No. 25-____

IN THE UNITED STATES SUPREME COURT

William Ewing,
Petitioner,

v.

United States of America,
Respondent.

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

# **PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

I. OTHER ACTS EVIDENCE CREATES A SIGNIFICANT RISK OF IMPROPER CONSIDERATIONS BY A JUROR OF A DEFENDANT'S CHARACTER INSTEAD OF THE EVIDENCE RELATED TO THE CHARGES. THE TRIAL COURT ALLOWED EVIDENCE OF A ROBBERY FOR WHICH MR. EWING WAS NOT CHARGED INTO EVIDENCE WITH FOUR OTHER ROBBERIES IN THE INDICTMENT. WHERE THE TRIAL COURT IMPROPERLY DETERMINED PROBATIVE VALUE AND FAILED TO EVALUATE UNFAIR PREJUDICE, IS MR. EWING ENTITLED TO A NEW TRIAL?

II. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT REQUIRES THAT A CRIMINAL PROSECUTION BE SUPPORTED BY PROOF BEYOND A REASONABLE DOUBT. WHERE NO RATIONAL JURY COULD CONCLUDE FROM THE EVIDENCE PRESENTED THAT MR. EWING POSSESED A FIREARM AS DEFINED IN LAW, MUST HIS CONVICTION FOR VIOLATING 18 U.S.C. §924(c) BE VACATED?

## PARTIES

The Petitioner is William Ewing. The Respondent is the United States of America.

There were no other parties in the lower courts.

Petitioner is an individual and no corporation has an interest in this case.

## RELATED PROCEEDINGS

Middle District of Tennessee, #3:22-cr-00174, *United States v. William John Ewing, III*, Judgment Date – January 28, 2025.

Sixth Circuit Court of Appeals, #25-5097, *United States v. William John Ewing*, Judgment date – March 24, 2026.

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*United States v. William John Ewing,* Middle District of Tennessee, #3:22-cr-00174, (unpublished).

## STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction over this petition pursuant to U.S. Const. art. III, § 2, cl. 2 and 28 U.S.C. §1254(1). The judgment to be reviewed  was entered by the Sixth Circuit Court of Appeals on March 24, 2026. No petitions for rehearing were filed and no extensions of time to file have been requested or granted.

The United States District Court for the Middle District of Tennessee had jurisdiction over this criminal case pursuant to 18 U.S.C. §3231.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 404(b):

(b) Other Crimes, Wrongs, or Acts.
(1) Prohibited Uses. Evidence of any other crime, wrong, or 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.
(2) Permitted Uses. 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.
(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:
(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
(C) do so in writing before trial--or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

18 U.S.C. 924(c)(1)(A)

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
(i) be sentenced to a term of imprisonment of not less than 5 years;
(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

## STATEMENT OF THE CASE

On April 4, 2022, the Regions Bank at 415 Sam Ridley Parkway West in Smyrna, Tennessee was robbed.[1] The assistant manager testified that he was at his desk opening an account for a customer and the branch. Two men came in and stood around but the branch was busy that day. After approximately two minutes, the men came around the desks, pulled out guns and one of them said "[t]his is a robbery." As he was considering pushing his silent alarm, one of the men aimed a firearm at him and said, if he were to push it, the man would shoot him. Jury Trial, Volume 2-B, R.202, PageID#1228.

Mr. Krouse put his hands up, unlocked his cash drawer and stepped away. One of the men started taking money. The vault custodian just happened to be walking into the vault room and they went in as well. One of the men again made a verbal threat. The code was entered and the men took the money from the vault and fled on foot. He then locked the front door and started making calls to his corporate security and police. *Id*, PageID#1229.

He distinguished the two men by who was closest to the vault most of the time and their height. *Id*, PageID#1232. The taller man told the employees "this is a robbery." He was wearing a white hat. *Id*. The taller man also told them to open their

[1] Mr. Ewing acknowledges that these facts were presented to the jury at trial. He does not accept them as true and does not adopt them as his own. He acknowledges that the Court may rely on them according to established standards.

cash drawers. *Id*, PageID#1235. The shorter man was also behind him and beside the two bank associates. *Id.* The taller man was taking the money and getting ready to go into the vault. The shorter man was by a teller station with the other two associates doing the same. *Id*, Page ID#1236. The taller man wearing the white beanie made the threat to "take someone out" if they did not get the money. *Id*, PageID#1238. The taller man pointed his firearm at Mr. Krouse. *Id.* The shorter man pointed his gun (with an extended magazine) at the two associates. *Id*, PageID#1239.

The taller man started to leave by walking toward or out the front doors to look around. He came back in to get the money from the vault. He was carrying a black Pittsburgh Steelers drawstring backpack. *Id*, PageID##1240-1241. Both men were wearing masks. *Id*, PageID#1242. Neither man was wearing gloves. *Id*, PageID#1244. The taller man's gun was black. Both firearms were semi-automatic handguns. The shorter man's firearm was tan. *Id,* PageID#1244, 1247, Pet. App'x Vol 2, p. 7.

Other facts concerning other robberies were introduced at trial and they are discussed where pertinent to the issues below.

## PROCEEDINGS BELOW

Mr. Ewing was charged via complaint on May 4, 2022 with one count of Hobbs Act Robbery involving a Cash Express store at 909 W. Broad St., Murfreesboro, Tennessee. R.3, PageID#39. His co-defendant, Frederick Carney, had previously been charged also in a complaint but with a robbery at a different Cash Express along with a charge of brandishing a firearm in relation to a crime of violence. R.3, PageID#4.[2]

The original indictment only charged Mr. Carney with the same two counts as in his complaint. R.14, PageID#24. The first superseding indictment had the same two counts as the original indictment as Counts 1 and 2 and added Count 3 which matched the charge in the complaint against Mr. Ewing (Cash Express, Murfreesboro). R.20, PageID#81.

