out there is probably the best place.

(PAUSE)

MR. NEWLAND: May I proceed, Your Honor?

THE COURT: Yes.

Q. (BY MR. NEWLAND) Mr. Lander, I apologize for that. I think where we left it was, I was asking you how you found Mr. Wooldridge. Could you just—let's reorient back there. Who found Mr. Wooldridge as an attorney?

A. I'm not sure exactly who. It was my family that was trying to help me get a private attorney at that point.

Q. Okay. And when you say your family was trying to help you get a private attorney, before Mr. Wooldridge represented you, were you represented by the Federal Public Defender's Office?

A. Yes.

Q. Okay. Do you remember the meeting when you went to go meet Mr. Wooldridge the first time?

A. Vaguely, yes.

Q. Did Mr. Wooldridge represent to you that he had a lot of federal experience and he had experience in handling these types of cases that you were charged with?

A. No.

Q. Okay. Did Mr. Wooldridge tell you that he was prepared to go to trial and represent you?

A. No.

Q. Okay. How much did you pay Mr. Wooldridge to represent you?

A. 40,000.

Q. Okay. And was that all due up front or was that, like, broken out in installments?

A. It was all up front.

Q. Okay. At some point, were you taken into custody pretrial, or were you always out on bond?

A. Before I hired—No, no, I was out on pretrial the whole time.

Q. Okay. And before the trial, were you out on pretrial bond the whole time?

A. Yes.

Q. Okay. How many times—So you hired Mr. Wooldridge. He's your private attorney. You pay him $40,000. How many times did Mr. Wooldridge meet with you before your case went to trial?

A. At least two or three.

Q. Okay. Was Mr. Wooldridge calling you and saying, you know, hey, here are leads; what things do we need to follow up?

A. No.

Q. What was your communication like with him? Did you have emails back and forth with him regularly before you went to trial?

A. No. It was usually phone calls, when I could get ahold of him.

Q. Okay. Was it hard to get ahold of Mr. Wooldridge?

A. Yeah.

Q. Okay. So when you say it's hard to get ahold of him, would you call him pretty regularly and leave messages? Is this once a week? Is this twice a week?

A. At least twice a week.

Q. Okay. And was it just you calling, or was it also your family calling Mr. Wooldridge?

A. No, just me.

Q. Just you?

A. Yes.

Q. Okay. Did Mr. Wooldridge talk to you about any plea offers that were made in this case?

A. No.

Q. Okay. He never sat down with you and discussed and said, hey, the government is willing for you to be—to plead guilty to X, and they'll dismiss other charges? Nothing like that?

A. Huh-uh.

Q. Okay. And I—

A. No.

Q. —I see that you're shaking your head. If you could, just for the court reporter, if you could say yes or no.

A. No, no, he didn't.

Q. Okay. All right. And just to clarify for the record, when you say—was your answer no, that he never sat down with you and discussed plea offers?

A. Yes. No, he didn't.

Q. Okay. Do you recall in this case, did he talk with you before the superseding indictment came out? So you were charged with—you had some original charges, right, that carried specific penalties, like zero to ten years potentially, and then there was a second indictment, what we call superseding indictment, that came out at some point. Do you remember that?

A. Yes.

Q. Do you recall talking with Mr. Wooldridge about there being a risk of a superseding indictment coming out if you didn't plead guilty?

A. I don't remember.

Q. Okay. If you had—if he had sat you down and had a conversation like that, do you think it would stick out in your mind?

A. Yes.

Q. Okay. Was this your first time interacting with the criminal justice system?

A. Yes.

Q. All this was pretty new to you?

A. Yes.

Q. Okay. As you were getting ready for trial with Mr. Wooldridge, did you tell Mr. Wooldridge about

certain investigatory leads—I'll call them that, right—things that he should have investigated to help prove your case?

A. I mentioned the footage from the truck stops, yes.

Q. Okay. And I want to be specific here. So when you say you mentioned the footage from the truck stops, what are you talking about? Are you saying that you were driving in the car with the complaining witness, the alleged victim, and there were truck stops that you stopped at along the way and they should have security camera footage? Is that what you're talking about?

A. Yeah.

Q. Okay. And what did you tell Mr. Wooldridge about them? Did you mention, for example, where you stopped?

A. Yep.

Q. Okay. And why did you—why were you able to remember where you stopped?

A. It's usually where I usually stop at to fill up on my way home.

Q. Okay. And so you told him where you stopped and when you stopped, those sorts of things?

A. Uh-huh.

Q. I'm sorry, I didn't catch that.

A. Yes.

Q. Okay. And what did Mr. Wooldridge say in response to that? Did he say, hey, I've got it; I'm going to issue a subpoena and we're going to try to get a copy of that footage?

A. No.

Q. What would he say to you?

A. I don't remember. I don't think he acknowledged it at all.

Q. Okay. Was it kind of he brushed you off, or he would just say, yeah, yeah, you know, we're moving on to the next thing type of deal?

A. Yeah, sort of.

Q. Okay. Did Mr. Wooldridge ask you for any witness lists prior to you going to trial with Mr. Wooldridge?

A. No.

Q. Did Mr. Wooldridge talk to you about any legal defenses that he thought you might have to the charges that were filed against you?

A. No.

Q. Okay. When you were going to trial, before the trial started, what was your understanding of what your exposure was, sentencing-wise? So did he talk about—say, you know, here's the mandatory minimum; here is the statutory maximum? Did he do anything like that with you?

A. No.

Q. Did he talk with you about the sentencing guidelines and how they produce advisory guideline ranges based on your criminal history and the particular offense conduct in a case?

A. No.

Q. Did he show you the sentencing guideline table and say, you know, if you go down here, here's an Offense Level 35; and you go over—you know, with the little chart? Did he show you any of those things?

A. No.

Q. Did he talk to you at all about your defense regarding picking up hitchhikers?

A. No.

Q. Did he talk with you before the trial started about your need to have any witnesses come and testify in court to the jury about the fact that it's normal to pick up hitchhikers on the reservation?

A. No.

Q. Did he talk with you about— I'm going to focus in—So let's talk about the hitchhiker issue for a second here. So you recall in your case that, eventually, Mr. Wooldridge called your wife to testify. Do you remember that?

A. Yes.

Q. And right before trial started, do you remember there being an issue about whether or not you were actually married to your wife and those sorts of things?

A. Yes.

Q. Okay. Had Mr. Wooldridge ever asked you for a copy of, like, your marriage certificate or anything proving that you were actually married to your wife?

