NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

BORIS WARD
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 23-60195

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether trial counsel provided constitutionally deficient representation to Mr. Ward.

2) Whether the district court erred by failing to vary from the sentencing range calculated under the Guidelines.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

On September 10, 2019, the Grand Jury for the Southern District of Mississippi returned a Second Superseding Indictment in district court case number 5:19cr3-KHJ-LGI, charging Mr. Ward with:[1]

Counts 1 and 2, possession of a detectable amount of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C);

Count 3, possession of 50 or more grams of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(viii);

Count 4, felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Indictment, ROA.1314; and

Count 5, possession of a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A).

The case proceeded to a jury trial beginning on September 6 and ending on September 9, 2022. The jury returned guilty verdicts on all counts.

Two sentencing hearings followed – one on January 30, 2023, and the other on March 30, 2023. The court ordered Mr. Ward to serve 235 months in prison as to counts one through three and 120 months in prison as to count four, all to run concurrently; 60 months in prison as to count 5, to run consecutively to counts one

[1] The Grand Jury returned the initial Indictment on February 20, 2019, and the First Superseding Indictment on June 25, 2019.

through four; for a total prison term of 295 months. The court also ordered a total of five years of supervised release, and a $500 fine. The court entered a Judgment reflecting this sentence on April 7, 2023. A copy of the Judgment is attached hereto as Appendix 1.

On April 13, 2023, Mr. Ward appealed his case to the United States Court of Appeals for the Fifth Circuit. On October 10, 2023, the Fifth Circuit entered an Opinion affirming the district court's rulings. It filed a Judgment on the same day. The Fifth Circuit's Opinion and its Judgment are attached hereto as composite Appendix 2.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on October 10, 2023. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISION INVOLVED

One of the issues presented in this Petition is ineffective assistance of counsel.

Adequate legal representation is guaranteed by the Sixth Amendment to the United States Constitution, which states:

> 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 defence.

U.S. Const. amend. VI.

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a criminal convictions entered against Mr. Ward for violations of federal law. The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charge levied against Mr. Ward arose from the laws of the United States of America.

B. Statement of material facts.

1. Mr. Ward's background.

Many if not most people that pass through our criminal justice system are raised in a less than desirable environment. Mr. Ward, an African American, is no exception. He was born in Chicago in 1972. He has six siblings. Mr. Ward was raised by his mother, and his father did not contribute financially. He grew up in poverty, within a violent neighborhood.

Mr. Ward's mother neglected him. She physically and verbally abused him. She withheld food as a form of punishment. Mr. Ward still has a scar on his head resulting from his stepfather pushing him through a window.

In summary, Mr. Ward has suffered many hardships in life. Given these hardships, he has tried to survive by any means necessary.

2. The charges.

As presented in detail above, the prosecution charged Mr. Ward with five crimes. Counts 1 through 3 allege that he possessed methamphetamine (hereinafter "meth") with intent to distribute it. Count 5 alleges that he possessed a firearm in relation to the drug distribution charges alleged in Counts 1 through 3. Count 4 alleges that Mr. Ward possessed a firearm after he was convicted of a felony offense.

3. The plea offer.

Before jury selection, the court and the parties discussed the prosecution's plea offer that was made well prior to trial. The prosecution offered for Mr. Ward to plead guilty to Count 3, which alleged possession of 50 or more grams of methamphetamine with intent to distribute. In return, the prosecution would dismiss the remaining Counts of the Indictment, and recommend a sentence within the lower 50 percent of the range calculated under the United States Sentencing Guidelines (hereinafter "Sentencing Guidelines" or "Guidelines").

Following the prosecutions description of the plea offer, the record indicates that neither Mr. Stamps nor Mr. Ward understood its terms. This lack of understanding is part of the basis for Mr. Ward's ineffective assistance of counsel argument. Specifics about the exchanges between the court, Mr. Ward, Mr. Stamps

and the prosecutor are set forth in detail below in the "Arguments" section of this Brief.

4. The proposed stipulation that Mr. Ward had a prior felony conviction.

To prove the felon in possession of a firearm charge alleged in Count 4, the prosecution had to present evidence that Mr. Ward did in fact have a prior felony conviction. In the majority of felon in possession cases, the defendant stipulates that he or she has a prior felony conviction. In that scenario, the jury does not hear the details about the defendant's prior conviction(s).

