

No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 2017

JOHN WATKINS, JR.,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE(S)

- I. Whether Mr. Watkins' conviction and minimum-mandatory sentence under 21 U.S.C. § 841(b)(1)(A) should be reversed, based on the following issues:
- A. Whether "methamphetamine" as used in 21 U.S.C. § 841(b)(1)(A) means pure methamphetamine, not a "mixture."
- B. Whether a constructive amendment occurred, in violation of the Fifth Amendment to the U.S. Constitution, where the indictment charged that the drug conspiracy involved 50 grams or more of "pure/actual methamphetamine," but the jury was instructed that it had to determine the quantity of "methamphetamine."
- B. Whether the government's evidence was sufficient to establish the drug quantity charged in the indictment — i.e., 50 grams or more of "pure/actual methamphetamine" — which resulted in an increased minimum-mandatory sentence under 21 U.S.C. § 841(b)(1)(A).
- II. Whether the district court abused its discretion, under Federal Rules of Evidence 404(b) and 403, in admitting Mr. Watkins' prior convictions into evidence at trial.
- III. Whether the enhancement based on the government's 21 U.S.C. § 851 notice should not have applied, because: B A A A A A.

Prior Florida drug convictions under § 893.13, Florida Statutes, which lack a *mens rea* element as to the illicit nature of the substance, are not "felony drug offense[s] for purposes of 21 U.S.C. § 841(b)(1)(A).

C. The prior convictions were not charged in the indictment and proven to a jury beyond a reasonable doubt, in violation of the Fifth and Sixth Amendments.

IV. Whether the career offender enhancement under U.S.S.G. § 4B1.1 should not have applied, where:

A. The Florida drug statute, § 893.13, is not a "controlled substance offense," because Florida law does not require knowledge as to the illicit nature of the substance.

B. Florida manslaughter, § 782.07, is not a "crime of violence.

LIST OF PARTIES

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

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APPENDIX A: Decision of the Eleventh Circuit Court of Appeals

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**On Petition for Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

The petitioner, **JOHN WATKINS, JR.**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on December 12, 2017.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-11a) is unpublished.

JURISDICTION

The Petitioner, **JOHN WATKINS, JR.**, was prosecuted by an Indictment alleging violation of federal criminal laws in the United States District Court for the Middle District of Florida, convicted and sentenced to 240 months for conspiracy to distribute methamphetamine. He appealed his conviction and sentence to the Eleventh Circuit Court of Appeals invoking the court's jurisdiction under 28 U.S.C. § 1291. (Doc. 93) His sentence was affirmed by an order entered December 12, 2017 . (Doc. 132)

The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall be held to answer for a capital, or infamous crime, unless on 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. Fifth Amendment to the United States Constitution.

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 where in 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. Sixth Amendment to the United States Constitution.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Eighth Amendment to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

I. Course of Proceedings and Disposition in the Court Below

On October 23, 2014, Mr. Watkins was charged in a one-count indictment with conspiracy to distribute methamphetamine, specifically alleging "the amount of pure/actual methamphetamine being fifty (50) grams or more." Doc. 1 (citing 21 U.S.C. § 841(a)(1) and (b)(1)(A), and § 846). This drug quantity carries a 10-year minimum-mandatory sentence and a maximum sentence of life in prison. *See* 21 U.S.C. § 841(b)(1)(A).

On January 13, 2015, the government filed a notice under 21 U.S.C. § 851 based on Mr. Watkins' prior convictions, seeking a 20-year minimum-mandatory sentence. Doc. 64. This enhancement also increased the minimum supervised release term from 5 to 10 years. *See* 21 U.S.C. § 841(b)(1)(A).

Mr. Watkins proceeded to trial before a jury on January 20, 21, 22, and 23, 2015. Docs. 101-104. At the conclusion of trial, the jury found Mr. Watkins guilty of "conspiracy to distribute methamphetamine." Doc. 75 at 1. The jury further found that Mr. Watkins "conspired to distribute methamphetamine in the amount. . .[w]eighing 50 grams or more." Doc. 75 at 2.

The statutory penalty that applied at sentencing, held on April 28, 2015, was therefore increased based on the drug quantity found at trial and the § 851

enhancement. Doc. 112 at 15. But for this 20-year minimum-mandatory prison term, the district court stated that it "thought that [a] sentence of 160 months was appropriate." Doc. 112 at 15. The district court sentenced Mr. Watkins to 20 years of imprisonment and 10 years of supervised release. Doc. 112 at 16; Doc. 91. Mr. Watkins is currently incarcerated.

II. Statement of the Facts

A. Trial Evidence

I Facts Related to the Conspiracy and Drug Quantity Charged in the Indictment

The indictment alleged that Mr. Watkins was involved in a conspiracy to distribute for approximately a one-year period, from "in or about mid 2013 through in or about July 2014," and that this conspiracy to distribute involved 50 grams or more of "pure/actual methamphetamine." Doc. 1 at 1. The only quantity obtained by the government over this one-year period was 3.16 grams, which was seized from Kevin Moore and found to have a purity of 82.1% methamphetamine, plus or minus 6.3%. *See* Doc. 103 at 16-21, 48, 128-29; Trial Exhibit 7; *see generally* Docs. 101-104. The government otherwise relied upon the testimony of several witnesses in an effort to prove Mr. Watkins' guilt and the drug quantity. A summary of this witness testimony is provided below.

a. Trial Testimony

Archie Crook

In April 2014, Crook executed a plea agreement with the federal government, agreeing to plead guilty to conspiracy to distribute 50 grams or more of pure/actual methamphetamine. Doc. 101 at 62; Doc. 102 at 13; Trial Exhibit 1. The conspiracy to which Crook was to plead guilty involved a different conspiracy than that alleged in the instant case and included an individual named Chase Lee. Doc. 102 at 21, 27, 55. Crook stated that he knew that it would be in his best interest to cooperate with the government. Doc. 101 at 64-65; *see* Doc. 102 at 7-9, 17-18. As Crook explained, he knew that cooperation provided him with a "good chance that [he] could get a time reduction at the end." Doc. 101 at 65.

On May 29, 2014 — the day Crook was to enter a guilty plea to conspiracy he tested positive for methamphetamine. Doc. 101 at 62-63. Crook denied to the court that he had used methamphetamine, when he had in fact used. Doc. 101 at 63. Crook realized when he tested positive that he had jeopardized his plea deal. Doc. 102 at 24. Law enforcement already knew about Chase Lee; as Crook agreed on cross-examination, he had to point the finger at someone else to say that he was a dealer. Doc. 102 at 25. That was the first time that Crook mentioned John Watkins to law enforcement. Doc. 102 at 25.

