

08-3151-cr(L)

To Be Argued By:
EDWARD T. KANG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 08-3151-cr(L)
08-3639-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

JOSEPH MARCELL RAY,
Defendant,

MYRON ORLANDO HENRY,
JASON DANTLEY DAVIS, also known as Handsome,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

=====

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Alvin W. Thompson, U.S.D.J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant was sentenced on July 18, 2008, and judgment entered on July 22, 2008. Government's Appendix ("GA") 519-21. On July 24, 2008, the defendant filed a timely notice of appeal pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure. GA 522. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of the Issues Presented

- I. Did the district court commit plain error: (1) in admitting other act evidence pursuant to Fed. R. Evid. 404(b), where the defendant failed to state with sufficient clarity that he was not disputing the issues of knowledge and intent; and (2) in exercising its discretion to deliver a limiting instruction as to the other act evidence during its final charge to the jury?

- II. Should this Court defer its consideration of the defendant's claim that he was denied his constitutional right to effective assistance of counsel when his attorney failed to object to evidence offered under Fed. R. Evid. 404(b) where, at present, there are insufficient facts on the record to determine whether trial counsel's alleged error was the type of strategic choice made after thorough investigation of the relevant law and facts that has been held by the Supreme Court to be "virtually unchallengeable"?

Even if this Court were to consider the merits of the defendant's claim, has the defendant met his heavy burden of establishing that he was denied his right to effective assistance of trial counsel, where the jury was presented with overwhelming evidence that the defendant distributed one ounce of crack cocaine on March 29, 2006, and he was therefore not prejudiced by the lack of objection?

III. Should the defendant's sentence be vacated and the case remanded for resentencing to allow the district judge to consider the impact of this Court's decision in *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008), which was decided two months after the defendant's sentencing date?

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Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On May 7, 2007, after hearing three days of evidence, a jury returned a guilty verdict against the defendant, Jason Dantley Davis, also known as “Handsome,” for one count of distributing more than five grams of crack cocaine. That conviction arose from the defendant’s distribution of approximately one ounce (28 grams) of crack cocaine to a cooperating witness, Joseph Ray, on March 29, 2006.

Minutes later, Ray sold that ounce of crack cocaine to a second cooperating witness, Felix Soto, in exchange for \$700.

The defendant now maintains that during trial, he was denied effective assistance of counsel because his trial attorney failed to object to the government's introduction of evidence pursuant to Fed. R. Evid. 404(b) that the defendant had previously been arrested and convicted of a similar controlled substance offense. In the alternative, the defendant claims that the trial court committed plain error in admitting that evidence, which was introduced for the limited purpose of establishing that the defendant had acted with the requisite knowledge and intent. Finally, the defendant requests that this case be remanded to the district court for resentencing to consider whether he would still qualify for enhancement under the "career offender" provisions of the Sentencing Guidelines in light of this Circuit's decision in *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008).

For the reasons that follow, the defendant's arguments of trial error and ineffective assistance of counsel lack merit and his conviction should stand. However, the government agrees that this case should be remanded for resentencing to allow the district court to consider whether he qualifies for enhancement as a "career offender" in light of the *Savage* decision.

Statement of the Case

On May 31, 2006, a federal grand jury in the District of Connecticut returned a three-count indictment charging the defendant and two co-defendants, Myron Henry and Joseph Ray, with various drug trafficking offenses. Count Three charged the defendant with possession with intent to distribute five grams or more of cocaine base (“crack”), in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and 18 U.S.C. § 2.

The case was assigned to the Honorable Alvin W. Thompson. On September 11, 2006, co-defendant Joseph Ray pleaded guilty to Count One of the indictment, which charged him with possession with intent to distribute fifty grams or more of crack cocaine. Ray executed a written plea agreement and cooperation agreement that same day. On April 26, 2007, co-defendant Myron Henry also pleaded guilty to Count One of the indictment. On April 27, 2007, the government filed an Information re: Prior Felony Notice as to the defendant, pursuant to 21 U.S.C. § 851.

Approximately one month prior to the beginning of trial, the government filed a Notice of Intention to Use Evidence pursuant to Fed. R. Evid. 404(b), with respect to a December 1, 2005, incident in which the defendant was arrested for possession of crack cocaine. The government’s notice also referenced the defendant’s subsequent conviction on May 2, 2006, for sale of a controlled substance in Connecticut Superior Court.

The government's presentation of evidence began on May 2, 2007. On May 7, 2007, after hearing three days of evidence, the jury returned a guilty verdict on Count Three as to the defendant. On July 18, 2008, the defendant was sentenced to 240 months of imprisonment, to be followed by eight years of supervised release. On July 23, 2008, the judgment was entered. The following day, the defendant filed a timely notice of appeal pursuant to Fed. R. App. 4(b). The defendant is currently serving his sentence.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. The March 15, 2006, controlled purchase of 63 grams of crack cocaine involving Felix Soto, Joseph Ray, and Myron Henry

At trial, the government presented its case through the testimony of FBI Special Agent Robert Bornstein; the testimony of two cooperating witnesses, Felix Soto and Joseph Ray; a representative from the United States Marshal's Office, Paul Winterhalder; and Hartford Police Officer Abhilash Pillai. The government also introduced conversations that were recorded during two controlled purchases of crack cocaine that Felix Soto made from Joseph Ray on March 15, 2006, and March 29, 2006. Additionally, the government presented numerous exhibits, including the drugs seized during those two controlled purchases.

