The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Joseph C. Murphy, Jr.

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Office Phone: (901) 544-4231 Facsimile: (901) 544-4230

INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Criminal Chief, United States Attorney's Office for the Western District of Tennessee

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

October, 1984; B.P.R. No. 011078

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee; B.P.R. No. 011078; October, 1984; Active

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

May, 1989 to Present, Assistant United States Attorney, United States Attorney's Office, Memphis, Tennessee. During my tenure with the United States Attorney's Office, I have had five different primary assignments:

- June, 2011, to present, Chief, Criminal Division. As Criminal Chief, I am currently responsible for supervising approximately twenty-nine Assistant and Special Assistant United States Attorneys as well as ten support staff. These attorneys investigate and prosecute a wide range of matters, including civil rights, environmental, violent crime, public corruption, national security, narcotics, firearms, and wire and mail fraud violations. In addition to my supervisory responsibilities, I serve as the point-of-contact

between local, state, and federal investigative agencies and our office regarding criminal prosecutions.

- July, 2008, to June, 2011, Chief, Narcotics/OCDETF Unit. As chief of the narcotics/OCDETF unit, I supervised four Assistant United States Attorneys and three support staff. The unit concentrated on the investigation and prosecution of drug trafficking organizations operating in multiple jurisdictions. As a first line supervisor, I reviewed and approved pleadings and plea agreements and assisted the attorneys I supervised in developing and implementing legal and investigative strategies. In addition to these duties, I carried an active case load and was responsible for the prosecution of criminal cases in the United States District Court for the Western District of Tennessee and the United States Court of Appeals for the Sixth Circuit.

- November, 1996, to July, 2008, Assistant United States Attorney, Criminal Division. As an attorney assigned to the criminal division, I was charged with developing and leading investigations conducted by local, state, and federal law enforcement agencies. These investigations focused on federal crimes committed by organizations and individuals, including fraud committed by government contractors, environmental crimes committed by businesses, various federal crimes committed by criminal organizations operating within multiple jurisdictions, and corrupt police officers. As the attorney directing these investigations, it was my responsibility to develop investigative strategies, direct the use of resources, arbitrate disputes between the various agencies, and ensure that the investigative strategies were effectively implemented. In addition, I prosecuted criminal cases in the United States District Court for the Western District of Tennessee and the United States Court of Appeals for the Sixth Circuit.

- May, 1991 to November, 1996, Assistant United States Attorney, Organized Crime and Drug Enforcement Task Force. As an attorney assigned to this task force, I was responsible for the investigation and prosecution of criminal organizations involved in drug trafficking and violent criminal activity. These investigations were conducted by agents and officers from local, state, and federal law enforcement agencies, and were significant in terms of number of defendants, scope and duration. My duties in this position included developing investigative strategies, directing the use of resources, and ensuring that the investigative strategies were effectively implemented. I was also responsible for litigating pending matters in the United States District Court for the Western District of Tennessee and the United States Court of Appeals for the Sixth Circuit.

- May, 1989 to May, 1991, Assistant United States Attorney, Financial Litigation Unit. In this position, I was responsible for instituting and handling civil forfeiture prosecutions. During this assignment, I handled forfeiture proceedings in both the trial and appellate courts.

- August, 1984 to May, 1989, Staff Attorney, National Cotton Council of America, Memphis, Tennessee. As a staff attorney at the National Cotton Council, a trade association that represents the raw cotton industry, I was responsible for handling a wide

variety of legal matters, including employment, contract, tax, and corporate law issues, as well as some limited litigation and policy formulation work relating to farm and agricultural policy.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

My current law practice consists entirely of criminal law matters pending in the United States District Court for the Western District of Tennessee and the United States Court of Appeals for the Sixth Circuit.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

The primary focus of my legal career has been the litigation of criminal cases in the United States District Court for the Western District of Tennessee and the United States Court of Appeals for the Sixth Circuit. I have tried approximately 125 felony jury cases to verdict in the district court. In the Sixth Circuit, I have handled approximately 140 cases pending before the court and have participated in approximately 48 oral arguments.

I began my legal career as a staff attorney at the National Cotton Council of America (Cotton Council), and was employed there from August of 1984 until May of 1989. At the Cotton Council I engaged in a wide-ranging legal practice that included reviews of legal documents such

as contracts and leases, and advising the Cotton Council's executives on legal matters, including employment, regulatory, and tax law. I also had the opportunity to participate in the litigation of some civil matters.

In May of 1989, I began working as an Assistant United States Attorney at the Memphis United States Attorney's Office. My initial assignment was representing the government in asset forfeiture cases. This work involved drafting and filing civil forfeiture complaints; litigating pretrial motions and discovery disputes; conducting discovery, including depositions; and handling the trial work in the district court. When there was an appeal in an asset forfeiture case, I was responsible for drafting the brief and arguing the case at the Sixth Circuit. Over the course of my career with the United States Attorney's Office, I have tried three asset forfeiture cases to verdict.

In May of 1991, I was assigned to the office's Organized Crime and Drug Enforcement Task Force (task force). The task force focused on dismantling drug trafficking groups, and the case load consisted primarily of drug and firearms cases. A typical case in the task force would include conspiracy, substantive drug, and firearms charges. Several of these cases were complex matters with multiple defendants -- in some cases the total number of defendants charged in a single indictment exceeded ten -- and the charged conduct took place over a period of several years. The litigation load in the unit was extremely heavy. I handled a large number of detention and suppression hearings, as well as trials, during this period. In addition, there was a great deal of writing, specifically drafting indictments, responses to suppression motions, and objections to Reports and Recommendations issued by United States Magistrate Judges who conducted the suppression hearings. The issues I handled in the trial and magistrate courts during this period included Fourth Amendment search and seizure issues relating to traffic stops, *Terry*-stop detentions of individuals, and search warrants; issues relating to the Constitutional and statutory validity of Title III court ordered wiretaps; evidentiary issues pertaining to the admissibility of evidence in jury trials; detention and sentencing issues; and, in the context of federal habeas proceedings, Sixth Amendment ineffective assistance of counsel claims. I was responsible for trying the cases assigned to me, handling any appeals stemming from those cases, including drafting the briefs and arguing the cases before the United States Court of Appeals for the Sixth Circuit, and handling any subsequent habeas petitions. During this assignment, there were two cases noteworthy because of their complexity: *United States v. Troy Richard Anderson, et al.*, a drug case in which 14 defendants were charged with conspiracy, substantive drug crimes, and firearms violations; and *United States v. Arcellous Johnson, et al.*, a drug case in which 16 defendants were charged with conspiracy and substantive drug crimes. In *Johnson*, the validity of a Title III court ordered wiretap was attacked by several defendants in a motion to suppress; the wiretap was later determined by the court to be valid and the motion to suppress was denied.

In November of 1996, I was assigned to the office's Criminal Division where I worked on a wide range of criminal matters. These matters included cases involving mail and wire fraud, criminal environmental, police corruption, theft of interstate shipments and interstate transportation of stolen property, income tax, and firearms violations. They tended to be complex cases, either

because of the scope of the criminal conduct involved in the case or the technical nature of the particular statutes the defendants were charged with violating. During this period, I litigated federal habeas claims that either came from my prior case assignments or which were assigned to me. As in my previous assignment, I was responsible for all aspects of the litigation in these matters: conducting the grand jury proceedings, drafting indictments and responses to pretrial motions, handling any hearings or trials, and briefing and arguing any cases that were appealed to the Sixth Circuit. Of note during this period was the case of *United States v. Freddie Ford and David Hernandez*. The defendants in this case were charged with mail and wire fraud, and were convicted on all counts following a 10-day jury trial.

In July of 2008, I was assigned to the office's Organized Crime Drug Enforcement Task Force as the lead attorney in the unit. In this role, I was responsible for reviewing indictments, plea agreements, and briefs prepared by the other task force attorneys, and conferring with them about the cases they were assigned. As noted above, the task force focused on dismantling drug trafficking organizations, and the cases prosecuted by this group tended to be complex. In addition to my supervisory duties, I also carried a full case load. During this period, my case load consisted of matters involving conspiracy, substantive drug, and firearms violations. In each case I was responsible for drafting the indictment and other legal documents necessary to initiate prosecution, responding to and litigating all pretrial motions, handling all the litigation connected to the case in the magistrate and district court, including detention matters, motions to suppress, and sentencing hearings. If a case was appealed, I was responsible for writing the brief and conducting the oral argument before the Sixth Circuit. I also handled any habeas actions filed by defendants I had convicted or which were assigned to me. The issues that arose in the cases I prosecuted while in the task force included the Constitutional validity of search warrants and traffic stops, the admissibility of evidence at trial, and sentencing matters. Notable cases I litigated during this period included the conviction of a medical professional for illegally distributing pain killers following a trial that lasted two weeks, and the successful prosecution of *United States v. Tommie Stepp*. In *Stepp* the defendant filed a suppression motion claiming that the stop of the car he was riding in violated the Fourth Amendment. The district court denied the motion to suppress and the Sixth Circuit upheld the district court's decision in a published decision, *see United States v. Stepp*, 680 F.3d 651 (6th Cir. 2012).

In June of 2011, I was appointed Criminal Chief, and I have continued in this position since my appointment. In this position, I am responsible for supervising the activities of approximately 29 Assistant and Special Assistant United States Attorneys and 10 support staff. I review the indictments and plea agreements drafted by the attorneys assigned to the Criminal Division, and I confer with them on an as needed basis regarding litigation strategies in criminal cases and habeas matters. Along with our office's Criminal Appellate Chief, I confer with the attorneys in the Criminal Division on issues arising when a case is appealed. I continue to maintain a case load, albeit at a reduced level because of my supervisory responsibilities. Since becoming Criminal Chief, I have handled two cases involving medical professionals charged with violations of the federal Controlled Substances Act: *United States v. Larry Egan Boatwright*, a case in which a pharmacist was charged with illegally distributing pain killers and convicted following a jury trial, and *United States v. Michael A. Patterson*, a case in which a medical

doctor was convicted of illegally distributing pain killers.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Over the course of my career I have litigated a large number of appeals in the Sixth Circuit. In each instance, I did the necessary legal research, drafted the brief, and conducted oral argument. Several of these matters resulted in published opinions: *United States v. Stepp*, 680 F.3d 651 (6th Cir. 2012); *United States v. Godman*, 223 F.3d 320 (6th Cir. 2000); *United States v. McFerron*, 163 F.3d 952 (6th Cir. 1998); *Hilliard v. United States*, 157 F.3d 444 (6th Cir. 1993), *cert. denied*, 510 U.S. 1130 (1994); *United States v. Price*, 134 F.3d 340 (6th Cir. 1998), *cert. denied*, 525 U.S. 845 (1998); *United States v. Mitchell*, 67 F.3d 1248 (6th Cir. 1995), *cert. denied*, 516 U.S. 1139 (1996); *United States v. Williams*, 53 F.3d 769 (6th Cir. 1995), *cert. denied*, 516 U.S. 1120 (1996); *United States v. Winston*, 37 F.3d 235 (6th Cir. 1994); *United States v. Johnson*, 27 F.3d 1186 (6th Cir. 1994), cert. denied, 513 U.S. 1115 (1995); *United States v. Glover*, 21 F.3d 133 (6th Cir. 1994), *cert. denied*, 513 U.S. 948 (1994); *United States v. Carter*, 14 F.3d 1150 (6th Cir. 1994), *cert. denied*, 513 U.S. 853 (1994); *United States v. Taylor*, 13 F.3d 986 (6th Cir. 1994); and *United States v. Hilliard*, 11 F.3d 618 (6th Cir. 1993), *cert. denied.* 510 U.S. 1130 (1994). I have also handled cases in the district court in which the court's decision was published: *United States v. McFerren*, 907 F.Supp. 266 (W.D. Tenn. W.D. 1995); *United States v. Hill*, 827 F.Supp. 1354 (W.D. Tenn. W.D. 1993); *United States v. Grant*, 822 F.Supp. 1270 (W.D. Tenn. W.D. 1993); *United States v. Milliken*, 769 F.Supp. 1023 (W.D. Tenn. W.D. 1991) .