In Mr. Ward's case, the defense refused to agree to a stipulation regarding his prior convictions. Defense counsel stated, "he declines, and I agree with his decision not to stipulate." From this statement, it appears that this ill-advised decision was supported by defense counsel. As a result of this poor decision, the jury heard evidence about a several year old drug possession conviction.

5. The trial.

The prosecution's star witness at trial was confidential informant Natasha Kennedy. She has been a drug addict for the past 29 years. She has prior convictions for both multiple drug sales and for 26 counts of forgery. She admittedly sold drugs to support her addiction. She also engaged in "sexual favors for men" to support her drug habit.

As presented below in more detail below, Ms. Kennedy conducted the controlled buys at issue on June 1, 2018, and on June 13, 2018. After that, she was charged with selling illegal drugs. Specifically, on June 17, 2019, she was charged in Louisiana state court with distributing meth. She was convicted of that crime and sentenced to "three years at hard labor with the Louisiana Department of Corrections."

Ms. Kennedy was also charged in Mississippi State Court of possessing hydrocodone. At the time of trial, the outcome of the Mississippi criminal case was unknown. It is important to note, however, that the charge originated in Adams County, the same county where Ms. Kennedy executed the subject Cooperation Agreement.

Ms. Kennedy testified that she made two controlled buys from Mr. Ward. The first was on June 1, 2018, at Mr. Ward's residence. She allegedly purchased about 14 grams of meth for $350. Mr. Ward purportedly told her to get the meth from behind the gas cap of a car in front of his trailer. Ms. Kennedy audio and video recorded the transaction with devices provided by law enforcement officers. Id. at ROA.2393.

Ms. Kennedy made a similar controlled buy from Mr. Ward at his residence on June 13, 2018. She again paid $350 for about one-half ounce of meth. Mr. Ward allegedly handed Ms. Kennedy the meth while they were in his trailer. The

transaction was recorded with audio and video recording equipment provided by law enforcement.

At trial, the prosecution did not have possession of the meth allegedly purchased on June 13. It was unavailable because the evidence technician destroyed the meth after its return from the Mississippi Crime Lab. An officer from the Sheriff's Office testified that its destruction was "an administrative error," and she did not know when it was destroyed.

Since the chain of custody of meth from the June 13 purchase was obviously broken by its loss, the prosecution offered photographs of the meth into evidence. The photographs were Government Exhibits 18, 19A, and 19B. For reasons unknown to the undersigned, defense counsel did not object to their admission.

On June 15, 2018, law enforcement obtained and executed a search warrant pertaining to Mr. Ward's property. The officers searched Mr. Ward and found keys to a Dodge Charger in his pocket. He had no drugs or guns on his person.

The officers also searched three cars in front of Mr. Ward's Trailer – a Cavalier, a Yukon and a Dodge Charger. They found about 3.5 grams of meth in both the Cavalier and the Yukon.

In the Charger, officers found about 3.5 grams of meth behind the gas cap and about 500 grams of meth in the locked trunk. Officers also found guns in the locked trunk.

Trial witnesses testified that they did not see Mr. Ward with a gun during either of the two controlled buys. One of the officers associated with the case testified that he had no knowledge of Mr. Ward ever using a gun in relation to drug trafficking. Nevertheless, the prosecution charged him with Possession of the guns in relation to drug trafficking (Count 5).

It is undisputed that Mr. Ward did not own the Charger or any of the cars where drugs were found. The Charger had no battery and was not in running order. In fact, the Charger was parked in front of Mr. Ward's trailer home when he initially moved into it. One of the agents in charge of the case, Mississippi Bureau of Narcotics Agent Jerry Stewart, testified that he had no knowledge about who put the guns and drugs in the Charger.

The jury found Mr. Ward guilty of the five counts alleged in the Indictment. The sentencing hearings followed.

6. The sentencing hearings.

The court conducted two sentencing hearings – the first on January 30, 2023, and the second on March 30, 2023. The sentence range under the Guidelines was 188 to 235 months in prison for Counts 1 through 4. The Sentencing Guidelines suggested sentence for Count 5 was 60 months. By statute, the sentence ordered for Count 5 had to run consecutively to the sentence ordered for all other Counts of the Indictment.

Through pleadings presented to the court between the first and second sentencing hearings, the defense asked for a variance from the Guidelines. Specifically counsel "objected to the base offense level on the grounds that the sentencing guidelines pertaining to purity and weight yields an excessive sentence." As presented below in the "Arguments" section, the requested variance would have decreased Mr. Ward's base offense level from 34 to 32. In turn, this would have decreased his sentence range for Counts 1 through 4 from 188 to 235 months in prison, to 151 to 188 months.