A. Actually, yeah. It was the day before my trial.

Q. Okay.

A. He received it the morning the trial began for—

Q. Okay. And who sent that to him?

A. My in-laws actually faxed it to him, I believe.

Q. Okay. And so Mr. Wooldridge, at that point, had he talked to you about your wife potentially testifying?

A. No.

Q. Okay. At some point, the decision was made to call your wife as a witness. Do you remember that?

A. Yes.

Q. Okay. Did he have any discussions with you about why he might want to call your wife to testify on your behalf?

A. No.

Q. Okay. Did he say, hey, I think your wife is going to humanize you or, you know, make you look like a more normal person if we put her on the stand in front of the jury, anything like that?

A. No.

Q. Did he ever discuss with you the possibility that if you put your wife on the stand, some of your text messages between you and your wife might come into evidence?

A. No.

Q. Did he ever talk to you about the fact that if those text messages came into evidence, that they may be harmful to your case?

A. No.

Q. Okay. Were you surprised when some of the text messages between you and your wife were read aloud to the jury?

A. Yes.

Q. Why was that surprising to you?

A. I wasn't expecting it.

Q. Okay. And why not?

A. I didn't know about it.

Q. Okay. Were there other people in your life that would have been willing to testify about how normal it is to pick up hitchhikers on the reservation?

A. Yes.

Q. Would your mom have been willing to testify about that?

A. Yes.

Q. Okay. Had you picked up hitchhikers before you picked up the complaining witness in this case?

A. Yes.

Q. Okay. Did Mr. Wooldridge tell you anything about your decision to testify or not to testify?

A. No.

Q. Was it ever discussed whether or not you were going to testify in this case?

A. Kind of. He told me that he made the decision not to put me on the stand.

Q. Okay. And why did he say he wasn't going to put you on the stand?

A. I don't remember specifically why.

Q. Okay. Is it hard to remember all these things as you sit here today because a couple of years have passed?

A. Yes.

Q. Okay. And is your memory even more foggy because of your time in the BOP? Does that make it harder to remember?

A. Yes.

Q. Have you endured some pretty significant assaults while you were in the BOP?

A. Yes.

Q. All right. And did that result in you having to be transferred facilities?

A. Yes.

Q. Okay. I want to talk about, real quick, the complaining witness and what you talked about with Mr. Wooldridge and his planned cross-examination. Okay?

A. Uh-huh.

Q. Do you remember talking with him before the complaining witness took the stand about questions that he might need to ask her?

A. No.

Q. Did he say anything to you about whether or not he planned to take it easy on her?

A. Yes.

Q. What did he say?

A. That he wanted to take it easy on her.

Q. Did he tell you why he thought he needed to take it easy on her?

A. No.

Q. Okay. Did he ever talk to you about his need to cross-examine her on the fact that she might have been pregnant at the time you picked her up while she was hitchhiking?

A. No.

Q. Did he ever talk to you about her brain fog that she was suffering from and how he needed to cross-examine her on that

A. No. I had no—I had no clue about that too.

Q. Okay. Well, I want to back up. So if you'll remember, in your trial, the complaining witness testified. Mr. Wooldridge cross-examined her for quite some time, and then she got off the stand. Do you remember that?

A. Yes.

Q. Okay. At some point, Mr. Wooldridge decided he was going to try to re-call her to the stand. Do you remember that?

A. Yes.

Q. Okay. Were you aware that he was going to try to re-call the complaining witness to the stand in his case-in-chief?

A. No.

Q. Had he talked to you about the fact that he was going to try to re-call her to the stand and then cross-examine her about her prior police statements, prior statements that she had given that were inconsistent?

A. No.

Q. Okay. So that wasn't some trial strategy that the two of you had discussed?

A. No.

Q. Okay. Did he tell you anything about how he disagreed with the judge's rulings on this case; in particular, the judge's ruling when the judge said, no, you cannot re-call the complaining witness?

A. No.

Q. Do you remember Mr. Wooldridge talking to you at all about his decision not to object when the prosecutor talked about Elizabeth Smart in closing arguments?

A. No.

Q. Okay. Did you talk about it after the fact where he said, hey, I'm sorry I didn't object; you know, this is what I was thinking?

A. No. I didn't even know about it at all until recently, actually.

Q. Okay. Do you know who Elizabeth Smart is?

A. No.

Q. Okay. Fair enough.

I just want to circle back very quickly here. Your testimony is that Mr. Wooldridge never conveyed any plea offers to you?

A. No.

Q. Okay. If Mr. Wooldridge had conveyed a plea offer to you where you were allowed to plead guilty to one count, with a mandatory minimum of zero years and a statutory maximum of ten years—if he had conveyed that to you pretrial, right, before the superseding indictment—I know this didn't happen, but we have to do this counter-factual thing. Zero to ten, you go open to the judge. If that's the offer and all the other charges are dismissed, would you have taken that plea offer?

A. Probably not, no.

Q. And why not?

A. Because I was innocent.

Q. And as you stand here today, are you still an innocent man?

A. Yes.

Q. Just for way of edifying the record here, have you been in any trouble while you were in the BOP? Have you had any shots?

A. No.

Q. Okay. What have you done to continue to better yourself while you've been in the BOP?

A. I got—I got a GED.

Q. Okay. Did you already have your diploma?

A. Yeah, high school.

Q. Okay. So you also got your GED. Are you taking classes while you're in the BOP?

A. Yes, I've—yeah, programming. I worked in the kitchen, UNICOR.

Q. Okay. Do you have anything else that you want the Court to know as you're here today?

A. No.

MR. NEWLAND: We pass the witness, Your Honor.

CROSS-EXAMINATION

BY MS. BURCH:

Q. Hi, Mr. Lander. My name is Amy Burch. I represent the government. You and I have not met before. Correct?

A. That's correct.

Q. And we have not discussed your case at all?

A. No.

Q. You testified that Mr. Wooldridge did not sit down and go over the plea offer with you; is that correct?

A. Yes.

Q. Do you recall a phone call with him where he discussed a plea offer with you?

A. He didn't discuss the plea offer. He just told me that the kidnapping charges was dropped and what I was being charged with, it carries two to ten, and that was pretty much it. He didn't—I didn't know what a plea offer was until after I lost my trial, and that was from hearing other inmates talking about it.

Q. All right. And you heard other inmates talking about getting a plea offer?

A. Yes, but I was already incarcerated and lost my trial by then, so...

Q. And did you tell Mr. Wooldridge that you were innocent?

A. Yes.

Q. And that nothing had happened with the victim?

A. Yes.

Q. And that—Did you always maintain your innocence to him?

A. Yes.

Q. And it's your testimony that, even if he had given you—You testified he did not convey the plea offer, but even if he had, you would not have taken it. Correct?