On redirect, the prosecutor elicited the following testimony:

Q. So then when you come in and you test positive for methamphetamine that day, you said you expected to get a bond, correct?

A. Yes, ma'am.

Q. And when you tested positive, what did I ask the court to do?

A. Lock me up.

Q. And when I found out that you had tested positive, your lawyer knew that wasn't a good situation for you, right, and that would be made known to the court at the time of your sentencing?

A. Yes, ma'am.

Q. And then later when you came in, you told law enforcement officers about John and Billy Ray Simmons. And did you and I have a discussion about the fact that you hadn't been truthful about them initially?

A. Yes, ma'am.

Q. And what did I tell you I was going to do as a result of you not disclosing that information to us?

A. Let it be known to the court at the time of my sentencing.

Q. That you had not been truthful with us, correct?

A. Yes, ma'am.

Q. And I wasn't happy about that?

A. No, ma'am

Doc. 102 at 56-57.

According to Crook's testimony, Crook's cooperation with the government began around January 2014, prior to being charged federally, when Agent Randy Crews approached him concerning an investigation he was conducting. Doc. 101 at 63-64, 66-67; Doc. 102 at 11 (discussion of January 2014 proffer letter). During his cooperation, Crook told Agent Crews that he had been involved in selling methamphetamine with three individuals — but none of those individuals was John Watkins. Doc. 101 at 66-67, 69; Doc. 102 at 12-13. Among the three individuals Crook named was Chase Lee, from whom Crook said he purchased "ice" — the pure form of methamphetamine. Doc. 101 at 68-69.

On August 5, 2013 — during the time that Crook was buying from Lee — Crook was stopped by law enforcement officers. Doc. 101 at 69. At that time, Mr. Crook was on his way from David Jones' house to see Lee, with \$1,700 that he had obtained from Jones. Doc. 101 at 69-71. According to Crook, Jones had asked Crook to get methamphetamine, because Jones could get methamphetamine cheaper from Crook than he could from Mr. Watkins. Doc. 101 at 70-71. Law enforcement seized the \$1,700, after finding marijuana in

the backseat of the car and arresting each of the occupants. Doc. 101 at 72.

Crook testified that he did not know Mr. Watkins at the time that he got the \$1,700 from Jones, but that he had seen Mr. Watkins on an earlier occasion. Doc. 101 at 71, 74-75. After he bonded out following his August 5, 2013 arrest, Crook said he learned from Jones and Jones' girlfriend (Cynthia Gordon) that some of the \$1,700 had come from Mr. Watkins. Doc. 101 at 73-74. Crook and others then met with Mr. Watkins, and Crook testified he told Mr. Watkins that he would do what he needed to do "to make it right" about the money. Doc. 101 at 77. Crook claimed that he agreed to sell methamphetamine for Mr. Watkins and that he moved in with Mr. Watkins. Doc. 101 at 77-79.

Within about a couple of weeks of moving in, Crook said he accompanied Mr. Watkins to Georgia to get methamphetamine ("ice") from Billy Ray Simmons, Mr. Watkins' source of supply. Doc. 101 at 82-83. Crook testified that he believed another individual (Anthony Fisher) went with them. Doc. 101 at 83. According to Crook, Mr. Watkins got an "8-ball" — a little over 3.5 grams — from Simmons. Doc. 101 at 85-86. Crook testified that they used this quantity and did not sell it. Doc. 101 at 86-87.

On the next trip, they got "[p]robably about half an ounce" (or 14 grams);¹

¹ Crook testified that one ounce equals 28 grams. Doc. 101 at 71, 88.

some of this quantity was used and some of it was sold. Doc. 101 at 87-88.

Crook testified that he sold the methamphetamine. Doc. 101 at 90. He estimated that he could earn about a \$600 profit off of 14 grams, and that it took about 1 to 2 days to sell the methamphetamine. Doc. 101 at 90-91.

Crook testified to another trip to Georgia to buy methamphetamine from Simmons, who in turn got the methamphetamine from a man named Mark. Doc. 101 at 92-97. Crook did not recall the quantity. Doc. 101 at 93, 97.

According to Crook, he went to Georgia with Mr. Watkins about once a week at least over a five-month period to get methamphetamine. Doc. 101 at 99-100, 110-11; Doc. 102 at 49-50. Crook testified on direct that they got one to two ounces most of these trips (Doc. 101 at 100); but on cross-examination, he said that that amount was the "most we would get" (Doc. 102 at 49-50).

Sometimes, Crook said, they would get smaller amounts, like an 8-ball, that Crook and Watkins would use. Doc. 102 at 50. Sometimes, they would get a quarter ounce. Doc. 102 at 50. When asked how much they got from Simmons over the five-month period, Crook said "it was close, around 20 ounces probably." Doc. 102 at 50.² On redirect, Crook stated that there were occasions that he and Watkins would get "multi-ounce quantities" from Simmons. Doc.

² In his testimony before the grand jury, Crook testified that he and Watkins were getting two to four ounces of methamphetamine from Simmons a couple of times a week, which would have totaled to as much as 160 ounces of methamphetamine. Doc. 102 at 51-52.

102 at 54.

Sometimes they took Sandy Cooper and Brittany Miller on the trips to Georgia. Doc. 101 at 111. Sandy Cooper went with them on one trip, and Crook believed they got a half ounce; some of this quantity was used on the way home, and some Crook sold. Doc. 101 at 111-13.³

Crook said that the individuals who then distributed the methamphetamine were Kevin Moore, David Jones, and himself. Doc. 101 at 100-02. When asked if Mr. Watkins distributed it, Crook testified, "Sometimes, but most of the time he didn't - - he didn't do much of the distributing. I did it all." Doc. 101 at 101. Crook claimed he was distributing for Mr. Watkins, and that Mr. Watkins got the majority of the profits. Doc. 101 at 101, 104.

About a month or so prior to his May 29, 2014 guilty plea, Crook says his relationship with Mr. Watkins changed, and he moved out. Doc. 101 at 114. Crook attributed the change to Mr. Watkins' girlfriend, who was telling Mr. Watkins that Crook was working with law enforcement and would get him in trouble. Doc. 101 at 114-15.

Even after moving out, Crook claimed that he would get methamphetamine from Mr. Watkins, and that they sometimes went on trips together to get methamphetamine from Simmons. Doc. 101 at 116. During this time-frame, they

³ Crook testified that Sandra Cooper left her own car on the side of the road, and the three of them went to Georgia in Mr. Watkins' car. Doc. 101 at 112. Cooper's car was towed. Doc. 101 at 112-13.

were getting smaller quantities, 8-balls, quarter ounces, half ounces. Doc. 101 at 116. They had less money to buy, because they were using more. Doc. 101 at 117.