The court denied Mr. Ward's plea for the above-described variance. It ordered Mr. Ward to serve 235 months in prison on Counts 1 through 4 to run concurrently with one another, and 60 months in prison on Count 5 to run consecutively to the 235 month prison term for Counts 1 through 4. This resulted in a total prison sentence of 295 months. The court also ordered Mr. Ward to served five years of supervised release following completion of the prison term.

V. ARGUMENT

A. Introduction.

Mr. Ward presents two issues to this Court. The first pertains to trial counsel's deficient legal representation of Mr. Ward. Counsel provided deficient representation in the following respects:

- counsel's lack of understanding of the plea offer, and consequently his inability to explain the offer to Mr. Ward;
- counsel's advice to Mr. Ward to reject the stipulation regarding prior convictions; and
- Trial counsel's failure to object to admission of lost meth from the alleged June 13 drug transaction.

Any one of these deficiencies requires reversal of Mr. Ward's conviction. The cumulative effect of the deficiencies provides further support for vacating the conviction.

Mr. Ward's second issue on appeal pertains to sentencing. The Sentencing Guidelines treat "actual methamphetamine" and "Ice" much more severely than regular meth. The purported reason behind this distinction is that the purity level of "actual methamphetamine" and "Ice" is higher than that of regular meth, thus defendants whose criminal activities relate to "actual methamphetamine" and "Ice" have a higher levels of culpability.

Mississippi District Judge Carlton Reeves addressed this issue in *United States v. Robinson*, Cause No. 3:21-CR-FKB, 2022 WL 17904534 (S.D. Miss. Dec. 23, 2022). He ruled that a defendant's sentence should not be enhanced for crimes related to "actual methamphetamine" or "Ice." He reasoned that the distinction between the different forms of meth is not based on empirical data. That is true because almost all meth has a purity level equal to that of "actual methamphetamine" and "Ice."

The district court in Mr. Ward's case used the enhancement for "Ice" when it calculated his sentencing range under the Guidelines. Based on Judge Reeves' well-reasoned opinion, that was error.

B. Review on certiorari should be granted in this case.

Rule 10 of the Supreme Court Rules states, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion." The Court should exercise its discretion and grant certiorari because this case involves the important Sixth Amendment right to effective assistance of counsel at all phases of a criminal litigation. Also, the case involves an important sentencing issue that could have nation-wide implications.

C. Argument: Trial counsel provided constitutionally deficient representation to Mr. Ward.

1. Law regarding ineffective assistance of counsel.

"[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (citation omitted). *Strickland v. Washington*, 466 U.S. 668, 689 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* To make a showing of ineffective assistance of counsel, a defendant must demonstrate the following:

> First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Id. at 687. Counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Id.* at 688.

The Fifth Circuit usually finds that ineffective assistance of counsel claims cannot be resolved on direct appeal because "no opportunity existed to develop the record on the merits of the allegations." *United States v. Gulley*, 526 F.3d 809, 821 (5th Cir. 2008) (citation and internal quotation marks omitted). For a court to address Mr. Ward's ineffective assistance of counsel claim on direct appeal, he must establish that "the record is sufficiently developed." *Id.* Mr. Ward asserts that because the record involves *omissions* in the advice provided to him about the plea

offer, as well as other *omissions* at trial, the record is sufficiently developed for appellate review.

2. Trial counsel was ineffective based on his own lack of understanding of the plea offer, and consequently his inability to explain the offer to Mr. Ward.

A primary basis for Mr. Ward's ineffective assistance of counsel argument pertains to the prosecution's plea offer. Before jury selection, the court and the parties discussed the prosecution's plea offer that was made well prior to trial. Based on this exchange, it is apparent that neither trial counsel nor Mr. Ward understood the terms of the offer.

The prosecution offered for Mr. Ward to plead guilty *only* to Count 3 of the Indictment. Count 3 alleged possession of 50 or more grams of methamphetamine with intent to distribute. In return, the prosecution would dismiss the remaining Counts in the Indictment, and recommend a sentence within the lower 50 percent of the range calculated under the Sentencing Guidelines. The prosecutor also noted that Mr. Ward's Guidelines calculation would be lower based on the adjustment for acceptance of responsibility.

