The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 54 (May 19, 2016) 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. 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 Microsoft Word 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 Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov. See section 2(g) of the application instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Chief Deputy Attorney General at the Tennessee Office of the Attorney General

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

Licensed in Tennessee in 2013. BPR number 031551.

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.

Licensed in Connecticut in 2004. Juris number 423712. I went inactive on May 28, 2013, as it did not appear likely that I would ever practice in Connecticut and it did not make sense to pay the annual fee to maintain active status.

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, apart from voluntarily deactivating my Connecticut licensure as described above.

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).

Tennessee Attorney General's Office, Chief Deputy Attorney General (2018-present)

Butler Snow LLP, partner (2016-18), senior counsel (2014-15)

University of Memphis Cecil C. Humphreys School of Law, Adjunct Professor (Cyberlaw 2012-15, Legal Methods 2011-12)

United States Attorney's Office for the Western District of Tennessee, Assistant United States Attorney (2011-14)

United States Department of Justice, Civil Rights Division, Criminal Section: Honors Program Trial Attorney (2005-10) and Special Assistant United States Attorney on detail to United States Attorney's Office for the District of Columbia (2005-06)

United States Court of Appeals for the Eighth Circuit, law clerk for Judge Steven M. Colloton (2004-05)

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.

In my current practice I manage the fifteen litigating divisions of the Attorney General's Office that represent the State of Tennessee and its agencies and officials in virtually all civil trial litigation and that provide advice to our clients about a wide range of legal issues. Our clients include the executive branch and all its constituent agencies, the legislature, and the judicial branch. We cover everything from state tax matters to the Claims Commission to constitutional challenges to healthcare to consumer protection to employment law, to give a small sampling of the span of our work.

Approximately 98% of my current practice is on the civil side. My involvement with criminal law typically arises in the context of proposed legislation or the occasional novel issue.

In certain matters, I engage in detail and invest a significant amount of time working on a granular level. For example, I spent several years negotiating nationwide settlements against opioid manufacturers and distributors. I was part of a small team of attorneys for the states arrayed at the table with elite corporate defense counsel and the top tier of the plaintiff's bar to resolve what the Wall Street Journal identified as "the largest and most complex civil case in the nation's history." Those negotiations resulted in a $26 billion global settlement.

I have also spent a significant amount of time working with others in our office and colleagues from other states to develop antitrust strategies against the dominant tech platforms.

With respect to management of other matters, my degree of supervision varies depending on need. Often issues only come to me when problems arise. Others arrive in the ordinary course of office processes. I review settlements in many different types of cases. I help develop and refine office policies. I work with our divisions to identify priorities for enforcement, to optimize case staffing, to help attorneys grow, and to otherwise help the office succeed.

I devote substantial time to managing the office's relationships with our clients. This sometimes entails extensive contact with legislators and the executive branch, working through thorny legal issues, helping them revise proposed changes to state law, and discussing litigation and settlement strategies. These contacts have provided an opportunity to better understand and appreciate the scope and workings of Tennessee government.

Managing the office's relationships with other states also constitutes a significant responsibility. Sometimes that means initiating or resolving multistate consumer protection cases, sometimes it means working together to coordinate the signing of a joint letter by the attorneys general to Congress or the administration or a corporation, and sometimes it means sharing information and best practices to improve office functionality.

Given my prior federal experience, I also frequently server as an intermediary with the federal government. Sometimes that involves collaboration, such as working with the DOJ and FTC on antitrust and consumer protection issues or working with the local U.S. Attorney's Office on a law enforcement grant. At other times, the conversations can be a bit more contentious.

Leadership is also an important aspect of my practice. Providing encouragement to my fellow attorneys, reinforcing the office's culture, and evaluating office systems and structures are all part of the job. I work with our human resources team to recruit outstanding attorneys and to develop the attorneys already in the office. I work with our communications team to highlight our successes and to clarify issues for interested parties, be they lawmakers, reporters, or community leaders.

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.

I have been blessed with an incredible breadth of experience across the full spectrum of law. In both private and State practice, I have engaged in complex litigation, culminating in years of work as one of the negotiators who reached a $26 billion resolution of "one of the largest and most complex civil litigation battles in U.S. legal history," per the Washington Post.

But I have not just practiced in the rarefied air of landmark litigation. I have been in court on big cases and little cases and much in between. As a prosecutor, I handled cases ranging from misdemeanor possession of alcohol at the VA to a conspiracy to assassinate the President. As a criminal defense attorney, my experience ranged from resolving speeding tickets in municipal court to defending complex multiagency investigations involving hundreds of millions of dollars in exposure. On the civil side, I have litigated eviction cases but also helped develop the strategy for antitrust cases against the most powerful corporations in the world.

I have argued everywhere from General Sessions Court to the U.S. Court of Appeals for the Sixth Circuit. I have represented the United States, the State of Tennessee, political subdivisions of states, Fortune 100 companies, mid-sized and small Tennessee companies, and individuals. I have tried over twenty cases, appeared at hundreds of hearings, drafted innumerable dispositive and evidentiary motions, requested and produced discovery in cases big and small, applied for search warrants, and settled many, many cases. In addition to the actual work of lawyering, I have also taught law school classes, published articles, drafted legislation, recruited attorneys, and served in the senior management of a large law office.

I was fortunate to begin my career as a law clerk for a judge on the United States Court of Appeals for the Eighth Circuit, assisting him in both civil and criminal appeals involving a wide range of substantive legal issues.

Following my clerkship, I was extremely lucky to join the Civil Rights Division through the DOJ's Honors Program. In this phase of my career, I was a federal prosecutor focused almost exclusively on criminal matters. I began my prosecutorial stint on a detail prosecuting domestic violence misdemeanors in D.C. Superior Court. This involved long days in court trying cases, arguing motions, negotiating plea deals, wrangling witnesses, and otherwise managing a docket of hundreds of cases. I also made an appearance in felony court to revoke the parole of a particularly dangerous defendant after discovering he had tortured his young wife.

As a trial attorney in the Civil Rights Division, the overwhelming majority of my time was spent on cases in Tennessee. My docket included human trafficking, hate crimes, and official misconduct. I was frequently in court, participating in initial appearances, motions hearings, trials, and sentencings. I also made extensive use of the federal grand jury to investigate cases and obtain indictments. During this time I also litigated several civil immigration appeals as part of a DOJ program to eliminate a backlog.

I moved to Memphis to become an Assistant U.S. Attorney and joined the office's Civil Rights Unit, which kept my docket heavily focused on sex trafficking, hate crime, and official misconduct cases. I also prosecuted several criminal tax cases, some criminal fraud, and a smattering of firearms crimes. I led multiagency teams on civil rights and white collar investigations. Most of my time was spent working on cases at the trial level, but I did also engage in appellate litigation and argument in the Sixth Circuit.

As a federal prosecutor I tried seven jury trials, five as first chair. I handled hundreds of motions hearings and sentencings. I worked on about a dozen significant matters that received national news coverage and at least one that received international news coverage; some of these are enumerated in the notable cases portion below. I also trained prosecutors, judges, and investigators both around the country and internationally on topics such as investigating, charging, and prosecuting sex trafficking; victim rights; the constitutional violations underlying official misconduct charges; and evidentiary considerations in hate crimes. The Department also had me speak to a variety of citizens groups to raise awareness of human trafficking.

Following my prosecutorial career, I joined Butler Snow. My practice at Butler Snow was a mix of civil and criminal, with most of the criminal work directed at defending investigations rather than charged cases. The civil work, probably 60% of my caseload, was a mix of complex litigation and commercial litigation. My complex litigation work arose primarily in the context of several large false claims and fraud cases involving very large companies. I engaged in witness development, evidentiary review, interaction with government attorneys and investigators, discovery, and drafting pleadings and motions. I also drafted numerous evidentiary and dispositive motions in products liability MDLs involving medical devices and pharmaceuticals, and occasionally contributed to appellate briefing. I also mediated a variety of individual cases nested within multidistrict litigation frameworks.

My commercial litigation experience included contract disputes, torts, insurance defense, and consumer protection. In many of these cases I was either sole counsel or was joined by one other attorney from the firm, though some cases did involve large teams. On the smaller cases I typically appeared in court for conferences and hearings, handled discovery, took depositions, drafted evidentiary and dispositive motions, and resolved the case through negotiation or mediation. In some of the larger cases I appeared in court, while in other large cases my participation involved drafting dispositive and evidentiary motions, working with witnesses, and producing discovery.

I also worked on healthcare matters, dealing with regulators on behalf of clients and developing strategies to resolve investigations or report violations. Healthcare work occasionally overlapped with my data privacy work, which sometimes involved prophylactic advice, sometimes involved evaluation of potential breaches, and sometimes involved helping clients respond to ransomware attacks.

On the criminal side, my work focused on the insurance, healthcare, and tax industries, including both corporate and individual clients. My role in these cases varied, but often involved substantial internal investigation followed by rigorous analysis and then meetings with government investigators and attorneys. In my two biggest criminal cases in private practice, both of which involved hundreds of millions of dollars in alleged exposure, my colleagues and I engaged in extensive internal investigation, met with government regulators, and were ultimately able to convince the government to forego any enforcement action.

Following five years at Butler Snow, I was recruited to work at my current job described above.

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

National opioids litigation: I served as a negotiator for one of the lead states in the multistate opioid settlement discussions from 2019-21. Following years of multilateral negotiation, sometimes in conjunction with the federal opioid MDL and sometimes not, the states reached a nationwide deal with four Fortune 50 companies for a total of $26 billion. Pursuant to the agreement, the large majority of those funds will be used to abate the opioid epidemic that has caused incalculable damage to Tennessee and the other states. The Wall Street Journal identified this as "the largest and most complex civil case in the nation's history."