According to Crook's testimony, he was using methamphetamine during the time period he was cooperating with the government. Doc. 102 at 15, 23. He also, during this time period (between January and April 2014), said he made between 10 and 20 trips to purchase methamphetamine from Simmons. Doc. 102 at 37. Mr. Crook testified that he did not tell Agent Crews about "everything and everyone [he] had been dealing with," referring to John Watkins. Doc. 101 at 67. He said he left this information out because he was worried and did not want anything to happen to him or his family. Doc. 101 at 67; Doc. 102 at 61. Crook also said, though, that Watkins knew that Crook was cooperating; Crook said he did not hide it, telling Mr. Watkins that he was not telling on Mr. Watkins. Doc. 101 at 115; Doc. 102 at 61, 65-66.

Law Enforcement Witnesses

Of the law enforcement witnesses who testified, Deputy James Crews stopped Kevin Moore on May 10, 2014, and seized what he suspected was methamphetamine. Doc. 103 at 16-21. Deno Deveau, who is employed at the Georgia Bureau of Investigation, later tested the substance and determined that there was 3.16 grams of methamphetamine with 82.1% purity (plus or minus

6.3%). Doc. 103 at 123-29.

b. Motions and Jury Instructions

At the close of the government's evidence, Mr. Watkins moved for a judgment of acquittal. Doc. 104 at 96-97; *see* Federal Rule of Criminal Procedure 29. Mr. Watkins argued that the evidence failed to establish that he had engaged in a conspiracy to distribute 50 grams of methamphetamine or more during the time-frame charged in the indictment. Doc. 104 at 96-97. The district court denied the motion. Doc. 104 at 97.

The district court's jury instructions informed the jury that one element of the conspiracy offense was that "the object of the unlawful plan was to distribute 50 grams or more of pure, slash, actual methamphetamine." Doc. 127 at 9. The court also then instructed the jury that it "may find the defendant guilty of the crime even if the amount of the controlled substance for which he should be held responsible is less than 50 grams." Doc. 127 at 10.

As to the drug quantity finding, the jury was instructed:

If you find the defendant guilty [of the conspiracy], you must also
unanimously agree on the weight of the methamphetamine the
defendant conspired to distribute and specify the amount on the verdict
form.

Doc. 127 at 10 (emphasis added). No objection was made to this instruction, which tracked the parties' proposed instructions. *See* Doc. 56 at 12; Doc. 57 at 2021; Doc. 104 at 100.

The jury found Mr. Watkins guilty of "conspiracy to distribute methamphetamine." Doc. 75 at 1. As to the drug quantity, the jury found that Mr. Watkins "conspired to distribute methamphetamine in the amount . . . [w]eighing 50 grams or more." Doc. 75 at 2.

After trial, Mr. Watkins moved for a new trial under Federal Rule of Criminal Procedure 33. Doc. 77. In this motion, Mr. Watkins argued, among other things, that the quantity testimony by the government's witnesses was not credible and that "[n]one of the witnesses testified to specific quantities reaching fifty (50) grams or more of methamphetamine that were conspired to be *distributed* by or at the will of the Defendant." Doc. 77 at 3. After the government filed its response (Doc. 79), the district court denied Mr. Watkins' motion, finding that the issues were argued during the trial and that Mr. Watkins' reasons for seeking a new trial were insufficient. Doc. 80.

2. Facts Related to the Evidence of Mr. Watkins' Prior Convictions, Admitted Trial Under Rule 404 (b)

Prior to trial, the government provided notice of its intent to use Mr. Watkins' prior convictions under Federal Rule of Evidence 404(b). Doc. 37. Although it originally listed five arrests or convictions, four are relevant for this appeal:

- (i) a 2004 conviction for possession of methamphetamine;
- (ii) a 2007 conviction for possession of a controlled substance;

(iii) a 2010 conviction for sale, manufacture, delivery, or possession with intent to sell, manufacture or deliver a controlled substance;

and

(iv) a 2011 conviction for possession of methamphetamine.

Doc. 37 at 1; Doc. 48; *see* Doc. 54 at 1 n.1.⁴ The government argued that these convictions were admissible under Rule 404(b) "as evidence of intent, knowledge and lack of mistake" (Doc. 37 at 2), as well as preparation and plan (Doc. 48 at 1).

Mr. Watkins objected to the introduction of this evidence before and during trial, on the ground that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. Doc. 43 (Rule 404(b) and 403 argument); Doc. 104 at 91. As to the 2004 possession conviction, Mr. Watkins pointed to the age of the offense and contended that this possession offense had little similarity to the instant offense, limiting its probative value. Doc. 43 at 6. Mr. Watkins further argued that the undue prejudice of permitting the jury to hear of this conviction outweighed any probative value. Doc. 43 at 6. Mr. Watkins made a similar argument as to the 2007 possession conviction. Doc. 43 at 7.

The 2010 conviction for selling/manufacturing/delivering/possessing with intent was, Mr. Watkins acknowledged, similar to the instant charge in some respects; but, he

⁴The fifth offense — a 2001 arrest — was not further argued by the government or introduced by the government at trial. *See* Doc. 54 at 1 n.1; Doc. 104 at 91.

contended, it was factually distinct. Doc. 43 at 7-8. As counsel recounted, this conviction followed the search of Mr. Watkins' house, which yielded eight boxes of pseudophedrine tablets and other loose tablets, camping fuel, lithium batteries, aluminum foil with methamphetamine residue, a glass jar containing methamphetamine mixture, and other items. Doc. 43 at 7; *see also* PSR ¶ 42. This conviction therefore suggested involvement with manufacturing methamphetamine, a different activity than that charged in the instant case. Doc. 43 at 8. Mr. Watkins therefore contended that evidence of this conviction was not admissible under Rule 404(b). Doc. 43 at 8.

In its response, the government maintained that these convictions were admissible under Rule 404(b). Doc. 48. The government asserted that the 2007, 2010, and 2011 convictions were "sufficiently similar to the alleged offense conduct in the present case." Doc. 48 at 4. The government also noted that the oldest of these convictions "occurred approximately six years prior to the beginning of the alleged conspiracy in this case." Doc. 48 at 5.

In a written order, the district court ruled that the 2007, 2010, and 2011 convictions were admissible. Doc. 54. The court concluded that 101 three cases are relatively recent and involve the same drug." Doc. 54 at 3. The court noted that, based on its response, the government evidently did not intend to introduce the 2004 conviction that had been listed in its notice (Doc. 37). Doc. 54 at 1 n.1.