In summary, the prosecutor stated, "[O]verall, the agreements would, upon his acceptance of the agreement, would make a *substantial difference in any possible sentencing if he were to be found guilty at trial*."

After the prosecutor explained the terms of the plea offer, the court asked Mr. Ward, "[w]ere you able to hear [the prosecutor] and his description of what the plea offer was?" Mr. Ward responded, "[y]es, ma'am, I heard him, but *I just really don't understand it*." Then the court allowed Mr. Ward the opportunity to consult with his counsel.

At this point, trial counsel showed his complete lack of understanding about the plea offer and its effect on a potential sentence. Trial counsel stated, "Your Honor, I would like to maybe consult with [the prosecutor] and make sure I understand what the offer is." The court responded, "[t]hat's fine. Take your time." Recognizing the dilemma that Mr. Ward was in, the prosecutor stated:

> Your Honor, I think that the parties, and especially Mr. Ward and Mr. Stamps, would benefit if we could have someone from probation assist in the guidelines, in the discussion of the plea. There's been some ongoing discussions, although, like I stated, the offer was ultimately declined, but I have some reservation that there may be some – I don't want to say misunderstandings, but *the offer may not be fully understood, and I think probation might be able to explain a few things to Mr. Ward about this*.

The prosecutor then stated, "I know that's not a normal request[,]" to which the court responded, "[w]ell, it's not normal because we are on the day of trial and I've got a jury waiting." The court advised the parties, "I'm not going to delay jury selection to have discussions that if they needed to be had, *they should have been had before today*."

After that, the court and the prosecutor went over the plea offer with Mr. Ward and his counsel yet again. Then the court asked Mr. Ward, "[h]ave you been made aware that the government has offered you a plea agreement that you could plead to Count 3 of the indictment and the government would dismiss the other remaining counts?" Mr. Ward responded, "[n]o, ma'am." To make sure Mr. Ward understood the question, the court stated, "[o]kay. You've not been made aware of that? If you've not been, you need to tell me the truth." Mr. Ward again responded, "[n]o, ma'am."

Over the next four pages of the trial transcript, the court attempts to explain the terms of the plea offer to Mr. Ward. After that, Mr. Ward rejected the plea offer.

It is apparent that Mr. Ward had a very difficult time understanding the terms of the plea offer and any estimated sentence under the offer. Even at the time of sentencing, it appeared that the court questioned Mr. Ward's understanding of the sentencing process. At sentencing, the court asked, "[d]o you feel like you understand the contents of the presentence report and the addendum to the report?" Mr. Ward responded, "[y]es[,]" but the court immediately asked, "[o]kay. You kind of made a face. Do you need any time to speak to your lawyer about the contents of the Documents?" From the court's question to Mr. Ward, a reasonable

inference can be drawn that court still did not believe that defense counsel had adequately explained the Sentencing Guidelines and the sentencing process to him.

Under Supreme Court precedent, "[d]efendants have a Sixth Amendment right to counsel, a right that extends to the plea bargaining process." *Lafler v. Cooper*, 566 U.S. 156, 162 (2012) (citations omitted). That is, "[d]uring plea negotiations, defendants are 'entitled to effective assistance of competent counsel.'" *Id.*

At a minimum, Mr. Ward would have faced a sentence that is 60 months less than the sentence ultimately ordered by the district court. This is true because the prosecution would have dismissed Count 5, which carried a statutory minimum sentence of 60 months that was ***required*** to be served consecutive to the sentence(s) ordered on the other counts in the Indictment.

The fact that the court ultimately ordered a sentence at the very top of the Guidelines range for Counts 1 through 4 further supports Mr. Ward's ineffective assistance of counsel argument. That is true because the prosecution would have recommended a sentence in the lower 50 percent of the Guidelines range.

Under these facts, this Court should vacate the conviction, and remand the case to district court for Mr. Ward to understand and further consider the plea offer. *See Lafler*, 566 U.S. at 174 (holding "[t]he correct remedy in these circumstances … is to order the State to reoffer the plea agreement.").

3. Trial counsel was ineffective based on his advice to Mr. Ward to reject the stipulation regarding prior convictions.

This issue focuses on Count 4, the felon in possession of a firearm charge under 18 U.S.C. § 922(g)(1). "Subject to certain limitations, 18 U.S.C. § 922(g)(1) prohibits possession of a firearm by anyone with a prior felony conviction, which the Government can prove by introducing a record of judgment or similar evidence identifying the previous offense." *Old Chief v. United States*, 519 U.S. 172, 174 (1997). At issue in *Old Chief* was

> whether a district court abuses its discretion if it spurns such an offer and admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction.