In parallel with the $26 billion settlement, in 2019 I was also involved in the negotiations that led Purdue Pharma to file for bankruptcy. Following Purdue's declaration of bankruptcy, I engaged in additional negotiations with the company, its owners, and other creditors, and I continued to supervise Tennessee's frontline negotiators throughout the bankruptcy litigation. Tennessee was one of the lead states in the effort to establish a bankruptcy plan that would resolve all of the potential claims against Purdue's owners as well as against the company. The company and its owners eventually agreed to pay over $5.5 billion, the significant majority of which would be dedicated to the abatement of the opioid crisis. NPR described this as "one of the most complicated bankruptcy cases in the nation's history."

Joe Brown v. Regions Bank: I represented Regions Bank from 2015-18 in convoluted litigation involving a couple who had not paid the mortgage on their $1.2 million home for seven years. Prior to my arrival in the case, the creative and occasionally *pro se* couple managed to stall the eviction process by convincing various courts that other courts had jurisdiction, rendering all of the courts unwilling to resolve the matter. Regions retained Butler Snow in 2015 to untangle the cases. We succeeded in returning possession to the bank. I litigated constituent cases of this matter in General Sessions Court, Circuit Court, Chancery Court, the United States District Court, the United States Bankruptcy Court, the Tennessee Court of Appeals, and the United States Court of Appeals for the Sixth Circuit. One of my attached writing samples comes from this litigation, as does the bar complaint described below.

A particularly satisfying resolution in private practice arose when the buyer of a client's home sued the client in Chancery Court for alleged failure to disclose a material fact prior to closing.

Following discovery and during the pendency of motions for summary judgment, the plaintiff paid a substantial sum to settle the case.

Several of my biggest successes at Butler Snow involved keeping cases out of the trial courts. In one instance, a Fortune 100 client faced a multiagency criminal and civil investigation involving allegations of complex fraud and hundreds of millions of dollars in exposure. In another, a Fortune 100 client faced a joint federal and state criminal investigation related to a broad conspiracy involving insurance fraud and public corruption on a massive scale. In both instances, the government ultimately declined to charge my clients.

United States v. Terrence "T-Rex" Yarbrough (Western District of Tennessee docket no. 2:10-cr-20283): First-chaired trial of a notoriously violent Memphis pimp on charges of child sex trafficking, sex trafficking by force, and food stamp fraud. We secured a 44-year sentence for the lead defendant. The FBI included Yarbrough on its list of "worst of the worst" sex traffickers.

United States v. Dale Mardis (Western District of Tennessee docket no. 2:08-cr-20021): I was part of the prosecution team that secured a life sentence for the racially-motivated murder of Shelby County Code Enforcement Officer Mickey Wright. The victim's body has never been found and investigators were not able to solve the case until years after the murder, which complicated the case. Numerous other complications ensued based on a convoluted procedural history. Because the defendant's case was death-eligible, his capable and aggressive attorneys flooded the prosecution with pretrial motions that often made strong arguments. I took the lead in responding to those motions and filing evidentiary motions in support of the prosecution. During the pendency of trial, the defendant tried to arrange for the murder of a witness; that created additional complications. The defendant pled guilty on the eve of trial. In preparing for sentencing, we unexpectedly uncovered evidence of his guilt in the decade-old unsolved murder of a different man. The defendant ultimately received a federal life sentence for the murder of Mickey Wright and a state life sentence for the murder of Henry Ackerman.

United States v. Juan Mendez (Western District of Tennessee docket no. 2:06-cr-20387): I prosecuted an international child sex trafficking ring that lured young girls from Mexico to Tennessee and forced them into prostitution through violence, rape, and threats against their families. We secured a 50-year sentence for the leader of the conspiracy. The case originated with a set of seven simultaneously-executed search warrants and involved approximately a dozen defendants. Because it was one of the earlier cases prosecuted under the Trafficking Victims Protection Act, it became a training exemplar that my co-counsel, my lead agents, and I used to teach thousands of investigators and prosecutors about human trafficking. The most satisfying part of this case was helping the youngest victim obtain a T-visa so she could safely reunite with her family in the United States.

United States v. Arthur Sease (Western District of Tennessee docket no. 2:06-cr-20304): I

second-chaired the trial of a Memphis police corruption kingpin who abused his police authority by kidnaping and robbing drug dealers, then collaborated with gang member co-conspirators to sell the stolen drugs. By the time of trial, we had identified nineteen separate robberies committed by Sease and his co-conspirators. This case was the capstone of a protracted effort to root out corruption in the Memphis Police Department.

United States v. Eric Baker (Middle District of Tennessee docket no. 1:08-cr-00002): I prosecuted the leadership of the Aryan Alliance for firebombing a house of worship in Columbia, Tennessee. The defendants had intended their attack to be the spark that triggered a nationwide race war.

United States v. Daniel Cowart (Western District of Tennessee docket no. 1:08-cr-10119): I prosecuted members of a West Tennessee white supremacist conspiracy who planned to murder black schoolchildren and assassinate President Obama. This case received substantial international attention.

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 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 or similar 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.

Harvard Law School, 2004, J.D. cum laude. Editor-in-chief of the Harvard Journal of Law & Public Policy; recipient of the Heyman Fellowship for Federal Public Interest Law.

University of Oxford, 2001, Honors B.A. in Philosophy, Politics, and Economics. Served on the Hertford College Middle Common Room Committee.

George Washington University, B.A. summa cum laude in Philosophy. Received the Shapiro Scholarship to the University of Oxford (a full scholarship to pursue a degree at Oxford); received the George Washington Award for Outstanding Contributions to the University.

PERSONAL INFORMATION

15. State your age and date of birth.

44 years old, born on [redacted] 1977.

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

I have lived continuously in the State of Tennessee for over ten years.

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

I have lived continuously in Williamson County for two and a half years.

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

Williamson 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 placed 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.

A law partner and I were subjects of a complaint by Joe and Kimerly Brown, litigants whose case produced one of the writing samples included with my application. The essence of the complaint was that I had doctored a copy of a deed of trust produced at a Chancery Court hearing. In their complaint, the Browns neglected to mention that the document was moved into evidence by their own counsel or that Mr. Brown extensively authenticated the document in the course of his testimony. Disciplinary counsel for the Board of Professional Responsibility dismissed the complaint. The complaint was identified as BPR File No. 56096-9-SC.

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.

Harpeth Hills Church of Christ in Brentwood, Tennessee; White Station Church of Christ in Memphis, Tennessee

Bible Study Fellowship, 2019-2021

Leadership Tennessee Signature Program Class VIII

Beacon Center of Tennessee, Legal Advisory Board 2015-2018

Restore Corps (nonprofit supporting human trafficking survivors), Board of Directors 2014-2017

Leadership Memphis Executive Program 2016

Shelby County Republican Party, General Counsel 2018

Shelby County Republican Lunch Hour Club, Vice-Chair 2015-2018

Harvard Club of the Mid-South, Schools Committee Co-Chair 2015-2018

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, Federal Practice Section Executive Council, 2017-present and chair, 2019-2020.

The Federalist Society for Law & Public Policy, member 2001-present; President of the Memphis Lawyers Chapter, 2014-2018; member of the Administrative Law & Regulation Practice Group Executive Committee, 2018-present

Memphis Bar Foundation, Fellow 2018-present

Republican National Lawyers Association, member 2018

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.

Harvard Law School Wasserstein Public Interest Fellows Program; Fellow 2021

Best Lawyers in America, Commercial Litigation, 2019

University of Memphis Cecil C. Humphreys School of Law Adjunct Professor of the Year, 2014

Formal congratulations from the Anti-Defamation League for the prosecution of Justin Shawn Baker, 2013

Memphis Business Journal Top 40 Under 40, 2013

U.S. Attorney's Special Achievement Award, 2012

Leo Bearman Sr. American Inn of Court, Barrister 2011-2014

Attorney General's Award for Distinguished Service, 2010

U.S. Department of Justice Civil Rights Division Special Commendation, 2009

Commendations from the Director of the Federal Bureau of Investigation, 2009 and 2010

U.S. Department of Justice Civil Rights Division Victim Rights Award, 2008

U.S. Department of Justice Civil Rights Division Special Achievement Awards, 2007, 2008, 2010

Harvard Law School Heyman Fellowship for Federal Public Service; Fellow 2005

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

Jonathan Skrmetti, *Symposium: The triumph of textualism: "Only the written word is the law"*, SCOTUSblog (Jun. 15, 2020), https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/

Matthew P. Cavedon & Jonathan T. Skrmetti, *Party Like It's 1935?:* Gundy v. United States *and the Future of the Non-Delegation Doctrine*, 19 FED. SOC. REV. 42 (2018).

Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013 (2013).

Jonathan T. Skrmetti, *The Keys to the Castle: A New Standard for Warrantless Home Searches in* United States v. Knights*, 122 S.Ct. 587*, 25 HARV. J.L. & PUB. POL'Y 1201 (2002).

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.

The below reflects my best recollection and a review of the available records. It is possible that I have inadvertently forgotten an event, did not realize that credit was provided for certain talks I gave, or misdated a talk.