At trial, Mr. Watkins reasserted his objection to the government's 404(b) evidence. Doc. 104 at 91. Although the government did not expressly state it on the record before introducing the evidence, the government admitted the 2004 — rather than the 2011 — possession conviction. See Doc. 104 at 91-94; Trial Exhibit 20.⁵

The 404(b) evidence was the last evidence that the jury heard before it began deliberations. Doc. 104 at 90-91, 93-95. The district court gave the pattern instruction. Doc. 104 at 94; see Eleventh Circuit Pattern Jury Instructions (Criminal Cases) at 58 (2010). The government also addressed the 404(b) evidence in its closing argument, contending to the jury that it was evidence of Mr. Watkins' intent. Doc. 104 at 124-25. All of the prior convictions used as 404(b) evidence were violations of § 893.13, Florida Statutes. See Trial Exhibits 19, 20, 21.

B. Facts Related to Sentencing

1. 21 U.S.C. § 851 Notice

On January 13, 2015 — a week before trial — the government filed a notice pursuant to 21 U.S.C. § 851, seeking to enhance the minimum-mandatory sentence to 20 years in prison. Doc. 64. The § 851 notice relied upon three prior Florida convictions, namely:

⁵In addition, the 2010 prior conviction exhibit was not limited to the judgment; it inexplicably contained the scoresheet. Trial Exhibit 19.

(a) "Case Number 45-2009-CF-005f53[sic]-AXXX-YX" — a

4/22/2010 conviction for sale/manufacture/deliver or possess with intent to sell/manufacture/deliver a controlled substance, in violation of Fla. Stat. § 893.13;

(b) "Case No. 45-2003-CF-0008777[sic]-AXXX-YX" — a 5/27/2004

conviction for possession of methamphetamine, in violation of Fla. Stat. §

893.13.6A; and

(c) "Case No. 45-2007-CF-000489-AXXX-YX" — a 11/29/2007

conviction for possession of a controlled substance, in violation of Fla.

Stat. § "893.136A."

Doc. 64 at 1-2; *see also* Trial Exhibits 19, 20, 21 (the prior convictions).

No objection was made to these prior convictions, including after being advised that challenges to the convictions could not be thereafter raised. Doc. 112 at 8-11. The district court sentenced Mr. Watkins to the resulting minimum-mandatory — 20 years in prison and 10 years of supervised release. Doc. 112 at 16. The district court made clear, however, that but for this mandatory sentence, "the sentence of 160 months was appropriate." Doc. 112 at 15.

2.Career Offender Enhancement

The Presentence Investigation Report ("PSR") recommended that the career offender enhancement should apply, based on two prior Florida convictions: (i) the 2010

conviction for selling/manufacturing/delivering a controlled substance, and (ii) a 2002 manslaughter conviction. *See* PSR ¶ 28. No objection was made to this determination. *See* Doc. 112 at 6-7. The resulting sentencing guidelines range that applied at sentencing was thus 360 months to life. *See* Doc. 112 at 6-7, 14; PSR li 92.

III. Standards of Review

The sufficiency of the evidence is reviewed *de novo*. *See United States v. Joseph*, 709 F.3d 1082, 1093 (11th Cir. 2013). In conducting this review, this Court views the evidence in the light most favorable to the government and draws all reasonable inferences and credibility choices in favor of the jury's verdict. *Id.*

The district court's admission of evidence at trial under Federal Rules of Evidence 404(b) and 403 is reviewed for abuse of discretion. *See United States v. Matthews*, 431 F.3d 1296, 1311 (11th Cir. 2005).

Claims not raised below are reviewed for plain error. *See United States v. Madden*, 733 F.3d 1314, 1319-22 (11th Cir. 2013); *United States v. Ramirez-Flores*, 743 F.3d 816, 821 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 948 (2015).

REASONS FOR GRANTING THE PETITION

I. Mr. Watkins' Conviction and Minimum-Mandatory Sentence Under 21 U.S.C. § 841(b)(1)(A) Should be Reversed

The federal drug statute provides different penalties based on the drug quantity

involved in the offense. 21 U.S.C. § 841(b). As relevant here, § 841(b)(1)(A) provides a 10-year minimum-mandatory sentence for an offense involving:

50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers

21 U.S.C. § 841(b)(1)(A). Lesser drug amounts result in lower statutory penalties. *See* 21 U.S.C. § 841(b)(1)(B), (C). The minimum-mandatory sentence for an offense falling under § 841(b)(1)(A) is increased to 20 years in prison if the defendant has a qualifying prior conviction and is enhanced under 21 U.S.C. § 851. *See* 21 U.S.C. § 841(b)(1)(A); 21 U.S.C. § 851.

Mr. Watkins was charged by indictment with conspiracy to distribute methamphetamine, the "amount of pure/actual methamphetamine being fifty (50) grams or more," in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and § 846. Doc. 1 at 1-2. Mr. Watkins was § 851-enhanced one week before trial, convicted at trial, and sentenced to the 20-year minimum-mandatory based on the drug quantity and § 851 enhancement. Docs. 64, 67, 75, 91.

Mr. Watkins' conviction and minimum-mandatory sentence under § 841(b)(1)(A) raises three issues:

A "Methamphetamine" in 21 U.S.C. § 841(b)(1)(A) Means Pure Methamphetamine, Not a "Mixture"

Section 841(b)(1)(A) provides for an increased minimum-mandatory sentence for "50 grams or more of methamphetamine" and "500 grams or more of a mixture or substance containing a detectable amount of methamphetamine." 21 U.S.C. § 841(b)(1)(A).

Because the statute uses both the terms "methamphetamine" and a "mixture . . . of methamphetamine," the reference to "methamphetamine" must be read to mean methamphetamine that is not a mixture. *See, e.g., Corley v. United States*, 556 U.S. 303, 314, 129 S. Ct. 1558, 1566 (2009) (discussing "one of the most basic interpretative canons" — i.e., "that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant").

Here, the only evidence introduced at trial was that the methamphetamine was a mixture. Indeed, the seized methamphetamine — 3.16 grams — was found to have a purity of 82.1%, plus or minus 6.3%. Doc. 103 at 128. Because the government did not establish that Mr. Watkins' offense involved "50 grams or more of methamphetamine" within the meaning of § 841(b)(1)(A), his conviction and minimum-mandatory sentence under that provision cannot stand.

Mr. Watkins recognizes that this Court has previously held that "methamphetamine" in § 841(b)(1)(A) is not limited to "*pure* methamphetamine." *United States v. Frazier*, 28 F.3d 99, 100-01 (11th Cir. 1994). Mr. Watkins accordingly preserves this issue for purposes of further review.