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Not applicable

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not applicable

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

Not applicable

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

Not applicable

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Cecil C. Humphreys School of Law, August 1981 to May 1984, JD

PERSONAL INFORMATION

15. State your age and date of birth.

57 years old; D.O,B. August 3, 1958

16. How long have you lived continuously in the State of Tennessee?

Approximately 32 years

17. How long have you lived continuously in the county where you are now living?

Approximately 32 years

18. State the county in which you are registered to vote.

Shelby County

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable

20. Have you ever pled guilty or been convicted or are now on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

No such complaints have been filed against me.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Chickasaw Council, Boy Scouts of America

- District Commissioner, 2011 to 2013 (approximate)
- Scout Master, 2008 to 2011 (approximate)
- Enrichment Committee Chair for ScoutBase 2012 and 2014

National Rifle Association

Memphis Sports Shooting Association

Appalachian Trail Conservancy

University of Memphis Alumni Association

St. Peter Catholic Church

The Federalist Society

Delta Waterfowl Foundation

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

- Tennessee Bar Association, 2004 to present (approximate)
  - Executive Committee, Environmental Law Section
  - Executive Committee, Criminal Justice Section
- American Inns of Court, Leo Bearman, Jr., Inn, 2014 to present

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

- Special Achievement Award, United States Department of Justice, 1993
- Certificate of Appreciation, United States Postal Inspection Service, 1994
- Outstanding Performance Certificate, United States Department of Justice, 1995
- Continuing Achievement Award, United States Attorney's Office, Western District of Tennessee, 1995
- Time-Off Award for Sustained High-Level Performance, United States Attorney's Office, Western District of Tennessee, 1996
- Extra Mile Achievement Award, United States Attorney's Office, Western District of Tennessee, 1997
- Sustained High Level Performance Award, United States Attorney's Office, Western District of Tennessee, 1997
- Exceptional Service Award, Federal Bureau of Investigation, 1998
- Service Award, Dyersburg Police Department, 1999
- Special Achievement Award, United States Attorney's Office, Western District of Tennessee, 2001
- Sustained Superior Performance Award, United States Attorney's Office, Western District of Tennessee, 2003
- Certificate of Appreciation, Federal Bureau of Investigation, Memphis Division, 2005
- Distinguished Service Award, United States Attorney's Office, Western District of Tennessee, 2005
- Sustained Superior Performance Award, United States Attorney's Office, Western District of Tennessee, 2005
- United States Attorney's Award for Outstanding Performance, United States Attorney's Office, Western District of Tennessee, 2006

- Distinguished Service Award, United States Attorney's Office, Western District of Tennessee, 2007
- Commendation from the Federal Bureau of Investigation recognizing Operation Snow Roots, September, 2012

30. List the citations of any legal articles or books you have published.

Not applicable

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Not applicable

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Not applicable

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Attached are the appellate briefs I drafted and filed in *United States v. David Hernandez,* Appeal No. 09-5262 (6th Cir.), and *United States v. Tommie Stepp*, Appeal No. 11-5004 (6th Cir.). Except for minor edits by our office's Criminal Appellate Chief, these briefs are entirely my work.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

There are several reasons I am seeking this position. To begin with, I have dedicated myself to

public service, and being appointed to the court would be an opportunity for me to continue serving the public. The position offers a unique opportunity to impact the lives of Tennesseans. Because the court hears and decides the appeals in all criminal cases and habeas motions decided in the State's trial courts, its members have the opportunity to improve the criminal justice system on a daily basis, positively affecting the lives of Tennesseans. Finally, a position on the court would offer an unparalleled professional challenge. Studying and interpreting the law in a written opinion requires intellectual rigor and focus. I believe I would find this both challenging and rewarding.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

For more than 25 years, I have prosecuted federal crimes committed in Western Tennessee. My current position has offered me multiple opportunities to see that crime victims, communities where crimes occur, and offenders receive equal justice under the law. As a prosecutor, I have the responsibility to ensure that only appropriate cases -- those where the crime can be proven beyond a reasonable doubt -- are indicted. Once a case is indicted, my focus shifts to the victim and the community where the crime occurred. My current position has allowed me to focus on making victims and communities whole again after being affected by crime. Lastly, by working to secure an appropriate sentence that allows for both fair punishment and the opportunity for rehabilitation, the interests of the offender and society as a whole are served.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I am seeking a position on the Court of Criminal Appeals. For several reasons, I believe that my selection would impact the court in a positive way. I have extensive experience handling criminal cases, from simple drug cases to complex fraud cases. As a result, I have had the opportunity to litigate a large number of matters in federal district court, including jury trials. Because of this experience, I am familiar with many of the issues that come before the Court of Criminal Appeals. Also, I have extensive experience handling habeas petitions in federal court. I have litigated a large number of appeals in the Sixth Circuit and have extensive experience conducting legal research, writing briefs, and arguing matters before an appellate court. In sum, I believe my work experience, which has involved litigating criminal cases from beginning to end, would impact the court in a positive way.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I have been involved in several community service organizations over the years. A member of St. Peter Church in Memphis, I have served on the Parish Council, taught Sunday School, and

been involved in the parish's stewardship campaigns. For the past three years, I have been involved in the University of Memphis' new student orientation program, serving on several parent panels addressing the parents of incoming freshman about the college experience and answering any questions they might have. I have also served as a volunteer for the Chickasaw Council of the Boy Scouts of America for several years now, serving as an adult leader in Pack 75 and Troop 75, the Enrichment Committee Chairman for ScoutBase 2012 and 2014, and as a district commissioner. If appointed to the court, I would continue with my involvement in my church and the Chickasaw Council.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I am the oldest of a family of eight children. This has impacted me in several positive respects. Due to the size of my family, I was expected to put myself through school. In order to pay my school expenses, I had to develop a strong work ethic at a young age. That work ethic has stayed with me over the years and continues to serve me well. If appointed to the court, I believe that my work ethic would enhance my ability to contribute to its success. I was able to pay for my education by working a number of different jobs, and in doing so I was exposed to many different types of people. This experience has helped me relate to the people I interact with. I believe that it would serve me well if I were appointed to the court. Coming from a big family, I learned that it was important to foster cooperation when undertaking a group project. Since the court's decisions are made by panels of judges rather than a single judge, cooperation and collegiality on the court are essential. If appointed, I believe that my life experiences would allow me to work well with the other judges on any panel on which I served.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

I definitely will uphold the law even if I disagree with the substance of the law. It is a judge's obligation to uphold the law no matter what his personal opinion of the law is. In one case I handled several years ago, the defendant entered into an agreement under which he provided information to the government in return for a possible sentence departure under the sentencing guidelines. The defendant provided the investigators the information about his past criminal conduct but failed to inform them that he was currently engaged in ongoing criminal activity. The applicable law holds that cooperation agreements are construed as contracts. No part of the cooperation agreement voided the agreement if the defendant engaged in new criminal conduct. I was therefore required by the case law to make a departure motion and did so at sentencing.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Mr. Reggie Smith, President, Town & Country Realtors,
B. The Honorable Jon Phipps McCalla, United States District Judge,
C. Mr. Leslie I. Ballin, Esq., Ballin, Ballin & Fishman,
D. Mr. Mitch Graves, Chief Executive Officer, Health Choice, LLC,
E. Mr. Edward L. Stanton III, United States Attorney, Western District of Tennessee,

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Criminal Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: February 24, 2016.

Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Joseph C. Murphy, Jr.
Print Name

Joseph C. Murphy, Jr.
Signature

February 24, 2016
Date

TN 011078
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

No. 09-5262

United States Court of Appeals
for the Sixth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID HERNANDEZ,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Tennessee
No. 2:04-cr-20397 (Mays, J.)

BRIEF FOR PLAINTIFF-APPELLEE UNITED STATES

For the Appellee:

EDWARD L. STANTON, III
United States Attorney

JOSEPH C. MURPHY, JR.
Assistant United States Attorney
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Memphis, Tennessee 38103
(901) 544-4231
joe.murphy@usdoj.gov

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TABLE OF AUTHORITIES

Statutes:

Other authority:

STATEMENT REGARDING ORAL ARGUMENT

The United States submits that the decisional process in this case would not be aided by oral argument.

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291 because it involves a final judgment of the district court. The district court had jurisdiction pursuant to 18 U.S.C. § 3231, because the defendant was indicted by a grand jury for federal offenses.

ISSUES PRESENTED

I. Did the district court err in denying Hernandez's motion for judgment of acquittal?

II. In polling the jury, did the district court commit plain error when it questioned a juror regarding her verdict after she gave contradictory answers to the district court's questions regarding whether or not the jury's verdict was her verdict?

STATEMENT OF THE CASE

In September of 2004, a federal grand jury sitting in the Western District of Tennessee returned an indictment charging Defendant-Appellant David Hernandez ("Hernandez") with twenty-two violations of federal criminal law. (RE-1, Indictment.) Hernandez was charged in Count 1 of the indictment with conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 371. (Id.) In Counts 2 through 19 of the indictment, Hernandez was charged with aiding and abetting wire fraud in violation of 18 U.S.C. §§ 1343 and 2. (Id.) Counts 20 through 22 of the indictment charged him with aiding and abetting mail fraud in violation of 18 U.S.C. §§ 1341 and 2. (Id.) Hernandez entered a plea of not guilty at his arraignment. (RE-20, Order on Arraignment.) The case proceeded to trial and the jury ultimately returned a verdict convicting Hernandez of all twenty-two counts in the indictment. (RE-195, Order on Jury Verdict.) The district court subsequently sentenced him to a term of twenty months imprisonment and three years of supervised release. (RE-243, Redacted Judgment.) A timely notice of appeal was filed. (RE-240, Notice of Appeal).

STATEMENT OF THE FACTS

A. Airtrans, Inc.

Airtrans, Inc. (Airtrans) was a trucking company based in Dyersburg, Tennessee. (RE-259, Trial Transcript (TR), Testimony of Misty Reed (Reed), March 20, 2008, pp. 508-09; RE-259, Trial Transcript (TR), Testimony of Candy Albea (Albea), March 20, 2008, p. 613; RE-259, Trial Transcript (TR), Testimony of Gary Newlun (Newlun), March 20, 2008, p. 668.) Freddie Ford (Ford) was the owner and president of Airtrans, and David Hernandez (Hernandez) was the company's general manager. (RE-259, TR, Albea, p. 618; RE-259, TR, Newlun, pp. 668.) Included within Hernandez's responsibilities as general manager of the company was supervision of the company's billing department and the department supervisor, Wanda White. (RE-259, Trial Transcript (TR), Testimony of Laura Jourden, March 20, 2008, pp. 535-36; RE-259, Newlun, pp. 684-85.) The proof at trial established that in 1987, Gary Newlun (Newlun) began working at Airtrans. (RE-259, TR, Newlun, p. 668.) He started in operations, securing loads for the company to haul and dispatching drivers, and moved into the accounting side of the operation in 1997, eventually becoming the company's controller. (RE-259, TR, Newlun, pp. 668-69, 704.)

B. Allied Carriers Exchange

Allied Carriers Exchange (Allied) was a not-for-profit financial institution

that serviced the trucking industry. (RE-282, Trial Transcript (TR), Testimony of Gary Rynearson (Rynearson), March 18, 2008, pp. 42-43.) Located in Denver, Colorado, Allied was owned by its member carriers and operated as a co-op. (RE-282, TR, Rynearson, pp. 43-44.) Allied factored its members' receivables, which meant that the member carriers assigned Allied their freight bills. (Id.) At trial Gary Rynearson (Rynearson), the former president and general manager of Allied, testified that Allied "bought the freight bills, we didn't loan against them." (Id.) Member carriers were charged one and three-quarters to three percent for this service. (Id.) Airtrans was a member of the co-op, and Rynearson had dealings with both Ford and Hernandez as a result of this business relationship. (RE-282, TR, Rynearson, pp. 44-46.)

At trial, Rynearson testified that an "accounts receivable" is a debt owed by a debtor, and that in the trucking industry such a debt is evidenced by a freight bill or other shipping documents such as a bill of lading. (RE-282, TR, Rynearson, pp. 46-48.) Allied's out-of-state member carriers would send the shipping documents evidencing their accounts receivables to Allied via FedEx, UPS or U.S. Mail. (RE-282, TR, Rynearson, p. 47.) After the shipping documents were processed by Allied, they were attached to a statement indicating the amount payable to Allied and sent to the debtor. (RE-282, TR, Rynearson, pp. 47-49.) Regarding the paperwork required by Allied in order to purchase a member carrier's accounts

receivable, Rynearson testified that ""[T]he sooner they got it to us, the faster they would get the money." (RE-282, TR, Rynearson, p. 47.) As far as timing of the payment to the carriers was concerned, if Allied received the paperwork from the carrier by 10:00 a.m. Mountain Time it would pay the carrier by 2:00 p.m. that same day, usually via wire transfer. (RE-282, TR, Rynearson, pp. 58-60.) Wells Fargo was one of the banks used by Allied to make the wire transfers to the member carriers in 2000 and 2001. (RE-282, TR, Rynearson, pp. 59-60.) If Allied was unable to collect the debt within ninety days, the debt was "charged back" to the member carrier, i.e., deducted from amounts owed to the member carrier as a result of accounts receivables sold to Allied the day the charge-back was made. (RE-282, TR, Rynearson, pp. 49-50.)

The bills the member carriers sold to Allied were required to be genuine. At trial, Rynearson testified that under Allied's Rules and Regulations the carrier delivering the shipping documents to Allied warranted that "the bill [was] genuine and in all respects what it purports to be;" that there were "no facts which would impair the validity of the bill to make it uncollectible according [to] the terms and face amount;" and "the bill [was] supported by [a] lawful[,] effective and complete bill of lading or other contract of carriage, together with a benefit genuine and valid signed delivery receipt." (RE-282, TR, Rynearson, pp. 60-61, 64-66.) Moreover, Allied's Rules and Regulations provided that certain bills were not

acceptable: "bills due from individuals not operating a bonafide business regularly at a [permanent] address, including individuals operating a business from a private residence," and "bills submitted which do not conform to the warrant provisions" of Allied's Rules and Regulations. (RE-282, TR, Rynearson, p. 67.)

Originally, Allied purchased receivables only after the freight had been delivered; this type of purchase of accounts receivable was referred to as a "commercial bill" by Allied. (RE-282, TR, Rynearson, pp. 50-51, 53.) Later, because of significant changes in the trucking industry, Allied began purchasing receivables while the loads were in transit, i.e., after the loads were picked up but before they were delivered. (RE-282, TR, Rynearson, pp. 51-57.) Allied referred to this program as the "conditional purchase" or "CP" program, and it was intended to provide a trucking company with interim funding. (Id.) Under the terms of the CP program, the critical funding document was a bill of lading, a shipping document issued by the shipper of the goods to the carrier. (RE-282, TR, Rynearson, pp. 54-57.)