Delivered Wasserstein Fellowship lecture at Harvard Law School, 2021

Panelist on National Association of Attorneys General chief deputies conference panels on "The Use of Outside Counsel by Attorneys General" and "Does Communications Have a Seat at the Table?", 2021

"Leadership in the Law" (with Danielle Barnes and Doug Blaze), 2021

Healthcare Enforcement Compliance Conference of the Health Care Compliance Association, "Trends and Best Practices in Healthcare Privacy and Security Investigations" (with Brian Stimson and Timothy Noonan), 2020

Moderator of joint National Association of Attorneys General/Harvard Berkman-Klein Center for Internet and Society panel on privacy and digital contact tracing, 2020

Moderator of National Association of Attorneys General panel on crytptocurrency regulation, 2020 (panelists included an SEC Commissioner and a CFTC Commissioner)

"Ethical Crisis in the Legal Academy: The Refusal to Represent Controversial Clients" (with Harold See), 2019

Tennessee Conference of District Attorneys General Annual Conference, "Preserving the Record on Appeal" (with Zach Hinkle), 2019

Bass Berry & Sims Annual Compliance & Government Investigations Seminar, "A Discussion on the Future of Privacy & Data Security Compliance" (with James Amsler, Jaime Barwig, and Lisa Rivera), 2019

Panelist on National Association of Attorneys General chief deputies conference panel on

opioids litigation and proposed settlement structures, 2019

Talk to the Murfreesboro members of the Federalist Society, "A Conversation with Chief Deputy Attorney General Jonathan Skrmetti," 2019

International Association of Privacy Professionals, Nashville Chapter, "Data Privacy and Security: The Role of the Tennessee Attorney General's Office" (with Lauren Lamberth, Carolyn Smith, and Ann Mikkelsen), 2019

National Association of Regulatory Attorneys Annual Conference, provided CLE on data privacy and cyberlaw, 2019

"Party Like it's 1935?: Gundy v. United States and the Future of the Non-Delegation Doctrine," 2018

False Claims Act CLE presented to in-house counsel for a Fortune 100 client (with Ed Stanton, Jim Letten, and Steve Parker), 2017

Howell Edmunds Jackson American Inn of Court, spoke about prosecuting child sex trafficking cases, ~2016

Foreign Corrupt Practices Act portion of Butler Snow's "Adapting to a Changing World: CLE for In House Counsel" (with Jim Letten and Steve Parker), 2016

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.

I applied for a seat on the United States District Court in 2017. This was an appointive position. I was not appointed.

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

No.

34. Attach to this application 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.

My first writing sample is a Tennessee Court of Appeals brief filed in a commercial litigation case described above. The very large majority of this brief reflects my personal effort, though my co-counsel did have input and my draft was subject to some review and light editing.

My second writing sample is from a Sixth Circuit interlocutory appeal in a child sex trafficking case. Again, the overwhelming majority of this brief reflects my personal effort, although the

material was subject to some review and editing.

ESSAYS/PERSONAL STATEMENTS

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

I have been blessed with extraordinary opportunities in the practice of law. I am convinced the best way to demonstrate gratitude is through a life of service. Spending the rest of my career on the Court would answer that calling. On the Court I could sustain and improve the environment that allows Tennesseans, including my children, to thrive and flourish. The Court provides an opportunity to practice law at the highest level, and additionally provides an opportunity to lead the Tennessee judiciary and the bar. I would enjoy doing both. I love the meticulous work of law and enjoy legal writing. My broad experiences give me a unique perspective that would benefit the Court and the judiciary's boards and commissions. Finally, I love encouraging young people to learn about civics and the law. The Court, through SCALES and otherwise, provides an exceptional platform to inculcate civic virtue in Tennessee's youth.

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)***

My work in the Civil Rights Division of the Department of Justice provided a rare opportunity to protect the rights of some of the most marginalized people in America. My first federal case involved Memphis police officers kidnapping and robbing drug dealers; we had some interesting victim testimony. Several other cases involved Mexican girls who had been horribly exploited and were terrified of contact with the justice system. I prosecuted a transit cop who raped a prostitute and a Memphis cop who violently abused a prostitute (in the latter case, we were fortunate to have five police witnesses who had no doubt the assault was unconstitutional and unnecessary). Both the Bush and Obama administrations recognized my civil rights work with a variety of awards, including the Attorney General's Award for Distinguished Service which is one of DOJ's highest honors. In private practice I provided pro bono assistance to nonprofits.

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)***

Associate Justice of the Tennessee Supreme Court. The Court has five members with statewide jurisdiction and serves as the court of last resort for all cases under Tennessee law. The open seat is available to qualified residents of the Middle and Eastern Grand Divisions. In addition to serving as Tennessee's high court, the Court also provides leadership to the Tennessee judiciary and its affiliated boards and commissions.

My selection would reinforce existing strengths of the Court and provide some additional insights arising from my background. I would contribute to the culture of collegiality and good

temperament and to the Court's methodological rigor, both already present among the justices. I would also bring extensive complex litigation experience and significant criminal law experience, which would expand the Court's collective perspective. I would also bring an expertise in technology law, increasingly a necessity for any court.

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 served in a leadership role in the Tennessee Bar Association, chairing a practice section and continuing to serve on the group's executive committee. I expect to remain active in the TBA if appointed.

I am part of the current Leadership Tennessee class and hope to stay engaged with that organization and its local parallels for years to come.

Church is an important part of my life and I look forward to getting back to teaching Sunday school and rejoining in my weekly Bible study once our newborn is a bit older.

I have judged moot courts in the past and anticipate judging many more if appointed.

My favorite service activity has been mentoring law students and would-be law students, either in a formal or informal capacity. I benefited from outstanding mentoring early in my career and am always grateful for opportunities to pay it forward. Next month I will head to ETSU to talk to students about careers in the law. Earlier this year, I was fortunate to receive one of Harvard's Wasserstein Fellowships that brought me to speak to a classroom full of students interested in public interest law and then meet one-on-one with several dozen similarly interested students. I imagine serving on the Court will increase the number of such opportunities and I look forward to talking to more students about the law. If appointed, I will visit at least one school group in every county to discuss the law and the work of the Court.

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)***

Having worked with businesses, individuals, and government agencies trying to make decisions amidst legal ambiguity, I know a priority of the Court must be to promote the clarity, predictability, and efficiency of the judicial system. Courts do not make the law but they can make the legal system work better. The interpretive methods and procedural rules adopted by the Court for the Tennessee judiciary can make a material difference. Clear and predictable interpretation of the law leads to more opportunity for people to enjoy freedom and prosperity. Promoting clarity, predictability, and efficient resolution of cases is not just a good outcome—it is a moral imperative for the courts.

Legal uncertainty and legal inefficiency undermine the public's perception of the criminal justice system and make it difficult for businesses to operate. My grandfather, a sign-painter who started a small business, did not have the margins to deal with any significant litigation.

But even huge corporate clients from my private practice days, or defendants in my current consumer protection cases, are often driven as much by the pain of the process as by the substance of their conduct. The process should never be so punitive that the merits become irrelevant.

The Court can improve the legal environment both through its jurisprudence and through its boards and commissions. Given the breadth of my experience, I will be cognizant of potential unintended consequences and will work to ensure that the legal system affords Tennesseans a fair and speedy resolution of their claims.

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)***

Absolutely. Since law school I have endorsed humility as the cardinal judicial virtue and emphasized the importance of leaving policymaking in the hands of democratically-accountable officials. I have written several opinion pieces to that effect, the first almost twenty years ago and the most recent just last year.

Ethical considerations prevent me from elaborating on examples from my current employment, but I recall a case from my prosecutorial days that demonstrates the principle. A Satanist hotel security guard in Jackson desecrated the worship implements of a traveling Orthodox Jewish day school. The students and teachers affected were quite distressed, and the items damaged included not just prayer books and instruments but also a valuable Torah scroll. Some community leaders pushed aggressively for a federal felony prosecution. After extensive investigation and research, I could not find a good-faith path to charging the defendant with a federal felony. The breadth of federal criminal law provides an opportunity to charge a felony against almost anyone provided a prosecutor thinks creatively enough, but such practices do violence to the rule of law and ultimately harm the institutional credibility of the justice system. We settled for a federal misdemeanor charge and, fortunately, our colleagues in the District Attorney General's Office were able to secure a felony conviction under Tennessee law. Several years later, I worked with Congressman David Kustoff to change the law and ensure that sufficiently serious destruction of religious property could be charged as a federal felony.

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. Edward L. Stanton III
Partner, Butler Snow, LLP
[redacted]
Memphis, TN 38119
[redacted]

B. Ross Booher
Chief Executive Officer, Latitude
[redacted]
Franklin, TN 37067

C. Hon. Steve Maroney
Chancellor, 26th Judicial District
[redacted]
Jackson, TN 38301
[redacted]

D. Tracey Harris Branch
Supervisory Special Agent, Civil Rights & Public Corruption Squad
Federal Bureau of Investigation
[redacted]
Memphis, TN 38120
[redacted]

E. Jason Thompson
Executive Minister, Harpeth Hills Church of Christ
[redacted]
Brentwood, TN 37027
[redacted]

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 Supreme Court 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 application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application 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: November 19, 2021.

___/s/ Jonathan T. Skrmetti_____
Signature

When completed, return this application to Ceesha Lofton, 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.

Jonathan T. Skrmetti
Type or Print Name

Signature

11/19/21
Date

031551
BPR #

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

Connecticut Bar Examining Committee - 423712

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

REGIONS MORTGAGE, Plaintiff/ Appellee,	)	
v.	)	Case No.: W2017-00605-COA-R3-CV
JOSEPH WILLIE BROWN and KIMERLY W. Brown, Defendants/ Appellants.	)	Thirtieth Judicial District at Memphis, Action No. CT-000531-17, Div. VI, Honorable Jerry Stokes

BRIEF OF PLAINTIFF/APPELLEE REGIONS MORTGAGE

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Attorneys for Plaintiff/Appellee Regions Mortgage

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

REGIONS MORTGAGE, Plaintiff/ Appellee, v. JOSEPH WILLIE BROWN and KIMERLY W. Brown, Defendants/ Appellants.	)	Case No.: W2017-00605-COA-R3-CV Thirtieth Judicial District at Memphis, Action No. CT-000531-17, Div. VI, Honorable Jerry Stokes

BRIEF OF PLAINTIFF/APPELLEE REGIONS MORTGAGE

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Browns perfect their appeal from General Sessions Court to Circuit Court?