On December 22, 2022 and December 27, 2022, Mr. Ewing timely filed several motions in preparation for trial. On December 29, 2022, Mr. Carney filed a motion to continue the trial due to the appointment of new counsel. R.66, PageID#187. On January 3, 2023, the government filed a motion for an extension of time to file its jury instructions and verdict form. R.74, PageID#264. The motion for extension of time to file was granted but this order did not dispose of Mr. Carney's motion to continue. It also granted an extension for the government's deadline for responding to Mr. Ewing's motions. Order, R.77, PageID#268.

[2] The initial documents 1 through 4 on the docket are duplicated but the PageID numbers distinguish between the two defendants.

Instead of complying with its timelines, the government obtained a second superseding indictment which was filed on January 9, 2023. R.78, PageID#269. This indictment alleged:

Count 1 – Ewing and Carney, robbery, Cash Express, Murfreesboro;

Count 2 – Ewing and Carney, robbery, Regions Bank, Smyrna;

Count 3 – Ewing and Carney, brandishing a firearm in Count 2;

Count 4 – Carney, robbery, Cash Express, Greenbrier;

Count 5 – Carney, brandishing a firearm in Count 4;

Count 6 – Ewing and Carney, robbery, Horizon Bank, Whites Creek;

Count 7 – Ewing and Carney, brandish and discharge a firearm in Count 6.

This forced Mr. Ewing's counsel into the need for a continuance and he filed such a motion on January 10, 2023. R.80, PageID#282. On January 11, 2023, the District Court granted the continuance and denied all of Mr. Ewing's pretrial motions without prejudice. R.81, PageID#284.

On March 28, 2023, Mr. Ewing filed a motion objecting to joinder, moved to sever his trial from that of Mr. Carney, and moved to sever the charges against him. R.102, PageID#361. The trial court denied those motions by order of May 10, 2022. R.140, PageID##554-555.

On March 28, 2023, Mr. Ewing also filed a motion to exclude other acts evidence disclosed by the government in discovery which were not charged. R.100, PageID#351. The government responded to that motion claiming that it did not intend to present evidence of other uncharged robberies as identified in the motion. Accordingly, the trial court declared the motion as moot and acknowledged that contemporaneous objections could be raised at trial. R.140, PageID#562. Additional information concerning this motion is contained in Issue 2 below because the government did in fact file a third superseding indictment which charged two of those robberies and finally provided notice that it intended to present other acts evidence in the form of a robbery at the Moulton, Alabama Cash Express on March 24, 2022.

On March 28, 2023, Mr. Ewing also filed a motion to exclude testimony of witness opinions that photographs from other alleged but uncharged acts depict the same person when compared to photographs from the charged offense. R.104, PageID#379. The trial court denied that motion by order of May 10, 2023 subject to contemporaneous objections at trial. R.140, PageID##563-564.

On April 21, 2023, the District Court ordered that Mr. Ewing file a reply to the government's response to his motion to sever and motion in limine regarding Mr. Carney's statements. R.130, PageID#510. Mr. Ewing complied with that order on April 24, 2023. R.133, PageID#527.

On May 22, 2023, the government filed a third superseding indictment. This indictment alleged:

Count 1 – Ewing and Carney, robbery, Cash Express, Murfreesboro;

Count 2 – Carney, robbery, Cash Express, Nashville:

Count 3 – Ewing and Carney, robbery, Cash Express, Ardmore:

Count 4 – Ewing and Carney, brandishing a firearm in Count 3;

Count 5 - Ewing and Carney, robbery, Regions Bank, Smyrna;

Count 6 – Ewing and Carney, brandishing a firearm in Count 5;

Count 7 – Carney, robbery, Cash Express, Greenbrier;

Count 8 – Carney, brandishing a firearm in Count 7;

Count 9 – Ewing and Carney, robbery, First Horizon Bank, Whites Creek;

Count 10 – Ewing and Carney, brandish and discharge a firearm in Count 9;

Count 11 – Carney, felon in possession of a firearm on May 2 and May 4, 2022. R.153, PageID#739, Pet. App'x, Vol. 1, p. 39-44.

On May 23, 2023, the government finally filed its notice of intent to use other acts evidence. R.157, PageID#760. The notice was related to evidence of a robbery of a Cash Express office in Moulton, Alabama 90 minutes prior to the Ardmore Cash Express robbery in Count 3. Also on May 23, 2023, Mr. Ewing filed a motion to exclude the evidence identified in the government's notice. R.158, PageID#765.

The jury trial ran from June 8 through 14, 2023. The results were:

Count 1 – Not guilty as to both defendants;

Count 2 - Hung jury;

Count 3 – Guilty as to Mr. Carney, hung jury as to Mr. Ewing;

Count 4 - Guilty of brandishing as to Mr. Carney; hung jury as to Mr. Ewing:

Count 5 – Guilty as to both defendants including assaultive conduct with a dangerous weapon;

Count 6 – Guilty as to both defendants;

Count 7 – Guilty as to Mr. Carney;

Count 8 – Guilty as to Mr. Carney;

Count 9 – Guilty as to Mr. Carney including assaultive conduct with a dangerous weapon; hung jury as to Mr. Ewing;

Count 10 – Guilty as to Mr. Carney with a specification of discharging the firearm; hung jury as to Mr. Ewing.

