ORIGINAL

No. 23-5802

In the
Supreme Court of the United States

ERIE ADAMS,
aka Michael Johnson,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In light of the facts of this case, was the defense counsel ineffective in light of this court's precedent in *Strickland v. Washington,* 466 U.S. 668 (1984)?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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Erie Adams, Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, whose judgment is herein sought to be reviewed, was entered on May 25, 2023, an unpublished decision in *Adams v. United States,* No. 21-1662, 2023 U.S. App. LEXIS 15823 (6th Cir. June 22, 2023), is reprinted in the separate Appendix A to this Petition.

The opinion of the United States District Court for the Eastern District of Michigan, whose judgment is herein sought to be reviewed, was entered on March 13, 2019, an unpublished decision in *United States v. Adams*, No. 13-20874, 2019 U.S. Dist. LEXIS 40252 (E.D. Mich. Mar. 13, 2019) is reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on May 25, 2023. The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

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

Id. Fifth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Id. Sixth Amendment.

STATEMENT OF THE CASE AND FACTS

In 2013, Adams faced an indictment for a single charge of possessing heroin with the intent to distribute, 21 U.S.C. § 841(a)(1). Subsequently, on January 10, 2014, at counsel's erroneous advise, he entered into a proffer agreement with the government. This agreement stipulated that Adams would share his knowledge regarding the ongoing investigation, in exchange for the government's commitment not to utilize his statements against him during their primary case. However, it also contained a provision subjecting Adams to a polygraph examination. Should the results of this examination suggest that Adams had been dishonest, the agreement specified that the government would have unrestricted use of any information disclosed during the proffer session.

On January 17, 2014, a polygraph examination of Adams revealed deceptive responses to questions regarding the murder of Tyrone Conyers, described as a "self-described middleman." *United States v. Adams*, 655 F. App'x 312, 314, 6th Cir. 2016, *per curiam*. Subsequently, on March 13, 2014, a superseding indictment was filed, accusing Adams of multiple charges, including conspiring to possess heroin with the intent to distribute, a violation of 21 U.S.C. §§ 846 and 841(a)(1);

possession of heroin with intent to distribute, a violation of 21 U.S.C. § 841(a)(1); possession of a firearm in furtherance of a drug trafficking crime, a violation of 18 U.S.C. § 924(c); and being a felon in possession of firearms, a violation of 18 U.S.C. § 922(g)(1). This superseding indictment significantly altered the legal charges against Adams. *United States v. Adams*, 2:13-cr-20874-SFC-DRG, ECF # 18 Filed 03/13/14). On the subsequent day, the government informed Adams of its intention to utilize his January 10, 2014, statements without any restrictions. Later on, the district court made a ruling deeming these statements as admissible evidence.[1]

Adams was found guilty by a jury on all six counts in the second superseding indictment. Subsequently, the district court issued a written judgment that sentenced Adams to the following prison terms: 240 months on Counts 1ss and 2ss to be served concurrently, 120 months on Counts 3ss, 4ss, and 6ss to be served concurrently with each other and all other counts, and 300 months on Count 5ss to be served consecutively

[1] Meanwhile, the government filed a second superseding indictment, adding charges for possession with intent to distribute oxycodone and possession with intent to distribute hydrocodone, in violation of 18 U.S.C. § 841(a)(1). *United States v. Adams*, 2:13-cr-20874-SFC-DRG, 2:13-cr-20874-SFC-DRG ECF # 47 Filed 06/05/14).

to all other counts. The Sixth Circuit affirmed. *Adams*, 655 F. App'x at 322.

Afterwards, Adams initiated a § 2255 motion. In a subsequent amended § 2255 motion, he asserted fifteen distinct grounds for relief. These grounds encompassed various claims, including assertions that his trial counsel was ineffective in providing advice regarding the proffer agreement (Claim 1), failing to challenge the presentence report's determination that he faced a mandatory minimum sentence of 25 years on the § 924(c) charge (Claim 2), and omitting specific motions, such as those related to a judgment of acquittal on the § 924(c) charge (Claims 3 & 13). Other claims focused on issues like failure to convey a plea offer (Claim 4), inadequately addressing expert testimony (Claim 5), and not moving for a judgment of acquittal on the § 922(g) charge (Claim 6). Additionally, claims extended to concerns about the jury pool and selection process (Claim 7), challenges to the government's notice of enhancement (Claim 8), the handling of a homicide detective's testimony (Claim 9), and a failure to argue the illegality of his sentence by both trial and appellate counsel (Claim 10). Other issues included neglecting to move for the exclusion of witnesses during testimony (Claim 11), not

filing a petition for a writ of error *Coram Nobis* regarding a prior § 924(c) conviction (Claim 12), neglecting to request an informant jury instruction (Claim 14), and an assertion of ineffective assistance by appellate counsel for omitting specific grounds (Claim 15). The district court's ruling resulted in the denial of all these claims, with the exception of Claims 3 and 12-14, which were not specifically addressed. Following a subsequent remand, the district court once again rejected most of these claims, except for Claim 1, which received a Certificate of Appealability (COA).