Based upon information received in March 2006 regarding an increase in narcotics trafficking activity and

violent crimes in the Bellevue Square section of Hartford, Agent Bornstein directed a cooperating witness, Felix Soto¹, to make a controlled purchase of crack cocaine from Joseph Ray on March 15, 2006. GA 30-33. Prior to Soto's meeting with Ray, law enforcement officers met with Soto and gave him cash as well as a digital transmitter and recorder to allow officers to listen and record conversations. GA 41. Officers then instructed Soto to go to Ray's residence and attempt to purchase 63 grams of crack cocaine. GA 37-38, 220-21.

Agent Bornstein observed Soto arrive at Ray's house and saw Ray come out and enter Soto's car. GA 44, 221. Ray then used Soto's cell phone to call a number that was later identified as belonging to Myron Henry. GA 44, 48. Agent Bornstein observed Soto and Ray leave from Ray's house and, a short while later, saw their car stop behind a blue Jeep Cherokee, which was later determined to be a car rented by Myron Henry's girlfriend. GA 45, 54, 222, 328-29. Ray was seen getting out of Soto's car, entering the passenger's seat of the Jeep Cherokee for a short while, and then re-entering Soto's car. GA 45. Agent Bornstein then heard Ray tell Soto that the person in the Jeep Cherokee would be coming back to Ray's house in a few moments with Soto's order. *Id.*

Agent Bornstein next saw Soto's car return to Ray's house and observed the Jeep Cherokee arrive about 15 or 20 minutes later. GA 50, 223. Ray again entered the Jeep

¹ Soto was also known by the nickname of "Gordo." GA 225-26.

Cherokee briefly, GA 223, and when he returned to Soto's car, Agent Bornstein overheard Ray and Soto discussing "63 grams" and heard Soto counting out and providing \$1,450 to Ray. GA 50-51. Ray kept approximately \$250 to \$350 for himself as a fee for brokering the transaction. GA 224. Agent Bornstein then met with Soto immediately following the transaction and seized the narcotics that Soto had purchased from Ray. GA 51-52. The substance was confirmed, through subsequent chemical analysis, to be cocaine base. GA 52.

B. The March 29, 2006, controlled purchase of 63 grams of crack cocaine involving the defendant, Felix Soto, Joseph Ray, and Myron Henry

Two weeks later, on March 29, 2006, officers directed Felix Soto to make a second controlled purchase of crack cocaine from Joseph Ray. GA 54-56. Prior to that transaction, officers met with Soto and again provided him with cash as well as a digital transmitter and recording device. GA 61-62, 327. Officers then followed Soto to Ray's house and saw Ray enter Soto's car. GA 64. Agent Bornstein overheard Soto tell Ray that he wanted the "same thing," which referred to the same quantity of crack cocaine that Soto had purchased from Ray on March 15. GA 76, 226. Ray responded that "Holmes won't know what the same thing is," indicating that Ray was going to obtain the crack from a different source than he had used for the March 15 transaction. GA 76-77, 226. Ray then used Soto's cell phone to call a phone number that was later identified as being subscribed to the defendant. GA 64-66. Ray explained that he chose to contact the

defendant to supply narcotics for the March 29 transaction because the defendant's prices were cheaper and therefore Ray could "squeeze more profit off the top for myself." GA 227.

While Ray was on the phone with the defendant, officers observed a red Hyundai registered to Paul Sanders, known by the nickname "Jungle," park next to Soto's car. GA 82, 231, 328. Sanders was overheard asking Ray if Ray was talking with "Handsome," a nickname used by the defendant. GA 83, 232-33, 328. When Ray confirmed that it was the defendant on the phone, Sanders told Ray to tell the defendant that he (Sanders) wanted to see the defendant as well. GA 83, 233, 328. Ray understood the request to mean that Sanders also wanted to purchase narcotics from the defendant. GA 233. Ray was overheard telling the defendant on the phone "Six-tre me, 63 me," which referred to Ray's request to purchase 63 grams of crack cocaine from the defendant. GA 83-84, 232-33. Agent Bornstein then saw Sanders leave the location. GA 87.

Soto devised an excuse to leave the location in order to receive further instruction from officers on how to proceed with the transaction. GA 88, 235. After approximately fifteen minutes, Soto returned to Ray's house. GA 88, 235. While in route, the defendant called Soto, thinking that Ray was using Soto's phone line. GA 88-92. When Soto returned, he advised Ray that the defendant had called, and Ray called the defendant back. GA 91, 235. Shortly thereafter, the defendant arrived at Ray's house driving a blue Buick. GA 93, 236, 329-30. That car was

determined to be an Alamo rental car, rented out to the defendant and his girlfriend. GA 95-97, 237. Ray got into the defendant's car and they drove around the corner to the defendant's apartment. GA 237-38, 331. Ray waited in the defendant's car while the defendant went inside the apartment. GA 238. When the defendant returned, he provided Ray with an ounce, 28 grams, of crack cocaine. GA 238, 307. Ray explained that he "needed more," but the defendant told Ray that the 28 grams was all that he could supply for the time being. GA 238. Ray and the defendant then returned to Ray's house, where Soto was waiting. GA 113, 238-39. Ray got out of the defendant's car and re-entered Soto's car. GA 113. Ray told Soto that he had "good news and bad news." GA 113, 239, 332. Ray explained that he was able to get 28 grams of crack, but was unable to complete the order. GA 113, 239, 332. Ray requested that Soto pay \$700 for the 28 grams and said that he would try to obtain the remaining narcotics from "the other dude," which referred to Myron Henry. GA 113, 239, 307, 332, 334. After collecting the money from Soto, Ray approached the defendant's car and gave the defendant approximately \$600 or \$650. GA 307.