Count 11 – Guilty as to Mr. Carney.

Verdict Form, R.194, PageID#975.

On September 23, 2024, the government moved to dismiss Counts 3, 4, 9, and 10 against Mr. Ewing only with no specific reason given (R.232, PageID#2654) and the motion was granted by order of September 24, 2024. R.233, PageID#2656.

Mr. Ewing was sentenced on January 28, 2025 to a term of 63 months for Count 5 (robbery) and 84 months for Count 6 (brandishing a firearm) for a total of 147 months with three years of supervised release. Sentencing Transcript, R.277, PageID#3163-3164. On February 3, 2025, Mr. Ewing timely filed his notice of appeal. R.262, PageID#2810.[3]

[3] The Sixth Circuit consolidated Mr. Ewing's case with Carney's appeal ($6^{th}$ Cir. #24-6051).

## REASONS FOR GRANTING THE WRIT

I. OTHER ACTS EVIDENCE CREATES A SIGNIFICANT RISK OF IMPROPER CONSIDERATIONS BY A JUROR OF A DEFENDANT'S CHARACTER INSTEAD OF THE EVIDENCE RELATED TO THE CHARGES. THE TRIAL COURT ALLOWED EVIDENCE OF A ROBBERY FOR WHICH MR. EWING WAS NOT CHARGED INTO EVIDENCE WITH FOUR OTHER ROBBERIES IN THE INDICTMENT. WHERE THE TRIAL COURT IMPROPERLY DETERMINED PROBATIVE VALUE AND FAILED TO EVALUATE UNFAIR PREJUDICE, MR. EWING IS ENTITLED TO A NEW TRIAL.

A. The entire record was not considered in the balancing test for prejudice.

The District Court never articulated whether it actually found unfair prejudice or, if any, to what degree. The Sixth Circuit in reviewing the District Court's ruling for an abuse of discretion never considered the unfair prejudice caused to Mr. Ewing by joinder with Mr. Carney's charges as well as Mr. Carney's collateral behavior such as flight and the evidence related to his felon in possession charges.

This Court has held that the probative value and unfair prejudice analyses must consider alternative evidence to establish the point in contention. ***Old Chief v. United States***, 519 U.S. 172, 182-183, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). In the instant case, the joinder of defendants and charges allowed the government to create a merged and blurred collage of multiple armed robberies, Mr. Carney's flight, and Mr. Carney's felon status all of which were presented to the jury deciding Mr. Ewing's case. This point was never discussed by the District Court or the Circuit Court contrary to this Court's instruction in ***Old Chief***. This is grounds for granting the petition. Sup. Ct. R. 10(c).

B. Background.

In his appeal to the Circuit Court, Mr. Ewing argued that joinder was improper with Carney's case and that the District Court should have severed his trial was well as some charges. The Court of Appeals ruled that he had waived this argument due to failure to object after the third superseding indictment. While that issue is not presented to this Court, the circumstances of all of that evidence and the prejudice it caused is relevant to the balancing test required to resolve this issue.

C. Prejudicial facts resulted from joinder of cases and charges.

The original indictment brought one count of Hobbs Act robbery and one count of brandishing a firearm in relation to a crime of violence against co-defendant Carney only regarding the Greenbrier Cash Express. Indictment, R.14, PageID#24. The first superseding indictment included the original two charges as Counts 1 and 2 but added one count of Hobbs Act robbery (Count 3) against Mr. Ewing and co-defendant Carney regarding the Murfreesboro Cash Express. First Superseding Indictment, R.20, PageID#81. Mr. Ewing filed his motion to sever on December 22, 2022. Motion to Sever, R.59, PageID#159.

At a status conference on January 5, 2023, counsel for Mr. Ewing continued his request for severance and on an additional ground that co-defendant Carney had requested a continuance. This was in the context of the government indicating that yet another indictment was pending. The trial court took note that the anticipated second superseding indictment could impact severance. Status Conference Transcript (1/5/2023), R.270, PageID##3016-3023. On January 9, 2023, a second superseding indictment was filed which rearranged and added counts. The details are set forth in the "Proceedings Below" section, ante. The motion to sever was renewed, R.102, PageID#361, but was not decided until May 2023.

At a status conference just a few weeks from the trial date, the government again announced its intention to deliver a third superseding indictment. *The government anticipated adding a March 10, 2022 Hobbs Act robbery involving only Mr. Carney (Nashville Cash Express)*, a March 24, 2022 Hobbs Act robbery leveled at both defendants (Ardmore, TN Cash Express), *and a felon in possession of ammunition charge against co-defendant Carney only.* Status Conference Transcript (5/16/2023), R.272, PageID##3052-3053. The trial court again took note that several motions – including one for severance – were just ruled on. *Id*, PageID#3060. Counsel for Mr. Ewing objected to any further delay and wanted to go to trial on the second superseding indictment as scheduled. *Id*, PageID#3056-3057.

The third superseding indictment was filed on May 22, 2023. R.153, PageID#739, Pet. App'x, Vol. 1, pp. 39-44. The motion to sever was not re-filed but the government then was complaining about late alibi notices at the final pretrial conference on May 25, 2023. The trial court was attempting to salvage the trial date and balance the concerns of the defendants to proceed and suggested that perhaps severance might be an option. Pretrial Conference Transcript (5/25/2023), R.273, PageID#3087. Counsel for Mr. Ewing at that time stated that Mr. Ewing was prepared and wanted to go to trial on all charges in the third superseding indictment. *Id*, PageID#3088.