A. Yes.

Q. You testified that you didn't talk to Mr. Wooldridge about it being normal to pick up hitchhikers on the reservation. Correct?

A. Say that again.

Q. You didn't talk to Mr. Wooldridge about it being normal to pick up hitchhikers on the reservation?

A. No, I didn't.

Q. So you don't know where he got that idea?

A. No, I don't.

Q. What did you talk about in terms of trial strategy?

A. Nothing, really. He just told us that she has a history of running away. Her older sister did the same thing in 2012. That was pretty much it.

Q. So you had three different meetings that took about two sentences? The two sentences you just said?

A. Yeah.

Q. Do you have— I think you testified with your lawyer that you have difficulty with your memory?

A. Yes.

Q. And is it possible that you don't remember having a conversation about the plea offer?

A. No. I remember that specifically because I brought my wife and my sister-in-law. And he talked about it over the phone, too, because I asked him to repeat it, and they both heard it for themselves. So there was no plea offer that was given; I know that.

Q. So your wife and sister were on all the phone calls with Mr. Wooldridge?

A. No, just that one specifically.

Q. The one specific one where he told you about the superseding indictment?

A. Yes.

Q. But never were they on a phone call where he talked to you about the plea offer?

A. No, that's the phone call that I'm talking about, is where he—the kidnapping was dropped and where I'm going to be charged with this new thing. But the plea offer was never mentioned though.

Q. In that phone call?

A. Yes.

Q. Or any other phone call?

A. Or any other phone call.

Q. Or anytime in his office?

A. Anytime of his office.

Q. And your memory is clear on that, even though it's fuzzy about some other things?

A. Yes.

Q. Do you think that— Strike that.

MS. BURCH: I'll pass the witness.

MR. NEWLAND: Just very briefly, Your Honor.

THE COURT: Of course.

REDIRECT EXAMINATION

BY MR. NEWLAND:

Q. You said you met two to three times with Mr. Wooldridge. Was that third time—was it, like, the day before trial?

A. Yes.

Q. Okay. So the third time that you ever saw your attorney face-to-face was the day before trial?

A. Yes.

Q. And the first meeting was when you hired him?

A. Yes.

Q. Okay. So you didn't have a lot of substantive talk about the case when you hired him?

A. No.

Q. He didn't have the discovery in that—during that first meeting?

A. No.

Q. During the second meeting, did he sit down with you and go over all the government's discovery and the strength of the government's case against you?

A. No.

Q. Did he sit down and show you the videos of the complaining witness and the statements that she said?

A. No.

Q. Did he show you body camera footage?

A. No.

Q. Did he give you 302's from the FBI for you to read?

A. What is that? I don't know.

Q. Did he give you written investigative reports?

A. No.

Q. Okay. So was that second meeting—was it two hours long, or was it closer to, like, five or ten minutes? How long would you say it was?

A. Maybe 15 minutes at most.

Q. And you had to drive all the way here to see Mr. Wooldridge?

A. Well, actually, no. The second time we came out here was for the arraignment. But he did that where I pled not guilty on my behalf because he had another court-appointed—I guess—or another court date. So we drove out here for nothing.

Q. Okay. And that was the second time you saw him?

A. Yes.

Q. Okay. And then the third time that you saw him prior to your trial was the day before trial?

A. Right.

Q. Okay.

MR. NEWLAND: Pass the witness, Your Honor.

MS. BURCH: Nothing further.

THE COURT: All right. Thank you, Mr. Lander. You can leave the witness stand and return to your seat over here.

(PAUSE)

MR. NEWLAND: Your Honor, I was just discussing with the government the order of witnesses. I don't know if the government intends to call Mr. Wooldridge, so just out of an abundance of caution, we'll go ahead and call him on direct.

THE COURT: Okay. That's fine.

MS. BURCH: And, Your Honor, for the record, I'll just let Mr. Newland know that I informed the witness that he is being called on the movant's direct and so I will have him on cross, just so he knows what's happening.

THE COURT: Okay. Very good.

Would you go ahead and take the oath.

(THE OATH IS ADMINISTERED TO MR. WOOLRIDGE BY THE COURT)

THE COURT: All right. Go ahead and take the witness stand, and just watch the steps as you come up, please.

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JAMES E. WOOLDRIDGE,

PETITIONER'S WITNESS, TESTIFIED ON HIS OATH AS FOLLOWS:

DIRECT EXAMINATION

BY MR. NEWLAND:

Q. Good morning, Mr. Wooldridge. How are you doing today?

A. Fabulous.

Q. All right. You and I have not spoken before, have we?

A. No.

Q. Do you remember representing Mr. Lander in this case?

A. I do.

Q. Okay. Do you remember how you were hired by Mr. Lander?

A. I was contacted, I believe, by family members, and they came in and hired me.

Q. Okay. Typical deal? Come into your office, sit down, have a talk—

A. Yes.

Q. —money changes hands?

A. I don't know if money exchanged hands right then, but I think we made an agreement and they made payments by mail.

Q. Okay. And how much were you paid to represent Mr. Lander in this case?

A. I think it was a total of 30,000.

Q. Okay. Do you remember putting together an affidavit in this case to respond to the 2255 allegations?

A. Yes.

Q. Have you had a chance to look that over before coming in here today?

A. Not since I prepared it.

Q. Okay. I'm going to reference the affidavit a few times. If you need me to, I'm happy to give you a copy of it, or if you—do you have a copy of it in your file, or is that just the criminal case file?

A. Just the criminal case file. But I think I remember the affidavit well enough.

Q. Okay. So let's talk about your exhaustive preparation of Mr. Lander and his potential witnesses. What witnesses did you interview in preparing for Mr. Lander's trial?

A. Beyond Mr. Lander and his family members, I think his mother and his wife.

Q. Okay. So let me stop you there. You mentioned Mr. Lander, and then you mentioned Mr. Lander's family members, and then you said his mother and his wife. When you say you interviewed his family members, was it just his mother and his wife, or were there other family members that you interviewed?

A. There were—he—the first time they came in, he brought a lot of family with him, and a lot of people had things to say, but I wouldn't call that necessarily an interview. But the focus was on his wife and his mother and Mr. Lander.

Q. Okay. Let's talk about the exhaustive preparation with Mr. Lander and his potential witnesses. Your exhaustive preparation—I'll take it with Mr. Lander first. How many times did you meet with Mr. Lander prior to going to trial?

A. I don't know that I kept a record of it. We met when he first came in. Most of the conversation with Mr. Lander was by telephone while he was out as—where he lived. And I want to say that when we had—We had a hearing in April. I think he was here for that too. Spoke with him and discussed some issues at that point, and then immediately before trial.