At trial, Rynearson testified that under the CP program, the carrier would submit a list of bills of lading being sold to Allied provided the carrier would guarantee to Allied that there was a bill of lading. (RE-282, TR, Rynearson, p. 57.) Allied, in turn, would advance to the carrier the face amount of the bill of lading, less any fees it was due. (Id.) Rynearson also testified that Allied did not bill the

customer at that point because the freight "hadn't been delivered and [Allied] didn't have the freight bill." (Id.) Once the freight had been delivered and the carrier created a freight bill, the freight bill, along with the bill of lading, would be provided by the carrier to Allied, who would then bill the customer. (RE-282, TR, Rynearson, pp. 57-58.) If the customer didn't pay within the ninety days, the bill would be charged back to the member carrier. (Id.)

C. The Fraud Scheme

By the late 1990's, Airtrans began having serious financial problems. According to Newlun's testimony at trial, the company's financial problems manifested themselves in several ways: income tax withholding payments were not always made on time, the company's bank account would be overdrawn, and in 2000 the Internal Revenue Service filed a tax lien against the company. (RE-259, TR, Newlun, pp. 669-70.) The tax lien was for $592,634.27 and was the result of income tax withholding payments not being made and FICA and Medicare taxes not being paid by Airtrans. (RE-259, TR, Newlun, pp. 672-73; RE-261, Trial Transcript, Testimony of Kimberly Tate, March 24, 2008, pp. 962-67.) Newlun would meet periodically with Ford and Hernandez to discuss the company's financial situation. (RE-259, TR, Newlun, pp. 675-76.)

Airtrans employees eventually began creating bogus documents and submitting them to Allied for payment. (RE-259, TR, Newlun, pp. 671.) Newlun

testified at trial that Ford knew about the bogus bills being submitted to Allied, that the fraud was "[B]asically a short term loan kind of an arrangement" and that Allied was not told about this. (RE-259, TR, Newlun, p. 673.) During his testimony at trial, Newlun identified three entities used to facilitate the fraud: a company named Larsen, (RE-259, TR, Newlun, pp. 673-75); Jeannes Transportation, which was operated by Patrick Jeannes, (RE-259, TR, Newlun, pp. 676-78); and Ram Logistics, which was operated by Joyce Force (RE-259, TR, Newlun, pp. 678-79.) The people at Airtrans were aware on a daily basis of the amount of money they needed to generate, and the Larsen, Jeannes and Ram submissions to Allied were used to cover cash short-falls. (RE-259, TR, Newlun, pp. 679-80.) The amount of the false billing submitted to Allied depended upon the amount of any daily short-fall in revenues at Airtrans. (RE-259, TR, Newlun, pp. 679-80.)

In order to effectuate the fraud scheme, false documents showing Larsen, Ram or Jeannes as liable for the freight charges would be generated in Airtrans' office in Dyersburg, Tennessee. (RE-259, TR, Newlun, pp. 676-79.) After the documents had been submitted to Allied, Newlun would send Jeannes and Force money via overnight express or wire transfer to pay Allied within the ninety day charge-back window. (RE-259, TR, Newlun, pp. 676-680, 686-88.) Newlun testified at trial that his role in the fraud scheme was to "insure that the bills were

paid prior to them being charged back by Allied" because if he failed to do so "that would create . . . an aura of suspicion if they started charging back and there was too much of it, [Allied] would stop factoring those invoices." (RE-259, TR, Newlun, p. 686.)

At trial, Gary Rynearson, the former president and general manager of Allied, referencing a submission of bills from Airtrans, testified that if Allied had known the bills were bogus Allied would not have bought them. (RE-282, TR, Rynearson, p. 226). He also testified that the total loss from the Airtrans fraud was in excess of ten million dollars. (RE-282, TR, Rynearson, pp. 243-44.) D. Ram and Jeannes

1. Ram

Joyce Force (Force) was the wife of a truck driver who worked for Ford. (RE-285, Trial Transcript (TR), Testimony of Joyce Force (Force), March 19, 2008, p. 445.) She was contacted by Ford, who asked her if she "would like to have a job, all I needed to do was to have a phone in my house, he was going to set up a credit rating for a company that needed credit established in Illinois. I would have the phone, but it wouldn't ring." (RE-285, TR, Force, pp. 445-46.) At the time, Force and her husband were having financial problems because Force's husband wasn't being paid. (RE-285, TR, Force, pp. 445-47.) Ford told her that he was going to pay her $150.00 a week for doing this, and that he should talk to

Newlun regarding the details. (RE-285, TR, Force, pp. 446-47.) Newlun called her and told her that he and Ford were going to select the name the phone was to be listed in because "[t]hey didn't want anything that would have like my last name associated with it because my husband worked for his company and, he wanted no connection between the two for this credit rating." (RE-285, TR, Force, pp. 447-48.) Following a conversation with Newlun, Force opened a checking account at a bank in the town where she lived; the account was in the name of Ram Logistics. (RE-285, TR, Force, pp. 448-50.) The proof at trial established that the bank account was opened at People's State Bank in the name of Ram Logistics, with Joyce A. Force shown as the person opening the account, on April 10, 2001. (RE-259, Trial Transcript (TR), Testimony of Eldon Leinberger (Leinberger), March 20, 2008, pp. 641-45; Collective Exhibit 46; RE-285, TR, Force, pp. 448-50.) Regarding the legitimacy of the Airtrans/Allied/Ram transactions, Force testified at trial that Ram was not a real business and that she never arranged for Airtrans to haul any loads of goods for which she was responsible. (RE-285, TR, Force, pp. 472-73, 480-81.)

At trial, Force testified that she would receive envelopes from Allied Carriers Exchange, and that she would send them, unopened, to Airtrans. (RE-285,TR, Force, p. 449.) Force also testified that she received checks from Airtrans for funds to cover amounts owed to Allied, that the Airtrans checks were signed by

Freddie Ford, and that the checks were sent to her via United Parcel Service. (RE-285, TR, Force, pp. 454-471.) The checks received from Ford were deposited in the bank and used to pay amounts owed to Allied. (Id.) There were checks that bounced and, when this happened, money would be wire transferred from Airtrans into the Ram bank account. (RE-285, TR, Force, pp. 463-65.)

2. Jeannes

During 2000 and 2001, Patrick Jeannes (Jeannes) operated a load finding business in which he would find loads for trucking companies in return for a fee. (RE-261, TR, Jeannes, pp. 989-90.) Jeannes conducted this business from his residence, did business under the name "Jeannes Transportation," and maintained his business account at First Tennessee Bank. (Id.) At trial, Jeannes testified regarding a cryptic conversation he had with Freddie Ford in which Freddie Ford told him that he would be receiving a bill in the mail and to let him "know when he got it." (RE-261, TR, Jeannes, pp. 990-91.) Several weeks after this conversation with Freddie Ford, Jeannes received a bill from Allied Carriers showing that he owed them money. (RE-261, TR, Jeannes, p. 991.) According to Jeannes' testimony at trial, the bills continued coming and showed that Jeannes owed Allied money for loads hauled by Airtrans. (RE-261, TR, Jeannes, pp. 991-92.) Jeannes testified at trial that the bills were bogus and that they were not for loads he had arranged. (Id.) He further testified that the money to pay the Allied bills would be

sent by Airtrans via wire transfer or check, that there were times that the checks from Airtrans bounced, and that these funds were used to pay the Allied bills. (RE-261, TR, Jeannes, pp. 992-99.) Jeannes talked to many people at Airtrans about getting the money to pay the Allied bills, including Hernandez. (Id.) At trial, Jeannes testified that the Airtrans checks he received were signed by Freddie Ford. (Id.)

E. Hernandez's Role in the Fraud Scheme

Hernandez's role in the scheme was to manage and direct the production of the false documents that were submitted to Allied in order to factor non-existent loads of freight. The false bills of lading submitted to Allied were manufactured en masse in the billing department at Airtrans: Wanda White, the billing department supervisor, would bring blank bills of lading to the billing department and instruct Laura Jourden, one of the billing clerks, and her coworker to fill out the shipper and receiver portions of the bills using the Airtrans' database, and to show Ram Logistics as liable for the shipping charges. (RE-259, TR, Jourden, pp. 537-39, 542, 553-55.) At trial, Jourden testified that Hernandez was present while the bogus documents were being created, and that on one occasion she overheard Hernandez, referencing the documents, telling Wanda White that "They have to do this[.] This has to be done[.]" and "These have to be filled out[.]" (RE-259, TR, Jourden, pp. 540-41, 545-46.) After Hernandez made these statements, Jourden

and some of the other people in the office sat down and filled the documents out. (RE-259, TR, Jourden, pp. 540-41.) Jourden also testified that after she and her co-worker filled out the bill, they turned them over to Wanda White. (RE-259, TR, Jourden, pp. 542, 546.) One witness testified at trial that the bills "... weren't for legitimate loads" and that there "had to be somebody sitting there like an assembly line and mass producing these [bills of lading]." (RE-261, TR, Jeannes, p. 1005.)

At trial Jourden admitted to filling out several of the bills of lading contained in Collective Exhibit 8. (RE-259, TR, Jourden, pp. 541-44.) The proof at trial established that these bills of lading were among those purchased by Allied on March 15, 2001. (Collective Exhibit 8; RE-282, TR, Ryneaerson, pp. 118-19, 121-22.) Jourden testified that her handwriting appeared on the bills of lading Bates stamped 06249, 06252 and 06255. (RE-259, TR, Jourden, pp. 541-44.) She further testified that she wrote the information for Ram on the bills of lading. (Id.) Rynearson testified at trial that Collective Exhibit 8 included bills of lading purchased by Allied on March 15, 2001, and that Allied wire transferred thirty-seven thousand seven hundred seventy-one dollars and five cents to Airtrans as a result of the purchase. (RE-282, TR, Rynearson, pp. 117-23; Collective Exhibit 8.) According to the testimony at trial, all the bills of lading included in Airtrans' March 15, 2001 submission to Allied were handwritten and showed Ram "as the buyer." (RE-282, TR, Rynearson, pp. 123-24.)

Hernandez would also instruct Jourden what loads to put on the conditional purchase list. (RE-259, TR, Jourden, p. 544.) He would bring her a list and tell her that "we have to have this many orders," and then he would "tell Wanda White that we had to have this much money." (Id.) Jourden would input the list that Hernandez gave her, print it out and fax it to Allied. (Id.) At trial, Jourden testified that on one occasion when she was preparing the conditional purchase list, Hernandez had a conversation with Ford's daughter in which he said "We've got to make this amount of money." (RE-259, TR, Jourden, pp. 544-45.)

The testimony at trial also established that on more than one occasion, Hernandez asked Misty Reed (Reed), a dispatcher at Airtrans, to sign a bill of lading. (RE-259, TR, Reed, pp. 508-09, 511-12, 532-33.) Reed testified that the party receiving the freight signs the bill of lading in order to show that the merchandise was received. (RE-259, TR, Reed, p. 510.) According to Reed, Hernandez would give her a name to sign or she would make a name up. (RE-259, TR, Reed, p. 511.) Regarding her signature on the bill of lading, Hernandez instructed Reed to "make it look like a gentleman's handwriting instead of a lady, or a man's name or a lady's handwriting if it was a lady, just like it wasn't my handwriting, basically." (RE-259, TR, Reed, pp. 511-12.)

Candy Albea (Albea), a former Airtrans employee who began working for the company in late-1999 or early-2000, testified at trial that there were daily

meetings at the company, which Hernandez participated in, during which they discussed how much revenue had to be generated that day by Airtrans. (RE-259, TR, Albea, pp. 613-14.) She also testified that Hernandez brought her a bill of lading to sign on one or two occasions because the person on the dock had not signed the bill. (RE-259, TR, Albea, p. 615.) At trial, she testified she remembered other people signing bills and "fussing about signing bills." (RE-259, TR, Albea, p. 624.) One of those people was Sonya Mitchell who, according to Albea, "fuss[ed] a lot about signing bogus bills." (RE-259, TR, Albea, p. 624.) During her cross-examination, Albea testified that later on she realized that what was going on at Airtrans regarding the conditional purchase loads was "actually fraud." (RE-259, TR, Albea, p. 637.)

There came a point-in-time where Hernandez asked Albea to recant a statement she had given to the Federal Bureau of Investigation. (RE-259, TR, Albea, p. 616.) Albea testified at trial that

> I had come back from St. Louis, and [Hernandez] was talking to me, and had told me that if I would - - basically that he would talk to Freddie about trying to get me back on out there, if I would recant my statement and tell you all that I had just made it all up, and he would hire back out there at what was Ground Air then.

(RE-259, TR, Albea, pp. 616-17.) Ground Air was a successor company to Airtrans, which changed names several times. (RE-259, TR, Albea, pp. 613-14,

616-17.) When she refused to recant her statement, Hernandez told Albea that she would "end up living on food stamps and working at McDonald's for the rest of [her] life." (RE-259, TR, Albea, p. 617.)

Hernandez also served as a contact person in the Airtrans office for Patrick Jeannes, whose company was used as a vehicle to facilitate the fraud, when Jeannes was attempting to secure funds from Airtrans to pay the Allied bills. At trial, Jeannes testified that he talked to several people about getting the money to pay Allied, including Hernandez. (RE-261, TR, Jeannes, pp. 992-93.)