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides relevant parts as follows:

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons, therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a ... United States court of appeals has decided an important question of federal law which has not been but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.

Id. Supreme Court Rule 10.1(a), (c).

QUESTIONS PRESENTED

I. DID COUNSEL'S ADVICE TO ADAMS TO ENGAGE IN PROFFER STATEMENTS WITH THE GOVERNMENT, CONTINGENT UPON AN INHERENTLY UNRELIABLE POLYGRAPH EXAMINATION, AMOUNT TO INEFFECTIVE ASSISTANCE OF COUNSEL, AS ELUCIDATED BY THE SUPREME COURT'S PRECEDENT IN *STRICKLAND v. WASHINGTON*, 466 U.S. 668, 104 S. CT. 2052 (1984)?

A. Trial counsel's ineffective assistance is evident in their advice to Adams, which led to his participation in a proffer statement contingent upon a favorable polygraph outcome.

In the course of proceedings, Attorney Suzanna Kostovski served as Adams's legal representative for Adams. However, when assessed within the framework of the *Strickland v. Washington*, 466 U.S. 668 (1984), standard for evaluating claims of ineffective counsel, Kostovski's

performance is found to be deficient. The *Strickland* ruling introduced a two-pronged test for assessing such claims. To successfully challenge a conviction or sentence based on the grounds of ineffective counsel, the defendant must establish: (1) that counsel's performance fell below an objectively reasonable standard, and (2) that there exists a reasonable likelihood that, had counsel not provided objectively unreasonable assistance, the outcome of the proceedings would have been different. *Id.* 466 U.S. at 688-689. This standard was further reaffirmed in *Williams v. Taylor*, 120 S.Ct. 1495 (2000). The Court has underscored the necessity of exercising substantial deference when assessing counsel's performance, explicitly stating that "judicial scrutiny of counsel's performance must be highly deferential." Furthermore, the Court has emphasized the significance of presuming that counsel's actions generally align with the broad parameters of reasonable professional assistance. This elevated degree of deference predominantly pertains to the initial performance aspect of the Strickland test, indicating that "the defendant must surmount the presumption that, given the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id. Strickland* at 689-691. Nevertheless, during the

proceedings governed by § 2255, neither a strategy underpinning counsel's actions nor any challenges to it have been proffered or disputed. When scrutinizing an ineffective assistance of counsel claim hinged upon a strategy challenge, the Court has expounded that "strategic choices made following a comprehensive investigation of the law and relevant factual aspects of plausible options are practically impervious to criticism." Conversely, strategic choices made with less than a thorough investigation are deemed reasonable only in proportion to the extent that reasonable professional judgment substantiates the curtailed scope of the investigation. This is the precise juncture where the defense in Adams's case deteriorated, resulting in a deficiency in performance.

Two years following the *Strickland* decision, the Court reaffirmed the criteria used to evaluate whether counsel's actions fell within the bounds of "reasonable professional assistance" or veered below an objective standard of reasonableness in *Kimmelman v. Morrison*, 477 U.S. 365 (1986). This standard is further elucidated in *Taylor*, at 1512-16. The Supreme Court acknowledged that "a single, serious error may support a claim of ineffective assistance of counsel." *Id. Morrison,* at 384. The Court stressed that such a "single serious error" could lead to counsel's

performance sinking "below the level of reasonable professional assistance," even when counsel's performance during trial was "generally creditable enough," and despite vigorous cross-examination, attempts to discredit witnesses, and efforts to establish an alternative version of the facts. *Id. Strickland,* at 386.

The government contended, and the Court concurred, that the pivotal factor hinged on whether counsel's "single serious error" or "failure" was a product of or attributable to a trial "strategy." *Id. Strickland*, at 384-386; *Taylor,* at 1516. The Court emphasized that "counsel must undertake reasonable investigations or make a reasonable decision that renders specific investigations unnecessary." *Id. Morrison*, at 385. The Court determined that counsel's omissions could not be considered part of any deliberate "strategy" or trial tactic because they were not based on a comprehensive examination of the law and pertinent facts related to all feasible options available to counsel. In essence, no deference should be afforded to counsel's actions, and counsel's performance falls short of *Strickland's* objective standard of reasonableness if counsel's specific acts or omissions cannot be shown to be the outcome of genuine strategic choices made after an exhaustive examination of the law and relevant

facts encompassing all potential options. *Id. Strickland,* at 691; *Morrison,* at 385-387; *Taylor,* at 1512-16.

When a convicted defendant alleges ineffective assistance of counsel, the defendant must specify the acts or omissions of counsel that are contended not to have been the result of reasonable professional judgment. *Id.* Strickland at 690. Advising Adams to engage in proffer statements, the utilization of which was contingent upon Adams passing a polygraph examination, cannot be considered a manifestation of "reasonable professional judgment."