Shortly thereafter, Agent Bornstein observed a blue minivan – later identified to be registered to Myron Henry's girlfriend – arrive at Ray's house. GA 116-17, 121, 329. Ray approached the minivan, stayed there briefly, and then returned and advised that the person in the minivan would be back in a few moments. GA 116-17, 121, 333. Approximately forty minutes later, Agent Bornstein saw the blue minivan return; Ray again approached the minivan, stayed there briefly, and then

returned to Soto's car. GA 117. At that point, Agent Bornstein overheard a transaction occurring and heard Soto count out loud that he was giving \$800 to Ray. GA 118. After getting the money, Ray was seen going back to the minivan and remaining there momentarily. *Id.* The minivan then left the area. Agent Bornstein then met with Soto immediately following the transaction and seized the narcotics that Soto had purchased from Ray. GA 119. The substance that Ray had obtained from the defendant was confirmed, through subsequent chemical analysis, to be 27.1 grams of a mixture and substance containing cocaine base. GA 122-24.

C. Introduction of 404(b) evidence

The government called, as its penultimate witness, Hartford Police Officer Abhilash Pillai. GA 341-48. Officer Pillai testified that he was conducting patrol on the evening of December 1, 2005. GA 342. Officer Pillai observed the defendant driving a Pontiac that evening, and saw the defendant run a red traffic light. GA 343. When Officer Pillai activated his overhead lights and sirens to initiate a motor vehicle stop, he saw the defendant stop the Pontiac, and an unknown male exited from the passenger's seat of the car. GA 344. Officer Pillai then followed the defendant, who continued driving further for a short while. *Id.* The defendant then stopped the car, exited and began running; Officer Pillai gave chase, and the defendant ignored Officer Pillai's verbal commands to stop. *Id.* As Officer Pillai approached, he saw the defendant discard a small brown can and continue running. *Id.* Officer Pillai was able to apprehend the defendant and secured him with

handcuffs. *Id.* After securing the defendant, Officer Pillai eventually retrieved the discarded can. GA 345. Inside, he found numerous clear pieces of knotted plastic, each containing a white rock-like substance, consistent with the appearance of crack cocaine. *Id.* Officer Pillai also found thirteen bags of phencyclidine mixed with dried mint leaves. GA 346. The defendant was charged with possession of a controlled substance and eventually pleaded guilty to sale of a controlled substance. GA 346-47.

Officer Pillai's testimony was of limited duration, as reflected by the fact that his entire testimony comprises 7 pages of the 516-page transcript in this case. Defense counsel did not cross-examine Officer Pillai and did not object to the introduction of that testimony as evidence pursuant to Fed. R. Evid. 404(b). The only other discussion of the 404(b) evidence to the jury was during summation, when the Assistant United States Attorney stated:

You can also in this case determine whether defendant acted knowingly based on his prior involvement in a drug offense. That may inform your judgment as to whether or not in this case he participated in this event knowingly. In other words, because of that experience, because of his arrest on December 1, 2005, where he was charged with distribution of a controlled substance, you could consider that to determine whether the defendant had the requisite state of mind on March 29th, 2006, the date alleged here.

GA 393.

During the jury charge, the trial court provided the following instruction regarding the other act evidence that had been presented:

Evidence was offered which, if believed, tends to show that on a different occasion the defendant previously engaged in unlawful conduct. In this regard, there was testimony that the defendant was convicted of a sale of a controlled substance.

Let me remind you that the defendant is not on trial for committing this prior act. Accordingly, you may not consider the evidence of the prior act as a substitute for proof that the defendant committed the charged offense, nor may you consider this evidence as proof that the defendant has a criminal personality or a bad character. The evidence of the previous act was admitted for a much more limited purpose and you must consider it only for that limited purpose.

If you determine that the defendant committed the act charged in the Indictment and the prior act as well, then you may, but need not draw an inference that in doing the act charged in the Indictment the defendant acted knowingly and intentionally and not because of some mistake, accident or other innocent reason.

Evidence of such previous unlawful conduct may not be considered by you for any other purpose. Specifically, you may not use this evidence to conclude that because the defendant committed the other act, he must also have committed the act charged in the Indictment.

GA 485-86.

D. The sentencing proceeding

The defendant was sentenced on July 18, 2008, two months prior to this Court's decision in *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008). At sentencing, counsel for the defendant and government agreed that the presentence report's designation of the defendant as a career offender was correct and neither party objected to the calculation of the defendant's sentencing guidelines range of 360 months to life imprisonment. Defendant's Appendix, Volume I ("DA Vol. I"), at 51. The district court adopted the factual statements in the presentence report as its findings of fact in the case, and also found the defendant's applicable guidelines range to be 360 months to life imprisonment. DA Vol. I at 51-53.

Defense counsel then requested that the district court impose a non-guidelines sentence of 120 months' imprisonment. DA Vol. I at 54-58. The government, although deferring to the district court's discretion, noted that the defendant's extensive criminal history and pattern of recidivism, in conjunction with all of the other factors

set forth in 18 U.S.C. § 3553(a), required that a lengthy sentence be imposed. DA Vol. I at 76-82.

In imposing sentence, the district court noted its consideration of all the appropriate factors outlined in 18 U.S.C. § 3553(a). The court also noted that “I think I made it clear that I didn’t believe the defendant’s career [offender] designation overstates his criminal history earlier.” DA Vol. I at 86. The court also stated “When I look at the fourth factor, which is the Sentencing Guidelines, I think it’s apparent that I am considering the fact that the guidelines range is 360 months to life.” DA Vol. I at 89. In the end, the district judge concluded:

When I balance all of these factors, I conclude that a sentence that is twice what the defendant would have gotten had he not gotten the Career Offender designation sends a very serious message that if because of his Career Offender status, he’s being punished in a very substantial way, and I believe that that sentence is sufficient but not greater than necessary to serve the purposes of a sentence in this case. So in case you’re not following the math, I have decided to impose a sentence of 240 months.