F. The Wire Transfers From Allied to Airtrans

As set forth below, Airtrans submitted a number of false billings to Allied which indicated that Jeannes or Ram was the liable party and which resulted in an interstate wire transfer from Allied's bank in Denver, Colorado to Airtrans' bank in Dyersburg, Tennessee:

Count No.	Date of Wire Transfer	Liable Party per submission by Airtrans	Amount of Wire Transfer to Airtrans	Citation(s) to Record
2	1-24-01	Jeannes	$ 114,090.04	RE-282, TR, Rynearson, pp. 75-78, 82, 91-92; Collective Exhibit 2; RE-259, Trial Transcript (TR), Testimony of Ralph Ventresco (Ventresco), pp. 565-72; Collective Exhibit 45

3	1-26-01	Jeannes	$ 95,493.87	RE-282, TR, Rynearson, pp. 86-94; Collective Exhibit 3; RE-259, TR, Ventresco, p. 573; Collective Exhibit 45
4	1-29-01	Jeannes	$ 88,941.57	RE-282, TR, Rynearson, pp. 93-98; Collective Exhibit 4; RE-259, TR, Ventresco, pp. 573-74;Collective Exhibit 45
5	1-30-01	Jeannes	$ 132,571.82	RE-282, TR, Rynearson, pp. 98-104; Collective Exhibit 5; RE-259, TR, Ventresco, p. 575; Collective Exhibit 45
6	2-1-01	Jeannes	$ 55,523.69	RE-282, TR, Rynearson, pp. 104-107; Collective Exhibit 6; RE-259, TR, Ventresco, p. 576; Collective Exhibit 45
7	3-15-01	Ram	$ 37,771.05	RE-282, TR, Rynearson, pp. 117-24; Collective Exhibit 8; RE-259, TR, Ventresco, p. 577
8	3-23-01	Jeannes	$ 232,495.99	RE-282, TR, Rynearson, pp. 124-31; Collective Exhibit 9 and Exhibit 10; RE-259, TR, Ventresco, pp. 577-78; Collective Exhibit 45
9	4-3-01	Ram	$ 53,665.26	RE-282, TR, Rynearson, pp. 224-26; Collective Exhibits 29 and 30 ; RE-259, TR, Ventresco, pp.

				578-79; Collective Exhibit 45
10	4-19-01	Ram	$ 69,029.29	RE-282, TR, Rynearson, pp. 133-39; Collective Exhibit 12; RE-259, TR, Ventresco, pp. 579-80; Collective Exhibit 45
11	4-20-01	Ram	$ 72,130.92	RE-282, TR, Rynearson, pp. 139-45; Collective Exhibit 13; RE-259, TR, Ventresco, pp. 580-81; Collective Exhibit 45
12	4-23-01	Ram	$ 32,669.25	RE-282, TR, Rynearson, pp. 152-156 : Collective Exhibits 14 and 15; RE-259, TR, Ventresco, pp. 581-82; Collective Exhibit 45
13	4-25-01	Ram	$ 67,476.73	RE-282, TR, Rynearson, pp. 156-64; Collective Exhibit 16; RE-259, TR, Ventresco, pp. 583-84; Collective Exhibit 45
14	5-3-01	Jeannes and Ram	$ 124,510.16	RE-282, TR, Rynearson, pp. 165-171; Collective Exhibit 18 and Exhibit 19; RE-259, TR, Ventresco, p. 584; Collective Exhibit 45
15	5-4-01	Jeannes	$ 91,904.34	RE-282, TR, Rynearson, pp. 171-179; Collective

				Exhibit 20 and Exhibit 21; RE-259, TR, Ventresco, pp. 584-85; Collective Exhibit 45
16	5-21-01	Ram	$ 215,794.63	RE-282, TR, Rynearson, pp. 179-90; Collective Exhibit 22 and Exhibit 21; RE-259, TR, Ventresco, pp. 585-86; Collective Exhibit 45
17	5-24-01	Jeannes and Ram	$ 71,589.95	RE-282, TR, Rynearson, pp. 195-99; Collective Exhibit 24 and Exhibit 21; RE-259, TR, Ventresco, pp. 586-87; Collective Exhibit 45

G. Wires and Mailings to Ram

At trial, Force testified that she received checks from Airtrans via UPS Overnight service. (RE-285, TR, Force, pp. 450, 455, 460, 466-70; Exhibit 42; Exhibit 43.) These checks were deposited into the Ram bank account and used to pay Allied. (RE-285, TR, Force, pp. 454-471.) The testimony at trial established that UPS is an interstate common carrier, and that the UPS overnight letters were sent from Dyersburg, Tennessee, where Airtrans was based, to Force in Chandlerville, Illinois. (RE-259, Trial Transcript, Testimony of Chris Willing,

March 20, 2008, pp. 607-609; RE-285, TR, Force, pp. 450-51, 466-68, 470-71.)

The details of these transactions are summarized in the following chart:

Count No.	Date of Mailing	Amount of Check	Citations to the Record
20	6-4-2001	$12,617.95	RE-285, TR, Force, pp. 466-68; RE-259, TR, Leinberger, pp. 649-50; Collective Exhibit 46
21	7-2-2001	$25,291.10	RE-285, TR, Force, pp. 470-71; Exhibit 43; RE-259, TR, Leinberger, pp. 652-53; Collective Exhibit 46
22	7-25-2001	$15,882.00	RE-285, TR, Force, p. 470; RE-259, TR, Leinberger, pp. 652-53; Collective Exhibit 46

On two occasions, wire transfers were made from the Airtrans bank account to the Ram account. At trial, Force testified that this was necessary on at least one occasion because the check from Airtrans bounced. (RE-285, TR, Force, pp. 463-65.) The details of these transactions are summarized in the chart below:

Count No.	Date of Wire Transfer	Amount of Wire Transfer	Citations to the Record
18	6-5-2001	$35,914.85	RE-259, TR, Ventresco, pp. 587-589; Collective Exhibit 45; RE-259, TR, Leinberger, pp. 651-52; Collective Exhibit 46; RE-260, Trial Transcript (TR), Testimony of Becky Gregory, March 21, 2008, pp. 933-35; Collective Exhibit 76
19	8-9-2001	$15,882.00	RE-285, TR, Force, pp. 463-65; RE-259, TR, Leinberger, pp. 653-55; Collective Exhibit 46; RE-260, TR, Gregory, pp. 940-41; Collective Exhibit 76

H. Proceedings at Trial

The trial of this case began on March 17, 2008. (RE-169, Minutes.) The government concluded its proof on March 25, 2008. (RE-175, Minutes.). At the conclusion of the government's proof, Hernandez made a motion for judgment of acquittal. (RE-262, Trial Transcript (TR), Statement of Defense Counsel (Defense Counsel), March 25, 2008, p. 1115). The motion was denied by the district court (RE-262, Trial Transcript (TR), The Court, March 25, 2008, p. 1130). Hernandez called Mark Weeks (Weeks) as a defense witness and, after examining Weeks,

rested his case. (RE-263, TR, Defense Counsel, pp. 1229, 1236.) The record in this case, as reproduced at the time this brief was written, does not demonstrate that Hernandez renewed his motion for judgment of acquittal at the close of his proof.

On April 2, 2008, the jury announced that it had reached a verdict in the case. (RE-264, TR, The Court, pp. 3-4.) The jury verdict, as initially announced, found Hernandez guilty as to Counts 1 through 22, and Freddie Ford, Hernandez's codefendant, guilty as to Counts 1 through 37. (RE-264, TR, The Court, pp. 4-8.) The district court then proceeded to poll the jurors individually regarding their verdicts, asking Juror Blake whether "the verdict, as published, constitute[d] [her] individual verdict in all respects?" (Id.) Juror Blake, who the record indicates was crying at this point, responded "Not as Hernandez?" (RE-264, Trial Transcript, Statement of Juror Blake, April 2, 2008, pp. 8-9.) The district court indicated that he could not hear Juror Blake and, when asked again by the district court about her verdict, Juror Blake responded "Not Hernandez," while continuing to cry. (Id.) In an effort to determine exactly what her verdict was, the district court asked Juror Blake if she was certain the verdict was hers. (Id.) At that point Juror Blake began shaking her head negatively and crying. (Id.) Later, Juror Blake confirmed to the district court that the verdict as published was her verdict. (Id.)

The district court polled the remaining jurors, the next ten of whom indicated that their verdicts as to Hernandez were all guilty. (RE-264, TR, The Court, pp. 10-11.) The twelfth juror polled, Juror Scruggs, indicated that she had "doubts." (RE-264, TR, The Court, p. 11.) After polling all of the jurors, the district court instructed them to resume deliberations and noted that he would provide them with a "clean copy of the verdict form" to be used in their deliberations. (RE-264, TR, The Court, p. 12) Hernandez did not object to the jury being allowed to resume its deliberations at this point or request a mistrial. On April 3, 2008, the jury returned a unanimous verdict finding Hernandez guilty of Counts 1 through 22 of the indictment. (RE-266, Trial Transcript, The Court, April 3, 2008, pp. 4-7, 9-11.)

SUMMARY OF THE ARGUMENT

Hernandez failed to renew his motion for judgment of acquittal at the close of his proof. In light of this fact, this Court reviews to determine if a manifest miscarriage of justice has taken place. A "miscarriage of justice" only takes place if the record is "devoid of evidence of guilt." In this case the record contained ample evidence of Hernandez's guilt: in his capacity as general manager of Airtrans, he directed employees of Airtrans to prepare bogus shipping documents

and to sign bogus names to shipping documents. These bogus documents, which represented accounts receivables, were then sold to Allied, the ultimate victim of the fraud, who in turn wire transferred funds to Airtrans. Moreover, Hernandez acted in concert with other individuals involved in the conspiracy in this case in a manner intended to accomplish the goals of the conspiracy. Thus, the record in this case is clearly not devoid of evidence of Hernandez's guilt.

Even if the Court applies the stricter standard for review of sufficiency of the evidence issues, i.e., could a reasonable trier of fact find that the government proved all the elements of the crime beyond a reasonable doubt, the government submits that there was sufficient evidence produced at trial to sustain the convictions in this case. The proof in this case demonstrated that Hernandez acted in concert with Freddie Ford and Gary Newlun in order to defraud Allied. It also established that Hernandez directed the production of the false documents that were submitted to Allied, that he was a person contacted by Patrick Jeannes when Jeannes was attempting to secure funds to pay a balance at Allied that was generated by the submission of bogus documents, and that he attempted to persuade an Airtrans employee who gave a statement to the Federal Bureau of Investigation to recant her statement in return for a promise of employment. Based

upon the proof at trial, a reasonable trier of fact could find that the government proved the essential elements of the charged crimes in this case beyond a reasonable doubt.

Regarding the jury polling issued raised by Hernandez, he failed to raise the issue in the court below and review of the issue is therefore subject to plain error analysis. There was no error in this case because the district court complied with Fed. R. Crim. P. 31 and only asked the questions required to clarify the juror's response to a question asked during a poll of the jury. Because there was no error committed in this case, the plain error analysis goes no further and Hernandez's conviction should be affirmed. Moreover, even if there was plain error in this case, it did not seriously affect the fairness, integrity or public reputation of the judicial proceeding and therefore the district court should not be reversed.

ARGUMENT

I. The district court did not err in denying Hernandez's motion for judgment of acquittal in this case.

A. Because Hernandez failed to renew his motion for judgment of acquittal at the close of his proof, this Court's review of the district court's denial of Hernandez's motion is limited to review for a manifest miscarriage of justice.

Based upon the record available to government counsel at the time this brief

was drafted, Hernandez made a motion for judgment of acquittal at the conclusion of the government's case-in-chief but failed to renew the motion at the close of his proof. Hernandez fails to cite to any such renewal in his brief. Because Hernandez failed to renew his motion, he has waived his objection to the denial of his motion absent a "manifest miscarriage of justice." United States v. Price, 134 F.3d 340, 349-50 (6th Cir. 1998).

In Price, the court held that "when the defendant moves for judgment of acquittal at the close of the government's case-in-chief, and defense evidence is thereafter presented but the defendant fails to renew the motion at the close of all the evidence, he waives objection to the denial of his earlier motion, absent a showing of a manifest miscarriage of justice." Price, 134 F.3d at 350. Thus, review by this Court is "limited to determining whether there was a "manifest miscarriage of justice." Id. "A "miscarriage of justice" exists only if the record is "devoid of evidence pointing to guilt." Id. (citation omitted)

In this case the record is replete with proof of Hernandez's guilt. To begin with, Hernandez was the general manager of Airtrans, and the proof at trial established that he exercised authority over several of the employees who participated in the fraud scheme. He also served as a contact for Patrick Jeannes

when Jeannes was trying to obtain funds from Airtrans to pay off the outstanding balances owed to Allied as a result of the fraud scheme. Hernandez instructed Misty Reed, Candy Albea and Sonya Mitchell, employees at Airtrans, to sign bills of lading with bogus signatures. Moreover, Hernandez took an active role in overseeing the "assembly line" in the billing department where the bogus bills of lading were created. At trial, Laura Jourden, who worked in the billing department, testified that Hernandez told Wanda White, the supervisor of the billing department that "They have to do this[,] This has to be done[,] and They have to be filled out." The creation of these bogus documents was a key part of the fraud scheme, since they were required in order to sell the bogus Jeannes and Ram loads to Allied. The testimony at trial also established that Hernandez would instruct Jourden what loads to put on the daily conditional purchase list. Candy Albea, a former Airtrans employee, testified at trial that what was going on at Airtrans regarding the conditional purchase loads was "actually fraud." Lastly, Hernandez attempted to induce Albea, who had made a statement to the Federal Bureau of Investigation, to recant her statement in return for re-employment at an Airtrans' successor company. The government would submit that the record in this case is filled with evidence demonstrating Hernandez's guilt and that the district

court's denial of his motion for judgment of acquittal should be affirmed.