2. Do the Browns' objections to the foreclosure process merit reversal of the General Sessions and Circuit Court's orders when multiple courts had previously determined that the Browns waived all objections to foreclosure as part of a settlement agreement?

3. Should this Court consider issues that the Browns raise on appeal which were not raised before or addressed by the courts below?

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Appellants Joe and Kimerly Brown ("the Browns") stopped paying the mortgage on their 7,870 square foot, six bedroom, seven-and-a-half bathroom mansion in Eads, Tennessee ("the Property") in 2010. (A.R. p. 25). Regions sought to foreclose, and the Browns embarked on a dilatory litigation strategy that has taken the better part of a decade and spanned at least eleven cases in seven courts. The Browns' litigation has included two cases in Shelby County Chancery Court[1], both of which were removed to federal court[2] and one of which the Browns pursued all the way to the United States Court of Appeals for the Sixth Circuit[3]; two cases in Shelby County General Sessions Court[4]; an attempted appeal to Shelby County Circuit Court[5] upon which this appeal is predicated; two appeals to the Tennessee Court of Appeals, including this case[6]; and a recent case in the United States Bankruptcy Court for the Western District of Tennessee.[7] The Browns lived rent-free in the mansion through almost all this litigation, having maintained possession until December 2017. (*See* A. R. p. 26; Browns' Br. p. 4).

The Browns' efforts to remain in the Property with no financial outlay far exceeded the limits of good-faith litigation. The United States Court of Appeals for the Sixth Circuit called the Browns' arguments "**frivolous**," emphasized that "the Browns agreed not to contest foreclosure proceedings," and held that their arguments "lack merit." (A.R. p. 40) (emphasis

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[1] Case nos. CH-11-0795-1 and CH-15-0378-1.
[2] Case nos. 2:11-cv-03022 and 2:15-cv-02202 in the United States District Court for the Western District of Tennessee.
[3] Case no. 15-5468.
[4] Case nos. 1650830 and 1733450.
[5] Case no. CT-000531-17.
[6] The other case in this Court, an appeal of the Chancery Court's decision in case CH-15-0378-1, is docketed as case number W2016-02596-COA-R3-CV. Both parties have filed their principal briefs in that case; the Browns' arguments essentially mirror the arguments set out in their brief in the instant case, though their demand for over $200,000,000.00 in damages is newly introduced in this appeal.
[7] Case no. 17-28648. Mr. Brown filed the bankruptcy on October 2, 2017, as a set out crew was in the process of evicting the Browns from the Property. *See* Appellants' Br. at 6.

added). The United States Bankruptcy Court for the Western District of Tennessee recently and pointedly found that "**[Mr. Brown] has engaged in a scheme to delay, hinder or defraud Regions** . . . ." Order Granting Amended Expedited Motion for Relief from Automatic Stay and for Abandonment, doc. no. 20 p. 4 in *In re: Joseph Willie Brown*, case no. 17-28648 (Bankr. W.D. Tenn. Nov. 9, 2017) (emphasis added) (attached hereto as Exhibit A).

This appeal involves only one segment of the overall litigation, the General Sessions Court order granting possession of the foreclosed property to Regions and the subsequent effort to appeal that decision to the Circuit Court. In January 2017, the General Sessions Court issued a judgment of possession in favor of Regions. (A.R. p. 3). The Browns immediately appealed the decision to Circuit Court. (A.R. p. 89). The Circuit Court dismissed the appeal for lack of jurisdiction on March 20, 2017, determining that the Browns had failed to perfect their appeal. (A.R. p. 113). The Browns immediately appealed that decision to this Court. (A.R. p. 110).

The Browns' brief ignores the issues decided by the General Sessions and Circuit Courts, and instead focuses on alleged fraudulent or otherwise improper actions by everyone from Regions' counsel in the 2013 foreclosure to Regions' counsel in Shelby County Chancery Court to the General Sessions Court Clerk's office. Browns' Br. at 4-5, 17. Even the Circuit Court's dismissal of their appeal on jurisdictional grounds is, in the Browns' eyes, objectionable only because of its connection to some conjured fraud involving the deed of trust and the Chancery Court proceedings. Browns' Br. at 5.

Because the Browns' arguments are rooted far back in the history of this litigation and involve allegations related to collateral proceedings, a more detailed history than an FED case would ordinarily merit may be helpful.

The Settlement Agreement

Regions first sought to foreclose on the Property in May 2011. The Browns immediately filed suit in Shelby County Chancery Court to prevent the foreclosure. (A.R. pp. 26-27, 37). Regions removed the case to the United States District Court for the Western District of Tennessee. The case was mediated and on May 9, 2012, the parties entered a settlement agreement. The Browns agreed to pay Regions $590,000 to satisfy their debt within ninety days; if they failed to pay , Regions could foreclose and the Browns would not "contest foreclosure proceedings." (A.R. pp. 27, 37, 40). The Browns did not make the payment; instead, they contested the validity of the settlement agreement in the District Court. The District Court found the settlement agreement valid and enforceable, and the Sixth Circuit affirmed. (A.R. pp. 39-40). Both the District Court and the Sixth Circuit Court of Appeals specifically held that the Browns had waived the right to object to the foreclosure. (*Id.*). The Browns subsequently attacked the foreclosure in Chancery Court; the Chancery Court, too, concluded that the Browns were precluded from relitigating those issues. (A.R. p. 45).

The Proceedings Below

The instant case began in General Sessions Court in March 2015, when Regions filed an FED action. (A.R. pp. 1, 3).[8] The Browns stymied Regions' efforts to regain possession of the property by filing a collateral Chancery Court case to enjoin the FED action (*see supra*; *see also, e.g.*, A.R. pp. 28-29) and bizarre sovereign citizen-style filings (*see, e.g.*, A.R. pp. 47-52, 91-96). After the Chancery Court ruled that the Browns' objections to the foreclosure process

[8] This was not Regions' first forcible entry and detainer action following foreclosure. Regions purchased the Property at a foreclosure sale in 2013 and when the Browns refused to leave the property Regions filed an FED action on October 14, 2013. The Browns were apparently able to get that case dismissed on the basis of the ongoing federal litigation. (A.R. p. 28). The federal court subsequently issued an order authorizing the FED action to proceed, which led to the instant case. (*See* A.R. p. 29).

were barred by collateral estoppel and the FED case could proceed, Regions prevailed in General Sessions Court and obtained a judgment of possession against the Browns on January 18, 2017. (A.R. pp. 1, 3, 98). The Browns immediately appealed to the Circuit Court. They avoided a cost bond by filing an affidavit of indigence and proceeding on a pauper's oath. (A.R. pp. 1, 89-93). The Browns continued to occupy the property through the appeal and never posted a possession bond. Regions moved to dismiss the Circuit Court appeal for lack of jurisdiction, arguing that the Browns had not perfected their appeal because they neither posted a possession bond nor vacated the property. (A.R. pp. 100-102). The Circuit Court agreed and granted Regions' motion to dismiss the appeal. The judgment of the General Sessions Court was thereby affirmed on March 20, 2017. (A.R. pp. 113-114).[9]

The Browns filed their notice of appeal to this Court on the same day the Circuit Court ruled. (A.R. 110). Following additional delay caused by, among other things, a nakedly dilatory bankruptcy case filed by Mr. Brown, Regions obtained possession of the property on December 9, 2017, more than seven years after the Browns stopped making any payments on the mansion. *See* Browns' Br. at 7; *see also* Exhibit A.[10]

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[9] In an effort to further delay execution of the writ of possession, Mr. Brown subsequently filed a dilatory bankruptcy action as well. *See* Browns' Br. at 6; *see also* Exhibit A (in which the Bankruptcy Court found that Mr. Brown's bankruptcy filing was part of "a scheme to delay, hinder or defraud Regions.").

[10] The Browns complain on appeal that the eviction was unlawful because the General Sessions Court Clerk's Office's violated its internal policy in issuing the writ of possession. *See* Browns' Br. at 6. This is one of many issues the Browns raise in their brief that is not properly before the Court. There is nothing in the appellate record relating to this issue, the Browns never raised the internal policy argument with the courts below, and the Browns offer no authority in support of their implicit proposition that the internal policy of the clerk's office trumps the General Sessions Court's judgment of possession. As discussed below, the Court should not entertain any of the many arguments raised for the first time in the Browns' brief.

ARGUMENT

This case can be readily disposed under the same principle the Circuit Court relied upon: the Browns failed to post a possession bond and simultaneously failed to vacate the Property, and therefore they did not perfect their appeal. This Court has previously held under similar circumstances that a tenant seeking review of an FED judgment must either vacate the property or post a possession bond. Failure to do either is a jurisdictional defect and the appeal is not perfected.

The Browns' argument, meanwhile, is somewhat difficult to follow. They do not address the Circuit Court's dismissal of their initial appeal, other than to assert that their inability to post a bond "should not have any forgiveness or forbearance for the actions of these attorneys." Browns' Br. at 5. Many of the issues that receive significant attention in the Browns' brief were never raised below and never addressed by the General Sessions Court or Circuit Court. Tennessee law precludes these issues in this appeal. In particular, the Browns complain at length about the Chancery Court proceedings, which are subject to a separate appeal in this Court as described above in footnote 6. The courts below never considered these arguments. The record in this case does not provide sufficient basis for this Court to consider them, either. The Browns' objections to the Chancery Court proceedings are addressed in their direct appeal of the Chancery Court decision.

One issue that the Browns did raise in the General Sessions Court – and in the Chancery Court, and in the United States District Court for the Western District of Tennessee, and in the United States Court of Appeals for the Sixth Circuit – is the allegedly deficient foreclosure process. As the federal courts and the Chancery Court conclusively determined, the Browns waived any objections to foreclosure as part of a 2012 settlement agreement. Any complaint the Browns have about foreclosure is therefore barred by res judicata and collateral estoppel.