DA Vol. I at 90.

SUMMARY OF ARGUMENT

The defendant has failed to satisfy the four prongs necessary to show that the district court committed plain

error in admitting the other act evidence and in waiting until the final jury charge to deliver a limiting instruction as to that evidence. The record reflects that the 404(b) evidence was admitted for a proper purpose in this case, namely, to establish that the defendant acted with the requisite knowledge and intent when he distributed narcotics to Joseph Ray on March 29, 2006. Furthermore, the defendant has not only failed to show that the admission of the 404(b) evidence was plainly erroneous, but in light of the overwhelming evidence presented to the jury proving his guilt, he has failed to meet his burden of showing that any alleged error affected substantial rights and seriously affected the fairness, integrity, or public reputation of his trial. In this case, the jury heard a cooperating witness, Joseph Ray, testify that the defendant distributed an ounce of crack cocaine to him on March 29, 2006. Ray's account was amply corroborated through the testimony of Agent Bornstein and cooperating witness Felix Soto, as well as through the introduction of several recorded conversations that were intercepted on March 29.

The defendant has also failed to satisfy the two prong test set forth in *Strickland v. Washington*, 466 U.S. 668, (1984), to demonstrate that he was denied his constitutional right to effective assistance of trial counsel. As to the first prong of that test, this Court should follow its baseline aversion to resolving ineffectiveness claims on direct review and decline to review the question of whether trial counsel's failure to object to the introduction of the 404(b) evidence was so unreasonable as to deprive the defendant of his rights guaranteed by the Sixth Amendment. The district court should be permitted to

develop the facts necessary to determine the adequacy of trial counsel's representation during the trial and to decide whether the alleged error was the type of strategic choice made after thorough investigation of the relevant law and facts that the *Strickland* Court held is "virtually unchallengeable." Moreover, even if this Court were to decide the merits of the defendant's claim, it would fail because the defendant has failed to meet his burden of proving prejudice. For the same reasons that the defendant cannot demonstrate that the introduction of the other act evidence affected his substantial rights, the defendant cannot show that the supposed ineffectiveness of his trial counsel prejudiced him such that the result of the trial would have been different but for the alleged error.

The government agrees, however, that this Court should vacate the defendant's sentence and remand for resentencing consistent with this Court's holding in *Savage*. At sentencing, the district court concluded that the defendant was a career offender and considered his designation as such in imposing a sentence of 240 months of imprisonment. One of the predicate offenses was a prior conviction for Sale of Controlled Substance, in violation of Conn. Gen. Stat. § 21a-277(b) and, as reflected in the corresponding plea colloquy transcript, was disposed of by guilty plea under the *Alford* doctrine. In *Savage*, this Court held that whether a prior narcotics conviction under Conn. Gen. Stat. § 21a-277(b) can be considered as a predicate "controlled substance offense" under U.S.S.G. § 4B1.2 requires analysis under the modified categorical inquiry. Because in this case, the defendant's prior narcotics conviction was disposed of by

an *Alford* guilty plea, and because there appears to be nothing in the charging document or other sufficient record that establishes that the charge was narrowed to include only the predicate conduct of a “controlled substance offense” as defined under U.S.S.G. § 4B1.2, it appears that the defendant’s prior narcotics conviction cannot be a predicate “controlled substance offense,” and therefore, that the defendant is not a career offender. This Court should thus vacate his sentence and remand the case to the district court for resentencing to consider these issues.

ARGUMENT

I. The district court did not commit plain error in admitting the 404(b) evidence

A. Governing law and standard of review

Rule 404(b) of the Federal Rules of Evidence states:

Evidence of other crimes, wrong, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice

on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Evid. 404(b).

This Court takes an “inclusionary approach” to “other acts” evidence, that is, it can be admitted “for any purpose except to show criminal propensity,” unless the trial judge concludes that its probative value is substantially outweighed by its potential for unfair prejudice. *United States v. Germosen*, 139 F.3d 120, 127 (2d Cir. 1998); *see also United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000) (“we follow the inclusionary rule, allowing the admission of such [other act] evidence for any purpose other than to show a defendant’s criminal propensity.”); *see also United States v. Pascarella*, 84 F.3d 61, 69 (2d Cir. 1996) (“This court follows the ‘inclusionary’ approach to ‘other crimes, wrongs or acts’ evidence, under which such evidence is admissible unless it is introduced for the sole purpose of showing the defendant’s bad character, or unless it is overly prejudicial under Fed. R. Evid. 403 or not relevant under Fed. R. Evid. 402.”) (internal citations omitted).

In *Huddleston v. United States*, 485 U.S. 681 (1988), the Supreme Court outlined the test for admission of other acts evidence under Rule 404(b). First, the evidence must be introduced for a proper purpose, such as proof of knowledge or identity. *Id.* at 691. Second, the offered evidence must be relevant to an issue in the case pursuant to Rule 402. *Id.* Third, the evidence must satisfy the probative-prejudice balancing test of Rule 403. *Id.*

Fourth, if the evidence of other acts is admitted, the district court must, if requested, provide a limiting instruction for the jury. *Id.* at 691-92. This Court has applied this four-prong test. *See United States v. Lombardozi*, 491 F.3d 61, 78 (2d Cir. 2007) (citing *United States v. Garcia*, 291 F.3d 127, 136 (2d Cir. 2002)).

In order to remove an issue of consequence, such as intent, from a case, a defendant must make some statement to the court of sufficient clarity to indicate that the issue will not be disputed. *United States v. Colon*, 880 F.2d 650, 659 (2d Cir. 1989); *see also United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 1992) (same).