B. Counsel's ineffectiveness had a profoundly detrimental impact on Adams, making the presence of prejudice evident.

The crux of the issue at hand is clear. Counsel's representation proved ineffective when she guided Adams into participating in a proffer statement, contingent upon a polygraph outcome. There existed no discernible advantage in permitting Adams to engage in such a proffer, particularly when tied to a polygraph contingency that empowered the government to exploit these protected statements. The repercussions were twofold: not only did the proffered statements lead to the issuance of two superseding indictments, but they were also wielded against Adams during sentencing. The foundation of the proffer agreement

rested on an inherently unreliable polygraph examination procedure, which notably tilted the scales in favor of the government. Attorney Kostovski bore the responsibility of examining the circuit's caselaw on this matter and should have discerned that this court had consistently held that all polygraph results were inherently unreliable, *United States v. Thomas*, 167 F.3d 299, 308 (6th Cir. 1999), *United States v. Blakeney*, 942 F.2d 1001 (6th Cir. 1991), *United States v. Barger*, 931 F.2d 359 (6th Cir. 1991), *Wolfel v. Holbrook*, 823 F.2d 970, 972 (6th Cir. 1987), and *United States v. Fife*, 573 F.2d 369, 373 (6th Cir. 1976). In a post-*Daubert* decision, the Sixth Circuit further affirmed its long-standing stance that polygraph results were inherently unreliable. *United States v. Scarborough*, 43 F.3d 1021, 1026 (6th Cir. 1994). It is crucial to note that all these cases predated Adams' charges. Consequently, even if Adams had passed the polygraph examination, the results could never have been employed to his benefit. Given Adams' steadfast resolve to proceed to trial, there was no valid reason to partake in a proffer statement of this nature. Trial counsel should have been cognizant of the potential ramifications, even in the worst-case scenario where Adams failed the polygraph exam. Regrettably, no research or strategy pertaining to this

defense was pursued or elucidated to Adams. Engaging in a proffer based on a shaky polygraph test, with the understanding not to present the proffer statements as the case-in-chief at trial, was an imprudent decision. The record remains devoid of any explanation for why this approach was even considered initially. It appears from the record that counsel may not have been aware of, or overlooked, the proffer agreement's provision that, if Adams did not pass the polygraph exam, all the statements he provided would be admissible against him at trial.

The crucial questions regarding why Attorney Kostovski provided such flawed advice and why she failed to adequately prepare have never been addressed. Notably, during the § 2255 proceedings, the government never sought an affidavit from trial counsel to elucidate whether any trial strategy was employed, if at all. See, *Adams v. United States*, 2:13-cr-20874-SFC-DRG, ECF # 127 Doc. 134 at 2. The government's defense that the wording on proffer agreements is standard is irrelevant and does not effectively address the allegation of ineffectiveness. *Adams v. United States*, 2:13-cr-20874-SFC-DRG ECF # 127 Filed 12/26/17 Pg 7. The assertions that Attorney Kostovski failed to review the proffer agreement, consequently rendering ineffective assistance, have been

evaded by the government. No affidavit, letter, or document from Attorney Kostovski has been presented to expound on her trial strategy. This absence can be attributed to the fact that counsel's rationale itself was flawed. Following the government's announcement that the proffer statements would be used against Adams, Attorney Kostovski corresponded with then-Attorney General Holder in a letter, expressing her discontent. In her letter, she conveyed her belief that she, and by implication, her guidance had led Adams to assume that none of the statements would be employed against him at any juncture:

> "In particular, Adams entered a proffer agreement to divulge what he knew about the narcotics investigation and Conyers's death ***in exchange for the government's promise not to use his statements as part of its case-in-chief against him [at trial].***"

See Case 2:13-cr-20874-SFC-DRG ECF No. 134 filed 03/01/18 PageID.2070, Exh. A, to 2255 dated 7/21/14 Letter from Attorney Kostovski to the Honorable U.S. Attorney General, Eric Holder at Page 2.

Attorney Kostovski herself, the individual responsible for advising Adams, labored under a misimpression regarding the use of Adams's proffer statements and the ensuing consequences. This misguidance had a detrimental impact on Adams. It is immaterial that Adams affixed his signature to the agreement. When the guiding hand of counsel falters, it

is unreasonable to anticipate that Adams could make sound decisions independently. In essence, Adams necessitated the guiding hand of counsel throughout all phases of the proceedings, as affirmed in decisions such as *United States v. Cavanaugh*, 643 F.3d 592, 597 (8th Cir. 2011) (acknowledging that a defendant requires the guiding hand of counsel at every stage of the proceedings against him); *United States v. Roy*, 855 F.3d 1133 (11th Cir. 2017) (asserting that the "guiding hand of counsel" is a requisite at every step in the proceeding against a defendant; otherwise, it violates the due process guarantee of the Fifth Amendment). Adams' claim was straightforward and unequivocal: were it not for counsel's advice, he would not have attended the proffer session.