Q. Okay. So that would be the extent of the exhaustive preparation with Mr. Lander, would be the three meetings that you just referenced and some telephone calls?

A. I think so.

Q. Okay. Let's talk about the exhaustive preparation with his potential witnesses. So we've identified you talked to his mother and we—you talked to his wife. Any other potential witnesses that you talked to as part of your exhaustive preparation in this case?

A. No.

Q. Okay. And how many times did you talk to—I'll take them in order. How many times did you talk to his mother?

A. Probably three or four.

Q. Okay. And were these lengthy conversations where you were getting into the facts of the case, or are these mostly mom wants an update, wants to know what's going on with her son type thing?

A. No, it was—I think they were mostly telephonic with her as well.

Q. Okay. Let's talk about the exhaustive preparation with Mr. Lander's wife. How many times did you talk or meet with Mr. Lander's wife?

A. That was probably, like, four or five, six maybe.

Q. Okay. And did you identify his wife and his mom as potential witnesses early on? Did you think you were going to need to call them in his defense?

A. I thought initially, yeah, probably. And then as we got later on closer to trial and we discussed the issue whether or not Mr. Lander wanted to testify in his own behalf, we ultimately decided against that. So then, for sure, I needed to put somebody on to bring out some aspects of his side of the case.

Q. Okay. Ultimately, you decided to put Mr. Lander's wife on the stand. Do you recall that?

A. Yes.

Q. Okay. When did the issue of the marital communications come up? When was that issue flagged for you? Was that something the AUSA brought up to you in a conversation in an email a week before trial? A month before trial?

A. They brought it up—I think we were discussing that pretty much from the beginning with Mr. Taylor, and it ultimately wound up and we wound up briefing on it.

Q. And you still made the decision, even knowing that that issue was flagged for the Court and that

it was going to be disputed, to put Mr. Lander's wife on the stand?

A. The judge ruled that—

Q. I'm going to stop you there. Did you make the decision to put Mr. Lander's wife on the stand?

A. Yes.

Q. Okay. And the point of putting Mr. Lander's wife on the stand was what, from your perspective?

A. To explain some things about the differences in culture, why it's not such an issue that he would pick up a girl, because out on the reservation, that's what you do. People don't always have transportation. They help each other out. So it's not something out of the ordinary that you would pick people up like that.

Additionally, if there was an issue of Mr. Lander having sex with someone other than his wife, his wife would have been the one that would have had—justifiably outraged. She was not, and she wasn't concerned that he had done anything. I mean, the accusation was against her husband and she didn't believe it, so—

Q. Okay.

A. And to humanize Mr. Lander.

Q. So the idea to put someone on the stand about the difference in cultures and to explain that to the jury, was that your idea?

A. Yes.

Q. Okay.

A. I say it's my idea. I mean, his wife and his mother were eager to do something to assist him.

Q. Uh-huh. And you made the decision not to put his mom on the stand to testify to that same idea?

A. That's correct.

Q. Okay. And to your recollection, do you remember if his mom lived on the reservation?

A. Yes.

Q. Okay. And his mom would have known about the cultural differences?

A. Yeah, everybody—

Q. About the hitchhiking, picking people up?

A. Yeah.

Q. Okay. Were you surprised when the prosecutor started reading out loud the text messages between Lander and his wife when he was refreshing her recollection?

A. I was, and that was—Again, the judge had ruled that the photographs they had retrieved were not privileged but those communications were, and he let him get into it anyway.

Q. Okay. And this is kind of in the weeds but let's talk about it right now. So when I'm refreshing someone's recollection, do you think that the rules allow me to read aloud from a document as the attorney? Is that the mode of refreshing someone's recollection under the Federal Rules of Evidence?

A. Without objection, I guess it could be.

Q. Okay. And you didn't object when the prosecutor was reading those text messages aloud while Mr. Lander's wife was on the stand. Correct?

A. I'm not really sure. I know it would—I would expect that I should have. I didn't have the transcripts available to see exactly what I did at trial.

Q. Okay. So we should reference the transcripts if there's any question on whether or not you objected?

A. (Nods head up and down.)

Q. So there was no trial strategy decision to not object at that point if someone was reading aloud to refresh a recollection?

A. That would be correct.

Q. Okay. The prosecutor, in closing argument and in rebuttal, referenced Elizabeth Smart. Do you remember that?

A. Yes.

Q. Okay. You've been a defense attorney for many years. How long?

A. I think I'm in my 23rd, 24th year.

Q. How long have you been— Practicing criminal defense the whole time? General practice? A little bit of everything?

A. I've been practicing criminal defense the whole time. It's dwindled down. I don't do so much general practice or—and I refuse to do any more

family law, so we're just down to criminal defense and 1983's.

Q. Since 1983, just down to—

A. No, no, 1983 actions, civil rights actions.

Q. Oh, okay.

A. That's the only civil stuff I do.

Q. Okay. And you're familiar with who Elizabeth Smart is? You remember the case, generally speaking?

A. Yes.

Q. Okay. As an experienced criminal defense attorney, set your hair on fire when the prosecutor brought up Elizabeth Smart during closing arguments?

A. I wouldn't say it set my hair on fire, but—

Q. Did you think it was improper?

A. It was—it was one of those things—yeah, it probably is, but, at the same time, it wasn't really that significant either.

Q. And the first time, you made a decision to let it go, because it's just in passing, referencing it one time and, what, you don't want to reference it in front of the jury? You don't want to jump up and down and make an objection, mountain out of a molehill kind of situation?

A. Well, it's one of those things—I mean, that Elizabeth Smart case is in the public domain. If you pay attention to the news and you've heard

about it, you know what it is, and if you don't—haven't been paying attention, you don't know what it is and it's not going to matter. But it's something that's just public domain information.

Q. But it mattered enough to the prosecutor to bring it up twice. Right?

A. Yeah, I guess— You'd have to ask them.

Q. Okay. All right. So you made the decision not to object when the prosecutor repeatedly brought up Elizabeth Smart in closing argument?

A. I would say it probably—it seems to be the record.

Q. Okay. Let's talk about the complaining witness. What did your preparation look like when you were getting ready to cross-examine the complaining witness?

A. Well, that was pretty much the crux of the case, was the fact that she couldn't tell the same story twice. And they had these interviews that they—I think there were, like, three of them recorded with her between, I think, Bohannan and somebody—yeah, I think may—it might have all been with Bohannan; I'm not—I don't remember. But I went through those videos, and they were fairly lengthy videos. Went through those several times in order to make sure that I knew which statements were in there that I needed to reference to ask her about. That took a lot of time. I think I did some investigation, as well, into her background, as much as could be done, and her family.