STANDARD OF REVIEW

Whether the Circuit Court properly granted the motion to dismiss is a question of law and is therefore reviewed de novo. *See, e.g., Cannon ex rel. Good v. Reddy*, 428 S.W.3d 795, 798-99 (Tenn. 2014). The same standard applies to the issue of whether the Browns' objections to the foreclosure process are barred by collateral estoppel and res judicata. *Jackson v. Smith*, 387 S.W.3d 486, 491 (Tenn. 2012) (a determination that a claim is barred by the doctrine of res judicata or claim preclusion is reviewed *de novo* on appeal).

Any issue not raised below typically "cannot be raised for the first time in this court," so the Court need not apply any standard of review to such issues. *See, e.g., Moran v. City of Knoxville*, 600 S.W.2d 725, 728 (Tenn. Ct. App. 1979). Under narrow circumstances, however, the Court may choose to exercise its discretion to consider plain errors that were not raised below. *See* Tenn. R. App. P. 36(b) & cmt.; *see also, e.g., Maday v. Public Libraries of Saginaw*, 480 F.3d 815, 820 (6th Cir. 2007) (plain error is a "very high standard"); *McMillin v. McMillin*, 2015 WL 1510766, at *8 (Tenn. Ct. App. Mar. 31, 2015) (plain error doctrine can only be invoked for an "error of such a great magnitude that it probably changed the outcome of the trial.") (internal quotations and citation omitted).

The Browns failed to perfect their appeal.

In this case, the Browns appealed the General Sessions Court's judgment of possession to the Circuit Court without bond based on a pauper's oath and an affidavit of indigence. (A.R. pp. 89, 91-93). This satisfied only the cost bond requirement for an appeal. *See* Tenn. Code Ann. § 27-5-103(a). Tennessee law requires a tenant[11] who remains in a contested property during the appeal of an FED action to post a bond equal to one year's rent. Tenn. Code Ann. § 29-18-

[11] A mortgagor who has defaulted on a mortgage, such as the Browns, is treated as a tenant under Tennessee law. *Metro. Life Ins. Co. v. Moore*, 72 S.W.2d 1050, 1051 (Tenn. 1934).

130(b)(2); *Crye-Leike Property Management v. Dalton*, 2016 WL 4771769, at *4 (Tenn. Ct. App. Sept. 12, 2016). The Browns did not post the requisite possession bond but nevertheless refused to leave the Property. *See, e.g.*, Browns' Br. at 7.

The Browns' failure to post a possession bond under Tenn. Code Ann. § 29-18-130(b)(2) while refusing to relinquish possession of the property was fatal to their appeal. *See Dalton*, 2016 WL 4771769, at *4. In *Dalton*, this Court recognized that while a tenant may retain possession of a property during appeal by posting a possession bond, or may pursue an appeal without a possession bond by relinquishing the property, a tenant who refuses to relinquish the property while simultaneously failing to post a possession bond has failed to perfect an appeal. *Id.* This Court held that the Circuit Court properly dismissed the tenant's appeal because the appeal was not perfected. *Id.* Following *Dalton*, the Circuit Court in this case lacked jurisdiction to entertain the Browns' appeal: "The only way that a circuit court may acquire subject matter jurisdiction over a case litigated in a general sessions court is through the timely perfection of a *de novo* appeal." *Sturgis v. Thompson*, 415 S.W.3d 843, 846 (Tenn. Ct. App. 2011) (quotations and citation omitted).

Because the Circuit Court acted in accordance with the law when it dismissed the Browns' appeal, its decision should not be reversed and Regions should prevail in this appeal.

The Browns' 2012 settlement agreement waives any objections to the foreclosure.

The only arguments in the Browns' brief that they actually raised in the courts below relate to alleged deficiencies in the foreclosure process. *See, e.g.*, Browns' Br. at 4-5 (Statement of the Issues Presented for Review), 17 (Conclusion). As exhaustive litigation in the United States District Court for the Western District of Tennessee, the United States Court of Appeals for the Sixth Circuit, and the Shelby County Chancery Court repeatedly confirmed, the Browns

entered into a settlement agreement in 2012 in which they agreed to either pay Regions $590,000.00 within an allotted period of time or not contest foreclosure. Each of those courts, after giving the Browns ample opportunity to make their case, determined that the settlement agreement was valid and binding and that it precluded the Browns from advancing any argument that the foreclosure was somehow invalid. (*See, e.g.*, A.R. 39-40, 45). The Browns attempt to litigate that issue yet again in this Court.

Collateral estoppel "bars the same parties . . . from relitigating in a later proceeding legal or factual issues that were actually raised and necessarily determined in an earlier proceeding." *Mullins v. State*, 294 S.W.3d 529, 534 (Tenn. 2009) (citations omitted). Collateral estoppel applies when:

> (1) The issue to be precluded is identical to an issue decided in an earlier proceeding,
>
> (2) The issue to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding,
>
> (3) The judgment in the earlier proceeding has become final,
>
> (4) The party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding, and
>
> (5) The party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded.

Mullins, 294 S.W.3d at 535.

The Sixth Circuit's decision in the Browns' federal case demonstrates that all five elements of collateral estoppel have been met. (*see* A.R. p. 37; *see also* Order, Doc. No. 25 in *Joe Brown, et al v. AmSouth Bank, et al.*, case no. 15-5468 (6th Cir. June 7, 2016 (attached hereto as Exhibit B)). The Browns repeatedly attempted to challenge the validity and enforceability of the settlement agreement, and thereby challenge Regions' foreclosure of the

Property, in federal court. (*See* A.R. p. 40). This is identical to their efforts to challenge the foreclosure in this case. The federal judgments (as well as the Chancery Court judgment) had become final. (A.R. pp. 44, 45). The parties involved in the prior litigation were the Browns and Regions, identical to the parties involved in the instant case. And the Browns had the full and fair opportunity in the earlier proceedings to contest the issue. (*See, e.g.*, A.R. pp. 40, 45). Indeed, the Sixth Circuit considered the merits of the Browns' arguments and found them "frivolous." (A.R. p. 40).

Because the Browns have already litigated their allegations of foreclosure issues multiple times in multiple courts – and lost every time – they should not be permitted to revisit the issue yet again in this case.

This Court should not consider issues the Browns raise for the first time on appeal.

The Browns' brief addresses numerous issues never raised before the courts below and never addressed by the courts below. These issues do not merit this Court's consideration. *See, e.g.*, *Sparks v. Metro. Gov't of Nashville and Davidson Cty.*, 771 S.W.2d 430, 434 (Tenn. Ct. App. 1989) ("Issues not raised in the trial court cannot be raised for the first time on appeal.").

For example, the Browns commit a significant portion of their brief to the allegation that Regions' counsel engaged in fraud in the Chancery Court. *See, e.g.*, Browns' Br. at 4-6, 10-12, 14-17. *See, e.g.*, Browns' Br. at 4-6, 10-12, 14-17. Neither the General Sessions Court nor the Circuit Court heard these arguments, which the Browns did not manufacture until after the notice of appeal was filed in this case. The record on appeal in this case does not contain any of the transcripts or exhibits upon which the Browns base this argument. This demonstrably false

assertion[12] was never raised in the General Sessions Court in opposition to the FED action and is altogether irrelevant to this appeal. *Cf. Myers v. Pickering Firm, Inc.*, 959 S.W.2d 152, 157 n.4 (Tenn. Ct. App. 1997) (documents not relied upon in the courts below are not relevant to an appeal).

Other examples of arguments not raised below abound. The Browns allege a conspiracy between Regions' counsel and the General Sessions Court Clerk's Office related to the writ of possession ultimately issued to Regions. Browns' Br. at 6. The Browns never took this issue up with either court below. The Browns appear to attempt to initiate a counterclaim for $200,000,000.00 in damages for "humiliation and mental anguish." *See* Browns' Br. at 17. Again, this claim for damages was never raised in the courts below and is therefore not properly before this Court. The Browns ask the Court to either return the Property to them or extract $1,200,000.00 from Regions as an amount equal to the value of the Property; they do not explain why they could possibly be entitled to any such relief when they stopped paying their mortgage and squatted in the house for seven years, but apart from the facially meritless nature of the demand, this is another issue that was not raised in the courts below.

In addition, the Browns make specious allegations or insinuations of misconduct by the General Sessions and Circuit Courts. *See, e.g.*, Browns' Br. at 4, 6, 15. Indeed, the Browns frame the core issue of the appeal from the outset as "Whether the Shelby Court [sic] General

[12] As the record in the Chancery Court case shows, and as Regions sets out in its brief in the relevant appeal, the deed of trust exhibit the Browns now identify as fraudulent was moved into evidence by the Browns' own counsel after Mr. Brown carefully reviewed the exhibit while on the stand and attested to its authenticity. Regions, meanwhile, insisted that the exhibit was irrelevant and that the Court should not consider it. Regions' core position throughout the Chancery Court proceedings was that the Browns' objections to foreclosure had no bearing on the resolution of the case because the Browns had waived all such objections as part of the settlement agreement. Under those circumstances, the allegation that Regions' counsel fraudulently altered a copy of the deed of trust is simply risible. *See generally* Regions' Br. in case no. W2016-02596-COA-R3-CV.

Sessions Court and Circuit Courts [sic] were complicit with The [sic] fraudulent actions perpetrated by Regions counsel . . . ." Browns' Br. at 4. There is no record that any such allegations were raised below, and so these claims, too, are not properly before this court.

All of these newly-minted claims should not be considered as they are raised for the first time on appeal.

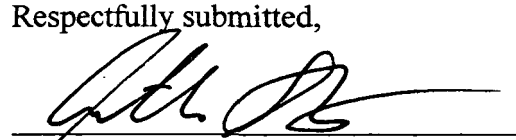
Consolidation of the Browns' two appeals may be appropriate.