C. Prejudice to Adams was Evident due to his Sentencing Range.

The district court's rationale for denying the § 2255 petition, asserting that Adams cannot demonstrate prejudice in light of the evidence, appears to have overlooked the critical point. Adams indeed failed the polygraph examination, and as a result, the information he provided to the government during the proffer session had a direct impact on increasing his overall sentence. *Adams*, 655 F. App'x at 322. At this juncture, prejudice is manifest. Beyond merely augmenting his final

sentence, it also prompted the government to file two superseding indictments. Moreover, the obvious prejudice lies in the fact that the jury was exposed to the proffer statements during the trial, despite counsel herself believing that these statements would not be presented. According to Attorney Kostovski's understanding, the Government had committed to abstaining from presenting any evidence related to the death of Tyrone Conyers during Adams's trial. However, during the trial, the trial court permitted the Government to call Detective Moises Jiminez, a homicide detective with the City of Detroit Police Department, for that purpose. During Detective Jiminez's cross-examination, by Attorney Kostovski the following testimony was given:

> Kostovski: "Okay. And you testified, sir, that Mr. Adams was selling this heroin. Is that what you said he said during this debriefing, allegedly?"
>
> Jiminez: "He was. I know for sure that I do remember that he was stepping on it to make more profit. I don't know what it is that they add. I'm not a chemist. I'm not - - I'm a homicide detective."
>
> Kostovski: Okay. Now, in reviewing these notes, does it refresh your recollection as to whether or not Mr. Adams allegedly said during the debriefing that he didn't have any customers?"
>
> Jiminez: "It still doesn't, because I wasn't there for the dope thing. I'm there for the homicide thing. Mr. Tyrone Conyers is dead."

Id. 2:13-cr-20874-SFC-DRG, Doc # 93 Filed 09/22/15 Pg 66 of 149 Pg ID 1381.

At this juncture, the government, to Adams' prejudice, had achieved its objective. They successfully introduced the proffer statements into the trial for the jury's consideration, despite counsel's guidance to Adams to proceed with the proffer statements and the polygraph examination. Following this stage, the subsequent proceedings for Adams, right through to sentencing, took a detrimental turn. This occurred without any elucidation from counsel regarding her strategy in advising Adams to participate in the proffer meeting. The only insight into her perspective was gleaned from Attorney Kostovski's letter to then-Attorney General Holder, wherein she expressed her erroneous belief regarding the use of the proffer statements.

These actions meet the clear and undisputed example of an ineffective assistance of counsel claim, warranting this court's intervention.

II. WAS KOSTOVSKI'S INEFFECTIVENESS DEMONSTRATED BY HER FAILURE TO CONTEST THE PRESENTENCE INVESTIGATION REPORT'S ASSERTION THAT ADAMS WAS SUBJECT TO A MINIMUM 25-YEAR TERM ON COUNT 5 UNDER § 924(C)?

Kostovski's representation was deficient as she failed to raise an objection to the sentencing enhancement under Count 5. Under the law, Adams should have been subject to only a consecutive 5-year sentence. The applicable law in this case mandates a 5-year sentence based on the drug charges, rather than the predicate charge mentioned in the 851 Notice and Paragraph 40 of the Presentence Investigation Report (P.S.R). Adams's sentence exceeds the mandatory minimum and maximum sentences prescribed by 18 U.S.C. § 924(c)(1)(a). It's essential to note that for section (c)(1)(c)(i) to be applied, section (c)(1)(a) must not apply, as the latter sets forth the foundational elements of the crime, and without one, the other cannot be invoked. As per Title 18 U.S.C. § 924(c)(1)(A), which states in relevant part:

> "Except to the extent that a greater minimum sentence is otherwise provided this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime ... for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, [in furtherance of any such crime] posseses a firearm, shall, in addition to the punishment provided for [such crime of violence or drug trafficking]."

The phrase "in furtherance of any such crime" pertains to the actual violent or drug crime being committed, not an underlying offense from 1992 when the drug crime in question occurred in 2013, 21 years later. "In furtherance" of the crime implies assisting in the commission of the contemporaneous offense, which in this case, is drug trafficking in 2013. The language "following" in addition to the punishment provided for does not signify that this firearm use entails an additional 5-year penalty on top of the punishment for the 1992 conviction but rather applies to the 2013 conviction. In other words, the penalty is an additional consequence imposed in relation to the ongoing drug trafficking crime referred to as "such crime" in the statute. The subsequent convictions carry 25-year sentences that apply to the use or possession of the firearm in distinct underlying counts within the same charging documents, even though they occurred at different times and dates.

The offenses in question are not crimes that transpired over two decades earlier. This is because the underlying drug trafficking offenses are categorized as "such crimes," rather than "such prior crimes of convictions." Section 924(c) encompasses foundational elements outlined in subsection (c)(1)(a), which pertain to present tense underlying crimes

involving acts of violence or drug trafficking. An illustrative case in point is *Deal v. United States*, 508 U.S. 129 (1993), where the dissent attempted to argue that the term "subsequent conviction" in 924(c) referred to a conviction for an offense committed after an earlier conviction had become final. However, the majority, in a 6-3 decision, disagreed and asserted that "subsequent conviction" applied to the underlying crimes of "conviction." In essence, Adams should have received a five-year sentence for the first 924(c) Count and then a 25-year sentence for the second conviction, which should have followed the initial 1992 conviction for alleged drug trafficking. Regrettably, this did not transpire in this case. A writ of certiorari should be granted in this case.