B. Because the Indictment Alleged "Pure/Actual" Methamphetamine, A Constructive Amendment Occurred

The indictment in Mr. Watkins' case charged 50 grams or more of "pure/actual methamphetamine." Doc. 1 at 1 (emphasis added). Thus, even if "methamphetamine" as

used in § 841(b)(1)(A) is not limited to "pure methamphetamine" (*see* Argument LA, *supra*), the indictment here required that the jury be instructed that the government had to establish 50 grams or more of "pure/actual methamphetamine." *See, e.g., United States v. Cancelliere*, 69 F.3d 1116, 1121-22 (11th Cir. 1995). Because the district court's jury instructions did not do so, a constructive amendment occurred. *See* Doc. 127 at 10.

The Fifth Amendment guarantees the right of the defendant to be tried and convicted only on charges brought by a grand jury. *See Cancelliere*, 69 F.3d at 1121; *Stirone v. United States*, 361 U.S. 212, 217-18, 80 S. Ct. 270, 273-74 (1960). Jury instructions that broaden the bases for conviction — and thereby constructively amend the indictment — run afoul of this Fifth Amendment right. *See Cancelliere*, 69 F.3d at 1121.

Here, the district court's jury instructions made only one reference to "pure/actual methamphetamine," and it did so in describing one of the elements of the conspiracy offense: "the object of the unlawful plan was to distribute 50 grams or more of pure, slash, actual methamphetamine." Doc. 127 at 9. But, the jury was then instructed that it "may find the defendant guilty of the crime even if the amount of the controlled substance for which he should be held responsible is less than 50 grams." Doc. 127 at 10. Thus, as for Mr. Watkins' conviction of the conspiracy, the jury was told he could be guilty regardless of the quantity of pure/actual methamphetamine. *See* Doc. 127 at 9-10; Doc. 75 at 1.

The court then instructed the jury as to the drug quantity finding that it had to make, stating:

If you find the defendant guilty [of the conspiracy], you must also unanimously agree on the weight of the methamphetamine the defendant conspired to distribute and specify the amount on the verdict form.

Doc. 127 at 10 (emphasis added). The district court's jury instructions therefore did not inform the jury that it had to agree on the weight of the "pure/actual" methamphetamine. The verdict form likewise required a finding as to "methamphetamine," rather than the "pure/actual methamphetamine" charged in the indictment. Doc. 75 at 1-2.

Moreover, nowhere in the court's jury instructions did the court define what the term "pure/actual methamphetamine" meant. *See* Doc. 127 at 2-15. The government, in its closing argument, argued that "pure/actual" methamphetamine meant that the jury had to find the quantity using the total amount times the purity; as an example, the prosecutor explained that 100 grams of methamphetamine at 80% purity would be 80 grams of pure or actual methamphetamine. Doc. 104 at 123. The district court, however, told the jury that the "final arguments by the lawyers are not to be construed by you as evidence in this case nor as your instructions on the law." Doc. 104 at 108 (emphasis added). And, the district court instructed the jury that it had to agree unanimously on the amount of "methamphetamine," not the "pure/actual methamphetamine" charged in the indictment. *See* Doc. 1; Doc. 127 at 10.

A constructive amendment has therefore occurred in this case in violation of the Fifth Amendment. *See Cancelliere*, 69 F.3d at 1121-22; *United States v. Narog*, 372 F.3d 1243, 1248-49 (11th Cir. 2004); *United States v. Madden*, 733 F.3d 1314, 1318-23 (11th Cir. 2013). Mr. Watkins therefore respectfully requests that this Court vacate his conviction and minimum-mandatory sentence under § 841(b)(1)(A).

C. The Evidence Was Insufficient to Establish 50 Grams or More of Pure/Actual Methamphetamine

As discussed above, Mr. Watkins' 20-year sentence is based on the drug quantity finding at trial and the § 851 enhancement. In the absence of this minimum-mandatory penalty, the district court made clear that it thought a lower sentence (160 months) would be appropriate. Doc. 112 at 15. This minimum-mandatory penalty should not have applied, because the government did not meet its burden to prove that the offense involved 50 grams or more of pure/actual methamphetamine.

During the entire one-year period of the charged conspiracy (*see* Doc. 1 at 1), the government seized 3.16 grams of methamphetamine. Doc. 103 at 128. According to the government's expert, this quantity was 82.1% pure methamphetamine — plus or minus 6.3%. Doc. 103 at 128. This quantity, of course, is far less than the charged quantity of 50 grams of pure/actual methamphetamine.

The government did not then provide sufficient evidence of the quality (or purity) of the methamphetamine otherwise involved in the alleged conspiracy. Although Kevin Moore — from whom the 3.16 grams was seized — agreed that this quantity was the "same quality" he had received from Mr. Watkins in the past and that the quality was "pretty consistent," all he could say was that the quality was "good." Doc. 103 at 91-92. Neither Moore, nor anyone else who testified, examined any other quantity of methamphetamine to assess its purity. *See* Doc. 103 at 91-92; *see generally* Docs. 101-104.

The government therefore otherwise relied upon the testimony of witnesses concerning the overall quantity in an attempt to deduce that the conspiracy must have involved more than 50 grams of pure/actual methamphetamine. *See* Doc. 104 at 122-24 (government's closing argument). These witnesses, however, received or hoped to receive a benefit for testifying against Mr. Watkins; had told the government different things at different times; and had used drugs during the time of the alleged conspiracy. *See* Statement of Facts A.1.a *supra*. Nor, moreover, did the government establish the quality or purity of any of these amounts, other than the 3.16 grams. The government's evidence — which resulted in a 10-year (and ultimately 20-year) minimum-mandatory sentence — was simply insufficient.

Mr. Watkins' conviction and sentence under § 841(b)(1)(A) should therefore be reversed.

II. The District Court Abused Its Discretion in Admitting Mr. Watkins' Prior Convictions Under Rule 404(b)

The very last evidence that the jury heard at trial was that Mr. Watkins had prior convictions. Doc. 104 at 93. Over his objections, the government introduced into evidence Mr. Watkins' 2004 conviction for possession of methamphetamine; 2007 conviction for possession of a controlled substance; and 2010 conviction for sale/manufacture/deliver/possession with intent. Doc. 43; Doc. 54; Doc. 104 at 90-94; Trial Exhibits 19, 20, 21. This evidence should not have been admitted at trial.

As an initial matter, the district court's pretrial ruling permitting the government to introduce Mr. Watkins' prior convictions had not included the 2004 conviction. Doc. 54 at 1 n.1. The district court had understood, because the government had not pursued this conviction in response to the defendant's motion in limine, that the government was not seeking its admission. Doc. 54 at 1 n.1. At trial, the government showed the court the judgments it intended to introduce; but the government did not explain that it now sought to introduce the 2004 conviction at trial (rather than the 2011 conviction the court had ruled upon). *See* Doc. 54 at 1 n.1; Doc. 104 at 90-94; Trial Exhibit 20. Because the district court must weigh the probative value of the evidence versus its undue prejudice, the district court should have been informed of the switch by the government.