Consolidation pursuant to Tennessee Rule of Appellate Procedure 16(b) may be appropriate given the overlap between the issues in this case. Such consolidation may be initiated on the Court's own motion. *See, e.g., Taylor v. Seymore*, 2015 WL 5011701, at *2 (Tenn. Ct. App. Aug. 24, 2015) (this Court *sua sponte* consolidated two appeals in which the same appellants "filed nearly identical petitions . . ."). As the Court will determine whether consolidation is an appropriate course, Regions simply raises the possibility that the Court might so exercise its discretion.

CONCLUSION

The General Sessions Court properly ruled for Regions and the Circuit Court properly dismissed the Browns' appeal of the General Sessions decision. The Browns provide no plausible basis for reversing the judgment of possession. The judgment below should be affirmed.

Respectfully submitted,



RANDALL D. NOEL (#6405)
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Attorneys for Appellees

OF COUNSEL:

BUTLER SNOW LLP
6075 Poplar Avenue, Suite 500
Memphis, Tennessee 38119
Telephone: (901) 680-7200
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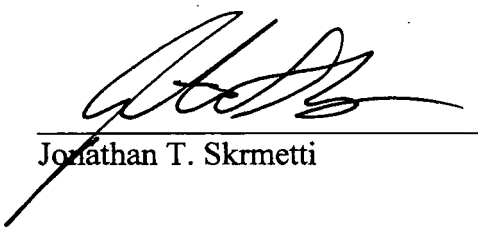
CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of the above document by mailing same via U.S. Mail, postage prepaid, and email to the following this the 21st day of February, 2018.

Joe W. Brown and Kimerly Williams Brown
11851 Metz Place
Eads, TN 38028
Jbrown260075@gmail.com



Jonathan T. Skrmetti

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Dated: November 09, 2017
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT TENNESSEE
WESTERN DIVISION

In re:

JOSEPH WILLIE BROWN
Debtor.

Case No. 17-28648-jdl
Chapter 7

ORDER GRANTING AMENDED EXPEDITED MOTION FOR RELIEF FROM AUTOMATIC STAY AND FOR ABANDONMENT

THIS PROCEEDING came before the court upon the Amended Expedited Motion for Relief from Automatic Stay and for Abandonment (Doc. No. 12)(the "Motion") filed by Regions Mortgage and Regions Bank, as successor by merger with AmSouth Bank (collectively, "Regions") which sought relief from the automatic stay under 11 U.S.C. § 362(d)(2) and (4) and abandonment under 11 U.S.C. § 554. Based upon the Motion, the exhibits tendered at the hearing on the Motion, the Debtor's failure to appear at the hearing on the Motion, and there having been no response to the Motion filed by the Debtor or any other party interest, as

evidenced by the Certificate of Compliance with LOC. BANKR. R. 9013-1 (Doc. No. 17), the Court hereby finds and orders as follows:

1. On October 2, 2017, the Debtor filed the instant voluntary chapter 7 petition. (Doc. No. 1).

2. This Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334; 11 U.S.C. § 362; and FED. R. BANKR. P. 4001(1) and the standing order of reference entered July 11, 1984 by the district court – Misc. Order No. 84-30 (W.D. Tenn.).

3. This is a core proceeding under 28 U.S.C. § 157(B)(2)(A) and (O).

4. This Court has the Constitutional authority to hear this proceeding and enter a final order subject to review under 28 U.S.C. § 158.

5. Venue is proper in this district under 28 U.S.C. § 1409(a).

6. On October 11, 2017, Regions filed the Motion. (Doc. No. 12).

7. The Debtor was provided adequate notice of the Motion and the hearing on the Motion.

8. On October 11, 2017, Regions served a copy of the Motion on the Debtor. *See* Certificate of Service (Doc. No. 13). Exhibit 10.

9. On October 13, 2017, the Bankruptcy Noticing Center served a copy of the Notice of Hearing, Combined with Related Information Re Form, Manner and Serving of Notice on the Debtor (the "Notice of Hearing"). *See* Certificate of Notice (Doc. No. 15). Exhibit 11.

10. The Notice of Hearing required any objection to the Motion to be filed on or before October 26, 2017.

11. No objection or other response to the Motion was filed by the Debtor or any other party in interest.

12. On October 30, 2017, Regions filed a Certificate of Compliance with LOC. BANKR. R. 9013-1. *See* Certificate of Compliance with LOC. BANKR. R. 9013-1 (Doc. No. 17). Exhibit 12. Regions served the Debtor with a copy of the Certificate of Compliance with LOC. BANKR. R. 9013-1 on October 30, 2017. *See* Certificate of Service (Doc. No. 18). Exhibit 13.

13. The hearing on the Motion was scheduled for 9:30 a.m. on November 2, 2017. At that time, counsel for Regions appeared in support of the Motion. Neither the Debtor nor any other party interest appeared at the hearing.

14. Counsel for Regions tendered thirteen (13) exhibits consisting of (a) orders and pleadings in this bankruptcy case and various other cases involving the Debtor and Regions; and (b) a copy of the recorded Substitute Trustee's Deed conveying the property at 11851 Metz Place, Eads, Tennessee (the "Metz Property") to Regions (collectively, items (a) and (b) are referred to as the "Exhibits").

15. Based upon the allegations in the Motion and the Exhibits the Court finds that the Debtor has no legal interest in the Metz Property and no equity in the Metz Property.

16. The foreclosure sale conducted by Regions was completed in 2013 – four (4) years before the filing of this case. The Substitute Trustee's Deed recites that the sale was held on June 27, 2013. (Exhibit 3). The Substitute Trustee's Deed satisfies the statute of frauds. The Substitute Trustee's Deed was delivered on August 1, 2013 and was recorded on September 3, 2013. (Exhibit 3). Further, the Substitute Trustee's Deed recites that Regions bid the sum of $446,250 which amount, after accounting for expenses of the sale, was applied to the indebtedness for which the property was sold, thereby satisfying any requirements for payment of consideration. Under any interpretation of when a foreclosure sale is completed, the Debtor has not held a legal interest in the Metz Property for over four (4) years. Any naked possessory

interest the Debtor holds is of no value to the bankruptcy estate. Further, the Metz Property is not necessary to an effective reorganization because this is a chapter 7 case which provides no opportunity for reorganization.

17. The requirements of § 362(d)(2) are satisfied and relief from the automatic stay under § 362(d)(2) is appropriate.

18. Additionally, relief under § 362(d)(4) is appropriate. Section 362(d)(4) provides that the court shall grant relief from the automatic stay

> with respect to an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of a petition was part of a scheme to hinder, delay or defraud creditors that involved either –
>
> > (A) transfer or all or part ownership of, or other interest in, such property without the consent of the secured creditor or court approval; or
> >
> > (B) multiple bankruptcy filings affecting such real property.

11 U.S.C. § 362(d)(4).

19. Regions, through its Motion and the Exhibits, has satisfied its initial burden to establish a prima facie case as to all the elements under 11 U.S.C. § 362(d)(4). Regions established that the Debtor has engaged in a scheme to delay, hinder or defraud Regions and which involved multiple bankruptcy filings.

20. Both actual intent and the existence of a "scheme" may be inferred from the six (6) years of litigation with Regions and the now two (2) bankruptcy filings; all of which have hindered and delayed Regions' attempts to obtain possession of the Metz Property.

21. The Debtor did not object or appear at the hearing and presented no evidence to rebut the prima facie case established by Regions.

22. Regions is entitled to relief from the automatic stay under 11 U.S.C. § 362(d)(4) and a finding that, upon recording in compliance with applicable Tennessee law, such relief shall be binding in any other bankruptcy case purporting to affect the Metz Property for a period of 2 years.

23. Because the Debtor has no legal or equitable interest in the Metz Property, the property is burdensome or of inconsequential value to the estate and the Metz Property is hereby abandoned from the bankruptcy estate under 11 U.S.C. § 554(a).

24. Additionally, to fully effectuate Regions' ability to realize upon the Metz Property, Regions must remove the Debtor's personal property from the Metz Property. Regions is authorized to remove any personal property located in, on or about the Metz Property and place such personal property in a location accessible to either the Debtor or the Trustee.

IT IS THEREFORE ORDERED that the automatic stay of 11 U.S.C. § 362(a) is hereby **TERMINATED** as to the Metz Property under 11 U.S.C. § 362(d)(2).

IT IS FURTHER ORDERED that the automatic stay of 11 U.S.C. § 362(a) is also hereby **TERMINATED** as to the Metz Property under 11 U.S.C. § 362(d)(4) and, upon the recording of this order in compliance with applicable State laws governing notices of interests or liens in real property, the relief granted in this order shall be binding in any other case under title 11 of the United States Code purporting to affect the Metz Property filed not later than 2 years after the date of the entry of this order.

IT IS FURTHER ORDERED that Regions may submit a certified copy of this Order to the Office of the Shelby County Register (the "Register") for recording and the Register shall accept such certified copy for recording and index the Order under the name of Joseph Willie

Brown and as an instrument affecting title to that certain real property located at 11851 Metz Place, Eads, Tennessee, 38028 and more particularly described at Instrument No. 13107874.

IT IS FURTHER ORDERED that the Metz Property is hereby **ABANDONED** under 11 U.S.C. § 554(a) and is no longer property of the bankruptcy estate.

IT IS FURTHER ORDERED that, to effectuate the relief granted herein, Regions may proceed under applicable nonbankruptcy law with its efforts to remove the personal property located in, on or about the Metz Property and may place such personal property in a location accessible to either the Debtor or the Trustee.

IT IS FURTHER ORDERED that this Order is a final order and the stay of FED. R. BANKR. P. 4001(a)(3) shall not apply to this Order.