III. WAS COUNSEL INEFFECTIVE IN FAILING TO SEEK ACQUITTAL ON 924(C) COUNT DUE TO INSUFFICIENT EVIDENCE MEETING BOTH LEGAL AND FACTUAL ELEMENTS BEYOND A REASONABLE DOUBT.

A. The Failure to Move for Rule 29 Acquittal on 924(c) Count: Insufficient Evidence to Satisfy 924(c) Elements Beyond a Reasonable Doubt.

In the present case, the Government failed to establish the elements of 924(c) for Count Five of the Indictment. Counsel's ineffectiveness is evident in their failure to seek a Rule 29 acquittal on this count. The prosecution's case revolved around a search of Adams's home, specifically

the laundry room in the basement, where they allegedly found slightly over one kilogram of heroin. Importantly, no firearms were discovered in close proximity to the drugs. The firearm mentioned in the indictment was located under a couch in the living room, a significant distance from the laundry room. Furthermore, no witnesses testified to Adams possessing or using a firearm during any previous transactions. The key issue at hand is that the evidence presented during the trial does not meet the elements of Possession of a Firearm in furtherance of a drug trafficking crime, as charged in the indictment and set forth in 18 U.S.C. § 924(c). To satisfy these elements, certain legal criteria established by the Sixth Circuit and Supreme Court jurisprudence must be met. These legal requirements will be elaborated upon in the accompanying Memorandum of Law in Support of the 2255 motion, which is hereby incorporated into this motion. Additionally, the declarations of Adams and any other witnesses will be presented in support of this motion and are incorporated herein. A writ of certiorari should be granted in this case.

IV. WAS KOSTOVSKI'S INEFFECTIVENESS IN FAILING TO ADEQUATELY COMMUNICATE THE PLEA OFFER TO ADAMS, HINDERING HIS ABILITY TO MAKE AN INFORMED DECISION.

In a letter addressed to the Honorable Eric Holder, the former U.S. Attorney General, dated July 21, 2014, Kostovski asserted the existence of a plea agreement with the United States, stipulating a 25-year sentence. This agreement included a proffer provision, wherein Mr. Adams was informed solely of its purpose to prevent the use of his statements against him during trial. Mr. Adams held the strong belief that this proffer agreement pertained exclusively to his knowledge regarding the death of an informant and was unaware of any 25-year plea agreement. A subsequent letter filed by counsel on July 21, 2014, it was conveyed to Attorney General Holder that the sole available option for Mr. Adams was an offer of 25 years, with the alternative being to proceed to trial:

> "Mr. Adams had no option than to proceed to trial. The offer was to plead to the indictment and face a mandatory 25-year sentence (20 years for the drug offense, plus 5 years consecutive for the 924(c) charge). Mr. Adams went to trial and was ultimately convicted.

Id. See, Exh. A filed with 2255.

It is evident from the record that trial counsel and the government had indeed reached an agreement regarding a 25-year plea offer, which

Adams was not made aware of nor permitted to independently decline. Counsel bore a responsibility to apprise Adams of this offer for his careful consideration. In fact, without the letter's disclosure, the truth of this arrangement would have remained concealed. Regrettably, Adams was never afforded the opportunity to accept the government's proposal, as there was an utter absence of any mention of such an offer at any juncture during the proceedings. In a similar legal precedent, *United States Ex. Rd. Caruso v Zelinsky*, 689 F.2d 435 (3rd Cir. 1982), the defendant raised allegations that his counsel had failed to communicate a plea offer to him. The Caruso court unequivocally held that the decision to accept or reject such an offer rested with the accused and that "the failure of counsel to advise his client of a plea bargain... constitutes a gross deviation from the accepted professional standard." *Id.* at 438.

Furthermore, in *United States v. Rodriguez,* 929 F.2d 747 (1st Cir. 1991), the First Circuit opined that there is ample authority suggesting that defense counsel's failure to inform the defendant of a plea offer can constitute ineffective assistance of counsel based solely on incompetence. The Seventh Circuit, in *Johnson v. Duckworth*, 793 F.2d 398 (7th Cir.), *cert. denied*, 479 U.S. 937, 107 S.Ct 416, 93 L.Ed 2d 367 (1986), held that

in the usual criminal case, defense attorneys have an obligation to inform their clients of plea agreements proffered by the prosecution. Failure to do so is deemed to constitute ineffective assistance of counsel under the Sixth and Fourteenth Amendments. *Id.* at 902. The Fifth Circuit, in *Beckman v. Wainwright*, 639 F.2d 252 (5th Cir. 1981), established that while an attorney need not seek the defendant's consent for every trial decision, when the question pertains to advising the client regarding a plea or not, the attorney bears the duty to counsel the defendant on the available options and potential consequences. Failure to fulfill this duty is deemed a manifestation of ineffective assistance of counsel. *Id.* at 267.