B. The district court did not err in denying Hernandez's motion for judgment of acquittal because the proof in the case was such that a rational trier of fact could have found all the essential elements of the offenses charged beyond a reasonable doubt.

Even if this Court applies a stricter sufficiency-of-evidence standard, Hernandez's claim fails. Hernandez claims in this appeal that the district court erred in denying his motion because "[T]here is no evidence that [he] devised or intended to devise anything illegal." (Brief of the Defendant-Appellant, p. 14.) The government submits that the district court did not err in denying the motion in this instance in light of all the proof presented at trial. When reviewing the sufficiency of the evidence to sustain a conviction on appeal, "the relevant question is 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 v. Virginia, 443 U.S. 307, 319 (1979).

In considering the evidence, the appellate court allows the government the benefit of all reasonable inferences and refrains from independently judging the weight of the evidence. United States v. Welch, 97 F.3d 142, 148 (6th Cir. 1996). "Circumstantial evidence and direct evidence are accorded the same weight,"

United States v. Sherlin, 67 F.3d 1208, 1214 (6th Cir. 1995) (citation omitted), and "circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not "remove every reasonable hypothesis except that of guilt," United States v. Ellzey, 874 F.2d 324, 328 (6th Cir. 1989) (quoting United States v. Stone, 748 F.2d 361, 363 (6th Cir. 1984)).

In the case at bar, Hernandez was charged in Count 1 of the indictment with conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 371 in connection with the overall scheme to defraud Allied; with aiding and abetting wire fraud involving the wire transfer of funds from Allied to Airtrans in violation of 18 U.S.C. §§ 1343 and 2 in Counts 2 through 17; with aiding and abetting wire fraud in connection with wire transfers of funds from Airtrans to Ram in violation of 18 U.S.C. §§ 1343 and 2 in Counts 18 and 19; and with aiding and abetting mail fraud in connection with checks sent to Ram via common carrier in violation of 18 U.S.C. §§ 1341 and 2 in Counts 20 through 22. (RE-1, Indictment.)

> "The essential elements of a conspiracy violation are: (1) that the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged; (2) that the accused willfully became a member of the conspiracy; (3) that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and (4) that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged."

> United States v. Poulos, 895 F.2d 1113, 1117 (6th Cir. 1990) (quoting United States v. Meyers, 646 F.2d 1142, 1143-44 (6th Cir. 1981)). "The existence of a criminal conspiracy need not be proven by direct evidence, a common plan may be inferred from circumstantial evidence." Id. (citation omitted). Once the conspiracy has been established, "only slight evidence is necessary to implicate a defendant." Id.

"The mail fraud statute prohibits the use of the mails "for the purpose of executing" a scheme to defraud. 18 U.S.C. § 1341. A conviction for mail fraud requires proof of (1) a scheme to defraud (2) which involves the use of the mails (3) for the purpose of executing the scheme." United States v. Castile, 795 F.2d 1273, 1277-78 (6th Cir. 1986) (footnote omitted). "A violation of the wire fraud statute, 18 U.S.C. § 1343, requires a showing of essentially the same things, the only difference being that a wire communication, e.g., a telephone call, is required instead of a mailing." United States v. Bibby, 752 F.2d 1116, 1126 (6th Cir. 1985). In order "[t]o be found guilty of aiding and abetting a criminal venture, a defendant must associate himself with the venture in a manner whereby he participates in it as something that he wishes to bring about and seeks by his acts to make succeed." United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990) (citation omitted).

Regarding the conspiracy charge in this case, the government submits that it produced sufficient proof such that a reasonable trier of fact could have found that

the government proved the essential elements of the offense beyond a reasonable doubt. To begin with, the circumstantial evidence in the case established that there was a willfully formed conspiracy that existed at the time alleged in the indictment. This conspiracy included Hernandez, as well as Newlun and Freddie Ford. The evidence in this case clearly established that none of these three individuals was forced to participate in the conspiracy. Moreover, the circumstantial evidence in the case established that Hernandez willfully became a member of the conspiracy as demonstrated by his willingness to direct others in the preparation of bogus documents that were ultimately submitted to Allied as part of the fraud scheme. The proof at trial also established that the coconspirators, including Hernandez, committed multiple overt acts. The overt acts proven at trial included the recruitment of Patrick Jeannes and Joyce Force into the scheme by Freddie Ford, see RE-1, Indictment, ¶¶ 14.A and 14.J, and Hernandez's direction and supervision of the creation of the false documents described in the indictment, see RE-1, Indictment, ¶ 14.B, as well as the creation of false documents by other members of the conspiracy as described extensively in ¶ 14 of the indictment in this case. Lastly, the false documents in this case, which were prepared at Hernandez's direction, were prepared knowingly and in furtherance of an object of the

conspiracy, namely to defraud Allied of money and other property, see RE-1, Indictment, ¶ 13. The government would submit that the evidence in this case established that a reasonable trier of fact could have found that the government proved each element as to the conspiracy charge.

The wire fraud charges embodied in Counts 2 through 17 of the indictment involved wire transfers from Allied to Airtrans based upon the submission of false documents which identified either Ram or Jeannes as the party liable for payment of the shipping charges. (RE-1, Indictment.) The preparation of the false documents was key to the successful execution of the fraud scheme in this case; absent the bogus documents, Allied would not have paid Airtans for the phantom Ram and Jeannes shipments. The record at trial established that Hernandez, the general manager of Airtrans and supervisor of Wanda White, the manager of the billing department, directed the preparation of the bogus documents and obtained bogus signatures on shipping documents from various Airtrans employees. Moreover, Hernandez was someone that Jeannes contacted at Airtrans when he was attempting to secure funds to pay the Allied bills that had come due. The government submits that it introduced sufficient proof at trial that a reasonable trier of fact could have concluded that the government proved all the elements of the

charges in Counts 2 through 17 beyond a reasonable doubt.

Counts 18 and 19, in which Hernandez is charged with aiding and abetting wire fraud, and Counts 20 through 21, in which Hernandez is charged with mail fraud, involve transfers of funds to Ram by Allied so that Force/Ram could pay Allied and keep the fraud in continual motion. At trial, Gary Newlun testified that the fraud was "[B]asically a short term loan kind of arrangement," and that the bogus Jeannes, Ram and Larsen submissions to Allied were used to cover cash short-falls. (RE-259, TR, Newlun, pp. 673-80.) The proof at trial established that Hernandez was the general manager of Airtrans, one of the primary vehicles for the commission of the fraud in this case. In his role as general manager of Airtrans, Hernandez directed the preparation of the bogus bills, ordered employees to sign bogus names to shipping documents, and was one of the people Jeannes contacted when he, Jeannes, needed money to pay the balances due to Allied. Moreover, according to Newlun's testimony at trial, Hernandez was periodically advised by Newlun of Airtrans financial condition, which was uniformly poor during the period in which the fraud scheme was in operation. Given the proof regarding Hernandez's hands-on operation of the Airtrans office during this period, the government submits that he participated in the fraud to such a great extent that he

sought by his acts to make it succeed, and is therefore guilty of aiding and abetting the wire and mail fraud counts charged in Counts 18 through 22 of the indictment.

II. The district court did not commit plain error when it questioned a juror regarding her verdict after she gave contradictory answers to the district court's questions regarding whether or not the jury's verdict was her verdict.

At trial, the jury announced they had a verdict in the case. After the district court read the verdict, the jury was polled. One of the jurors indicated that the announced verdict was not her verdict as to Hernandez but then indicated it was her verdict. The district court questioned the juror regarding her verdict in light of her inconsistent answers to the questions asked when he polled the jury. Hernandez, who did not make a contemporaneous objection to the court's questioning of the juror, now claims that the district court committed reversible error in this instance. The government submits that the district court did not commit any error, much less reversible error, in this instance. Because Hernandez failed to object to the district court's handling of this situation, this Court reviews for plain error, see Fed. R. Crim. P. 52(b); United States v. Morrow, 977 F.2d 222, 226 (6th cir. 1992) (where defendant fails to object, issue is reviewed on appeal only for plain error).

Regarding plain error review on appeal, the Sixth Circuit has opined that:

> ... our inquiry under Rule 52(b) is made up of four distinct analyses. First, we are to consider whether an error occurred in the district court. Absent any error, our inquiry is at an end. However, if an error occurred, we then consider if the error was plain. If it is, then we proceed to inquire whether the plain error affects substantial rights. Finally, even if all three factors exist, we must then consider whether to exercise our discretionary power under Rule 52(b), or in other words, we must decide whether the plain error affecting substantial rights seriously affected the fairness, integrity or public reputation of judicial proceedings.

United States v. Thomas, 11 F.3d 620, 630 (6th Cir. 1993).

To begin with, there was no error in this case regarding the district court's polling of the jury and subsequent exchange with Juror Blake. Fed. R. Crim. P. 31 requires that a jury's verdict be unanimous and permits a court to poll the jurors individually after the verdict has been returned. Rule 31(b) provides that "[I]f the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial." See also King v. Ford Motor Co., 209 F.3d 886, 896 (6th Cir. 2000) ("Generally, the proper procedure when a poll indicates that unanimity with a verdict is uncertain is to return the jury to the jury room for further deliberations or to declare a mistrial."). In this case, the district court asked

Juror Blake questions about her verdict in an attempt to clarify the situation. This was reasonable in this case given the fact that the indictment involved two defendants, Hernandez and Freddie Ford, who were charged in a total of thirty-seven (37) counts; the jury in this case was thus required to render a total of fifty-nine (59) different verdicts. The district court initially had trouble hearing Juror Blake's answer to his question and the situation was made worse by Juror Blake's weeping and shaking of her head during the polling. Once the district court ascertained exactly what Juror Blake's verdict was, he stopped asking her questions and sent the jury to the jury room to deliberate further, consistent with Rule 31(d). (6th Cir. May 22, 1990).

In United States v. Miller, 902 F.2d 1570, 1990 WL 67400 (C.A. 6 (Ohio)), an unpublished decision of the Sixth Circuit, this Court dealt with a factual situation analogous to that presented in the case at bar. In that case, the district court polled the jurors after the jury returned a unanimous guilty verdict on all counts. Id., at *4. When Juror Odom was asked by the district court if the verdict returned by the jury was his verdict, Juror Odom responded "I said semi." Id. When the district court inquired a second time, Juror Odom responded "Semi" once again. Id. The district court then announced that he was sending the jury back to

deliberate and asked Juror Odom if he had participated in the jury's deliberations, and Juror Odom responded that he had. Id at *5. Juror Odom then claimed he had been talked into the conviction but admitted that while he had not initially voted to convict the defendant he finally had done so. The district court then asked Juror Odom if "your signature on the verdict form ... that is your signature? That means that you voted yes in accordance with the verdict form, is that correct?" Id. Juror Odom answered the district court's question in the affirmative and the court discharged the jury over the objections of defense counsel. The reviewing court, finding no abuse of discretion, upheld the district court, noting that given Juror Odom's answers to the district court's questions during the jury polling it was necessary to clarify the juror's response. See also King, 209 F.3d at 896 ("However, a judge's limited questioning of a juror regarding a poll answer is not coercive or otherwise erroneous if used simply to clear up ambiguity in the juror's answer."). In the present case, the district court's questions to Juror Blake were clearly intended to clarify her somewhat confusing answers concerning the exact nature of her verdict. As such, there was no error in this case and, because there was no error, the inquiry regarding plain error should be concluded.

Even if there were any error in this case, it was not plain. The term "plain"

"is synonymous with 'clear' or, equivalently, 'obvious.'" United States v. Jones, 108 F.3d 668, 671 (6th Cir. 1997). Given the holdings in the Miller and King cases cited above, both of which permit questioning of jurors regarding their answers to poll questions, it can not be credibly argued that any error in this case was "plain."

The next question to consider in the plain error analysis is whether the error affected a substantial right. Because the jury returned to the jury room to deliberate anew after Juror Scruggs expressed her reservations about her verdict, Hernandez's substantial rights were not violated.

Lastly, even if this Court finds that an error occurred, the error was plain and the error affected a substantial right, it must decided whether the error seriously affected the fairness, integrity or public reputation of the judicial proceeding. The government submits that because the district court followed Rule 31(b) and sent the jury back to continue its deliberations, the verdict in this case

did not seriously affect the fairness, integrity or public reputation of the judicial proceeding.

CONCLUSION

Based upon the reasons and authorities cited herein, this Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

[Include this certificate if the specified pages of your brief exceed the 30-page limit for principal briefs or the 15-page limit for reply briefs.]

I certify that this brief complies with the type-volume limitation provided in Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure. The brief contains 8,516 words of Times New Roman (14-point) proportional type, from the Statement of Jurisdiction through the Conclusion. WordPerfect X4 is the word-processing software that I used to prepare this brief.