The motion to sever was not renewed at the close of proofs or thereafter.

*Prejudice from joinder of Defendants*.

As noted above, the adverse ruling as to misjoinder of defendants is not presented to this Court but the structure of these rules supports Mr. Ewing's position. Joinder of defendants in a single indictment is controlled by Fed.R.Crim.P. 8(b) which states:

> (b) Joinder of Defendants. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

It is acknowledged that the Executive and Judicial Branches of government favor joinder. ***United States v. Tisdale***, 980 F.3d 1089, 1084 (6th Cir. 2020). The government is only one party to a criminal action and enjoys no constitutional right to a fair trial. On its face, Fed.R.Crim.P. 8 basically allows the government to determine joinder simply by how it chooses to structure the indictment. This allows the government to maximize prejudice to a defendant. The District Court had a continuing duty to be alert for unfair prejudice from the joinder. ***Schaffer v. United States***, 362 U.S. 511, 515-516, 80 S.Ct. 945, 4 L.Ed.2d 921 (1960). Figure one demonstrates two defendants who share only a small portion of their activity together. Figure two demonstrates two defendants who share majority of their criminal activity together.

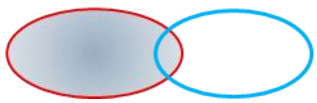

Figure 1.

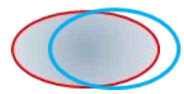

Figure 2.

The difference in prejudice to the single defendant in either figure above is obviously different depending on the amount of overlap. In the instant case, there was moderate overlap in the charging instruction but extremely slight overlap in the result. This prevents the District Court's error from being harmless because it simply is not possible to have confidence in the verdict.

What happened in the instant case is that the felon in possession charge (Count 11), the March 10 Nashville Cash Express robbery (Count 2), and the April 20, 2022 Greenbrier Cash Express robbery (Count 7 plus the 18 U.S.C. §924(c) charge in Count 8) did not fit within the parameters of Fed.R.Civ.P. 8(a) but the jury heard the evidence as to those charges during Mr. Ewing's trial.

Mr. Ewing was improperly tried on the counts identified in the preceding paragraph when his trial was joined with Mr. Carney because of the express language of Fed.R.Civ.P. 8(b). There was nothing in the indictment to suggest that Mr. Ewing participated in any of those acts. They were all stand-alone offenses and all of the elements of each of them were completed within a matter of a few minutes. The only reason the District Court denied Mr. Ewing's motion was because it failed to analyze the two rules separately and properly study the language of the indictment.

The trial court denied the objection to joinder in its May 10, 2023 order. Matters became worse with the third superseding indictment which added the March 10 Nashville Cash Express (Count 2) and the felon in possession of ammunition charge (Count 11) against Mr. Carney only.

Rule 14 protections were improperly denied.

Fed.R.Civ.P. 14(a) serves as a protection where joinder creates prejudice. That rule states:

> (a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

The United States Supreme Court has recognized that joinder, even when proper under Rule 8 may prejudice either a defendant or the government. ***Zafiro v. United States***, 506 U.S. 534, 538, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). Severance of defendants should be granted when joinder will prevent the jury from making a reliable judgment about guilt or innocence. *Id*, at 539. ***Zafiro*** provided several examples of when the risk of prejudice is sufficient to require severance. The most compelling reason involved evidence of a codefendant's wrongdoing which can lead a jury to an erroneous conclusion that a defendant was guilty. *Id*. The Court recognized that this is usually a case-by-case analysis.

In the instant case, the primary acts of wrongdoing on the part of Defendant Carney that created prejudice are:

- March 10, 2022 Cash Express Robbery in Nashville;
- April 20, 2022 Cash Express Robbery in Greenbrier:
- April 20, 2022 brandishing a firearm in Greenbrier;
- May 2, 2022 discharge of a firearm in the First Horizon bank robbery
- Felon in possession of a firearm charges which included evidence of Carney's prior felony conviction;
- Carney's flight from arrest on May 2, 2022;
- Carney's high-speed flight on April 20, 2022;
- Carney's purchase and sale of the Charger and Impala;
- Purported admissions made by Carney to Shyanne McCullough.

While Mr. Ewing disagrees that the evidence was properly admitted for either identity or modus operandi, the focus here is on the massive amount of evidence presented that was relevant only to Mr. Carney but heard by a jury deciding Mr. Ewing's fate. In the instant case, the following witnesses were utilized by the government for the counts that involved Mr. Carney only:

1. JH, victim, 4/20/2022 Greenbrier Cash Express, Trial Volume 1-A, R.200, PageID#1044-1063. (Single robber, Dodge Charger, working alone that day).

2. CF, next door employee, 4/20/2022 Greenbrier Cash Express, Trial Volume 2-B, R.202, PageID##1377-1388. (Black Dodge Charger, heard JH scream).

3. BC, next door proprietor, 4/20/2022 Greenbrier Cash Express, *Id*, PageID##1390-1395.

4. JS, deputy sheriff, 4/20/2022 Greenbrier Cash Express, *Id*, PageID##1395-1419. (Vehicle chase of Dodge Charger).

5. BL, police captain, 4/20/2022 Greenbrier Cash Express, Trial Volume 3, R.203, PageID##1448-1462. (Issuance of "be on the lookout" on radio).