In addition, under the *Strickland* test, a court deciding whether an attorney's performance fell below a reasonable professional standards can look to the A.B.A. Standards for guidance. *Id.* Strickland, 466 U.S. at 688. The A.B.A. standards of criminal justice provide in relevant part: Defense counsel should conclude a plea agreement only with the consent of the defendant and should ensure that the decision whether to enter a plea of a guilty or nolo contender is ultimately made by the defendant. *Id.* A.B.A. Standards for Criminal Justice, 14-32. The A.B.A. Criminal Justice Standards clearly assert that the final decision regarding a plea

agreement should rest with the defendant. The usage of the term "conclude" signifies that the client's consent is essential, regardless of whether the decision pertains to accepting or rejecting a plea offer. While it is worth noting that Strickland explicitly noted that the A.B.A. Standards are merely a guideline. *Strickland*, 466 U.S. at 688 these standards lend support to the conclusion that, assuming the accuracy of Movant's new allegations, the conduct of defense counsel failed to meet the reasonable professional standards expected. Considering both the A.B.A. Standards and established legal precedent in various circuits, this Court must concur that counsel's failure to communicate the Government's fourth plea offer to the Movant constitutes behavior falling below the prevailing professional standards, rendering it unreasonable.

Given Adams's demonstrated instance of actual ineffective assistance of counsel, the District Court was obligated to devise a remedy that is both proportionate to the harm suffered and respects the delicate balance of competing interests. *United States v. Morrison*, 449 U.S. 361 (1981). It is recognized that the appropriate remedy for ineffective assistance of counsel should aim to restore the defendant to the position they would have occupied had the Sixth Amendment violation not transpired.

However, in certain circumstances, granting a new trial may not be the most suitable recourse.

A straightforward solution emerges in this case: requiring the government to reinstate its original plea offer is constitutionally permissible, in line with the principles established in *Mabry v. Johnson*, 467 U.S. 504, 510 (1971). This approach is further supported by the decision in *Partida-Parra*, 859 F.2d at 633, which acknowledged that under specific circumstances, it may be appropriate for the court to order "specific performance" of the plea bargain. Requiring the government to reinstate its original offer would also align with the policy articulated by the Supreme Court in *Kimmelman v. Morrison*, 477 U.S. 365 (1986). In that case, the Court held that "the Constitution constrains our ability to allocate as we see fit the ineffective assistance. The Sixth Amendment mandates that the State [or Government] bear the risk of constitutionally deficient assistance of counsel." *Id.* at 379, 106 S.Ct at 2585. Under *Kimmelman,* even if one might perceive that the Government's competing interests could be encroached upon by reinstating the original offer, an alternative outcome would impermissibly shift the burden of ineffective assistance of counsel from the Government to Adams. On

March 21, 2012, the Supreme Court issued a decision in *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), wherein it held that when counsel's ineffective advice results in the rejection of a plea agreement and the alleged prejudice is having to undergo a trial, a defendant must demonstrate that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the Court, accepted by the Court, and that the conviction or sentence, or both, under the offer's terms would have been less severe than the actual judgment and sentence imposed. The Court determined that the appropriate remedy in such circumstances was to compel the State to reoffer the plea agreement. If the defendant accepts the offer, the State trial court can then exercise its discretion to decide whether to vacate the convictions and resentence the respondent in accordance with the plea agreement, vacate only some of the convictions and re-sentence accordingly, or leave the convictions and trial-imposed sentence undisturbed. *Id.* p. 1391. Furthermore, on the same day, the Supreme Court issued a decision in *Missouri v. Frye*, 132 S. Ct. 1399 (2012). In this case, the Supreme Court ruled that defense counsel has an obligation to communicate formal offers from the prosecution for acceptance of a plea on terms and conditions that may be

favorable to the accused. It further determined that counsel's deficiency lay in failing to communicate the prosecutor's written plea offer before it had expired. *Id.* p. 1405-1408.

Therefore, in a situation such as the present one, where the defendant was denied the opportunity to accept a plea offer due to the Sixth Amendment violation, restoring to his pre-violation status necessitates the reinstatement of the original offer. The Court further elucidated that the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers, even those that either expire or are declined. *Id.* at 1409. Consequently, based on the aforementioned facts, this Court must concur that Adams was never apprised of his right to accept or reject the Government's 25-year offer. Consequently, he received a more severe sentence, which could have been avoided had he been informed of the Government's offer. Therefore, this Court must conduct an evidentiary inquiry to ascertain the reasons behind Adams not receiving the Government's offer and subsequently apply the appropriate remedy. A writ of certiorari should be granted in this case.

V. WAS KOSTOVSKI'S FAILURE TO MOVE FOR ACQUITTAL, GIVEN THAT ALL EXPERTS WHO TESTIFIED WERE NOT ADMITTED AS EXPERTS UNDER FED. R. EVID. 702, RESULT IN A VIOLATION OF MR. ADAMS' SIXTH AMENDMENT RIGHTS TO A FAIR TRIAL?