While ordinarily a challenge to an evidentiary ruling is reviewed for abuse of discretion, *see United States v. Jones*, 299 F.3d 103, 112 (2d Cir. 2002), where, as here, a party has failed to object at trial, this Court reviews only for plain error, *see United States v. Morris*, 350 F.3d 32, 36 (2d Cir. 2003). Pursuant to Fed. R. Crim. P. 52(b), plain error review permits this Court to grant relief only where (1) there is error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Williams*, 399 F.3d 450, 454 (2d Cir. 2005) (citing *United States v. Cotton*, 535 U.S. 625, 631-32 (2002), and *United States v. Olano*, 507 U.S. 725, 731-32 (1993)).

To “affect substantial rights,” an error must have been prejudicial and affected the outcome of the district court

proceedings. *Olano*, 507 U.S. at 734. This language used in plain error review is the same as that used for harmless error review, with one important distinction: in plain error review, it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. *Id.* “In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial.” *Id.* (citation omitted).

B. Discussion

The defendant concedes in his brief that his trial counsel failed to object to the district court’s admission of the other act evidence and that consequently, the trial judge’s ruling is subject to plain error review. Def. Br. at 22. The defendant has failed to demonstrate any of the four prongs of plain error review.

1. The district court’s admission of the other act evidence was not plainly erroneous

The defendant has failed to demonstrate the first two prongs of plain error review: that the experienced judge, by admitting the other act evidence, committed error that was plain. *See Williams*, 399 F.3d at 454 (citing *Cotton*, 535 U.S. at 631-32, and *Olano*, 507 U.S. at 731-32).

First, the record reflects that the other act evidence was admitted for a proper purpose in this case, namely, to establish that the defendant acted with the requisite knowledge and intent when he distributed narcotics to Joseph Ray on March 29, 2006. The limited purpose

which the 404(b) evidence was to serve was noted both during the government's summation, *see* GA 393, as well as in the court's charge to the jury, *see* GA 485-86. *See United States v. Edwards*, 342 F.3d 168, 176-77 (2d Cir. 2003) ("Knowledge, intent and identity are all expressly listed in Rule 404(b) as permissible purposes for offering other acts into proof.").

Second, the evidence was relevant to the issue of the defendant's knowledge and intent. Strictly speaking, the defendant's plea of not guilty to the charge that he distributed crack cocaine on March 29, 2006, put his state of mind in dispute, as the government bore the burden of proving that the defendant had the requisite knowledge and intent to distribute drugs that day. *See Colon*, 880 F.2d at 656. Moreover, the record is devoid of any statement made by defense counsel to the district court of sufficient clarity to indicate that the issues of knowledge and intent would not be disputed at trial. *See id.* at 659. During a hearing on the issue of the admissibility of other act evidence, the prosecutor stated: "The relevance goes to, is it important to an issue that's in dispute? And the government submits that the answer to that question is yes." GA 316. Had it been the case that the defendant was not disputing the issues of knowledge and intent, he had the opportunity to make that known to the district judge with the clarity that this Court requires. *See Colon*, 880 F.2d at 659. However, the defendant failed to do so. Moreover, when the district judge noted that "I think [the] matter has been put in issue," GA 317, the defendant again failed to make *any* statement – let alone a statement with the requisite degree of clarity – that would indicate that he

would not be disputing the issues of knowledge and intent. In light of the defendant's failure to state that he was not contesting these issues despite having had ample opportunity to do so, it was not plain error for the district court to conclude that the 404(b) evidence was relevant to the disputed issues of knowledge and intent.

Third, the district court did not commit error, plain or otherwise, in concluding that "the requirements of Rule 403 are satisfied, [and] the probative value is not substantially outweighed by the danger of unfair prejudice or any of the other factors mentioned in Rule 403." GA 317. As discussed above, the other act evidence was introduced for a proper purpose under Rule 404(b), and was relevant to establish the disputed issue of knowledge and intent. Moreover, the probative value was not substantially outweighed by the danger of unfair prejudice. In *Old Chief v. United States*, 519 U.S. 172, 180 (1997), the Supreme Court held that "unfair prejudice" means an "undue tendency to suggest a decision on an improper basis." In this case, the experienced district judge's carefully circumscribed limiting instructions and the prosecutor's summation avoided the danger that the jury would consider the evidence for an improper purpose. The district court's determination that the probative value of the 404(b) evidence was not substantially outweighed by the danger of unfair prejudice should be upheld. See *United States v. Quinones*, 511 F.3d 289, 310 (2d Cir. 2007) ("In reviewing Rule 403 challenges, we 'accord great deference' to the district court's assessment of the 'relevancy and unfair prejudice of proffered evidence, mindful that it sees the witnesses, the parties, the jurors,

and the attorneys, and is thus in a superior position to evaluate the likely impact of the evidence.”) (quoting *United States v. Paulino*, 445 F.3d 211, 217 (2d Cir. 2006)).