6. HW, victim, 3/10/2022 Nashville Cash Express, Trial Volume 1-A, R.200, PageID#1092-1098. (Single robber, one other employee).

7. AM, detective, 3/10/2022 Nashville Cash Express, Trial Volume 2-B, R.202, PageID#1184-1189.

One additional witness was utilized that dealt with the collateral issue of Mr. Carney's purchase and sale of cars:

8. SS, owner of T & S Auto, Trial Volume 4, R.204, PageID##1702-1715, Pet. App'x, Vol. 2, pp. 17-30.

Additional witnesses were utilized that involved only the location, chase, and arrest of Mr. Carney:

9. FBI SA Alamo, *Id*, PageID##1716-1738. (Foot chase of Mr. Carney).

10. SC, police officer, *Id,* PageID##1739-1745. (Approach to Mr. Carney's residence prior to foot chase, body camera videos).

11. KP, police officer, *Id,* PageID##1747-1752. (Recovery of back pack after foot chase of Mr. Carney).

12. DR, police officer, *Id*, PageID##1753-1759. (Arrest of Mr. Carney after foot chase, recovery of cell phone, coins and cash).

13. JS, fingerprint analyst, Trial, Volume 5, R.205, PageID##2135-2139. (Fingerprint examination of magazine from Dodge Charger with no identifiable prints).

14. LM, crime scene investigator, First Horizon, projectile path and recovery, Trial Volume 4, R.204; PageID##1686-1701.

15. LA, trace evidence analyst, Trial Volume 6, R.206, PageID##2180-2204. (Testing of Mr. Carney's clothing for gunshot residue).

The following witnesses provided testimony related to all counts but included prejudicial testimony related only to the counts leveled against Mr. Carney only:

16. SM, Mr. Carney's girlfriend, Mr. Carney's purported admission as to 4/4/2022 Regions Bank Robbery, 3/10/2022 Nashville Cash Express, and 4/20/2022 Greenbrier Cash Express. Trial Volume 3, R.203, PageID##1595, 1633, 1635, Pet. App'x, Vol. 2, pp. 11-13; Trial Volume 5, R.205, PageID#1968.

17. FBI SA Rexing, cell tower, phone subscriber records, and social media records analysis, Trial, Volume 4, R.204, PageID##1790-1899. The testimony particular to the Greenbrier Cash Express robbery occurred at *Id*, PageID##1844, 1851.

18. Task Force Officer Sutherland, case agent, Trial Volume 5, R.205, PageID##1946-2135. This included the interview of Ms. McCullough in which she initially implicated in only three robberies: April 4 Regions Bank, Smyrna, April 20 Greenbrier Cash Express, and February 18 Murfreesboro Cash Express. *Id*, PageID#1968.

Each robbery had its own set of exhibits which included video and stills from the surveillance cameras and photographs of the buildings. Each of these took considerable time and the exhibits dedicated solely to the Nashville and Greenbrier Cash Express robberies as well as the chase and capture of Mr. Carney had nothing to do with Mr. Ewing. But government's Exhibit 99 was particularly problematic because it established Mr. Carney's status as a convicted felon.

Mr. Carney's admissions to Ms. McCullough and all of the other circumstances noted above render the standard instruction on considering each defendant separately meaningless and ineffective. Granted, this jury made multiple unanimous decisions regarding Mr. Carney but could not reach a unanimous decision on any incident except the Regions Bank robbery. This could signify a compromise verdict just as easily as it could signal independent consideration.

A concept in the Due Process Clause of the Fifth Amendment is important to consider on this issue. The sheer number of robberies – four of which did not involve Mr. Ewing – and the very limited findings of guilt for a single incident raise a very serious question as to whether the guilty verdict for Mr. Ewing is a "reliable judgment about guilt or innocence." ***Zafiro***, *supra*.

Mr. Ewing asserts that actual unfair prejudice occurred due to the sheer scope of the prosecution and the inclusion of significant evidence which would not have been relevant or admissible if he were tried separately from Mr. Carney. Mr. Ewing urges this Court to find that the "reasonable probability" of prejudice exists and is sufficient to establish plain error because the verdict is not reliably tied to guilt or innocence. See ***United States ex rel. Hetenyi v. Wilkins***, 348 F.2d 844 (2d Cir. 1965), cert. denied ***Mancusi v. Hetenyi***, 383 U.S. 913, 86 S.Ct. 896, 15 L.Ed.2d 667 (1966).

A reasonable probability of unfair prejudice exists in this case by virtue of the verdicts which speak loudly of the weakness of the government's case as to the identity of the shorter robber. Additionally, the evidence of identity from the Regions Bank videos and witnesses is extremely thin. Because a large volume of evidence irrelevant to Mr. Ewing was heard by his jury, a risk is created that there was a leap over the required burden of proof of beyond a reasonable doubt. In ***Old Chief***, this Court said:

> The term “unfair prejudice,” as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 403[03] (1996) (discussing the meaning of “unfair prejudice” under Rule 403). So, the Committee Notes to Rule 403 explain, “ ‘Unfair prejudice’ within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860.
> ***Old Chief****, supra, at 180.*

***Old Chief*** obviously involved a prior conviction as the “other bad act” but there is no logical distinction between evidence of a prior conviction and this massive amount of evidence involving other criminal behavior of Mr. Ewing’s co-defendant. This Court agreed with the position of Old Chief that the risk can include use of bad character evidence as “raising the odds that he did the later bad act . . . (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily). *Id*, at 180-181. In Mr. Ewing’s case, that risk could be defined as “if his friend did these, then he might have done those.”