Id. This Court held that defendants do have a right to stipulate to a prior felony conviction under these circumstances. *Id.*

As recognized in *Old Chief*, Mr. Ward had a right to stipulate to a prior felony conviction in relation to the Count 4 felon in possession charge. When the court asked defense counsel about the stipulation issue, counsel stated, "he declines, and I agree with his decision not to stipulate." From defense counsel's statement, it is apparent he agreed with this ill-advised decision. Accordingly, the district court ruled that the jury was allowed to hear evidence about a year 2002 conviction for possession three grams of cocaine.

We must consider defense counsel's failure to stipulate to Mr. Ward's prior convictions in relation to the court's ruling under Rule 404(b) of the Federal Rules of Evidence. The court held that the 20-year old conviction for possessing a small amount of cocaine was relevant not only to prove the felon in possession charge, but also to prove intent and knowledge about selling larger quantities of meth. Trial Tr., ROA.2171-77.

So if the subject prior conviction could be entered for Rule 404(b) purposes, then Mr. Ward would have a difficult time proving that he was prejudiced by admission of the conviction to prove the felon in possession charge. However, for the following reasons, defense counsel had a very strong argument that the 20-year old prior conviction for drug *possession* was not relevant to prove the subject drug *distribution* charges.

At the end of the first day of trial, the court invited the parties to research the prior bad acts issue and argue their positions to the court the following day. Defense counsel apparently rejected this offer. That is, he did not object to admission of the 2002 drug possession conviction as Rule 404(b) evidence of intent and knowledge.

Prior to trial, counsel did file a very general Motion *in Limine* Pursuant to Federal Rules of Evidence 404(b). However, as noted in the district court's Order denying the Motion, "Ward does not point to any specific evidence he asks the

Court to exclude from trial." In other words, defense counsel did not ask the court to exclude the year 2002 conviction for drug possession. Trial counsel should have objected to admission of the year 2002 conviction.

As stated above, admission of crimes, wrongs or other purportedly bad acts of a defendant is governed by Rule 404(b) of the Federal Rules of Evidence. Rule 404(b)(1) states the following limitation on use of such evidence: "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Rule 404(b)(2) states the allowable uses of such evidence: "This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

In *United States v. Ridlehuber*, 11 F.3d 516 (5th Cir. 1993), the Fifth Circuit ruled that admission of extrinsic bad acts evidence was reversible error, and vacated the conviction. The court explained the dangers inherent in admission of unindicted "bad acts" of a defendant. The Court stated: "One of the dangers inherent in the admission of 'other acts' evidence is that the jury might convict the defendant 'not for the offense charged but for the extrinsic offense.'" *Id.* at 521 (citing *United States v. Beechum*, 582 F.2d 898, 914 (5th Cir.1978)). "To guard

against this danger, Rule 404(b) excludes extrinsic offense evidence when it is relevant solely to the issue of the defendant's character." *Id.* at 521.

The initial step in gauging the admissibility of a defendant's "other bad acts" is determining whether the acts are extrinsic or intrinsic to the crime alleged in the indictment. In *United States v. Sumlin*, 489 F.3d 683, 689 (5th Cir. 2007), the Fifth Circuit explained that "Rule 404(b) only applies to limit the admissibility of evidence of *extrinsic* acts." (Emphasis added; citation omitted). "*Intrinsic* evidence, on the other hand, is generally admissible 'so that the jury may evaluate all the circumstances under which the defendant acted.'" *Id.* (emphasis added; citations omitted).

The *Sumlin* court went on to describe the difference between extrinsic evidence and intrinsic evidence. "Evidence of an act is intrinsic when it and evidence of the crime charged are inextricably intertwined, or both acts are part of a single criminal episode, or it was a necessary preliminary to the crime charged." *Sumlin*, 489 F.3d at 689 (citation omitted).

In summary, if evidence of an act is intrinsic to the crime charged, then Rule 404(b) does not apply. If the evidence is extrinsic to the crime charged, then the Rule 404(b) analysis does apply. In Mr. Ward's case, the court found that the 2002 drug possession conviction was extrinsic to the subject crimes. Mr. Ward agrees with that holding, therefore, Rule 404(b) applies to our analysis.