During the criminal trial, all expert witnesses who testified failed to qualify and were not admitted by the Court as experts to provide direct evidence authenticating and verifying the identity of the drugs in question, which were central to the charges against Adams as outlined in the indictment. Notably, on the first day of the trial, DEA drug lab witness Carmelo Gomez was never qualified or accepted as an expert by the Court, thus violating Fed. R. Evid. 702 (See DE 92, Tr. 67-74). Similarly, the DEA lab fingerprint expert was never qualified, admitted, or accepted as an expert by the Court, also directly contravening Fed. R. Evid. 702. On the third day of the trial, DEA Forensic Chemist Allison Kidder-Mostrom likewise failed to qualify or be accepted/admitted by the Court under FRE 702 (See DE 94 Tr., 14-19). Notably, Ms. Kostovski did not object to these deficiencies or move for acquittal based on the Rule 702 violations.

It is crucial to note that the courts have established that an agent may offer expert testimony regarding drug jargon, provided that the witness

is properly qualified as an expert, as seen in *United States v. Wilson*, 484 F.3d 267 (4th Cir. 2007). In the present case, however, the agents in question were not qualified as experts, rendering the *Wilson* precedent and Rule 702 inapplicable. Rule 701 of the Federal Rules of Evidence stipulates that "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702" (emphasis added). As elucidated in United States v. Espino, 317 F.3d 788 (8th Cir. 2003), lay opinion testimony is admissible solely to assist the jury or the court in comprehending the facts about which the witness is testifying and not to provide specialized explanations or interpretations that an untrained layperson could not arrive at when perceiving the same acts or events. *Id.* 797. Therefore, pursuant to this rule, a witness's perception allows them to offer lay opinion testimony such as "He was scared," "He was nervous," "He was upset," and "It was cold," along with similar expressions of opinions that individuals

commonly formulate in their everyday lives. Lay opinion testimony under Rule 701 permits a witness to assert, for instance, that a defendant "was not under the influence." All of these examples of lay opinion testimony are founded on the witness being physically present and forming their conclusions through their sensory perception, constituting expressions of opinions that laypersons routinely generate in their daily experiences.

Indeed, the rule explicitly precludes a witness from stating, for instance, "based upon my interview with other people present at the scene, 'He was nervous'" or "He was not under the influence" or any similar phrase. This limitation arises from the rule's requirement that the opinion must be rooted in the "perception" of the witness. The rule does not authorize a witness to provide testimony based on information acquired from sources other than their own sensory experiences. Were it otherwise, the rule would have included the term "knowledge." The advisory committee notes to the rule further underscore this point by stating, "Limitation (a) is the familiar requirement of first-hand knowledge or observation." (FED. R. EVID. 701 advisory committee notes). In delving into the occasionally blurred distinctions between the testimony admissible as lay opinion under Rule 701 and expert opinion under Rule 702, this Court aptly remarked, "The

interpretive waters are muddier still: while lay opinion testimony must be based on personal knowledge, ... expert opinions may [also] be based on firsthand observation and experience." *United States v. Perkins*, 470 F.3d 150, 155-156 (4th Cir. 2006) (emphasis in original) (internal quotation marks deleted)). In the context of an appeal, it's important to highlight that in the case of *Certain Underwriters at Lloyd's of London v. Sinkovich*, 232 F.3d 200 (4th Cir. 2000), this Court definitively ruled that conclusions drawn from an investigation were not admissible as lay opinion testimony under Rule 701. The Court's reasoning was clear: "Geary lacked first-hand knowledge of the accident, and his conclusions were not typical of those that an ordinary person would form based on their own perceptions. Geary's sole basis for knowledge regarding the accident was derived from his investigative efforts and his analysis of the collected data." *Id.* at 204. In *TLT-Babcock, Inc. v. Emerson Electric Co.*, 33 F.3d 397 (4th Cir. 1994), the Court firmly established that Kenneth Merrill, serving as the project manager, was precluded from offering a lay opinion regarding the reasons behind a fan shaft failure. This exclusion resulted from Merrill's testimony not being rooted in his personal observations but rather relying on reports provided by his staff. The Court explicitly articulated, "Merrill's proposed testimony,

therefore, could not have been grounded in his own firsthand observations and, consequently, was appropriately excluded by the district court." *Id.* at 400). Although the cases cited are of a civil nature, the same fundamental principles are applicable to the current case. If evidence is deemed insufficient to justify taking money from an individual's wallet, it should likewise be considered inadequate to justify taking years from a person's life. In *United States v. Peoples*, 250 F.3d 630 (8th Cir. 2001), the Eighth Circuit held that, for a police officer to offer a lay opinion under Rule 701, the officer must possess direct, firsthand knowledge of the events about which they are testifying.

The court's ruling in the cited case found that Agent Neal's testimony lacked direct personal knowledge of the subject matter and was instead rooted in her post-investigation opinions rather than her firsthand perception of the facts. Consequently, the district court's decision to admit Agent Neal's opinions on recorded conversations was deemed erroneous *Id.* at 641. The same legal principle should be applied to the current case.