When the identification comparison was presented by the case agent, Task Force Officer Sutherland, counsel for Mr. Ewing objected. Trial Volume 5, R.205, PageID##2030-2032 and 2034-2041. This objection was sustained and the trial court gave a limiting instruction to the jury to only use the testimony to explain why the investigation developed and not for a particular identification. *Id,* PageID#2043. Unfortunately, that instruction did not occur until after the lunch break. This is yet another circumstance that the District Court and the Court of Appeals should have considered as part of the whole record. Even though it did not happen until during trial (in other words, post-ruling), the District Court could have held that enough prejudice was piling up against Mr. Ewing so that the agent should not be allowed to provide his opinion testimony. Simply put, there was an open gate for the government and no balancing as required by FRE 404(b) or FRE 403.

Regarding the admission of the evidence to establish modus operandi, Mr. Ewing also disagrees with the decisions of the lower courts. His disagreement can be summed up easily: due to the size and layout of these facilities, there are limited methods of operation than can physically occur. Again, his point to this Court is that the volume of irrelevant evidence as to Mr. Ewing created an unacceptable risk of a jury decision based on improper considerations and contrary to the required burden of proof.

C. Analysis.

Regarding the first part of the test, there is no challenge to the fact that the Moulton Cash Express robbery occurred as it is documented on video and supported by witness testimony. But Mr. Ewing's involvement is not established even to a probable cause standard. On the second day of trial, a hearing was held on the challenges to the government's notice of intent to use the Moulton Cash Express robbery as other acts evidence. The victim of that robbery was the only witness. Trial Volume 2-A, R.201, PageID##1111-1177, Pet. App'x, Vol. 1, pp.45-111. The trial court found sufficient evidence to conclude that the Moulton robbers were the same as the Ardmore robbers. Trial Volume 2-B, R.202, PageID#1249-1253, Pet. App'x, Vol. 1, pp. 3-7. But, at the time of the ruling and to this day, the evidence to establish that Mr. Ewing had any involvement in either robbery is non-existent.

The trial court did not articulate its analysis under MRE 403. It appears that the trial court proceeded as if there was some prejudice by ruling that it would give a limiting instruction. Trial Volume 2-B, R.202, PageID#1252, Pet. App'x, Vol 1, p. 6. The Sixth Circuit said "Although the district court could have stated its findings more clearly, the district court did not abuse its discretion where it recognized that it would take the proper analysis at this step. . . ." Opinion, at 19, Pet. App'x, Vol. 1, p. 33. This conclusion by the Sixth Circuit is problematic for two reasons. First, the District Court never stated its findings at all. There is no clue as to how probative the District Court viewed the evidence or whether it considered the unfair prejudice minor or significant. Without these intermediate findings, the second problem is obvious – whether discretion was abused or not cannot be determined if the exercise of the discretion is unknown.

A district court abuses its discretion "when it relies on erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." ***Schlaud v. Snyder***, 717 F.3d 451, 457 (6th Cir.2013) (quotation marks omitted). The lack of articulation was followed by the Sixth Circuit filling in the gaps and then making its own decision contrary to the standard of review applicable to the issue.

In ***Protective Committee v. Anderson***, 390 U.S. 414, 434, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968), this Court said:

> [I]t is essential ... that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the fact or analysis of the law....

As was urged in the District Court by trial defense counsel, the evidence of the Moulton, Alabama Cash Express robbery had no probative value as to identity because no independent or circumstantial evidence existed to show that Mr. Ewing committed it. An assumption that he committed it would rely entirely on the sheer number of charges which also had no independent evidence that he committed them – clearly an improper basis for a jury verdict.

Having no probative value, it would not take much prejudice to outweigh the probative value – substantially or otherwise. In terms of determining unfair prejudice, the District Court could have articulated its view of several circumstances:

First, the number of counts alone created a high risk of guilt by propensity by overwhelming the jury with quantity instead of quality. Second, Mr. Carney's independent escapades could cause a "birds of a feather" conclusion by the jury. Third, the government's gamesmanship with timing and reversal of its earlier declaration statement that it did not intend to introduce evidence of other acts. Fourth, the general additional prejudice created by joinder with Mr. Carney. While the prejudice of joinder is generally acknowledged by courts when dealing with claims of misjoinder or motions to sever, it is balanced against the preference for economic gains for the government and is deemed tolerable. But in the Rule 403 analysis process, it is yet additional prejudice that must be placed on Mr. Ewing's side of the scale. Only when the actual fair and unfair prejudice of the evidence is correctly and accurately assessed can the weighing process properly occur. That part of the requirement set out by this Court on multiple occasions simply never occurred.

***Old Chief***, *supra*, was primarily a Rule 403 case but that discussion informs the lack of record concerning the Rule 403 portion of an "other acts" challenge. This Court took favorable note of the Advisory Committee Notes to FRE 403 which defined "unfair prejudice" to mean "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." ***Old Chief***, *supra*, at 180. ***Old Chief*** contains an excellent discussion of how the probative value of a piece of evidence can be diluted when either abundant other evidence exists or less prejudicial evidence is available as an alternative. This discussion also pointed out that the District Court's decision is to be considered at the time the ruling is made. ***Old Chief***, *supra*, at 180-185.

In the instant case, the District Court had just a few weeks earlier denied the objection to misjoinder and denied the motions to sever. Then the third superseding indictment was filed containing five other robberies. The trial court did not make this FRE 404(b) ruling until the second day of trial. As noted above in the discussion of the motion to sever defendants and charges, the trial court never stepped back to look at the overall impact of the volume of charges facing Mr. Ewing – two of which he was not even charged with committing.