APPROVED:

BUTLER SNOW LLP

/s/ James E. Bailey III
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Attorneys for Regions Bank

REQUEST FOR SERVICE

The undersigned hereby requests that the Clerk cause a copy of this Order to be served on the following persons upon its entry:

Joseph Willie Brown
11851 Metz Place
Eads, TN 38028

Edward L. Montedonico
200 Jefferson Avenue, Suite 201
Memphis, TN 38103

United States Trustee
200 Jefferson Avenue, Suite 400
Memphis, TN 38103

MATRIX

/s/ James E. Bailey III

39184841.v1

SAT-41410 0651-2 pdford02 17-28648
Joseph Willie Brown
11851 Metz PL
Eads, TN 38028

023648 23648 1 AB 0.400 30309 6 8 8427-1-23974
BUTLER AND SNOW PLLC
1170 PEACHTREE STREET NE
SUITE 1900
ATLANTA GA 30309-7703

B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: June 07, 2016

Mr. Joe W. Brown
Ms. Kimerly Brown
11851 Metz Place
Eads, TN 38028

Mr. Randall Dean Noel
Mr. Jonathan Thomas Skrmetti
Butler Snow
6075 Poplar Avenue
Suite 500
Memphis, TN 38119

Re: Case No. 15-5468, *Joe Brown, et al v. Amsouth Bank, et al*
Originating Case No. : 2:11-cv-03022

Dear Counsel and Parties:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Amy E. Gigliotti
Case Manager
Direct Dial No. 513-564-7012

Enclosure

No. 15-5468

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOE W. BROWN; KIMERLY BROWN,

Plaintiffs-Appellants,

v.

AMSOUTH BANK; REGIONS MORTGAGE,

Defendants-Appellees.

ORDER

Before: BOGGS and KETHLEDGE, Circuit Judges; HOOD, District Judge.*

Joe W. Brown and Kimerly Brown, proceeding pro se, petition the court to rehear its order of March 23, 2016, affirming a judgment entered by a magistrate judge that denied their motion for a new trial, enforced a settlement agreement, and dismissed their civil action seeking a temporary restraining order to prevent the foreclosure sale of their real property.

Upon careful consideration, the court concludes that it did not overlook or misapprehend any "point of law or fact" when it issued its order. *See* Fed. R. App. P. 40(a)(2). The petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

No. 11-5808

United States Court of Appeals
for the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TERRENCE YARBROUGH,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Tennessee
No. 2:10-cr-20283 (Anderson, J.)

BRIEF FOR PLAINTIFF-APPELLEE UNITED STATES

For the Appellee:

EDWARD L. STANTON, III
United States Attorney

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STATEMENT REGARDING ORAL ARGUMENT

The Court's decisional process would not be significantly aided by oral argument because the facts and legal arguments are adequately presented in the briefs and record. Oral argument would serve only to provide an unnecessary new forum for the bad faith and vexatious claims of the pro se appellant, who was found not competent to represent himself in the district court.

STATEMENT OF JURISDICTION

The district court has jurisdiction over this case pursuant to 18 U.S.C. § 3231 because the underlying offense is an offense against the laws of the United States. Yarbrough asserts that his case falls under the collateral order doctrine and thus implicitly claims that this Court has jurisdiction pursuant to 28 U.S.C. § 1291, which grants this Court jurisdiction over final decisions of the district courts. Yarbrough's overbroad reading of the collateral order doctrine would clog this Court's docket with half-completed cases while needlessly delaying the resolution of matters in the courts below. This brief argues below that the interlocutory appeal of an order for the psychiatric evaluation of a pretrial detainee should be dismissed for lack of jurisdiction.

ISSUES PRESENTED

I. Does the district court's finding that Yarbrough is not competent to represent himself at trial preclude his self-representation on appeal?

II. Does a district court's order for the psychiatric evaluation of a pro se pretrial detainee who claimed not to understand the charges against him constitute a final order such that this Court has jurisdiction to review it?

III. Does the district court's order of November 18, 2011 finding Yarbrough not competent to represent himself, in which the court reviewed the results of the completed psychiatric evaluation it had previously ordered, moot this appeal?

IV. Did the district court abuse its discretion when it ordered Yarbrough to be psychiatrically evaluated?

STATEMENT OF THE CASE

This is an interlocutory appeal of the district court's order for the mental evaluation of a pro se pretrial detainee who repeatedly claimed not to understand the nature of the charges against him.

On August 11, 2010, Terrence Yarbrough was charged in a five-count indictment with child sex trafficking; sex trafficking by force, fraud, and coercion; and conspiracy to defraud the United States. (District Court Record Entry in Western District of Tennessee case 2:10-cr-20283, hereinafter "R.E.," 1, Indictment.) The court detained Yarbrough following a detention hearing. (R.E. 43, Minute Entry, R.E. 44, Order of Detention Pending Trial.) In January of 2011, the grand jury returned a superseding indictment charging Yarbrough with a total of thirteen counts of sex trafficking by force, fraud, and coercion against twelve victims, four of whom were minors, in addition to a charge of conspiracy to defraud the United States. (R.E. 80, Superseding Indictment.)

After Yarbrough discharged several court-appointed attorneys and indicated a desire to represent himself, the district court held a *Faretta* hearing at which Yarbrough stated he could not understand the charges against him. (R.E. 116, Minute Entry; R.E. 130, Transcript of Proceedings, June 20, 2011, at 14-22, 46, 48, 51.) On June 22, 2011, the district court ordered Yarbrough to undergo a pretrial mental

examination in light of his repeated statements on the record that he was unable to understand the nature of the charges against him. (R.E. 117, Order Granting United States' Motion for Pretrial Psychiatric Examination of Defendant Pursuant to Title 18, United States Code, Sections 4241 and 4247(b).)

Yarbrough filed a motion to reconsider. (R.E. 118, Motion to Reconsider Mental Evaluation and Dismiss the Indictment.) The district court denied that motion and further ordered that all other filings by Yarbrough be held in abeyance pending the results of his psychiatric evaluation. (R.E. 126, Order Denying Motion for Reconsideration.) Yarbrough also filed a motion to stay the order in the district court pending his appeal. (R.E. 124, Motion to Stay.) Per the district court's order, that motion was held in abeyance.

Yarbrough timely filed a notice of appeal of the court's order for a psychiatric evaluation on June 28, 2011. (R.E. 121, Notice of Appeal (interlocutory).) He also filed a separate motion to stay the psychiatric examination in this Court on July 7, 2011. This Court denied his motion to stay. (Doc. 006111070220, Order.)

During the pendency of this appeal, Yarbrough received his psychiatric evaluation and was returned to the Western District of Tennessee. (*See* R.E. 149, Minute Entry; R.E. 154, Order Granting Motion for Hearing and Order Terminating Self-Representation.)

STATEMENT OF THE FACTS

At a special report date on June 20, 2011, the district court conducted a *Faretta* inquiry in response to Yarbrough's expressed desire to represent himself and the contentious discharges of his prior court-appointed attorneys. (R.E. 130, Transcript of Proceedings, June 20, 2011, *passim*.) After establishing that Yarbrough had reviewed the Superseding Indictment, the court began inquiring about Yarbrough's understanding of the charges against him:

> The Court: Do you understand each of the counts? Do you understand there are 14 separate counts?
>
> The Defendant: Yeah, I understand there is 14 separate counts, but I don't understand the counts. I don't understand them at all. And I've talked to about – all my lawyers, they can't even explain them to me.

(*Id.* at 14.)

Based on Yarbrough's answer, the court determined it would have to go through the counts one by one to determine specifically what Yarbrough did not understand. (*Id.* at 15.)

> The Court: Mr. Yarbrough, Count 1 alleges sex trafficking. It alleges that between July of 2006 and August of 2008, in the Western District of Tennessee, you did knowingly recruit, entice, harbor, transport, provide or by other means utilize a minor who is identified as GC to financially receive something of value from participation in a venture basically where you were using GC to perform sex acts and you benefited

	financially from those acts. Do you understand?
The Defendant:	Not necessarily, sir.
The Court:	What do you not understand?
The Defendant:	None of it.
The Court:	I don't believe that, Mr. Yarbrough. What part do you not understand?
The Defendant:	It look like you have a problem explaining it.
The Court:	No, I don't have a problem explaining it.
The Defendant:	Sound like you hesitated. Can you explain it to me?
The Court:	Mr. Yarbrough, let me tell you something. We are not going to play games.
The Defendant:	I'm not playing.
The Court:	Then you need to either listen and answer yes or no and tell me why you don't. What is it you don't understand about Count 1?
The Defendant:	I don't understand.

(*Id.* at 15-16.)

The exchange continued in a similar vein. The court then moved on to the next count:

The Court:	Count 2. Between November of 2006 and December of 2006, again you utilized another minor identified as NT to engage in commercial sex acts and you benefited [sic] financially from those sex acts. Do you understand that?
The Defendant:	No, sir.
The Court:	What part do you not understand?
The Defendant:	None of it.

(*Id.* at 17.) Yarbrough went on to provide a verbatim answer with respect to Count 3 (*id*. at 17), Count 4 (*id.* at 18), Count 5 (*id.*), Count 6 (*id.*), Count 7 (*id.* at 19), Count 8 (*id.*), Count 9 (*id.*), Count 10 (*id.* at 20), and Count 11 (*id.*). Asked what part

of Count 12 he did not understand, Yarbrough replied "Not one bit of it." (*Id.* at 20.) Asked what part of Count 13 he did not understand, Yarbrough responded "Any of it." (*Id.* at 21.) Count 14, a food stamp fraud conspiracy as opposed to the earlier sex trafficking charges, led to the following exchange:

The Court:	Do you understand?
The Defendant:	No, sir.
The Court:	What part do you not understand?
The Defendant:	That one really has me confused.
The Court:	What part?
The Defendant:	Man, the whole thing.
The Court:	That's what you said on all of them, right?
The Defendant:	Yeah, but that one right there really has me confused.