Furthermore, legal authorities, including treatise writers, have underscored the inadmissibility of an agent's testimony under Rule 701 when their opinion relies, even in part, on information acquired from third

parties. This issue often arises in criminal prosecutions involving law enforcement officers asked to express an opinion about a defendant's involvement in criminal activity. If the witness is asked to base their opinion on matters they personally investigated, it is deemed to be "based on the perception of the witness." However, if the opinion incorporates elements perceived by other agents and conveyed to the witness, such an opinion may be subject to rejection (Wright, 29 FEDERAL PRACTICE & PROCEDURE § 6254 (2009) (emphasis added)). In the present case, a critical procedural error occurred when the court permitted witnesses to testify without first qualifying them as experts. This error, when viewed in conjunction with the ineffective assistance of counsel during the trial, particularly counsel's failure to object to the introduction of the flawed testimony, represents reversible error. As such, this court should grant an evidentiary hearing to assess the degree of prejudice suffered as a result of counsel's deficiencies. A writ of certiorari should be granted in this case.

VI. WAS COUNSEL IN EFFECTIVE FOR FAILING TO FILE A *CORAM NOBIS* PETITION PRIOR TO SENTENCING, ALERTING THE COURT TO THE POTENTIAL ILLEGALITY OF THE FIRST 924(C) CONVICTION UNDER THE POSSESSION THEORY OF CONVICTION, CONSTITUTE A VIOLATION OF THE DEFENDANT'S RIGHTS THAT WARRANTS RECONSIDERATION BY THIS COURT?

Adams contends that trial counsel's ineffectiveness is evident in their failure to submit a coram nobis petition challenging the validity of the prior 924(c) conviction in the original case, given that it was obtained under the possession theory, a legal position subsequently deemed inapplicable.

A petition for a writ of Coram Nobis, authorized by Title 28, United States Code, Section 1651 (the All-Writs Act), allows for the challenging of federal convictions. Historically, this writ corrected factual errors or technical judgment issues. In modern times, it has a broader scope, enabling courts to pursue justice in exceptional cases with compelling circumstances where no other remedies are available. Crucially, a Coram Nobis petition does not initiate a new legal proceeding but extends the original one, granting jurisdiction to both Article I and Article III Courts to address prior legal or factual errors. This jurisdiction applies to Article III Courts when addressing Sixth Amendment violations, such as the deprivation of counsel, *United States v. Morgan*, 346 U.S. 502, 1954, and extends to Article I Courts

when dealing with issues like failure to provide advice on immigration consequences, also a Sixth Amendment violation. *United States v. Denedo,* 129 S.Ct. 2213, 2009. In *Denedo*, the Supreme Court recognized Article I jurisdiction to address a Coram Nobis Petition aimed at correcting an attorney's failure to advise the defendant on immigration consequences following a guilty plea. *Denedo*, a Nigerian national serving in the U.S. Navy entered a guilty plea in military court, believing he wouldn't face deportation based on his attorney's assurances. However, six years later, after his discharge, he faced deportation proceedings. Justice Kennedy, writing for five justices, held that *Denedo's* plea could be challenged in an Article I Military Court under Title 28, United States Code, Section 1651.

In the present case, the Coram Nobis remedy was available to counsel to challenge the prior 924(c) conviction, particularly in light of the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995). In Bailey, the Supreme Court clarified that to secure a conviction under § 924(c)(1), the government must demonstrate the active employment of a firearm based on the language, context, and history of the statute. Such active employment, the Court determined, would include brandishing, displaying, bartering, striking with, and firing or attempting to

fire the weapon. It would not include, however, merely storing a weapon near drugs or drug proceeds or placing the weapon somewhere for later active use. *Id. Bailey.* One type of claim that has historically been recognized as fundamental, and for which collateral relief has accordingly been available, is that of "jurisdictional" error. *See, e.g., United States v. Addonizio*, 442 U.S. 178, 185, 60 L. Ed. 2d 805, 99 S. Ct. 2235 (1979) ("Habeas corpus has long been available to attack convictions and sentences entered by a court without jurisdiction."); *Keel v. United States*, 585 F.2d 110, 114 (5th Cir. 1978) (en banc) (distinguishing, in challenge to conviction resting on guilty plea, "jurisdictional" errors from those which may not be raised via collateral attack). Since jurisdictional error implicates a court's power to adjudicate the matter before it, such error can never be waived by parties to the litigation. See *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 152, 53 L. Ed. 126, 29 S. Ct. 42 (1908) (ordering case dismissed for lack of jurisdiction despite the absence of objection from either party to trial court's previous adjudication of merits). In other words, the doctrine of procedural default does not apply.

In Adams' previous arrest and 924(c) conviction, firearms were found near drugs but not actively in possession, as indicted (PSI ¶ 40). This case

dates back to 1992, predating the *Bailey* decision in 1995. When the new case began in 2013, counsel should have promptly filed a *Coram Nobis* challenging the earlier (1992) conviction for the 924(c) count. This action would have prevented the current (2013) 924(c) count from being considered a "second" offense, avoiding the 25-year consecutive sentence requirement. Counsel's failure to recognize the relief opportunity presented by the Bailey decision necessitates an evidentiary hearing to assess whether counsel's ineffectiveness warrants setting aside the sentence in this case. A writ of certiorari should be granted in this case.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand to the Court of Appeals for the Sixth Circuit.

Done this 15 day of September 2023.

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