This Court should grant this petition because of the Sixth Circuit's failure to properly review the District Court's exercise of discretion. Accordingly, Mr. Ewing's convictions must be reversed due to the improper admission of the other acts evidence.

## II. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT REQUIRES THAT A CRIMINAL PROSECUTION BE SUPPORTED BY PROOF BEYOND A REASONABLE DOUBT. WHERE NO RATIONAL JURY COULD CONCLUDE FROM THE EVIDENCE PRESENTED THAT MR. EWING POSSESED A FIREARM AS DEFINED IN LAW, HIS CONVICTION FOR VIOLATING 18 U.S.C. §924(c) MUST BE VACATED.

### A. Substantial evidence does not support the verdict.

In ***Glasser v. United States***, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.2d 680 (1942), the "verdict of a jury must be sustained if there is *substantial evidence*, taking the view most favorable to the Government, to support it." *Id*, *supra*, at 80 (citations omitted), superseded by rule on other grounds, ***Bourjaily v. United States***, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). (Emphasis added). In ***Jackson v. Virginia***, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), however, this Court held that ***Glasser*** should be understood as actually implementing the following standard: "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Jackson***, *supra*, at 319 (emphasis in original).

The Sixth Circuit correctly cited the standard in its opinion but then did not apply it. Opinion, p. 21, Pet. App'x, Vol. 1, p. 35.

B. Standards.

The Due Process Clause requires the government to prove all elements included in the definition of an offense beyond a reasonable doubt. ***Patterson v. New York***, 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977). The third superseding indictment in Count 6 alleged:

> On or about April 4, 2022, in the Middle District of Tennessee, [1] Frederick Eugene Carney and [2] William John Ewing, III, did knowingly use, carry, and brandish a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is Armed Bank Robbery as charged in Count Five, in violation of Title 18, United States Code, Sections 2113(a) and (d).
>
> All in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2.

The statute at issue reads as follows:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

There is a particular definition, however, in Title 18, Chapter 44 that defines "firearm" that is important:

> (3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

18 U.S.C.A. § 921(a)(3). The requirement that bank robbery, and by implication Section 921(a)(3), requires a real – not fake – firearm has been acknowledged in the Sixth Circuit. ***United States v. Sherer***, 770 F.3d 407, 412 (6th Cir. 2014). The trial court instructed the jury that the government did not have to prove the firearm was real for the robbery charges. Trial Volume 7, R.207, PageID#2353. In contrast, when the trial court instructed the jury about the term "firearm" for Count 6, it said only "The term 'firearm' means any weapon which

will or is designed or may readily be converted to expel a projectile by the action of an explosive. The firearm need not be loaded." *Id*, PageID##2356-2357. There was no distinguishing this from the instruction as to robbery making it very difficult for the jurors to follow their instructions. That is a very fine distinction and the jurors may simply have taken the two cumulatively and not made a distinction at all.

C. Background.

Regions Bank employee Daniel Krouse claimed that he could tell if a gun was real or not. He based this on his experience plus what he saw. Trial Volume 2-B, R.202, PageID#1239, Pet. App'x, Vol. 2, p. 6. He was not certain as to whether the taller robber's gun was black but he believed they were both semi-automatic handguns. He also claimed that the shorter robber's gun had an extended magazine. *Id*, PageID1247, Pet. App'x, Vol. 2, p. 7. His experience was not placed into the record.

Derrick Wallace, an associate at Regions Bank, testified that he believed the firearms were real. He described the firearm held by the man in the white hat (taller of the two) as a semi-automatic. *Id*, PageID##1336; 1338. He was not asked to express an opinion as to the gun held by the shorter of the two robbers.

Exhibits 14 and 14-A through 14-P were the relevant photographs and videos from Regions Bank. *Id*, PageID##1221-1224. Task Force Officer Sutherland was questioned primarily about photo comparisons from the videos and still photographs obtained during the investigations. He was asked to look at Exhibit 14-P which was a still taken from the bank video. At one point, he describes the firearm of the taller robber as "two-tone gray, darker, lighter." Trial Volume 5, R.205, PageID#1961, Pet. App'x, Vol. 2, p. 46. But later on in his testimony, he looked at another image contained within Exhibit 14-P and claims that the shorter of the two robbers has a gun that is "two-tone, identifiable as a silver or gray and then a dark black." *Id*, PageID##1964-1965, Pet. App'x, Vol. 2, pp. 37-38. As noted above, other witnesses from Regions Bank identified one gun as dark and the other as tan or all dark. Trial Volume 2-B, R.202, PageID##1207, 1217-1218, Pet. App'x, Vol. 2, pp. 3, 4-5. None of this testimony established that either firearm was real.

D. Analysis.

The two non-law enforcement witnesses both stated their belief. They were not asked for specifics. Mr. Krouse claimed experience but that experience was not provided to the jury to properly weigh his conclusion. Mr. Wallace's belief is standing alone with no foundation at all. The case agent provided descriptions but was not asked to opine. Considerable discussion was had about his identification of a magazine as an extended magazine but ultimately the jury was told to disregard it because he did not provide enough detail from the image he was viewing. Trial Volume 5, R.205, PageID##1997-1999. Ms. McCullough was very clear in her testimony that the firearm she saw Mr. Carney possessing had an extended magazine. Trial Volume 3, R.203, PageID#1614.