/s/ Joseph C. Murphy, Jr.
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Assistant United States Attorney

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Appellee, pursuant to Sixth Circuit Rules 28(c) & 30(b), hereby designates the following filings in the District Court's record as entries that are relevant to this appeal:

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NO.
Indictment	9/22/2004	1
Order on Arraignment	10/13/2004	20
Minutes	3/17/2008	169
Minutes	3/25/2008	175
Order on Jury Verdict	4/23/2008	195
Notice of Appeal	2/27/2009	240
Redacted Judgment	3/9/2009	243
Trial Transcript	3/20/2008	259
Trial Transcript	3/24/2008	261
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Trial Transcript	4/2/2008	264
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Trial Transcript	3/18/2008	282
Trial Transcript	3/19/2008	285

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Plaintiff-Appellee United States was served upon counsel for Defendant-Appellant David Hernandez, Stephen R. Leffler, Esq., 707 Adams Avenue, Memphis, Tennessee 38105 by filing with the Court's CM/ECF system this 7th day of June, 2011.

/s/ Joseph C. Murphy, Jr.
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No. 11-5004

United States Court of Appeals
for the Sixth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TOMMIE STEPP,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Tennessee
No. 2:09-cr-20134 (McCalla, J.)

BRIEF FOR PLAINTIFF-APPELLEE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other authority:

STATEMENT REGARDING ORAL ARGUMENT

The United States submits that the decisional process in this case would not be aided by oral argument.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231 because the defendant-appellant was charged with an offense against the laws of the United States. This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291 because it involves a final judgment of the district court.

ISSUES PRESENTED

I. Did the district court err in denying Stepp's Motion to Suppress Evidence?

II. Did the district court err in not allowing Samuel Kenneth Jones, Sr., to testify as an expert witness on the subject of dog training at the suppression hearing?

III. Did the district court err in imposing a condition of supervised release which required Stepp to receive vocational training and maintain full-time employment outside the field of boxing?

STATEMENT OF THE CASE

On April 21, 2009 a federal grand jury sitting in the Western District of Tennessee returned an indictment charging defendant-appellant Tommie Stepp ("Stepp") with conspiracy to possess cocaine with intent to distribute and to distribute cocaine in violation of 21 U.S.C. § 846. (RE-1, Indictment.) He entered a plea of not guilty at his initial appearance before the district court. (RE-30, Minute Entry.) Stepp subsequently filed a motion to suppress, RE-64, Motion to Suppress, which the district court denied, RE-92, Order Denying Defendants' Motions to Suppress Evidence.

Following denial of his motion to suppress, Stepp entered a conditional guilty plea, reserving the right to appeal the denial of his motion to suppress. (RE-105, Order on Change of Plea; RE-110, Plea Agreement.) The district court subsequently sentenced Stepp to thirty-seven months imprisonment and three years of supervised release. (RE-163, Redacted Judgment.) A timely notice of appeal followed sentencing. (RE-164, Notice of Appeal).

STATEMENT OF THE FACTS

A. Introduction

Both Stepp and his codefendant, Cedric Boswell, filed motions to suppress seeking suppression of the evidence seized by police officers, as well as statements made to these officers, during a traffic stop of a vehicle in which they were traveling. The evidentiary hearing began on December 17, 2009, and, following an adjournment of the hearing, was concluded on January 6, 2010.

B. The Traffic Stop

In April of 2009, Scott Lawson (Lawson) was employed as a deputy sheriff with the Rutherford County Sheriff's Office and assigned to the Interstate Crime Enforcement Unit. (RE-79, Motion to Suppress Hearing Transcript (SH), Testimony of Scott Lawson (Lawson), December 17, 2009, pp. 9-10, 43.) On April 16, 2009, Lawson was sitting in the median of Interstate 24 at mile marker 91 observing west-bound traffic. (RE-79, SH, Lawson, pp. 10-11.) He observed a Hyundai Sonata driving westbound on Interstate 24. (Id.) Cedric Boswell (Boswell) was driving the vehicle and Stepp was the passenger. (RE-79, SH, Lawson, pp. 10-11.) Based on the driving pattern of the vehicle and the belief that it was a rental, which in Lawson's experience was often used for "secondary crimes," he radioed for a license plate check at 8:51 a.m. (RE-79, SH, Lawson, pp. 11-15, 18.) The check revealed that the license plate was registered to a 2008

Chevrolet Express van. (RE-79, SH, Lawson, p. 16.) In addition to the vehicle registration violation, Lawson testified at the suppression hearing that the vehicle's right rear brake light was not functioning. (RE-79, SH, Lawson, pp. 19, 35.)

Lawson testified at the suppression hearing that he initiated a traffic stop of the vehicle at approximately 8:53 a.m. based on the vehicle registration and brake light violations. (RE-79, SH, Lawson, pp. 17-19.) From 8:53 a.m. to approximately 8:55 a.m., Lawson explained to Boswell and Stepp the basis for the stop and proceeded to ask for a rental agreement. (RE-79, SH, Lawson, p. 20.) During this encounter, Stepp was sitting in the passenger seat "holding a phone tightly, a boost phone tightly to his hands." (Id.) Lawson testified at the suppression hearing that this type of "pay-as-you-go" phone is "commonly used in the criminal world, they're hard to track." (RE-79, SH, Lawson, pp. 20-21.) After being asked for the rental agreement, both occupants of the vehicle "started fumbling around" appearing to search for the agreement. (RE-79, SH, Lawson, p. 20.) Boswell, the driver of the vehicle, then asked if he could look in the trunk. (Id.) Lawson and Boswell walked to the trunk of the vehicle, where Boswell opened the trunk briefly, moved one thing aside, and then shut it "pretty quickly." (Id.)

Neither Boswell nor Stepp were able to produce the rental agreement. (RE-

79, SH, Lawson, p. 21.) Boswell then told Lawson that he did not believe he was an authorized driver on the rental agreement. (Id.) According to Lawson's testimony at the suppression hearing, Boswell and Stepp both appeared nervous, and their hands were shaking when they handed over their driver's licenses. (RE-79, SH, Lawson, pp. 24, 84.) Lawson also testified at the suppression hearing that he believed there was a possibility that the vehicle was stolen because neither Boswell or Stepp had a rental contract and the license tag on the vehicle did not come back to that vehicle. (RE-79, SH, Lawson, p. 105.)

At approximately 8:55 a.m., two minutes into the traffic stop and still without proof of a rental agreement, Lawson returned to his vehicle and began to run criminal history checks on both men. (RE-79, SH, Lawson, pp. 22-23.) The first background report that Lawson received indicated that Stepp had a prior felony conviction for narcotics. (RE-79, SH, Lawson, p. 22.) Lawson then contacted a second database for a more expansive background check and any outstanding warrants. (RE-79, SH, Lawson, pp. 22-23.) The result of the second check revealed that Boswell had been investigated by the DEA for trafficking cocaine. (RE-79, SH, Lawson, p. 24.) The two background checks took approximately ten minutes to complete. (RE-79, SH, Lawson, pp. 23-24.)

After receiving the information about Boswell, Lawson "had a feeling that something was not right" because of the third- party rental and nervous indicators

that Boswell and Stepp had shown, so he called for a backup officer. (RE-79, SH, Lawson, pp. 24-25.) When the backup officer arrived, Lawson asked him to contact the rental car company to determine the status of the vehicle and contact the DEA agent responsible for investigating Boswell. (RE-79, SH, Lawson, p. 25.) According to Lawson's testimony, he wanted the backup officer to call the rental car company because "I still did not know if [the vehicle] was stolen or why the [license] tag did not match the vehicle" and because he wanted to know if [Boswell] was an authorized driver of the vehicle. (RE-79, SH, Lawson, p. 25.)

Approximately ten minutes after the traffic stop had been initiated, Lawson returned to the vehicle. (RE-79, SH, Lawson, pp. 25-26, 71-72.) At this point in time he had not resolved the situation regarding the vehicle's registration violation, nor had he been able to contact the rental car company directly regarding the proper owner and driver of the vehicle. (Id.) At the suppression hearing, Lawson testified that he told Boswell that he would issue a warning, and asked him to step out of the vehicle to safely procure the information necessary for the citation. (Id.)

Shortly after 9:03 a.m.,[1] (RE-79, SH, Lawson, p. 70), Lawson began asking

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[1] A DVD of the traffic stop was admitted into evidence at the suppression hearing as Exhibit 5, see RE-79, SH, Lawson, pp. 33-34. According to Lawson's testimony and the dispatch log, which was admitted into evidence at the suppression hearing as Exhibit 2, Lawson called the dispatcher to check the license tag of the vehicle at 8:51 a.m., see Exhibit 2 and RE-79, SH, Lawson, p.

Boswell questions pertinent to completing the warning ticket. (RE-79, SH, Lawson, p. 26.) During the questioning, Boswell initiated conversation, stating that he was a boxer "ranked number six in the world" and was traveling from Atlanta to Nashville to train in a gym. (RE-79, SH, Lawson, pp. 26-27.) Boswell, however, could not provide the name of the gym and became nervous when Lawson asked. (RE-79, SH, Lawson, p. 27.) At this point, Lawson had not completed the warning ticket, (RE-79, SH, Lawson, pp. 30, 80.) Testifying at the suppression hearing, Lawson acknowledged that Boswell and Stepp were not free to leave because the vehicle registration issue had not been resolved. (RE-79, SH,

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18, and initiated the traffic stop of the vehicle at 8:53 a.m., see Exhibit 2 and RE-79, SH, Lawson, p. 19. There is a difference between the time-stamp on the video of the traffic stop and the times recorded in the dispatch log, the times shown on the dispatch log being approximately one hour earlier than the video. Lawson testified at the suppression hearing that the times listed in the dispatch log were correct and that difference in time between the dispatch log and the time-stamp of the video was the result of the clock on the video not being set back after the daylight savings change. (RE-79, SH, Lawson, pp. 34-35, 58.) Noting that during the suppression hearing defense counsel repeatedly referred to the time of the stop and the event occurring thereafter as being after 10:00 a.m., the district court observed that:

> It is, however, uncontested that the stop was initiated before 9:00 a.m., and the actions relevant to the suppression motions occurred prior to 10:00 a.m. Therefore, the court will assume that when Defense counsel refers to times such as 10:02 a.m. or 10:03 a.m., he intended to state 9:02 a.m. or 9:03 a.m.

(RE-92, Order Denying Defendants' Motions to Suppress Evidence, p. 6, fn. 1.)

Lawson, pp. 79, 82.) Lawson also testified, however, that even if Stepp had denied him consent to search the vehicle and the drug dog had not indicated, he "would still have found out what was going on with the tag before [he] released" Boswell and Stepp. (RE-79, SH, Lawson, pp. 79-80.)

Lawson testified at the suppression hearing that based on the "whole picture of everything that ha[d] taken place" as of the time he began issuing the warning citation he had reasonable suspicion to believe Stepp and Boswell had committed a drug violation. (RE-79, SH, Lawson, pp. 83-84.) Deputy Lawson stated that: (1) when he initially spoke with Stepp and Boswell they appeared nervous; (2) Boswell's and Stepp's hands were shaking when they handed over their licenses; (3) Stepp was pretending to be asleep when Lawson first approached the car, but had a tight grip on his "drop phone"; (4) neither Stepp or Boswell could produce the rental agreement; (5) when looking for the rental agreement Boswell opened the trunk briefly, moved one thing aside, and shut the trunk; (6) Lawson did not know who owned the vehicle at that point in time; (7) Boswell stated that he was not authorized to drive the vehicle; (8) both men had criminal histories involving narcotics; and (9) Boswell started talking about traveling a significant distance to train in a gym as a world class boxer, but was unable to identify the gym. (RE-79, SH, Lawson, pp. 20, 84.)

At the suppression hearing, Lawson testified that before he called the K-9

unit he asked Boswell for consent to search the car and was told to ask Stepp. (RE-79, SH, Lawson, p. 27.) At approximately 9:10 a.m. (RE-79, SH, Lawson, p. 81), Lawson approached Stepp and asked him were he and Boswell were headed. (RE-79, SH, Lawson, p. 27.) Stepp repeated Boswell's story about training in Nashville, but could not identify the gym or its general location. (RE-79, SH, Lawson, pp. 27-28.) Although Stepp did not decline consent, he told Lawson two or three times that he, Stepp, was in a hurry to get to Nashville. (RE-79, SH, Lawson, pp. 27-28.) Based on this reaction, Lawson made a decision to radio for a K-9 unit to the scene, specifically a drug dog, and that he did so sometime between 9:13 a.m. and 9:14 a.m. (RE-79, SH, Lawson, pp. 24, 27-29.)

Lawson testified at the suppression hearing that prior to the arrival of the dog unit he had not concluded his efforts to clarify the vehicle registration issue. (RE-79, SH, Lawson, p. 106.) At approximately 9:15 a.m. Edward Lee Young (Young), a Sergeant K-9 handler with the Rutherford County Sheriff's Office, arrived on the scene with his drug detector dog Arak. (RE-79, SH, Lawson, pp. 28-29; RE-80, Suppression Hearing Transcript (SH), Testimony of Edward Lee Young (Young), pp. 118-20.) At the suppression hearing Young testified at length regarding his certifications, qualifications and training as well as those of Arak. (RE-80, SH, Young, pp. 118, 122-24, 130.) Based on Arak's alert, Lawson searched the vehicle and uncovered two kilograms of cocaine in the trunk wrapped

in tape and concealed in a cookie box. (RE-79, SH, Lawson, p. 29; RE-80, SH, Young, pp. 129-30.)