A two-part test is employed to gauge the admissibility of extrinsic "other bad acts" evidence under Rule 404(b). *Beechum*, 582 F.2d at 911. Under the first element of the test, "it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character." *Id.* (citation omitted). Rule 404(b)(2) contains examples of issues for which "other bad acts" may be admissible. As stated above, the examples are proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Beechum*, 582 F.2d at 911.

In *United States v. Adair*, 436 F.3d 520 (5th Cir. 2006), the Fifth Circuit reiterated factors that must be considered when determining whether unfair prejudice of a prior bad act outweighs its prejudicial effect. The factors are: (1) "the extent to which the defendant's unlawful intent is established by other evidence"; (2) the "overall similarity of the extrinsic and charged offenses"; and (3) "how much time separates the extrinsic and charged offenses [because] temporal remoteness depreciates the probity of the extrinsic offense." *Id.* at 526 (citation omitted).

First, we consider the extent to which Mr. Ward's intent to ***distribute*** drugs is established by his conviction for ***possessing*** a small amount of cocaine. As the Fifth Circuit held in *Adair*, "we must make a common-sense assessment of the relevant circumstances surrounding the extrinsic evidence." 436 F.3d at 526

(citation omitted). From a "common sense" perspective, this Court should hold that *possessing* a small amount of cocaine does nothing to prove that Mr. Ward *distributed* meth. This factor weighs in Mr. Ward's favor. For the same reason, the second factor – the overall dissimilarity of the prior drug *possession* conviction and the subject drug *sale* offense – weighs in his favor.

Under the third factor, we consider the time gap between Mr. Ward's prior conviction and the subject offense. At the time of trial, the prior drug possession conviction was over 20 years old. This large temporal gap further supports Mr. Ward's argument.

In summary, defense counsel's failure to agree to a stipulation about Mr. Ward's prior criminal history represents ineffective assistance of counsel. The district court's ruling that the prior conviction was admissible under Rule 404(b) does not cure trial counsel's shortcoming. That is true because, under the analysis presented above, counsel should have objected to admission of the 2002 drug possession conviction under Rule 404(b).

4. Trial counsel was ineffective by failing to object to admission of *lost* meth from the alleged June 13 drug transaction.

One of the alleged controlled buys was on June 13, 2018. Ms. Kennedy purportedly bought about one-half ounce of meth.

At trial the prosecution did not have possession of the meth allegedly purchased on June 13. It was unavailable because the evidence technician

destroyed the meth after its return from the Mississippi Crime Lab. An officer from the Sheriff's Office testified that its destruction was "an administrative error," and she did not know when the meth was destroyed.

Since the chain of custody of meth from the June 13 purchase was obviously broken by its loss, the prosecution offered photographs of the meth into evidence. The photographs were entered into evidence at trial, Defense counsel did not object to their admission.

Generally, whether "the proponent of evidence has proved an adequate chain of custody goes to the weight rather than the admissibility of the evidence, and is thus reserved for the jury." *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1154 (5th Cir. 1981) (citations omitted). However, the proponent of the evidence must make "a threshold showing that *reasonable precautions were taken against the risk of alteration, contamination or adulteration*" of the evidence. *Id.* at 1155 (emphasis added; citations omitted). Further, "under an exception to the best evidence rule … secondary evidence is admissible … where it appears that the original [evidence] has been lost or destroyed, *without any fault of the party offering the evidence*." *United States v. Hickman*, 468 F.2d 610, 611 (5th Cir. 1972) (emphasis added).

In Mr. Ward's case, defense counsel did not object to admitting photographs of the lost meth. So we do not know whether reasonable precautions were taken against the risk of alteration, contamination or adulteration of the meth. However,

we do know that fault for its destruction lies squarely on the shoulders of the evidence technical at the Mississippi Crime Lab. By extension, fault lies on the prosecution's shoulders.

In summary, had defense counsel objected to admission of the Government Exhibits 18, 19A and 19B, there is a reasonable probability that the evidence would not have been admitted. *See Hickman*, 468 F.2d at 611. This, in turn, would have required the jury to return a verdict of not guilty on the Count 2 charge related to the June 13 drug transaction. Therefore, failure to object to the evidence represents ineffective assistance of counsel.

5. The cumulative effect of all of trial counsel's errors amounts to constitutionally deficient representation.

Finally, the Court should consider the cumulative effect of trial counsel's errors. In *United States v. Houston*, 481 Fed. App'x 188, 196 (5th Cir. 2012), the Fifth Circuit ruled that the cumulative effect of errors warranted reversal of a conviction. The *Houston* court held, "[c]umulative error analysis evaluates 'the number and gravity of the errors in the context of the case as a whole.'" *Id.* at 194 (citation omitted).