This conclusion is particularly true here where the government now sought to introduce a much older prior conviction. The 2004 conviction related to an arrest of Mr. Watkins in December 2003 for simple possession — almost 10 years prior to the start of the charged conspiracy in the instant case. *See* Doc. 37 at 1; Doc. 1 at 1. Although this Court has affirmed the admission of older prior convictions as Rule 404(b) evidence, the district court here did not undertake any of the required analysis under Rule 404(b) or 403 as to this prior conviction. Doc. 54 at 2-3; Doc. 104 at 91-93; *cf. United States v. Matthews*, 431 F.3d 1296, 131112 (11th Cir. 2005).

Further supporting that an error occurred here is that neither the 2004 and 2007 simple possession offenses had any probative value, and any probative value that they did have was substantially outweighed by their prejudicial effect. Both the possession offenses occurred several years prior to the instant conspiracy. *See* Doc. 37 at 1; Doc. 1 at 1. Moreover, neither simple possession conviction had any probative value concerning whether

Mr. Watkins was participating in a conspiracy to distribute methamphetamine six or nine years later. While this Court has affirmed the district court's admission of a possession offense in a subsequent distribution case, *see United States v. Butler*, 102 F.3d 1191, 1195-96 (11th Cir. 1997), the district court in Mr. Watkins' case did not consider the 2004 and 2007 convictions together to determine whether their probative value was substantially outweighed by the danger of unfair prejudice.

The 2010 conviction was also factually dissimilar to the instant offense. The 2010 conviction involved a controlled delivery of pseudoephedrine and a subsequent search of Mr. Watkins' residence; pseudoephedrine and other supplies for making methamphetamine, as well as a mixture containing methamphetamine, were found. Doc. 43 at 7-8; PSR ¶ 42. This offense bears no factual similarity to the instant offense, which allegedly involved Mr. Watkins traveling from Florida to Georgia to obtain methamphetamine from someone else (who had obtained it from someone else) and conspiring to distribute methamphetamine. *See* Doc. 43 at 7-8.

Taken together, these three prior convictions had the effect of demonstrating Mr. Watkins' bad character and propensity. Indeed, the Rule 404(b) evidence admitted consisted of the judgments (and in one instance, the scoresheet). *See* Trial Exhibits 19, 20, 21. Thus, what the jury was informed of was that Mr. Watkins had three prior drug convictions. The unfair prejudice of informing the jury of Mr. Watkins' prior convictions substantially outweighed the limited to no probative value of these prior convictions. Mr. Watkins accordingly maintains that it was an abuse of discretion to admit this evidence.

As a final matter, it bears noting that the government argued in closing to the jury that Mr. Watkins' prior convictions showed his "intent" in this case. Doc. 104 at 124. The

Rule 404(b) evidence pertained to three convictions under § 893.13, Florida Statutes, in 2004, 2007, and 2010. *See* Trial Exhibits 19-21. None of these post-2002 convictions, however, required knowledge of the illicit nature of the substance. *See Shelton v. Secretary, Dep't of Corr.*, 691 F.3d 1348, 1349-51 (11th Cir. 2012); *State v. Adkins*, 96 So. 2d 412, 414-16 (Fla. 2012); *see also* Argument III.A and IV.A, *infra*. Therefore, these judgments were not probative of Mr. Watkins' "intent," and certainly any probative value was substantially outweighed by the danger of unfair prejudice. *See* Fed. R. Evid. 403, 404(b). This evidence should not have been admitted for this reason as well.

III. Challenges to the 21 U.S.C. § 851 Enhancement

A. Because Florida Does Not Require a *Mens Rea* Element For Any of the Prior Convictions Listed in the 21 U.S.C. § 851 Notice, the Minimum-Mandatory Sentence Should Not Have Been Increased

The government relied upon Mr. Watkins' 2004, 2007, and 2010 convictions under § 893.13, Florida Statutes, in requesting a 20-year minimum mandatory sentence under 21 U.S.C. § 841(b)(1)(A). Doc. 64. None of these convictions qualifies for the enhancement under § 841(b)(1)(A).

To qualify for this enhancement, a prior conviction must fall within the definition of a "felony drug offense." 21 U.S.C. § 841(b)(1)(A). A "felony drug offense" includes "any law . . . of a State . . . that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44).

Following the state legislature's enactment of 893.101, Florida Statutes, in May 2002, knowledge of the illicit nature of the substance is not required for a defendant to be convicted under the Florida drug statute, § 893.13. *See Shelton v. Secretary, Dep't of Corr.*, 691 F.3d 1348, 1349-51 (11th Cir. 2012); *State v. Adkins*, 96 So. 2d 412, 414-16 (Fla. 2012).

Accordingly, the Florida drug statute is broader than § 802(44), because it covers more activity than conduct relating to drugs. Nor has Congress made it clear that it intended to include offenses regardless of the lack of *mens rea*. See Argument IV.A, *infra*. For these reasons, these prior Florida convictions are not felony drug offenses, and the 20-year minimum-mandatory sentence should be vacated.

B. Mr. Watkins' Sentence Should Not Have Been Enhanced Based on Prior Convictions That Were Not Charged in the Indictment and Proven to a Jury Beyond a Reasonable Doubt

Mr. Watkins' statutory penalties were increased based on facts of, and about, prior convictions that were neither charged in the indictment nor proven to the jury beyond a reasonable doubt. See 21 U.S.C. § 841(b)(1)(A); Docs. 1, 64, 75, 91, 101, 102, 103, 104; Doc. 112 at 15-16. Specifically, Mr. Watkins' statutory penalties were increased — the minimum prison term was increased from 10 years to 20 years, and the minimum supervised release term was increased from 5 years to 10 years — based on the "fact of his prior convictions and that these prior convictions constitute "felony drug offenses." See 21 U.S.C. § 841(b)(1)(A).

Mr. Watkins recognizes that the Supreme Court has thus far excepted the "fact of a prior conviction" from the Fifth and Sixth Amendment indictment and jury trial rights. See *Alleyne v. United States*, 133 S. Ct. 2151, 2160 & n.1 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998). Because this issue may be revisited, Mr. Watkins respectfully maintains for purposes of further review that his statutory penalties should not

have been increased based on facts of and about prior convictions that were not charged in the indictment and proven to the jury beyond a reasonable doubt. *See, e.g., Descamps v. United States*, 133 S. Ct. 2276, 2294-95 (2013) (Thomas, J., concurring in the judgment).⁶

IV. Challenges to the Career Offender Enhancement

At sentencing, Mr. Watkins was determined to be a career offender based on two prior convictions: (i) 2010 conviction for selling/manufacturing/delivering a controlled substance, and (ii) a 2002 Florida manslaughter conviction. *See* PSR ¶ 28; Doc. 112 at 6-7. Neither conviction qualifies as a career offender predicate.