After the cocaine was discovered in the trunk, Boswell and Stepp were taken into custody and advised of their constitutional rights as required by Miranda v. Arizona, 384 U.S. 436 (1966). (RE-79, SH, Lawson, pp. 29-30). Lawson testified at the suppression hearing and the dispatch log showed the two men being taken into custody at 9:19 a.m. (RE-79, SH, Lawson, p. 30; Exhibit 2.) After being advised of his rights, Stepp gave a written statement to Lawson in which he admitted that he had obtained the cocaine found in the trunk from a male Hispanic, that he had done so at Boswell's request, and that he and Boswell were taking the cocaine to Memphis so that Boswell's "people could sell it." (RE-79, SH, Lawson, pp. 32-33.)

C. The Suppression Hearing

Chief District Judge Jon Phipps McCalla conducted an evidentiary hearing on the motions to suppress. The hearing began on December 17, 2009, at which time Lawson testified as a government witness. (RE-75, Minute Entry.) The hearing was adjourned and reconvened on January 6, 2010, at which time the government called Young as a witness. (RE-77, Minute Entry.) At the conclusion of Young's testimony, the government rested. The government's proof at the hearing is outlined in Subsection B of this section.

Stepp called Samuel Kenneth Jones, Sr. (Jones), as a defense witness and tendered him to the district court as "an expert in training dogs." (RE-80, Suppression Hearing Transcript (SH), Statement of Doris Randle-Holt (Randle-Holt), January 6, 201, p. 163.) Jones testified that he was a member of the AKC, the German Shepard Club of Memphis, and that he was affiliated with Hollywood Feed, a chain of food stores. (RE-80, Suppression Hearing Transcript (SH), Testimony of Samuel Kenneth Jones, Sr. (Jones), January 6, 2010, pp. 161-62.) During cross-examination regarding his qualifications, Jones admitted that he had last trained a drug dog ten years before he had been called to testify; that he had only trained two or three drug dogs over fifty years; that he was not certified as a drug dog trainer or dog trainer by any groups; that he had not been employed by any police departments as a drug dog trainer; that he did not have a degree in animal husbandry or any similar field; and that he had never been a police dog handler. (RE-80, SH, Jones, pp. 164-67.) Jones testified that he trains dogs for "people to take out into the field" and that most people who bring him dogs have "problem dogs that they can't control." (RE-80, SH, Jones, p. 166.).

Counsel for the government took the position that Jones was not qualified to testify on matters concerning drug dogs. (RE-80, Suppression Hearing Transcript, Statement of Joseph C. Murphy, Jr., p. 167.) Defense counsel was then allowed to rehabilitate the witness. The district court ruled that it did not appear that Jones

was qualified to testify regarding drug dogs, noting that it sounded like Jones trained a drug dog with another person over ten years ago and that there were certifications available in the "area." (RE-80, Suppression Hearing Transcript, Statement of the District Court, pp. 168, 171.) Read in context, the "area" the district court was referring to was drug dog training and handling. When defense counsel made an offer of proof, however, it was clear that her goal was to have Jones testify not about dog training but about the handling of drug dogs. (RE-80, SH, Randle-Holt, pp. 172-73.)

D. The District Court's Ruling on Stepp's Motion to Suppress

The district court entered a written order denying Stepp's Motion to Suppress. (RE-92, Order Denying Defendants' Motions to Suppress Evidence.) Regarding the motions, the district court ruled that:

> - Lawson had probable cause to make the traffic stop because the vehicle being driven by Boswell displayed a license tag belonging to another vehicle and had a broken brake light. (RE-92, Order Denying Defendants' Motions to Suppress Evidence, pp. 12-13.)
>
> - Lawson had reasonable suspicion to extend the duration of the traffic stop because he had a reasonable suspicion of illegal drug activity. (RE-92, Order Denying Defendants' Motions to Suppress Evidence, pp. 15-16.)
>
> - The scope and duration of the detention of Stepp and Boswell were not unreasonably extended beyond the purposes of the initial traffic stop because the problem with the vehicle's registration had not been dealt with at the

time of the drug dog alert on the vehicle. (RE-92, Order Denying Defendants' Motions to Suppress Evidence, pp. 16-17.)

- The officers had probable cause to search the vehicle in light of the drug dog alert. (RE-92, Order Denying Defendants' Motions to Suppress Evidence, pp. 17-20.)

E. Sentencing

Stepp entered a conditional guilty plea in this case, reserving his right to appeal the denial of his motion to suppress. Following his change of plea, a Presentence Investigation Report was prepared. The report revealed that Stepp had been employed as a professional boxer since 1998, that he was paid per fight or per week when he worked as a sparring partner, and that he had made $3,000.00 that year. (Presentence Investigation Report, ¶ 66.) Stepp told the probation officer writing the report that he had a monthly income of $400, that he earned approximately $400 a week for sparring, and noted that his boxing income was "not steady income and varies every month depending on the workload." (Presentence Investigation Report, ¶ 71.) In addition, the report noted that Stepp had been employed as a "package helper" at UPS, a cable installer, the operator of a janitorial services company, and a telephone operator. (Presentence Investigation Report, ¶ ¶ 66-70.) There was no indication in the report that Stepp had ever received any vocational training or additional education beyond his GED.

A sentencing hearing was held in this case on December 20, 2010. At the

hearing government counsel and defense counsel had an opportunity to address the district court, as did the defendant. Government counsel noted defendant's long history of illegal drug usage and need for job skills and addressed his prospects as a boxer: "Mr. Stepp is getting old to box, and, in fact, realistically, if he were to get out of prison, I don't know that there's a lot of future in the boxing business for him as a fighter." (RE-173, Sentencing Hearing Transcript (Sent. Hr.), Statement of Joseph C. Murphy, Jr. (Murphy), December 20, 2010, p. 8.) When afforded an opportunity to speak, defense counsel informed the district court that

> Your Honor, in this case, 24 months [imprisonment] is – shouldn't be a sentence to provide education for him, he has a GED. Now, I know the government has said, well, he's getting older, he may not be able to box anymore, he has a skill, that's true. But he could always use that skill to try to deter and help other young men, other wayward young boys because if Your Honor will look at this presentence report, I think he got in trouble when he was about 16 years old doing what some young men [do] when they really don't have the guidance they really should, stealing cars, breaking in cars. And we know that even in our community, the local police department work with wayward boys, they used to have a boxing club and I think they still do ...

(RE-173, Sentencing Hearing Transcript (Sent. Hr.), Statement of Doris Randle-Holt (Randle-Holt), December 20, 2010, pp. 12-13.) Defense counsel concluded by noting that Stepp could "work with them." (Id.) In response to defense counsel, the district court noted that while it was great to "work with youngsters,"

the court was concerned with "confusing that with the true necessity of obtaining a skill that would give [the defendant] a life of meaningful employment." (RE-173, Sentencing Hearing Transcript (Sent. Hr.), Statement of the District Court (The Court), December 20, 2010, p. 13.)

Following the exchange with defense counsel, the district court gave Stepp an opportunity to address the court, (RE-173, Sent. Hr., The Court, December 20, 2010, pp. 15-16), and Stepp made some brief comments. (RE-173, Sentencing Hearing Transcript (Sent. Hr.), Testimony of Tommy Stepp, December 20, 2010, p. 16.) The district court next noted that an application for revocation of Stepp's pretrial release was pending. (RE-173, Sent. Hr., The Court, p. 17.) Stepp informed the district court that he had been arrested driving a vehicle given to him by his codefendant - and fellow boxer - Cedric Boswell, which turned out to have been stolen, and that he had been in jail ever since. (RE-173, Sent. Hr., Stepp, p. 17.) At the conclusion of this exchange the district court gave Stepp a second chance to address the court, asking Stepp if there was "anything else that you need to let me know about" because it was "that chance, really, to say anything else." (RE-173, Sent. Hr., The Court, p. 19.)

Next, the district court engaged in the sentencing analysis required under 18 U.S.C. § 3553. The district court noted that there was a need for vocational training in this instance: "something that will move you into something that's

reliable for the long-term as opposed to a short-term career like in boxing." (RE-173, Sent. Hr., The Court, pp. 24-25.) In sentencing Stepp, the district court required him to participate in vocational training and to seek and maintain full-time employment outside the field of boxing. (RE-173, Sent. Hr., The Court, p. 28.) Defense counsel did not object to the special condition regarding full-time employment outside the field of boxing. As the hearing was drawing to a conclusion, the district court inquired whether there was anything else from the defense (RE-173, Sent. Hr., The Court, December 20, 2010, p. 34), to which defense counsel replied "No, Your Honor." (RE-173, Sent. Hr., Randle-Holt, p. 34.)

SUMMARY OF THE ARGUMENT

The district court did not err in denying Stepp's Motion to Suppress Evidence. This case involves a traffic stop of a rental vehicle in which Stepp was traveling. The license tag of the rental vehicle was registered to another vehicle. After the rental vehicle was stopped, neither Stepp or Boswell, the driver of the vehicle, could provide the officer who made the stop with the rental agreement for the vehicle. Although both men claimed to be boxers traveling from Atlanta to Nashville to train, neither man was able to tell the officer the gym where they would be training. Moreover, the officer received information that both men had histories of involvement with narcotics. The officer took reasonable steps to

dispel his suspicion: he attempted to secure the necessary documents from Stepp and Boswell, he called for a backup officer to assist him in the investigation, and he conducted records checks using his department's dispatcher. Despite these efforts, the officers were never able to resolve the questions relating to the registration of the vehicle and Stepp and Boswell's possession of the vehicle. Neither the duration or scope of the detention in this case exceeded the Fourth Amendment's boundaries.

The district court did not err by prohibiting Samuel Kenneth Jones, Sr., to testify as an expert in the field of dog training during the suppression hearing. To begin with, Jones did not have sufficient training in the field of dog training in order to be deemed an expert in that field. He admitted that he was not certified as a dog trainer, had no formal training in the field as established by virtue of his lack of certifications and education, and had not worked for a police department as a dog handler or trainer. His experience as a dog trainer was also limited. According to Jones he had trained two or three drug dogs over the course of fifty years, the most recent instance being over ten years before the hearing. His testimony, to the extent it was credible, made it clear that he trained dogs that people had problems with and for the "field," not police dogs. In addition, the defense offer of proof made it clear that they intended to have Jones testify that the

drug dog handler in this case had handled the drug detector dog improperly during the traffic stop. Jones's background in handling drug dogs was virtually nonexistent.

The district court did not err in imposing a special condition of supervised release directing that Stepp receive vocational training and maintain full-time employment outside of boxing. Stepp's boxing connections played a role in the instant offense. The presentence report established that he made little income from boxing and was in need of vocational training. Given Stepp's work history and lack of skills, boxing had become an impediment to him earning a living. Moreover, the special condition does not prevent Stepp from boxing or training other people to box on a part-time basis, and therefore does not constitute a restraint on his liberty greater than necessary to insure that he acquire needed vocational skills.

ARGUMENT

I. The district court did not err in denying Stepp's Motion to Suppress Evidence.

Stepp, who concedes the traffic stop in this case was valid, contends that the district court erred in denying his motion to suppress because: (1) "Lawson's

suspicionless extraneous question at the traffic stop was coercive and violated [his] Fourth Amendment rights;" (2) "The unrelated questioning was sufficiently coercive because [Stepp and Boswell] were not free to leave;" and (3) in the alternative, "Should the Court determine that the stop was not coercive, the stop was measurably prolonged beyond the time necessary to complete its purpose." The government would submit that the district court did not err in denying the motion to suppress because the detention of Stepp in this case did not exceed the limits imposed by the Fourth Amendment.

Regarding the standard of review to be applied in cases involving the denial of a motion to suppress, the Sixth Circuit has opined that

> "When reviewing a district court's decision on a motion to suppress, we use a mixed standard of review: we review findings of fact for clear error and conclusions of law de novo." [citation omitted.] In particular, "[w]hether a seizure is reasonable under the Fourth Amendment is a question of law that we review de novo." [citation omitted.] "When a district court has denied a motion to suppress, [we] review[ ] the evidence in the light most likely to support the district court's decision." [citation omitted.]

United States v. Everett, 601 F.3d 484, 487-88 (6th Cir. 2010).

"[A] seizure that is lawful at its inception can violate the Fourth Amendment

if its manner of execution unreasonably infringes on interest protected by the Constitution." Illinois v. Caballes, 543 U.S. 405, 407 (2005); Everett, 601 F.3d at 488. The principles announced in Terry v. Ohio, 392 U.S. 1 (1968), "apply to define the scope of reasonable police conduct" during traffic stops. United States v. Hill, 195 F.3d 258, 265 (6th Cir. 1999). "To qualify as reasonable seizures under the Fourth Amendment, Terry seizures must be 'limited in [both] scope and duration.'" Everett, 601 F.3d at 488 (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)). "Under Terry's duration prong, a stop 'must . . . last no longer than is necessary to effectuate the purpose of the stop.'" Id. "Under its scope prong, 'the investigative methods employed should be the least intrusive means reasonable available to verify or dispel the officer's suspicion in a short period of time.'" Id. Quoting the United States Supreme Court, the Sixth Circuit has observed "that the ultimate touchstone" of the Fourth Amendment is "reasonableness." Everett, 601 F.3d at 492.

The detention in this case complied with both the duration and scope prongs of Terry. There is no real disagreement about any of the dispositive facts in this case. These facts include the following:

- The vehicle in which Boswell and Stepp were traveling

had license tags that were registered to a different vehicle. This was one of the reasons for Lawson's initial stop of the vehicle.

- The vehicle in which Boswell and Stepp were traveling was a rental and they did not have a copy of the rental agreement in the car.