Q. Okay. Why don't we—You brought up the videos. Let's focus and let's start there. So the prosecution, understandably, didn't put on the different recorded videos. Right? They didn't play them for the jury?

A. Right.

Q. Because they had problems with their witness; let's just call it what it is. Would you agree with that?

A. Well, the videos were bad.

Q. Right. And the videos were bad, so it would be helpful if the jury saw them? Fair to say?

A. Absolutely.

Q. Okay. And what did you do to get the videos into evidence?

A. When she was on the stand, I examined her about the statements so that she could have an opportunity to deny or explain. Most of her testimony about her previous statements was that she didn't remember anything and didn't know anything about those statements. But anyway, I had quite a few notes prepared in order to ask her specifically about things that she had said before. She did not unequivocally deny having made those statements, didn't explain—

Q. So you didn't— Let me stop you here. You didn't offer the three videos into evidence. Correct?

A. Not through her.

Q. Not through her. You were going to try to offer them into evidence through someone else. Correct?

A. Right.

Q. And you were going to try to do that through a records custodian, I believe?

A. Yes.

Q. Okay. And that was a conscious decision that you made as part of your trial preparation and trial strategy?

A. Correct.

Q. So your—as you stand here today—and I'm reading your—as I'm reading your affidavit here, where you say, ". . .the development of a very sound trial strategy that was ultimately derailed by the presiding judge primarily in his disallowance of entry into evidence of the recorded interviews. Were I to try the matter again, I would adopt the exact same strategy."

Sitting here today, you've had some time between when you wrote this affidavit that was filed on July 21st, 2022. If you were trying this case again today, would you still try to offer the videos into evidence through a records custodian rather than a witness whose statements they were?

A. That's correct, because the witness would not be able to authenticate those videos. Somebody else had to authenticate the videos.

Q. Okay. So you see it as an authentication issue, which is why you did not offer the videos at that time?

A. Right.

Q. Okay. But you agree that it would have been important for the jury to see those videos?

A. It was— My opinion is that Mr. Lander was denied a fair trial because the jury did not get to see those videos.

Q. Okay. Why didn't you impeach the witness about her pregnancy as a reason for—

A. Well, that had already been addressed.

Q. Why didn't you impeach the witness about her brain fog?

A. I did.

Q. Okay. You think you effectively impeached her about her brain fog? You went into that? Asked her about diagnoses, asked her about seeing doctors—

A. Yeah.

Q. —asked her how long she had brain fog, asked her how it impacted other areas of her life?

A. Again, I didn't get to review the transcript of my examination of her before I came here, but that sounds right.

Q. Okay. Before you put Mr. Lander's wife on the stand, you had an opportunity to review the text messages between him and his wife?

A. That's correct.

Q. Okay. Fair to say those were pretty problematic?

A. They were.

Q. Fair to say those were not helpful to the case?

A. At all.

Q. Yeah. Were you— You know, in your professional opinion, did you have worries about those text messages coming in?

A. Not after the judge ruled that the communications were privileged.

Q. Okay. So you thought they weren't coming in at all?

A. That's right.

Q. So you said, all right, they're privileged; I can put the wife on the stand?

A. Yeah. I didn't do anything to open the door. They went into it and the judge let them.

Q. The door is not opened. The judge went into it. You'd make the same decision again today to put the wife on the stand?

A. I would rely on the judge's orders saying the communications were privileged, yes.

Q. Okay. So the issues with Mr. Lander being denied a fair trial all come down to the presiding judge; is that your testimony here today?

A. Improper rulings, yeah. He was denied the opportunity to put on his defense by us not being

allowed to show the jury that she had made some wildly inconsistent statements and demonstrated some behavior that would have rendered her incredible.

MR. NEWLAND: If I can have one moment, Your Honor.

THE COURT: Yes.

(PAUSE)

MR. NEWLAND: Your Honor, we pass the witness.

CROSS-EXAMINATION

BY MS. BURCH:

Q. Mr. Wooldridge, you testified that you've been a criminal defense attorney for approximately 23 to 24 years; is that correct?

A. I think I'm in my 23rd year.

Q. And is it fair to say that in those 20 years, you've developed thoughts and practices in dealing with criminal defendants?

A. I hope so.

Q. When you are extended a plea offer by the government, is it your typical practice to convey that plea offer to the defendant?

A. That's a mandatory issue.

Q. Did you convey the plea offer in this case?

A. I did.

Q. Did Mr. Lander always maintain his innocence to you?

A. He did.

Q. And when a person maintains their innocence, do you recommend that they take a plea offer?

A. I tell them as long as they say they're—they didn't do it, I cannot put them up to take a plea offer.

Q. And in this case, you actually believed Mr. Lander; is that correct?

A. I do. I still do.

Q. And so would you have had any reason to try to persuade him to take a 10-year plea offer if he was telling you you were innocent—he was innocent and you believed him?

A. No, I would not have done that. But I don't think it actually was a 10-year offer. It was just—what Mr. Taylor was offering had no minimum sentence and a maximum of ten. And he probably would have been a probation candidate, given his lack of any kind of criminal history or anything that would have scored points against him.

Q. Now, did you develop a trial strategy that would explain why Mr. Lander, a middle-aged married man, would offer a ride to a teenage girl from a gas station?

A. Well, that was part of it, as referenced earlier. I mean, it's just a different culture. It's not something that raises flags. I mean, for me personally, I

wouldn't get near her if she walked up to me at a gas station like she did in this case; you go back inside and talk to somebody. But they have a different culture.

Q. So was developing the understanding of that culture part of your trial strategy?

A. It was.

Q. And you testified that you had to—that it could either be the mother or the wife to discuss that. Correct?

A. Yes.

Q. Was there a reason that you did not want to call Mr. Lander's mother?

A. One, she—as I referenced before, she is not his wife. She is not the one to be outraged if he's trying to have sex with somebody else. So there was that issue there that she had trust in her husband. Ms. Begay couldn't do that.

And additionally, Ms. Begay was not particularly well-spoken as far as what we would need for trial. I mean, it was kind of hard to get facts out of her. She was very much on her son's side, wanted to protest his innocence, but she wasn't—didn't seem to come across as being able to provide facts.

Q. So as an attorney, it was your professional opinion that she would not be the strongest witness in this case?

A. That would be correct.

Q. Now, did you also develop an opinion about what kind of witness you thought Mr. Lander would make?

A. Mr. Lander had a communication style that—he was somewhat reticent and hesitant in his answers, and when you asked him, I mean, he wouldn't just answer you; he would kind of look—get a little uncomfortable, and he'd—not—give you answers that weren't necessarily evasive, but they weren't very well on point either.