As the Fifth Circuit described in *Houston*, trial counsel in Mr. Ward's case committed numerous errors that weighed heavily. Even if this Court concludes that each error, viewed in isolation, does not amount to ineffective assistance of

counsel, the Court should nevertheless grant certiorari and rule that the cumulative effect of the errors warrants reversal of Mr. Ward's conviction.

B. Argument: The district court erred by failing to vary from the sentencing range calculated under the Guidelines.

1. Law regarding the reasonableness of a sentence.

> Pursuant to *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007), we engage in a bifurcated review of the sentence imposed by the district court. *United States v. Delgado–Martinez*, 564 F.3d 750, 752 (5th Cir. 2009). First, we consider whether the district court committed a "significant procedural error," such as miscalculating the advisory guidelines range. *Id*. If there is no error or the error is harmless, we may proceed to the second step and review the substantive reasonableness of the sentence for an abuse of discretion. *Id*. at 751–53. We review the district court's factual findings for clear error and its interpretation and application of the guidelines, including any cross-reference provisions, *de novo*. *United States v. Arturo Garcia*, 590 F.3d 308, 312 (5th Cir. 2009).

United States v. Griego, 837 F.3d 520, 522 (5th Cir. 2016).

In Mr. Ward's case, the district court ordered a within-Guidelines sentence. "Sentences within the properly calculated Guidelines range are presumed to be substantively reasonable." *United States v. Romans*, 823 F.3d 299, 313 (5th Cir. 2016) (citation omitted).

2. The Sentencing Guidelines enhancement for meth purity lacks an empirical foundation.

Mr. Ward's sentence range under the Guidelines was 188 to 235 months in prison for Counts 1 through 4. The Sentencing Guidelines range for Count 5 was 60 months. At issue is the 235 month sentence for Counts 1 through 4.

The defense asked the district court to vary downward from the sentencing range calculated under the Guidelines. Specifically counsel "objected to the base offense level on the grounds that the sentencing guidelines pertaining to purity and weight yields an excessive sentence."

The Sentencing Guidelines differentiate between regular meth and Ice, which is considered a purer form of meth. One gram of regular meth has a converted drug weight of 2 kilograms, while one gram of Ice has a converted drug weight of 20 kilograms. U.S.S.G. § 2D1.1, Application Note 8(d).

The probation officer in Mr. Ward's case concluded that 542.18 grams of meth should be classified as Ice. Based on that conclusion, the total converted drug weight attributable to Mr. Ward was 14,897.50 kilograms. The probation officer's calculation is presented in the following chart:

drug conversion: *<u>including</u>* the Ice enhancement under the Drug Conversion Table found at U.S.S.G. § 2D1.1, Application Note 8(D)

form of meth	weight / grams	converted weight / kilograms
meth (2 controlled buys)	26.95	53.90
meth – *Ice* (in Charger trunk)	*542.18*	*10,843.60*
meth (relevant conduct)	2,000.00	4,000.00
TOTAL		**14,897.50**

As demonstrated by the following chart, the converted drug weight attributable to Mr. Ward is only 5,138.26 kilograms if the enhancement for Ice is not applied:

drug conversion: *excluding* the Ice enhancement under the Drug Conversion Table found at U.S.S.G. § 2D1.1, Application Note 8(D)

form of meth	weight / grams	converted weight / kilograms
meth (2 controlled buys)	26.95	53.90
meth (in Charger trunk)	*542.18*	*1,084.36*
meth (relevant conduct)	2,000.00	4,000.00
TOTAL		**5,138.26**

To summarize, the total converted drug weight attributable to Mr. Ward reduces from 14,897.50 kilograms to 5,138.26 kilograms when we eliminate the Guidelines enhancement for Ice under 2D1.1, Application Note 8(D). In turn, this decreases Mr. Ward's base offense level from 34 under § 2D1.1(c)(3), to 32 under § 2D1.1(c)(4).

The probation officer assigned Mr. Ward a total offense level of 34. She assigned him a criminal history category of III. At a total offense level of 34 and a criminal history category of III, Mr. Ward's sentencing range under the Guidelines was 188 to 235 months in prison for Counts 1 through 4. The court ordered Mr. Ward to serve a sentence at the very top of the Guidelines range – 235 months in prison.