A. A Violation of the Florida Drug Statute, § 893.13, is Not a "Controlled Substance Offense"

As shown above, Florida law does not require knowledge of the controlled substance as an element for a defendant to be convicted under Fla. Stat. § 893.13. *See* Argument III.A, *supra*. For this reason, the 2010 Florida drug conviction under § 893.13 also does not qualify as a career offender predicate.

The career offender designation dramatically increases the sentencing guidelines range for defendants who have certain qualifying prior convictions. *See* 28 U.S.C. §

⁶ Mr. Watkins maintains his challenge to the admissibility of these prior convictions under Federal Rules of Evidence 403 and 404(b). *See* Argument II, *supra*. These prior convictions should have been proven to the jury in a penalty-phase of the trial before his sentence was increased in violation of the Constitution.

994(h); U.S.S.G. § 4B1.1. Congress, by statute, has defined the qualifying prior convictions to include an offense described in 21 U.S.C. §§ 841, 952(a), 955, 959 and chapter 705 of title 46. *See* 28 U.S.C. § 994(h)(2)(B); *see also United States v. LaBonte*, 520 U.S. 751, 753, 117 S. Ct. 1673, 1675 (1997) (describing that the Sentencing Commission was "not granted unbounded discretion," as Congress "imposed upon the Commission a variety of specific requirements") (citing 28 U.S.C. § 994(b)-(n)). Section 841 of Title 21 is the closest analogue to the Florida offense at issue here.⁷

As this Court has recognized, § 841 contains a *mens rea* element, which requires that the defendant know of the illicit nature of the controlled substance. *See* 21 U.S.C. § 841(a) ("knowingly or intentionally"); *United States v. Donawa*, 735 F.3d 1275, 1281 (11th Cir. 2013). The Florida law in effect at the time of Mr. Watkins' 2010 conviction lacks this element. *See Donawa*, 735 F.3d at 1281 (addressing Fla. Stat. § 893.101 (2002)). Thus, as this Court has recognized, § 893.13, Florida Statutes, lacks an element required by 21 U.S.C. § 841(a)(1). *Id.* ("The federal statute, in contrast to Florida's current law, requires the government to establish, beyond a reasonable doubt and without exception, that the defendant had knowledge of the nature of the substance in his possession.") (citation omitted).

In light of Congress's definition of career offender predicates ("an offense described in

⁷ The remaining listed federal statutes pertain to importation and offenses aboard a vessel. *See* 21 U.S.C. §§ 952(a), 955, 959; 46 U.S.C. § 70503

section 401 of the Controlled Substances Act (21 U.S.C. 841)), the Sentencing Commission's definition of "controlled substance offense" in U.S.S.G. § 4B1.2(b) must be read to include a *mens rea* requirement. *See LaBonte*, 520 U.S.

at 757, 117 S. Ct. at 1677 (stating that "[b]road as [the Sentencing Commission's] discretion may be . . . it must bow to the specific directives of Congress"). Because an offense in violation of § 893.13, Florida Statutes, lacks this element this Florida offense is not a career offender predicate. *See* 28 U.S.C. § 994(h).⁸

Further supporting that the "controlled substance offense" definition should be read to include a *mens rea* element is the dramatic increase in the guidelines range that results from the career offender enhancement. Because neither Congress nor the Sentencing Commission clearly dispensed with a *mens rea* element, § 4B1.2(a)(2) should be interpreted to include a *mens rea* requirement.⁹

Mr. Watkins recognizes that this Court has held that a conviction under § 893.13 is a career offender predicate. *See United States v. Smith*, 775 F.3d 1262, 1266-67 (11th

⁸ This Court has recognized that the Sentencing Commission is not limited to § 994(h) as the sole basis for the career offender enhancement. *See, e.g., United States v. Smith*, 54 F.3d 690, 692-93 (11th Cir. 1995). Unlike *Smith* — where the Sentencing Commission included "attempt" offenses although not set forth in § 994(h) — the Sentencing Commission here has not clearly included offenses lacking a knowledge element as to the illicit nature of the substance. *See* U.S.S.G. § 4B1.2 & cmt. n. 1 .

⁹ *See Staples v. United States*, 511 U.S. 600, 618-19, 114 S. Ct. 1793, 1803-04 (1994) (concluding that *mens rea* was an element of felony offense; had Congress intended to dispense with *mens rea* requirement, it should have made that clear); *Elonis v. United States*, 135 S. Ct. 2001, 2009-12 (2015) (addressing mental state required for conviction under 18 U.S.C. § 875(c); stating, "The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read 'as dispensing with it.") (citation omitted); *see also Begay v. United States*, 553 U.S. 137, 145, 128 S. Ct. 1581, 1587 (2008) (interpreting Armed Career Criminal Act's violent felony definition, in light of its purpose to punish more severely those more likely to commit crimes with a gun, to be limited to purposeful offenses

Cir. 2014), *cert. denied*, 135 S. Ct. 2827 (2015). He therefore respectfully preserves this issue for further review.

B. Florida Manslaughter is Not a "Crime of Violence"

1. Physical Force/Elements Clause

The definition of a crime of violence for purposes of U.S.S.G. § 4B1.1 includes a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). Florida manslaughter does not meet this physical force/elements clause of the crime-of-violence definition.

At the time of Mr. Watkins' conviction, the Florida manslaughter statute provided:

The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, is manslaughter, a felony of the second degree. . . .

Fla. Stat. 782.07(1) (2001). The elements of this offense are: (i) death, (ii) death caused by the act, procurement, or culpable negligence of the defendant, and (iii) the death was not justified or excusable homicide. *See United States v. Garcia-Perez*, 779 F.3d 278, 283 & n.17 (5th Cir. 2015) (collecting Florida cases); *Tyus v. Florida*, 845 So. 2d 318, 321 (Fla. 1st DCA 2003).¹⁰

Physical force is thus not an element of this offense. *See Johnson v. United States*, 559 U.S. 133, 138, 140, 130 S. Ct. 1265, 1269-71 (2010); *Garcia-Perez*, 779 F.3d at

¹⁰ See also *United States v. Howard*, 742 F.3d 1334, 1346 & n.5 (11th Cir. 2014).