And we discussed with Mr. Lander—I mean, because that's ultimately his decision anyway, whether he's going to take the plea or what he's going to plead to and whether or not he wants to testify. That's his decision. And after we discussed it, Mr. Lander decided he didn't want to testify either, and so at that point, then, yeah, it went back to we really did need to have—put his wife on to have somebody speak on his behalf.

Q. Now, with respect to the text messages and the photograph, the feet photograph that were in that line of text messages, you did object based on that, didn't you?

A. Again, I didn't get to read the transcript to see exactly what I did, but I would be very surprised and disappointed in myself if I didn't.

Q. Well, in terms of objecting, you tried to keep everything out as marital privilege. Correct?

A. That's correct.

Q. All right. And so in terms of— And it was your understanding that that's how the judge ruled?

A. Yes.

Q. That the photo could come in, but not the text messages?

A. That's correct.

Q. All right. Now, are you aware that the—that that was an issue on appeal?

A. I did not follow the appeal.

Q. All right.

A. Beyond my interaction with Ms. Knapp—she was the one, I think, doing the appeal for Mr. Elza's office. Beyond my interaction with her, I didn't have anything else to do with the appeal.

Q. With respect to the attempts to impeach the complaining witness, you did ask her about her brain fog, did you not?

A. Yeah, I got— As I recall, it was a pretty extensive cross-examination.

Q. Multiple times. Correct?

A. Yes.

Q. And although you did not present her with the videos during her testimony, you did ask her about the fact that she had previously made inconsistent statements, did you not?

A. Yes.

Q. With respect to closing argument, was it your opinion that the Elizabeth Smart reference is something, I think you said, in the public domain?

A. Yes.

Q. And if you had objected, there's two choices. Right? A judge can sustain your objection or can overrule your objection. Do you agree with that?

A. Yes.

Q. Were you concerned that the judge—what—did you have any concern about what the jury would think if the judge sustained your objection?

A. No. It's always good if he sustains my objection.

Q. What would have been the result if the judge had sustained your objection?

A. Well, then you would ask the judge to instruct the jury to disregard, and he'll tell them to disregard, and then you move for a mistrial, and he'll say mistrial is denied, and then you move on.

Q. And did you have a concern about what the jury would think if the judge overruled your objection?

A. Well, it never looks good, especially towards the end, if you're being shut down.

Q. Did you have any concern that by acting concerned about the Elizabeth Smart reference, that the jury would make inferences that you wouldn't want them to make?

A. Give it more credence than it carried on its own, yeah.

Q. Do you believe that you performed effectively as a defense attorney in this case?

A. I did the best I could.

Q. And did you, as aggressively as you could, defend Mr. Lander against the charges that he claims he's innocent of?

A. Yes.

MS. BURCH: Pass the witness.

REDIRECT EXAMINATION

BY MR. NEWLAND:

Q. Your testimony here that you think Mr. Lander was a probation candidate?

A. Yes.

Q. Okay. Do you recall what the base offense level for Mr. Lander was under the PSR?

A. I do not.

Q. Was it high? Low?

A. After conviction, yes.

Q. After conviction, it was high?

A. Yes.

Q. Okay. So you think the three points for acceptance of responsibility—is that what would have gotten him down to being a probation candidate?

A. No. What I was referring to there was before any of that. I mean, if he's found guilty on the kidnapping, it's a minimum of 20. That's a different set of considerations from the guidelines, as opposed to if he had pled out to the transportation of a minor, it was a maximum of ten. I didn't calculate the guidelines at that time, but I'm pretty sure he would have been probation eligible—

Q. Okay. So you didn't look at the sentencing guidelines to see the base offense level on the transportation?

A. At that time, no.

Q. Okay. So when you say he was a probation candidate, you don't really know?

A. Well, he would have been.

Q. Well, he's—All right. It's zero to ten; that's why he was a probation candidate, not because of his base offense level, not because you're asking for a variance, not because you're asking for a downward departure, anything like that?

A. Not like that.

Q. Okay.

A. Way too early for that.

Q. Right. You're just shooting from the hip.

If—You said that you chose—it was a conscious decision to put Mr. Lander's wife as opposed to Mr. Lander's mom on the stand. There were no text messages between Mr. Lander and his mom about anything sexual. Right?

A. No.

Q. The government didn't have any text messages between Mr. Lander and his mother about any rape fantasies, did they?

A. No.

Q. They didn't have any text messages between Mr. Lander and his mother about a foot fetish, did they?

A. No.

Q. So we have someone who is maybe not as eloquent, maybe not effective of a public speaker as the wife; is that fair?

A. Uh-huh.

Q. But we don't have the potential, at least, for rape fantasies coming in. Correct?

A. Well—

Q. Through mom. Mom wouldn't have known about it. Government doesn't have any text messages; they can't cross-examine her; they can't refresh her recollection with any rape fantasy text messages. Correct?

A. That's true.

Q. Okay. And we don't have the potential for foot fetish text messages coming in if mom testifies. Correct? The government doesn't have them; they haven't been produced in discovery; none of that stuff?

A. Correct.

Q. Okay.

MR. NEWLAND: Nothing further, Your Honor.

MS. BURCH: No redirect, Your Honor.

THE COURT: All right. You may step down. Thank you, Mr. Wooldridge.

MR. NEWLAND: Your Honor, we would rest at this time.

THE COURT: All right.

MS. BURCH: The government rests and closes also.

THE COURT: Government also rests and closes? Does petitioner close?

MR. NEWLAND: Yes, Your Honor.

THE COURT: Okay. Do you-all need a break before we proceed to closing arguments? I'm happy to give you a few minutes, or I'm fine to continue.

MR. NEWLAND: We're fine, Your Honor.

THE COURT: Okay. Is ten minutes a side sufficient?

MR. NEWLAND: Yes, Your Honor.

MS. BURCH: Yes, Your Honor.

May this witness be excused?

THE COURT: Yes.

MR. NEWLAND: May we go ahead, Your Honor?

THE COURT: Yes.

MR. NEWLAND: Your Honor, the testimony here today is that Mr. Wooldridge would choose the same trial strategy, is that Mr. Wooldridge made no evidentiary errors, and that my client was denied a fair trial and it's all the judge's fault. So it's the judge's fault that extrinsic evidence of prior inconsistent statements didn't come in. It's the judge's fault that the jury didn't see what he even concedes and calls very impactful prior inconsistent statements because of, quote, an authentication issue.