In ***Sherer***, an agent testified that the firearm used was real but the issue was reviewed in that case under the plain error standard. Id. Considerable testimony was submitted from eyewitnesses to the crime. One FBI Agent with considerable gun experience testified to his opinion based on enhanced photographs. *Id*, at 410. While Mr. Ewing acknowledges that the firearms used do not have to be in evidence and expert testimony is not required to meet this element, the evidence in the instant case is woefully inadequate to allow a rational jury to find the element satisfied beyond a reasonable doubt. The evidence does not even establish to any degree of certainty that Mr. Ewing ever possessed the firearm with an extended magazine.

In ***United States v. Farrad***, 895 F.3d 859, 874 (6th Cir. 2018), a conviction was sustained where the jury had several different angles of a single firearm which included a close-up and possibly high-resolution photographs. The jury also had detailed testimony from an officer with considerable experience that pointed to specific characteristics of the weapon in the images. In ***United States v. Crowe***, 291 F.3d 884, 887 (6th Cir. 2002), a conviction was sustained where an experienced police officer testified to what detail he could make out on a firearm tucked into the back of a suspect's pants. A firearm was later recovered which had similar characteristics. Nothing of the sort appears in the instant case.

The Sixth Circuit failed to look for any actual facts in the record to support the required element of a real gun or even facts to support such an inference. This is in contrast to the two examples above where they have done so.

E. The Sixth Circuit's misapplication of the test.

Of those witnesses that claimed experience with guns, the factual details – even in generalities – were not provided to the jury. While rational inferences are permissible (perhaps even mandated), some facts need to exist to support the inference otherwise it is conjecture.

The Sixth Circuit believed that Mr. Ewing was asking that court to weigh the credibility of witnesses Krouse and Wallace (Opinion, p. 22, Pet. App'x, Vol. 1, p. 36) with the following passage:

> Ewing challenges the testimony of these witnesses because "Krouse claimed experience but that experience was not provided to the jury to properly weigh his conclusion" and "Wallace's belief is standing alone with no foundation at all." Ewing Appellant's Br. at 47.

The Sixth Circuit then brushed aside this challenge by incorrectly labeling it a challenge to the credibility of the witnesses by stating "[b]ut we do not 'consider the credibility of witnesses' in reviewing the sufficiency of evidence supporting a conviction." (citation omitted). Mr. Ewing did not claim that the witnesses testified falsely about their belief. But a belief is not a fact and juries must decide cases based on facts and reasonable inferences from them.[4]

The jury had the responsibility to draw reasonable inferences "from basic facts to ultimate facts." ***Jackson***, *supra*, at 319. The claim is that the basic facts were simply not present. This properly preserved claim placed a duty on the Sixth Circuit to answer the question as to whether the facts or inferences were sufficient for a rational jury to find proof beyond a reasonable doubt. Its failure to do so has decided this important federal question in a way that conflicts with the decisions of this Court and is grounds for granting the petition pursuant to Sup. Ct. R. 10(c).

## CONCLUSION

By denying the motion to sever filed by Mr. Ewing, the District Court allowed the jury to hear about two robberies, one brandishing a firearm, and one felon in possession of ammunition charge along with Mr. Carney's felony conviction. Also along for the ride were Mr. Carney's two instances of flight from the police one of which involved a high-speed car chase and the other one involved air support from a police helicopter. While that decision is not part of this petition, the prejudice this placed on Mr. Ewing was not taken into consideration when the District Court

[4] The Sixth Circuit also claimed that Mr. Ewing was asking the Court to weigh the evidence but the briefing does not support this claim. The claims that Mr. Ewing was asking the Court to assess credibility or weigh the evidence were mechanisms to avoid the responsibility to actually look for facts.

decided to allow the other acts evidence involving Moulton, Alabama Cash Express robbery into evidence. This made a sixth robbery the jury listened to in this seven-day trial. By including Mr. Carney in the trial, his purported admissions to his on-again-off-again girlfriend were into the record along with her desire to obtain a reward from Regions Bank.

These two issues passed through the usual filtering required by a District Court but they did so as ships passing in the night. When the misjoinder objections and motions to sever were denied on May 10, 2023, the impact of the Moulton, Alabama robbery was not yet in play although everyone knew it was coming based on the discovery. Two weeks later, the government officially noticed its intent to use the Moulton, Alabama robbery. When the trial court decided the fate of Mr. Ewing' objection to the similar acts evidence on the second day of trial, the prejudice/probative value analysis never mentioned the additional prejudice – unfair or not – that this would cause on top of the five charged robberies or Mr. Carney's solo escapades.

While this jury was apparently able to do some compartmentalizing based on the verdicts, the limiting instructions were simply inadequate to provide reliability in this verdict. Precedent requires that an unfair prejudice analysis be individualized to a particular defendant using a holistic approach based on the entire case. That simply did not happen in this case. Mr. Ewing is entitled to have a new trial on Count 5 and is entitled to a judgment of acquittal as to Count 6.

This Court should accordingly grant the petition to correct the failure of the Sixth Circuit to follow this Court's directives.

## RELIEF REQUESTED

WHEREFORE, Mr. Ewing respectfully requests this Honorable Court grant this petition, reverse the Circuit and District Court's ruling as to the Fed.R.Crim.P. 29 motion and enter a judgment of acquittal as to Count 6 and vacate the conviction as to Count 5 remanding the matter to the District Court for a new trial on that Count.

06/22/2026

*/s/ J. Nicholas Bostic*

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