Fourth, the district judge provided an appropriate limiting instruction during the jury charge. See GA 484-85. The district court’s limiting instruction was drawn almost verbatim from paragraph 5.10 of Sand’s *Modern Federal Jury Instructions*, and is consistent with language approved by this Court in previous cases. See, e.g., *United States v. Brand*, 467 F.3d 179, 206-07 (2d Cir. 2006). The defendant’s assertion that the district court plainly erred by waiting until the final jury charge to provide the limiting instruction with respect to the other act evidence is without merit. Def. Br. at 21-22. Not only did the defendant’s trial counsel fail to make any request for a limiting instruction, let alone a request that the instruction be given at the conclusion of Officer Pillai’s testimony, but more importantly, this Court has held that the decision to provide a contemporaneous limiting instruction or to delay delivering the instruction until the final charge is a decision that is generally within the judge’s discretion. See *United States v. Sliker*, 751 F.2d 477, 487 (2d Cir. 1984) (citing *United States v. Dabish*, 708 F.2d 240, 243 (6th Cir. 1983) (“timeliness of such an instruction is best left to the trial judge’s discretion” so that it was not error to instruct in the general charge to the jury)); see also 1 Weinstein, Weinstein’s Evidence ¶ 105[05], at 105-44 (1986); *United States v. Garcia*, 848 F.2d 1324, 1335 (2d Cir. 1988), *rev’d on other grounds sub nom. Gomez v. United States*, 490 U.S. 858 (1989). That is particularly

true in this case, where there was a delay of just one day from the admission of Officer Pillai's testimony and the district court's limiting instruction delivered during the final jury charge.

2. Even if plainly erroneous, the defendant has failed to meet his burden of showing that the error affected substantial rights

In any event, even if the district court's admission of the other act evidence and the timing of the limiting instruction constituted plain error, which they do not, the defendant has failed to meet his burden of demonstrating that the error was prejudicial and affected the outcome of his trial. *See Olano*, 507 U.S. at 734. The evidence presented at trial demonstrating the defendant's guilt was overwhelming.

First and foremost, the jury heard the testimony of Joseph Ray, who testified that the defendant distributed an ounce of crack cocaine to him on March 29, so that Ray could sell those narcotics to Felix Soto. GA 238. Ray also testified that Soto paid him \$700 for the ounce of crack, and after collecting that money, he gave \$600 or \$650 to the defendant. GA 307.

Second, the observations and testimony of Agent Bornstein corroborated Ray's testimony. Agent Bornstein observed Ray call the defendant, a call that was later confirmed through analysis of subscriber information. GA 64-66. Moreover, Agent Bornstein overheard Ray arranging with a supplier to provide a quantity of crack

cocaine; and subsequently Agent Bornstein confirmed the supplier to be the defendant, when Ray acknowledged to a person nicknamed “Jungle” that he (Ray) was talking on the phone with the defendant. GA 83. Furthermore, Agent Bornstein saw Ray’s supplier driving a blue Buick, which was later confirmed to be a rental car rented out to the defendant and his girlfriend. GA 95-97.

Third, Felix Soto’s testimony corroborated Ray’s testimony that the defendant had distributed an ounce of crack cocaine. Soto confirmed that while Ray was negotiating with his supplier to provide a quantity of crack cocaine, the person nicknamed “Jungle” arrived and Ray confirmed to “Jungle” that he was speaking with the defendant. GA 328. Soto was also able to identify the person driving the blue Buick as the defendant. GA 330. Furthermore, Soto testified that after Ray left with the defendant in the blue Buick, Ray returned with the defendant in that same car, and Ray had in his possession an ounce of crack cocaine. GA 331-32. Soto also confirmed that he gave Ray \$700. GA 334.

For all these reasons, the defendant cannot meet his burden of demonstrating that the alleged erroneous admission of the other act evidence was prejudicial and affected the outcome of his trial.

3. The defendant cannot meet his burden of demonstrating that the alleged error seriously affects the fairness, integrity, or public reputation of judicial proceedings

The defendant cannot demonstrate that the district court's admission of the other act evidence seriously affected the fairness, integrity, or public reputation of his trial. As detailed above, the other act evidence was limited and comprised only 7 pages of the 516-page trial transcript. Moreover, the law enforcement officer who testified to the 404(b) evidence was the government's penultimate witness, and he testified only after the jury was presented with overwhelming evidence of the defendant's guilt in the form of the recorded conversations and the testimony of Agent Bornstein, Joseph Ray, and Felix Soto. The defendant does not challenge the admissibility of any of that evidence on appeal. In sum, the defendant has simply failed to show that the district court's admission of the other act evidence seriously affected the fairness, integrity, or public reputation of his trial.

For all these reasons, the district court did not commit plain error in admitting the other act evidence pursuant to Fed. R. Evid. 404(b).

II. The defendant was not denied his constitutional right to effective assistance of counsel at trial when counsel failed to object to the 404(b) evidence

A. Governing law and standard of review

A defendant seeking to overturn a conviction on the ground of ineffective assistance of counsel bears “a heavy burden.” *United States v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004). He is required to demonstrate both: (1) that counsel’s performance was so unreasonable under prevailing professional norms that “counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,” and (2) that counsel’s ineffectiveness prejudiced the defendant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984)); accord *United States v. Campbell*, 300 F.3d 202, 214 (2d Cir. 2002); *United States v. Trzaska*, 111 F.3d 1019, 1029 (2d Cir. 1997). “Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.” *Strickland*, 466 U.S. at 467. “[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 690. Moreover, the Supreme Court stressed that judicial scrutiny of an attorney’s performance

must be highly deferential and must avoid “the distorting effects of hindsight.” *Id.* at 689.

As to the first prong – whether counsel’s performance was unreasonable – this Court has held that the defendant has the burden of showing that “his trial counsel’s performance ‘fell below an objective standard of reasonableness.’” *Johnson v. United States*, 313 F.3d 815, 817-18 (2d Cir. 2002) (quoting *Strickland*, 466 U.S. at 687-88 (1984)). “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Strickland*, 466 U.S. at 690-91.

As to the second prong, the Supreme Court has held that “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Id.* “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.” *Id.*

“This Court is generally disinclined to resolve ineffective assistance claims on direct review.” *Gaskin*, 364 F.3d at 467 (citation omitted); *see also United States*

v. Khedr, 343 F.3d 96, 99-100 (2d Cir. 2003) (“this Court has expressed a baseline aversion to resolving ineffectiveness claims on direct review”) (citation omitted). “Among the reasons for this preference is that the allegedly ineffective attorney should generally be given the opportunity to explain the conduct at issue.” *Khedr*, 343 F.3d at 100 (citing *Spearman v. Edwards*, 154 F.3d 51, 52 (2d Cir. 1998)).