As analyzed above, if we decreased the two levels associated with the Ice enhancement, Mr. Ward's total offense level decreases from 34 to 32. Combining a total offense level of 32 and a criminal history category of III results in a Guidelines range of 151 to 188 months in prison. Guidelines Sentencing Table. That range is considerably lower than the 235 month prison term ordered by the district court.

At this point, we turn our attention to why the district court erred by including the sentence enhancement provision for Ice. We rely on District Judge Carlton W. Reeves' opinion in *United States v. Robinson*, Cause No. 3:21-CR-FKB, 2022 WL 17904534 (S.D. Miss. Dec. 23, 2022). Judge Reeves presides in the Southern District of Mississippi, the same district that exercised jurisdiction over Mr. Ward's case. Also, Judge Reeves is the current Chairman of the United States Sentencing Commission.

As in the subject case, the defendant in *Robinson* "objected to the U.S. Sentencing Guidelines provisions regarding methamphetamine purity." *Robinson*, 2022 WL 17904534 at *1. Judge Reeves recognized that the "Sentencing Guidelines use drug purity as a proxy for a defendant's culpability." *Id.* "The Guidelines say, in relevant part, 'the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs.'" *Id.* (citing U.S.S.G. § 2D1.1 cmt.

n.27(C)). "As a result, the Guidelines make a distinction between 'methamphetamine' and 'actual methamphetamine.'"[2] *Id.* (citing § 2D1.1(c)). "All else equal, defendants caught with actual methamphetamine get longer sentences than defendants caught with methamphetamine mixture." *Id.* (citation omitted). Of significant importance is the fact that "[n]o other drug is punished <u>more</u> severely based on purity." *Id.* (emphasis in original) (citing *United States v. Hayes*, 948 F. Supp. 2d 1009, 1025 (N.D. Iowa 2013)).

Judge Reeves concluded that he should not apply the enhancement for meth purity. *Robinson*, 2022 WL 17904534 at *3-4. He agreed with Robinson's contention that "the purity level of methamphetamine is not indicative of Mr. Robinson's culpability." *Id.* at *1. This is true because "DEA data show[s] that most methamphetamine confiscated today is 'pure' regardless of whether the defendant is a kingpin or a low-level addict." *Id.* at *3) (citing *United States v. Hendricks*, 307 F. Supp. 3d 1104, 1108 (D. Idaho 2018), and *United States v. Carrillo*, 440 F. Supp. 3d 1148, 1154 (E.D. Cal. 2020)).

Judge Reeves offered a better solution for sentencing defendants convicted of selling "actual meth" or "Ice." He held, "[g]iven the on-the-ground reality in methamphetamine cases, the better way to determine culpability is to examine all

[2] "Actual methamphetamine" and "Ice" are treated the same under the Guidelines. Both carry a converted drug weight 10 times higher than regular meth. *See* U.S.S.G. § 2D1.1, Application Note 8(D); *see also*, *Robinson*, 2022 WL 17904534 at *2.

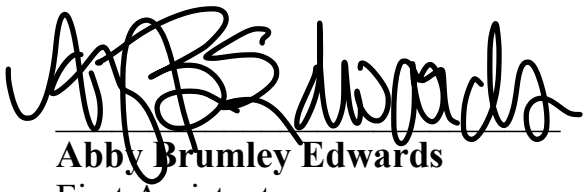
of the circumstances of the defendant's case and life – seeing the defendant as a 'whole person,' as the Supreme Court just instructed in *Concepcion*." *Robinson*, 2022 WL 17904534 at *3 (citing *Concepcion v. United States*, 142 S. Ct. 2389, 2395 (2022)).

This Court should follow Judge Reeves' well-reasoned opinion in *Robinson*. That is, the Court should grant certiorari and set a new precedent by ruling that the purity level of meth in Mr. Ward's possession is not indicative of his culpability.

VI. CONCLUSION

Based on the arguments presented above, Mr. Boris Ward asks the Court to grant his Petition for Writ of Certiorari.

Submitted December 5, 2023 by:



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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

BORIS WARD
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 23-60195

CERTIFICATE OF SERVICE

I, Abby Brumley Edwards, appointed under the Criminal Justice Act, certify that today, December 5, 2023, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis was served on Counsel for the United States by Federal Express, No. 774351203830, addressed to:

The Honorable Elizabeth B. Prelogar
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.

Abby Brumley Edwards
First Assistant
Office of the Federal Public Defender