- Boswell informed Lawson that he was not authorized to drive the vehicle.

- Lawson believed that the vehicle might be stolen, and although the officers on the scene attempted to dispel their suspicions regarding the status of the vehicle, they were unable to do so prior to the discovery of the cocaine in the trunk of the vehicle.

- Neither Stepp or Boswell, both of whom claimed to be boxers traveling from Atlanta to Nashville to train, could tell Lawson what gym they would be using. Lawson had received a report that both men had a history of involvement with narcotics, and both men appeared nervous throughout the stop.

- The traffic stop lasted approximately twenty-seven minutes measured from the time the traffic stop was initiated to the time Boswell and Stepp were taken into custody.

The detention in this case lasted no longer than was necessary to investigate the issues involving the vehicle's registration. Since neither Boswell or Stepp possessed any documents showing they were legally entitled to possess the

vehicle, this added a second issue that had to be resolved and necessarily lengthened the detention. Lawson was prompt in making his record checks and called a backup officer to assist him in trying to resolve the questions regarding the vehicle. Given the reason for the initial stop and the fact that neither occupant of the vehicle could produce any documents establishing that they were lawfully in possession of the vehicle, the length of the detention in this case was reasonable.

Moreover, the methods used by the officers to attempt to dispel their suspicions were reasonable. The location where the initial stop was made-the side of an interstate highway-limited the tools available to Lawson to resolve the situations presented to him as a result of the traffic stop. They involved limited questioning of Boswell and Stepp by Lawson, an attempt to obtain the rental documents from the men, record checks made through the sheriff's office dispatcher, and assistance from additional officers. The officers acted in a reasonable manner in this situation in light of all the circumstances, and the manner in which they conducted their investigation did not amount to a violation of the Fourth Amendment.

II. There was no violation of Stepp's Fifth Amendment rights in this case .

Stepp also contends that his statement to Lawson, in which he admitted his participation in the cocaine conspiracy charged in this case, should be suppressed because it is the "fruit of the poisonous tree." The government submits that because the detention of Stepp comported with the Fourth Amendment, this issue is moot. It is undisputed in this case that Stepp was advised of his Constitutional rights as required by Miranda prior to giving his statement; Stepp concedes as much in his characterization of this issue.

III. The district court properly exercised its discretion when it did not allow Jones to testify as an expert in the field of dog training.

At the suppression hearing, Stepp tendered Jones as an expert in the field of dog training. The government was allowed to question Jones concerning his qualifications to testify as an expert. The questioning revealed that he was not certified as a dog trainer, had not ever worked for a police department as a dog handler or dog trainer, and that he had no educational background in dog training. The district court refused to allow Jones to testify as an expert given his lack of qualifications. A trail court's decision regarding the admissibility of expert testimony is reviewed for abuse of discretion. United States v. Bender, 265 F.3d 464, 472 (6th Cir. 2001).

The government initially notes that, apart from questions of privilege, the Federal Rules of Evidence do not apply in suppression hearings. See United States v. Matlock, 415 U.S. 164, 172–74 (1974); see also Fed. R. Evid. 104(a) (stating the court is not bound by rules of evidence when deciding preliminary matters concerning the admissibility of evidence); Fed. R. Evid. 1101(d)(1) (stating evidence rules are inapplicable to "[t]he determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104."). To the extent, however, that the rules provide guidance on whether to allow proposed expert testimony, the government submits that they support the view that excluding the defendant's proposed evidence was not an abuse of discretion.

Rule 702 of the Federal Rules of Evidence provides that "[I]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise . . ." The district court did not abuse its discretion in this instance when it did not allow Jones to testify as an expert. To begin with, he was not qualified to testify because he lacked an expert's "knowledge, skill,

experience, training or education" required by Rule 701. Jones testified that he was not a certified dog trainer, that he had never worked as a dog handler or dog trainer for a police department, that he did not have a degree related to dog training, that he had last trained a drug dog ten years ago, and that he had trained two to three drug dogs over a period of fifty years. According to Jones, he trained dogs for the "field." There was no proof that Jones had published anything regarding dog training or had been recognized as a dog trainer by any other person or organization. As a purely factual matter, Jones did not have the necessary qualifications to testify as an expert witness.

Second, the training of the drug dog in this case was never raised as an issue by the defense, so the testimony of a dog trainer would not help the district court understand the evidence or determine a fact in issue as required by Rule 702. Moreover, a review of the offer of proof made by the defense regarding what Jones would have testified about reveals that it was the intent of the defense to have Jones testify about drug dog handling rather than the more generalized field of dog training. By his own admission, Jones had limited experience with training drug dogs-only two or three over fifty years-and absolutely no experience handling drug dogs. Thus, Jones did not have sufficient knowledge to testify

about drug dog handling. These facts establish that the district court did not abuse its discretion in excluding Jones' testimony in light of the defense offer of proof.

IV. The district court properly imposed a special condition of supervised release in this case.

The district court, concerned about Stepp's future employment opportunities, ordered that he participate in vocational training and seek and maintain full-time employment outside the field of boxing as a condition of supervised release. Stepp, who never voiced an objection to this requirement in the district court, now contends that the district court abused its discretion in imposing this condition. The government submits that the district court did not commit error in this instance. Regarding the proper standard of review in this instance, the government would submit that because Stepp did not object in the district court the standard of review is for plain error, provided this Court determines that the district court complied with the holding in United States v. Bostic, 371 F.3d 865 (6th Cir. 2004). If this Court determines Bostic was not complied with, then the standard of review is for abuse of discretion, see United States v. Modena, 302 F.3d 626, 636 (6th Cir. 2002).

In Bostic this Court held that

> [D]istrict courts, after pronouncing the defendant's sentence but before adjourning the sentencing hearing, [must] ask the parties whether they have any objections to the sentence just pronounced that have not previously been raised. If the district court fails to provide this opportunity, they will not have forfeited their objections and thus will not be required to demonstrate plain error on appeal.

Bostic, 371 F.3d at 871-72. The government submits that the district court gave Stepp a final opportunity to raise any objections to his sentence after the sentence had been pronounced and that he failed to do so. While the government submits that what the district court did in this case was sufficient and that plain error review is appropriate, government counsel would direct this Court to its holding in United States v. Clark, 469 F.3d 568, 570-71 (6th Cir. 2006), which appears to indicate otherwise. The government submits that the imposition of the special condition of supervised release in this case did not amount to error, plain or otherwise.

Federal sentencing law requires a sentencing court to impose certain specified conditions on a term of supervised release such as a prohibition against the defendant committing a federal, state or local crime during his period of supervised release and DNA testing, see 18 U.S.C. § 3583(d). The sentencing court is also allowed to impose special conditions of supervised release. Id. In

order to impose a special condition, the sentencing court must determine, among other things, that the condition

> is reasonably related to specified sentencing factors, namely the nature and circumstances of the offense and the history and characteristics of the defendant, and the need to afford adequate deterrence, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. . .

United States v. Modena, 302 F.3d 626, 636 (6th Cir. 2002) (quoting United States v. Ritter, 118 F.3d 502, 504 (6th Cir. 1997)).

In this case the special condition was appropriate. To begin with, Stepp's involvement in boxing played a role in the offense: he and Boswell, a fellow boxer, were transporting two kilograms of cocaine to Memphis, and they both told police officers that they were traveling to Nashville to train. In addition, Stepp's pretrial release was revoked because of a second arrest in a case involving Boswell. Given Stepp's work history, two things are clear: he is unable to make a decent living boxing and he is in dire need of vocational training in order to earn a decent living. The record in this case establishes that boxing had become an impediment to Stepp making a decent living.

In imposing the special condition of supervised release regarding full-time employment as a boxer, the district court sought to remove this impediment in order for Stepp to acquire the skills he needed to earn a decent living. Moreover, this condition of supervised release does not prevent Stepp from boxing or training other people to box on a part-time basis, and thus does not involve a deprivation of liberty greater than that required to effectuate the district court's goal of providing Stepp with the vocational training he needs. Given the totality of the circumstances in this case, the district court did not abuse its discretion in imposing the special condition of supervised release in this case.

CONCLUSION

Based upon the reasons and authorities cited herein, this Court should affirm the district court in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation provided in Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure. The brief contains 6687 words of Times New Roman (14-point) proportional type, from the Statement of Jurisdiction through the Conclusion. WordPerfect X4 is the word-processing software that I used to prepare this brief.

/s/ Joseph C. Murphy, Jr.
JOSEPH C. MURPHY, JR.
Assistant United States Attorney

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Appellee, pursuant to Sixth Circuit Rules 28(c) & 30(b), hereby designates the following filings in the District Court's record as entries that are relevant to this appeal:

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NO.
Indictment	04/21/09	1
Minute Entry	06/15/09	30
Motion to Suppress	09/15/09	64
Minute Entry	12/17/09	75
Minute Entry	01/06/10	77
Notice of Filing of Official Transcript (Suppression Hrg)	01/21/10	79
Notice of Filing of Official Transcript (Suppression Hrg)	01/21/10	80
Order Denying Defendant's Motion to Suppress	02/25/10	92
Order on Change of Plea	04/19/10	105
Plea Agreement	04/19/10	110
Redacted Judgment	12/21/10	163
Notice of Appeal	12/22/10	164
Pre-Sentence Report	N/A	
Sentencing Hearing Transcript (All pages)	02/08/11	173
Exhibit 2 (Suppression Hearing)	N/A	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Plaintiff-Appellee United States was served upon counsel for Defendant-Appellant Tommie Stepp,

Doris Randle Holt
1st Asst. Federal Defender
200 Jefferson Avenue
Suite 200
Memphis,TN 38103

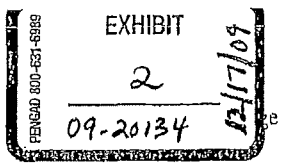
by filing with the Court's CM/ECF system this 18th day of July, 2011

/s/ Joseph C. Murphy, Jr.
JOSEPH C. MURPHY, JR.
Assistant United States Attorney

Radio Log

DATE: 04/20/2009
TIME: 06:58:02AM

RUTHERFORD COUNTY SHERIFFS DEPARTMENT



Radio Traffic From: 04/16/2009 Thru: 04/16/2009

DATE	TIME	FROM	TO	TRAFFIC	License Plate	CFS #
04/16/2009	0644	553 - LAWSON, SCOTT	2911	10-8 - IN SERVICE	Race: / Sex:	
04/16/2009	0851	553 - LAWSON, SCOTT	TB01	10-28 - CHECK VEHICLE REG.	Plate: GA ARH6720 Make: Model: Color: Race: / Sex:	
04/16/2009	0853	553 - LAWSON, SCOTT	TB01	10-81 - CHECKING VEHICLE	Race: / Sex:	200920375
	Location: I-24 WB 85 MM					
04/16/2009	0859	553 - LAWSON, SCOTT	TB01	10-53 - WANTED CHARGE	Race: / Sex:	200920375
	NCIC/CH X2 BOSWELL,CEDRIC D 072169 / STEPP,TOMMIE R 091470 BOTH B/MS					
04/16/2009	0913	553 - LAWSON, SCOTT	TB01	10-110 - INFORMATION	Race: / Sex:	200920375
	NEED K9 CODE 3					
04/16/2009	0914	553 - LAWSON, SCOTT	TB01	10-51 - LICENSE STATUS CHECK	Race: / Sex:	200920375
	GA DL 066192871 CEDRIC BOSWELL					
4/16/2009	0919	553 - LAWSON, SCOTT	TB01	10-15 - ARRESTEE IN CUSTODY	Race: / Sex:	200920375
	X2					
4/16/2009	0929	553 - LAWSON, SCOTT	TB01	10-110 - INFORMATION	Race: / Sex:	200920375
	ON CH ADVISE 10-15 AND SCHED FROM BEFORE					
4/16/2009	0947	553 - LAWSON, SCOTT	TB01	10-15 - ARRESTEE IN CUSTODY	Race: / Sex:	200920375
	SCHED 2 WILL BE BRINGING THIS TO SO					
4/16/2009	0952	553 - LAWSON, SCOTT	TB01	10-6 - BUSY	Race: / Sex:	200920375
	SO					
4/16/2009	1151	553 - LAWSON, SCOTT	TB01	10-98 - FINISHED W/LAST CALL	Race: / Sex:	200920375
4/16/2009	1151	553 - LAWSON, SCOTT	TB01	10-6 - BUSY	Race: / Sex:	
	SO					
4/16/2009	1727	553 - LAWSON, SCOTT	PG02	10-7 - OUT OF SERVICE	Race: / Sex:	
4/16/2009	2303	553 - LAWSON, SCOTT	9242	10-8 - IN SERVICE		

Report_Radio Log

Radio Log

RUTHERFORD COUNTY SHERIFFS DEPARTMENT

DATE: 04/20/2009
TIME: 06:58:02AM

Radio Traffic From: 04/16/2009 Thru: 04/16/2009

DATE	TIME	FROM	TO	TRAFFIC	License Plate	CFS #
					Race: / Sex:	
04/16/2009	2307	553 - LAWSON, SCOTT	9242	10-48 - WRECKER REQUEST		200920525
					Race: / Sex:	

;RCSO;NEED NEXT SCHEDULED CLASS A WRECKER FOR BUDGET RENTAL VEHICLE GA TAG ARH6720 SILVER HYUNDAI SONATA; RELATED TO 10-81 CFS #200920375

Total Records: 15