The Supreme Court has held that “in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance” because the district court is “best suited to developing the facts necessary to determining the adequacy of representation during an entire trial.” *Massaro v. United States*, 538 U.S. 500, 504, 505 (2003). “The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. . . . inquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel’s investigation decisions, just as it may be critical to a proper assessment of counsel’s other litigation decisions.” *Strickland*, 466 U.S. at 691 (citations omitted). Accordingly, the Supreme Court explained that few ineffectiveness claims “will be capable of resolution on direct appeal.” *Massaro*, 538 U.S. at 508.

Nevertheless, direct appellate review is not foreclosed. This Court has held that “[w]hen faced with a claim for ineffective assistance of counsel on direct appeal, we may: (1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent petition for writ of

habeas corpus pursuant to 28 U.S.C. § 2255; (2) remand the claim to the district court for necessary factfinding; or (3) decide the claim on the record before us.” *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003). “The last option is appropriate when the factual record is fully developed and resolution of the Sixth Amendment claim on direct appeal is ‘beyond any doubt’ or ‘in the interest of justice.’” *Gaskin*, 364 F.3d at 468 (quoting *Khedr*, 343 F.3d at 100).

B. Discussion

The defendant’s ineffective assistance of counsel claim is derivative of his plain error argument: that his trial counsel was constitutionally ineffective for his failure to object to the government’s introduction of the other act evidence. This Court should follow its “baseline aversion to resolving ineffectiveness claims on direct review,” *Khedr*, 343 F.3d at 99-100, and decline to entertain the defendant’s ineffective assistance of counsel claim. The defendant’s trial counsel should be afforded the opportunity to explain the conduct at issue and to reveal his conversations with defendant about trial strategy, and the district court should be permitted to develop the facts necessary to determine the adequacy of trial counsel’s representation during the trial. *See Khedr*, 343 F.3d at 100 (citing *Spearman*, 154 F.3d at 52); *Massaro*, 538 U.S. at 505.

In *Gaskin*, this Court held that “[a]s a rule, counsel’s decision to stipulate to certain evidence, *like his decisions to offer or object to evidence*, involves a strategic choice,

which is ‘virtually unchallengeable’ if made after thorough investigation.” 364 F.3d at 467 (emphasis added) (quoting *Strickland*, 466 U.S. at 690-91). Thus, the district court in this case should be allowed to make factual findings on whether trial counsel’s decision not to object to the admission of the other act evidence was made “after thorough investigation.” *Gaskin*, 364 F.3d at 467. Without a more complete record developed on this issue, this Court can only speculate as to whether trial counsel actions were constitutionally ineffective or a well-considered trial strategy that is “virtually unchallengeable” under *Strickland*. 466 U.S. at 690-91

Nevertheless, even if this Court were to consider the merits, the defendant’s claim should still be rejected as he cannot satisfy the “prejudice” prong of *Strickland*. See 466 U.S. at 687, 694. For the reasons discussed at length in the preceding sections, the defendant has failed to show a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 694. In this case, exclusion of the 404(b) evidence of which the defendant now complains would not have altered the jury’s verdict. As detailed in Section I.B.2 of this brief, the record reflects that the jury was presented with overwhelming evidence demonstrating that the defendant distributed 28 grams of crack cocaine to Joseph Ray, and that Ray provided those drugs to Felix Soto on March 29, 2006, in exchange for \$700. This evidence was introduced through the testimony of Joseph Ray, which was corroborated through the admission of conversations recorded on the

day of the transaction, as well as the testimony of Agent Bornstein and Felix Soto.

For all these reasons, the defendant has failed to meet his burden of establishing the prejudice prong of the *Strickland* test, and his claim of ineffective assistance of counsel should be rejected.

III. This Court should vacate the defendant's sentence and remand for resentencing in light of *United States v. Savage*

A. Governing law and standard of review

“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.” *Gall v. United States*, 128 S. Ct. 586, 596 (2007). “In reviewing a sentencing on appeal, [the appellate court] must ‘first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range.’” *United States v. Savage*, 542 F.3d 959, 964 (2d Cir. 2008) (quoting *Gall*, 128 S. Ct. at 597). The district court’s determination of whether a prior offense was a “controlled substance offense,” as defined by U.S.S.G. § 4B1.2 is reviewed *de novo*. *Savage*, 542 F.3d at 964. “The government bears the burden of showing that a prior conviction counts as a predicate offense for the purpose of a sentencing enhancement.” *Id.* (citing *United States v. Green*, 480 F.3d 627, 635 (2d Cir. 2007)).

In determining whether a prior conviction qualifies as a predicate offense under U.S.S.G. § 4B1.2, this Court has held that it takes a “modified categorical approach; that is, we generally look only to the statutory definition of the prior offense of conviction rather than to the underlying facts of the offense.” *Savage*, 542 F.3d at 964 (quoting *United States v. Brown*, 514 F.3d 256, 265 (2d Cir. 2008)). Under the modified categorical approach, the appellate court conducts a two-part inquiry. *Savage*, 542 F.3d at 964. First, in the categorical inquiry, the appellate court asks whether the statute of the prior conviction criminalizes conduct that falls exclusively within the federal definition of a predicate offense. *Id.* If so, “there is no problem, because the conviction necessarily implies that the defendant has been found guilty of” a predicate offense. *Id.* (quoting *Taylor v. United States*, 495 U.S. 575, 599 (1990)). If, however, the statute of the prior conviction criminalizes both predicate and non-predicate conduct, then the second part of the modified categorical inquiry requires that the appellate court ask whether the government has shown that the plea “necessarily” rested on a fact identifying the conviction as a predicate offense. *Savage*, 542 F.3d at 964 (citing *Shepard v. United States*, 544 U.S. 13, 24 (2005)).