283-84 (concluding that Florida manslaughter statute "does not have an element of force"); *Tyus*, 845 So. 2d at 321-22 (affirming conviction where death resulted from stress-induced medical condition caused by defendant's burglary of residence). Nor is the *use*, attempted *use*, or threatened *use* of physical force an element of this offense. *See Leocal v. Ashcroft*, 543 U.S. 1, 8-10, 125 S. Ct. 377, 382-83 (2004); *see, e.g., Tyus*, 845 So. 2d at 321-22. Accordingly, Florida manslaughter does not constitute a crime of violence under U.S.S.G. § 4B1.2(a)(1).

2. The Residual Clause

Section 4B1.2(b)(2) also includes as crimes of violence a felony offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(b)(2). The quoted phrase, the so-called residual clause, does not apply here.

a. This Court is bound by prior precedent to apply the Supreme Court's interpretation of the identical residual clause in the Armed Career Criminal Act ("ACCA") to the guidelines' residual clause. *See United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008) (applying *Begay v. United States*, 553 U.S. 137, 128 S. Ct. 1581 (2008), to the guidelines). In *Johnson v. United States*, 135 S. Ct. 1551 (2015), the Supreme Court has interpreted the ACCA's residual clause to mean nothing. Ergo, as a matter of statutory interpretation, the ' the guidelines' residual clause means the same thing — nothing.

The Supreme Court's decision in *Welch v. United States*, 136 S. Ct. 1257 (2016), further demonstrates that the residual clause — as a matter of statutory interpretation — has no interpretation after *Johnson*. Indeed, a determination that a statute is unconstitutionally vague comes after the process of statutory interpretation has yielded no interpretation. *See Welch*, 136 S. Ct. at 1268 (quoting *Skilling v. United States*, 561 U.S. 358, 405-06, 130 S. Ct. 2896, 2929 (2010) ("It has long been our practice ... before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction.")). This Court has applied the rules of statutory construction to the guidelines,¹³ and, significantly, has applied the Supreme Court's interpretation of the ACCA's residual clause to the guidelines' residual clause. *See Archer, supra*. Accordingly, the residual clause does not supply a basis to find that a prior conviction is a crime of violence.

b. Mr. Watkins recognizes this Court's decision in *United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015), *pet. for reh'g pending*, Appeal No. 14-10396 (11th Cir. Oct. 13, 2015). *Archer*, however, pre-dates *Matchett* and is binding as to the statutory interpretation of the residual clause. *See United States v. Hornaday*, 392 F.3d 1306, 1316 (11th Cir. 2004).

c. Moreover, Mr. Watkins preserves his argument that the Constitution, including the due process clause, applies to the guidelines. *See Peugh v. United States*, 133 S. Ct. 2072, 2082-84 (2013) (holding that the ex post facto clause applies to the guidelines). The same vagueness concerns that resulted in the Supreme Court's decision in *Johnson* apply to the

identically worded residual clause in the guidelines — i.e., the denial of fair notice to defendants and arbitrary enforcement by judges. 135 S. Ct. at 2557. Other circuits have applied *Johnson* to the guidelines.¹⁴ As the petition for rehearing en banc remains pending in *Matchett*, Mr. Watkins accordingly preserves these arguments for further review.

d. Finally, even *assuming* arguendo the residual clause may persist to apply in this case, Florida manslaughter is not a crime of violence under this definition. Indeed, Florida manslaughter may be committed by act, procurement, or culpable negligence; the least culpable conduct covered by this statute requires less than recklessness. *See Garcia-Perez*, 779 F.3d at 285-89 (outlining Florida law, including *Baker v. State*, 30 Fla. 41, 11 So. 492, 498 (1892)). As a result, Florida manslaughter does not fall within the residual clause. *See Begay*, 553 U.S. at 142-45, 128 S. Ct. at 1585-88; *United States v. Chitwood*, 676 F.3d 971, 976-79 (11th Cir. 2012) ("Offenses that are not strict liability, negligence, or recklessness crimes qualify as crimes of violence under U.S.S.G. § 4B1.2(a)(2)'s residual clause if they categorically pose a serious potential risk of physical injury that is similar to the risk posed by one of the enumerated crimes") (citing *Begay*, 553 U.S. at 142-45, 128 S. Ct. at 1585-88; *Sykes v. United States*, 131 S. Ct. 2267, 2275-76 (2011)).

3. Generic "Manslaughter" Enumerated in the Guidelines' Commentary

The commentary to § 4B1.2 lists "manslaughter" as a crime of violence. U.S.S.G. § 4B1.2 cmt. 1. This commentary, however, relates to the residual clause. Because the residual clause cannot be applied after *Johnson* — on constitutional or statutory interpretation grounds — this commentary is inconsistent with the text of § 4B1.2(a). *United States v. Soto-Rivera*, 811 F.3d 53, 59-61 (1st Cir. 2016); see *Stinson v. United States*, 508 U.S. 36, 43, 113 S. Ct. 1913, 1918 (1993). As such, manslaughter is not an enumerated offense.

Even assuming *arguendo* that manslaughter is an enumerated offense, Florida manslaughter is non-generic and is therefore not a crime of violence. See *Garcia-Perez*, 779 F.3d at 284-89. Indeed, Florida manslaughter includes offenses even where the death was unanticipated; Florida law provides that "the fact that it could not reasonably have occurred to the defendant, or did not occur to him, that death was a probable result of the act, does not prevent a conviction of manslaughter." *Id.* (quoting *Baker*, 11 So. at 498) (internal quotation marks omitted). As such, Florida manslaughter is not a crime of violence under any definition in § 4B1.2.

C. Relief is Warranted

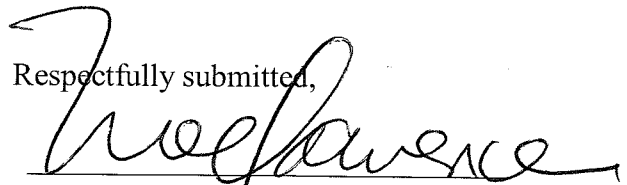
Based on the foregoing, Mr. Watkins does not qualify for the career offender

enhancement. Although the district court did not ultimately sentence Mr. Watkins within the career offender guidelines range (*see* Doc. 112 at 14-16), the career offender designation may not be amenable to challenge in the future. *See, e.g., Spencer v. United States*, 773 F.3d 1132, 1135 (11th Cir. 2014) (en banc). It could also have adverse consequences in the future. *See, e.g., United States v. Lawson*, 686 F.3d 1317, 1319-21 (11th Cir. 2012). Accordingly, Mr. Watkins respectfully requests relief from the career offender designation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Noel Lawrence", written over a horizontal line.

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