I don't pretend to elucidate to the judge the issues with authentication, but authentication is not a bar to admissibility. Authentication is separate. I believe that authentication could have easily been established and those items would have come in.

Mr. Wooldridge made what he thought at the time was a strategic decision. He thought that he could cross-examine a young alleged victim vigorously for hours and then re-call her later to try to get into evidence videos. And the judge, understandably, said no. The judge had the authority to control the method and order of interrogation of witnesses. Just as here today, if I hadn't called Mr. Wooldridge, my opposing counsel could have said, you know, "We rest," and Mr. Wooldridge never testifies and never before the Court.

That's professionally unreasonable, Your Honor. It's professionally unreasonable not to get what everyone admits are the key statements and the crux, the heart of the government's case in front of the jury. It's one thing for me to say, "Witness, you

have given prior inconsistent statements, haven't you? Yes, I have. You have said different things at different times? Yes, I have," than to see a witness telling wildly different versions of events on three different occasions to three different law enforcement agencies in her own words, Your Honor.

That has a different impact for the jury. It's professionally unreasonable to not get those statements into evidence, Your Honor. It's professionally unreasonable not to get them into evidence when they are produced in discovery by the government. It's professionally unreasonable not to do that when the government would have had no reasonable basis to object to authentication under the circumstance, Your Honor.

So we have deficient performance on that point, Your Honor. The question is, do we have prejudice. Do we have a reasonable probability that the outcome of the proceedings would have been different but for his deficient performance. It's the crux of the government's case. It's incredibly impactful by all accounts. Is there a reasonable probability that one juror would have voted to acquit, and we submit that there is, Your Honor. It was a close case to begin with, Your Honor. Frankly, the facts are kind of bizarre in the whole case. So what we have is a runaway. We have a runaway who gives different statements to different law enforcement agencies. We have a runaway who claims that there's a trucker who drove her all the way to New Mexico and then another unnamed trucker who gave her rides back to Oklahoma, and then somehow she ends up back in Amarillo eventually, Your Honor.

I submit that, under the facts of this case, there would be a reasonable probability that if the jury had seen her—had seen the complaining witness talk to police officers and tell them all these different versions of events before she pinned the finger on Mr. Lander, that there's a reasonable probability sufficient to undermine confidence in the outcome that one juror would have voted to acquit on that point alone.

If we move along, Your Honor, to the issue of putting Mr. Lander's wife on the stand. At best, Your Honor, I think we have some very threadbare assertions of trial strategy to explain I believe what Mr. Wooldridge called cultural differences.

Accepting that as true and that that's a sound trial strategy, then you have to explain why Mr. Lander picked up a teenage girl to give her a ride, frankly. He could have called anyone on the reservation, but he said specifically he could have called Mr. Lander's mother. He could have called any witness in the entire world that didn't have the issues that Mr. Lander's wife had. The judge had already ruled that the foot fetish photo was coming in.

So if you take Mr. Wooldridge at his best and everything he said is true, he knew the jury was going to see that photo if he put Mr. Lander's wife on the stand. And if the Court will recall, a prime issue in this case was that the complaining witness had testified that Mr. Lander had expressed sexual desire in the complaining witness's feet while she was riding along in his truck.

So these are two independent events and that could be directly corroborated by Mr. Lander's wife

and no one else, but that evidence isn't coming in unless you put her on the stand. And was she put on the stand to prove a vital point to the defense? Was she put on the stand to prove an alibi? No, Your Honor. For marginal benefit. That's professionally unreasonable.

Then, Your Honor, we have the ruling on the marital privilege, and the judge got it right. Those statements weren't supposed to come in. And, in fact, those statements actually weren't offered into substantive evidence. Mr. Wooldridge allowed opposing counsel to read them into evidence as refreshing the recollection, which, I guess, Your Honor, isn't technically evidence, but the jury has heard them. You can't unring the bell when there's text messages between a husband and a wife talking about a rape fantasy.

So again, it's not the judge getting it wrong. It's Mr. Wooldridge not understanding basic rules of evidence and when you need to object, Your Honor, because he didn't object at that point. And had he objected and said, "Your Honor, opposing counsel can refresh the recollection; he can approach; he can show the text messages and ask questions," the judge would have sustained that. The judge made a pretrial ruling which was appropriate on the governing law and standards.

So, Your Honor, we again have deficient performance here and a reasonable probability that the outcome of the proceedings would have been different.

We cannot underestimate how impactful it was to have Mr. Lander's particular sexual interests and particular sexual fantasies put in front of the jury by his own wife in the defense's case-in-chief. This is not merely some small evidentiary issue. This is something where the jury says, "Oh, it's the guy's own wife." You know, you have the complaining witness who is all over the place, who is pointing the finger at Mr. Lander only on the third time talking to police. But it's Mr. Lander's wife. And but for his decision to call Mr. Lander's wife, she would not have testified. She would not have testified because they had already won on the marital privilege issue, Your Honor.

So that's professionally unreasonable. And there's a reasonable probability that at least one juror in that jury box would have acquitted Mr. Lander but for the decision to call his wife.

And this isn't a case, Your Honor, where we are saying, look, there's an expert that they should have called to explain the but-for causation. Like this isn't a Burrage case, Your Honor. Mr. Wooldridge has already said, "Yeah, I could have called someone else. I thought she wasn't the best public speaker, but she didn't have any of the issues that Mr. Lander had, and she could have completely explained the cultural differences."

So we have who he should have called and the fact that he shouldn't have called anyone at all if you're going to call anyone for that point. We would submit that we have proved Strickland prejudice on that one as well.

Your Honor, moving on to the Elizabeth Smart closing argument. I know my friend on the other side did a good job of trying to get Mr. Wooldridge to explain some sort of trial strategy for not objecting. If the Court will reflect on the record and the transcript that comes out, Mr. Wooldridge didn't offer any strategy for not objecting the first time when Elizabeth Smart was brought up, let alone not objecting the second time.

I believe the appellate record is clear that that was already an issue in this case and that that was improper. However, it was under plain error review before the Fifth Circuit, and but for Mr. Wooldridge's failure to object, it would not have been subject to plain error review. It would have been subject to abuse of discretion review, Your Honor.

And, frankly, looking at the record, Your Honor, the trial judge was getting the evidentiary rulings right, and I think, had he timely objected, the trial judge would have granted that objection and would have moved to strike and/or granted a mistrial the second time that the prosecutor brought it up.

We don't get to get into a counter-factual where the prosecutor only brings up Elizabeth Smart once, because it's brought up during the opening closing argument and brought up during the rebuttal. So, again, we have a reasonable probability that the outcome of the proceedings would have been different but for his failure to timely object.