This Court held in *Savage* that a prior conviction under Conn. Gen. Stat. § 21a-277(b) cannot categorically qualify as a “controlled substance offense” within the meaning of U.S.S.G. § 4B1.2 because the Connecticut Statute criminalizes certain conduct that falls outside the Guidelines’ definition. 542 F.3d at 964-65. Under Connecticut law, “the statutory definition of ‘sale’ as

applied to illegal drug transactions is much broader than [the] common definition” of a sale as an “exchange of an object for value.” *Id.* at 965 (quoting *State v. Myers*, 101 Conn. App. 167, 921 A.2d 640, 648-49 (2007)). Specifically, Connecticut statute criminalizes “a mere offer to sell a controlled substance.” *Savage*, 542 F.3d at 965.

The *Savage* Court also concluded that a “‘mere offer to sell, absent possession, does not fit within the Guidelines’” definition of a controlled substance offense. *Id.* (quoting *United States v. Price*, 516 F.3d 285, 288-89 (5th Cir. 2008)). Consequently, if a prior conviction under Conn. Gen. Stat. § 21a-277(b) is being relied upon as a predicate “controlled substance offense” under U.S.S.G. § 4B1.2, the government must show that the plea “necessarily” rested on the fact identifying the conviction as a predicate offense. *Savage*, 542 F.3d at 966 (quoting *Shepard*, 544 U.S. at 21). In conducting that modified categorical inquiry, the appellate court is “‘limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between the judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.’” *Savage*, 542 F.3d at 966 (quoting *Shepard*, 544 U.S. at 26). “The determinative issue is whether the judicial record of the state conviction established with ‘certainty’ that the guilty plea ‘necessarily admitted elements of the [predicate] offense.’” *Savage*, 542 F.3d at 966 (quoting *Shepard*, 544 U.S. at 26).

To that end, the *Shepard* Court identified two types of proof that might suffice to establish that a plea “necessarily” rested on the elements of a predicate offense: (i) proof that the defendant admitted to predicate conduct when confirming the factual basis for a valid plea; and (ii) proof that the charge was narrowed to include only predicate conduct. 544 U.S. at 21-22.

However, this Court in *Savage* held that where a defendant enters a plea under the *Alford* doctrine, the defendant does not, by design, confirm the factual basis for his plea. 542 F.3d at 966. Thus, a prior conviction under Conn. Gen. Stat. § 21a-277(b) cannot be relied upon as a predicate “controlled substance offense” under U.S.S.G. § 4B1.2 where that conviction was based on entry of an *Alford* plea, and there is nothing to prove that the charge was narrowed to include only predicate conduct.

B. Discussion

The government does not dispute that the district court concluded that the defendant was a career offender under U.S.S.G. § 4B1.1(b), *see* DA Vol. I at 72, 76, 86-87, and that district court considered that designation in sentencing the defendant to 240 months of imprisonment, *see id.* The two predicate offenses upon which the government relied in establishing the defendant’s career offender designation was: (1) a first degree Robbery conviction and (2) a Sale of Controlled Substance conviction, in violation of Conn. Gen. Stat. § 21a-277(b). Establishing both prior convictions as predicate offenses was necessary to

designate the defendant as a career offender.” See U.S.S.G. § 4B1.1 (the defendant is a career offender if, *inter alia*, he has at least two prior felony convictions for either a crime of violence or a controlled substance offense). However, in light of the decision in *Savage*, it does not appear that the government can satisfy its burden of establishing the defendant’s prior narcotics conviction as a “controlled substance offense” under U.S.S.G. § 4B1.2.

Because the defendant’s prior narcotics conviction was under Conn. Gen. Stat. § 21a-277(b), the *Savage* decision requires use of the modified categorical inquiry. 542 F.3d at 966. However, as the transcript of the plea colloquy of the defendant’s prior narcotics conviction demonstrates, the defendant pleaded guilty under the *Alford* doctrine. Therefore, unless there is proof that the charge was narrowed to include only predicate conduct, the defendant’s prior narcotics conviction cannot be a predicate “controlled substance offense” for purposes of establishing his career offender designation. However, there appears to be nothing in the charging document or other sufficient record that establishes that the charge was narrowed to include only the predicate conduct of a “controlled substance offense” as defined under U.S.S.G. § 4B1.2.

For these reasons, the government agrees that this Court should vacate the defendant’s sentence and remand the case for resentencing consistent with this Court’s holding in *Savage*.

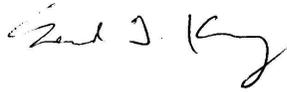
CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed. However, the defendant's sentence should be vacated and the case should be remanded for resentencing for the district court to consider the impact of this Court's decision in *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008).

Dated: July 27, 2009

Respectfully submitted,

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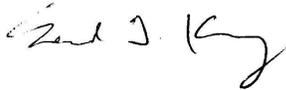


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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(c)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,944 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

A handwritten signature in black ink, appearing to read "Edward T. Kang". The signature is written in a cursive style with a large, stylized "K" at the end.

EDWARD T. KANG
ASSISTANT U.S. ATTORNEY

ADDENDUM

**Rule 404. Character Evidence Not Admissible To Prove
Conduct; Exceptions; Other Crimes**

. . .

(b) Other Crimes, Wrongs, or Acts.--Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.