So, Your Honor, under all these circumstances, we think that the—that it's pretty clear that Mr. Lander was denied a fair trial and Mr. Lander is

innocent. But, more importantly, it's not because the trial judge got it wrong. It's because he received ineffective assistance of counsel.

And with that, we would ask the Court, if there are any specific issues that the Court would like addressed, we would ask that the Court order supplemental briefing after the transcript comes out.

THE COURT: Thank you.

Ms. Burch?

MS. BURCH: Your Honor, with respect to Mr. Lander's first claim that the plea offer was not communicated to him, that claim fails on his own testimony. To show prejudice related to a plea offer, he has to show that he would have taken the plea offer. And he admitted today that he would not have taken the plea offer. So even if the Court believes the movant's testimony that it was never extended to him, in contravention to Mr. Wooldridge's testimony that it was, there's still no prejudice, because he wouldn't have taken it anyway.

With respect to the remaining claims, we are in the realm of Strickland prejudice related to trial strategy. And this Court knows and applies on a regular basis the standard that says judicial scrutiny of counsel's performance must be highly deferential. It's tempting to second-guess counsel's assistance after a conviction or an adverse sentence. And a fair assessment requires every effort to eliminate the distorting effects of hindsight and to reconstruct the circumstances of counsel's chal-

lenged conduct and evaluate it from counsel's perspective at the time.

And what we heard today from Mr. Wooldridge is that, relating to the decision to call Mr. Lander's wife, counsel believed that Mr. Lander's wife would have made the better witness; over the mother, who he didn't find to be a strong witness; over Mr. Lander who, as we saw in today's testimony, does have a soft-spoken, reserved demeanor that counsel correctly summed up from the witness stand. And that decision should not be questioned with hindsight. At the time, that seemed like the reasonable trial strategy.

He also gave another reason for wanting to call the wife, that being that if she showed that she was on her husband's side, the jury would think, hey, maybe he didn't do this; his wife believes him; his wife isn't concerned; his wife doesn't think he had sex with the minor. And those are reasonable trial strategies.

He also believed that the marital communications would be limited. Now, with respect to a failure to object to the manner of refreshing recollection, the Court has to look at the potential prejudicial effect. What would have happened had he objected. Had he objected, then the jury would have been instructed to disregard what the statement said.

But the photo was already in evidence. And as the Fifth Circuit determined when it reviewed this issue, it was unlikely to have a prejudicial effect. So if the Fifth Circuit says it's unlikely to have a

prejudicial effect and—this Court should give that some concern or consideration.

And also, the Fifth Circuit said that the foot fetish information was already before the jury in another manner, and so I would ask the Court to review that Fifth Circuit opinion as it takes into consideration Mr. Lander's claims.

The decision to not object during closing argument, counsel explained that it was his opinion that Elizabeth Smart information is in the public domain. The Fifth Circuit did not find the prosecutor's remark improper. It didn't decide one way or the other. It went on and said that without deciding that, it was just going to decide that it wasn't—it was unlikely to have a significant prejudicial effect.

And so for that reason, the government submits that it's—if the Fifth Circuit says that that statement was unlikely to have a significant prejudicial effect, then assuming that the objection had been sustained, which is an assumption—It might have been overruled. But if it had been sustained, there could have been a curative argument—I mean a curative instruction, and again, we are to the level of, there just wasn't prejudice.

With respect to the attempt to impeach the victim, I encourage the Court to read those portions of the transcript, because, in fact, Mr. Wooldridge did attempt to impeach the victim. He did ask her about her brain fog. He did ask her about her reasons for running away. There had been a prior ruling in the case that he was not going to be able to ask her about the pregnancy because that related

to prior sexual conduct, and under the Federal Rules of Evidence, that would not have been allowed in.

And so he did attempt to impeach her in these ways. He did ask her about her prior inconsistent statements. He did not put the videos in front of her. He explained that he thought he had an authentication problem. He intended to offer the videos through a different witness; the Court disallowed it. And then he did what he should do, which is, well, then, can I re-call her? If you're not going to let me get it in this way, can I re-call her? And he argued vigorously to try to re-call her, and the judge disallowed that.

And so with the benefit of hindsight, we can all say, you know, maybe he could have offered the videos directly to her. But he didn't have the benefit of knowing that he wouldn't be able to get it in through the other officer. And so—And we also have the fact that—The fact that she made statements that were inconsistent was in front of the jury. Just the videos were not. But the fact that she had made prior inconsistent statements was something the jury was aware of, and they, even so, found Mr. Lander guilty.

And so the government would just submit to the Court that, on the prejudice prongs of all of those—I mean, in addition to not having deficient performance, we especially don't have prejudice, because there's just not any likelihood that the outcome of the trial would have been different if information that was already in front of the jury was presented in a different way.

And so for those reasons, we would ask the Court to deny Mr. Lander's 2255 motion.

THE COURT: Thank you.

All right. The Court will be in recess. At this time, I cannot think of any additional briefing that we need right away. We will wait for the transcript, and as we begin working on our recommendation, if we do need additional briefing, we will submit an order to the parties for that.

Court is in recess. Thank you.

MR. NEWLAND: Thank you, Your Honor.

(END OF HEARING)

I, Mechelle Daniel, Federal Official Court Reporter in and for the United States District Court for the Northern District of Texas, do hereby certify pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

/s/ Mechelle Daniel DATE MARCH 22, 2023

Mechelle Daniel, CSR #3549
Federal Official Court Reporter

[LETTER TO HONORABLE LEE ANN RENO,
NORTHERN DISTRICT OF TEXAS]

FILED June 21, 2023

June 11, 2023

Honorable judge, Lee Ann Reno

I am writing this letter today seeking relief and reconsideration on the judgement of my 2255 motion: No. 2:22-cv-00046-Z-BR. Based off of the admission Mr. Wooldridge gave at my trial of not knowing what he was doing. Your honor I have been incarcerated since May 1, 2019. I have not been in any trouble and or caused trouble to this present day. I am actively programming, I am currently employed. I'm trying to remain uplifted with a positive attitude/outlook, but truth be told there are days that are very difficult. I feel as though I'm not the only one being punished, my family is also suffering. So I am kindly asking for relief. I've never filed legal work on my own, so I'm filing this in forma pauperis. I hope this is the correct way to do so. Thank you for the time you took to read my letter and thank you for your help.

Sincerely, Royce Lander #97598-408

[Envelope to Honorable Lee Ann Reno,
Northern District of Texas]

Received June 21, 2023

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