(*Id.* at 22.) When asked about the forfeiture count, Yarbrough conceded "I understand what you are saying." (*Id.* at 23.)

After the United States raised the potential of a competency issue, the district court advised Yarbrough that based on his answers he could be sent to a medical facility for evaluation to ensure that he was capable of understanding the charges against him and preparing a defense. (*Id.* at 44-45.) The district court then once again asked Yarbrough if he understood the charges:

The Court:	Okay. Do you understand the charges against you?
The Defendant:	No, sir, I do not.
The Court:	You don't understand any of the charges?
The Defendant:	I understand the words. I understand the words. I do not understand the nature of the charges. I don't understand how they relate to me. I understand –

> I'm very competent. I got – if you send me to a medical exam, it's just a waste of time and slowing up everything. I'm very competent, and maybe you don't understand what I mean.

(*Id.* at 45-46.)

Yarbrough then asserted that none of his previous attorneys could understand the indictment, either. (*Id.* at 47.) The court noted that Yarbrough had dismissed those attorneys for what he perceived as ineffective assistance. (*Id.*) The district court made one final effort to ascertain Yarbrough's understanding of the charges against him:

> The Court: All right. Bottom line, do you understand the charges against you, Mr. Yarbrough?
>
> The Defendant: No, sir.
>
> The Court: All right. Then I'm going to order that Mr. Yarbrough be submitted for a competency evaluation, that he be transported to the nearest medical facility that is equipped to conduct the evaluation, and then once I receive the report, I'll decide how to proceed.

(*Id.* at 48.) The district court subsequently issued a written order confirming that Yarbrough was to be evaluated because "while the Court attempted to question the Defendant about his desire to represent himself in the case pro se, the Defendant stated repeatedly on the record that he was unable to understand the nature of the charges against him." (R.E. 117, Order Granting United States's Motion for Pretrial

Psychiatric Examination of Defendant Pursuant to Title 18, United States Code, Sections 4241 and 4247(b), at 1.)

In response, Yarbrough filed a notice of appeal and sought a stay of the order in both the district court and this Court. (R.E. 121, Notice of Appeal (Interlocutory); R.E. 124, Motion to Stay; Doc. 006111012700, Motion Requesting a Stay of the Court Order for a Mental Exam.) The district court held Yarbrough's motion to stay, along with all other pro se motions filed by Yarbrough below, in abeyance pending determination of his competency to represent himself. (R.E. 126, Order Denying Motion for Reconsideration.) This Court denied Yarbrough's motion for a stay. (Doc. 006111070224, Order.)

Yarbrough was transported to a medical facility where a forensic psychologist opined that he was competent to proceed to trial. (*See* R.E. 154, Order Granting the Government's Motion for *Faretta* Hearing and Order Terminating Defendant's Self-Representation, at 2; R.E. 171, Transcript of Proceedings, Nov. 10, 2011, at 57.) Yarbrough refused to cooperate with the evaluator: "I made it clear to her that my case is pending in the Sixth Circuit and if I voluntarily participate in this evaluation, my interlocutory appeal will be a moot issue." (Document: 006111090722, Affidavit of Judicial Notice: Fraud and Misconduct, at 68.)

Following the evaluation, Yarbrough returned to the Western District of

Tennessee and began filing increasingly bizarre motions relying on the UCC and other inapt authorities. For example, he informed the district court that

> [s]ince there is no proof of a contract between the Court or the Affiant and the Affaint is a flesh and blood man, not a ficticious [sic] entity (stramineus homo) nor do the Constitution of the United States of America apply to the Affiant as well as the laws, policies, and/or statutes of the incorporated government of the United States of America; the Court must recognized [sic] their orders and judgements as null and void due to fraud and release the Affiant.

(R.E. 137, Affidavit of Judicial Notice, at 4-5).

Yarbrough also returned a purportedly voided copy of the Superseding Indictment to the prosecution with a letter stating "This NOTICE is to informally inform you that I revoke acceptance of your presentments/commercial units/goods; Superseding Indictment, U.S. v. Yarbrough, et al., No. 10-20283-STA-dkv (W.D. Tenn. 2011) (doc. 81) (attached); because it is a fraudulent contract and defective." (R.E. 147-1, Correspondence, at 1). In that same correspondence, Yarbrough stated:

> Considering the intricate and elboratedly [sic] laid scheme of this Public/private proceeding, the time it took for me to discover the fraud and defects is unarguably reasonable. . . . [I]t took me 2 years, through due diligence and the will to prove my innocence, to discover your plot. If Anderson, J. had not disclosed the fact that the Constitution of the United States of America did not apply to me, I would have still been lost. I believe he committed treason by disclosing that information before several witness but I am going to take advantage of the opportunity given to me.

(*Id.* at 2.)

In a filing in this Court, Yarbrough claimed to identify the source of the conspiracy against him:

> It appears that the UNITED STATES, Congress, and the courts have adopted more than the Grand Jury from the English after the Federal Government gained its so-called Independence from Great Britain; unless the UNITED STATES never has actually gained its independence and it is being ran by a foreign government/corporation/entity. It is supposed to be a secret but the court and its officers have gotten too sloppy, because the Affiant, a layman, through due diligence, has discovered the plot.

(Doc. 006111080722, Affidavit of Judicial Notice, Fraud and Misconduct, at 5.) As a result, Yarbrough disclaimed the jurisdiction of the court: "Because of the fraudulently instituted criminal case and the Affiant having to get familiar with the criminal procedure, he has become aware that none of the statutes, Bill of Rights, or case laws apply to him." (*Id.* at 6.) Numerous other filings in this Court and the district court include parallel assertions.

At a second *Faretta* hearing conducted on November 10, 2011, Yarbrough refused to accept a copy of his mental evaluation because he claimed it was fraudulent. (R.E. 171, Transcript of Proceedings, Nov. 10, 2011, at 19.) When the district court discussed the possibility of standby counsel, Yarbrough responded

> I am the authorized representative for the debtor, Terrence Arnett Yarbrough, and I'm appearing in propria persona and special admiralty pursuant to Federal Rules of Civil Procedure E(8) in the original and alternative restricted appearance. I will not accept counsel unless you

> can guarantee conflict counsel, conflict-free counsel. I will not accept any form of counsel.

(*Id.* at 43.) The district court then asked Yarbrough whether he was under the jurisdiction of the court; after attempting to evade the question for some time, Yarbrough asserted that he was not under the court's jurisdiction. (*Id.* at 44-46.) Yarbrough also continued to claim that he did not understand the charges against him. (*Id.* at 47.)

As a result of Yarbrough's repeated claims of inability to understand the charges against him, his stubborn adherence to inapposite bodies of law, and his disruptive behavior before the district court, the court found him incompetent to represent himself. (*Id.* at 54; R.E. 154, Order Granting Motion for Hearing and Order Terminating Self-Representation.) The district court appointed yet another attorney to represent Yarbrough, this time with a strong admonition that he would not allow the new counsel to withdraw. (R.E. 171, Transcript of Proceedings, Nov. 10, 2011, at 56; R.E. 150, CJA 20 and 21: Appointment of Attorney Eugene A. Laurenzi for Terrence Yarbrough.)

Yarbrough's strategy of vexation and frivolity continues to saturate his pro se litigation before this Court. For example, in response to the Court's briefing order, Yarbrough filed a "Notice Rejecting the Court's Order (6th Cir. Mar. 2012) for

Failure to Provide POC with Affidavit" on April 12, 2012. In that document, Yarbrough announced that he

> exercises his liberty to reject the Appellate Court's Order because the Court has failed to provide the requested Proof(s) of Claim, because the Court's Order fails to address other issues raised in the district court that fall under the Collateral Order Doctrine (such as an Appearance Bond), and including but not limited to, the aforementioned reasons in this Notice and Affidavit.

(Doc. 006111279114 at 4.) Yarbrough maintained that tack in his supplemental brief, refusing to brief the additional issues as ordered and asserting that "[s]ince the Respondents are in default and have failed to cure, the Appellant cannot perform to the terms of the Court's Order and the Appellant's original brief along this [sic] Supplemental Brief supersedes the Court's Order." (Doc. 006111298554 at 35.)

SUMMARY OF THE ARGUMENT

Yarbrough's abusive litigation tactics and inability to comprehend the relevant law led the district court to find him not competent to represent himself. That determination should extend to appellate matters. This Court's docket ought not be burdened with Yarbrough's contemptuous and nonsensical pro se filings.

Even if Yarbrough were permitted to represent himself on appeal, the Court lacks jurisdiction to hear this cause. The collateral order doctrine is a narrow and limited exception to the final judgment rule. It does not encompass a district court's order to send a pretrial detainee from one detention facility to another for the purpose of a mental evaluation. Even if the Court decides to the contrary and determines that the order is subject to interlocutory review, the Court still lacks jurisdiction because there is no case or controversy at issue: Yarbrough has already been evaluated and returned to his previous accommodations. The case is moot.

Finally, should this Court reach the merits of the case, the record clearly demonstrates that the district court acted well within the range of its discretion when it ordered a psychiatric evaluation for Yarbrough. Yarbrough repeatedly claimed he did not understand the charges against him yet insisted on representing himself. Yarbrough created a situation where absent an evaluation, the record would leave any conviction prone to collateral attack.

ARGUMENT

Standard of Review

This Court reviews for abuse of discretion the district court's determination to send Yarbrough for a psychiatric evaluation. *See United States v. Jones*, 495 F.3d 274, 277 (6th Cir. 2007). "Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment." *United States v. Kuehne*, 547 F.3d 667, 692 (6th Cir. 2008) (citation omitted).

I. The district court's finding that Yarbrough's obstructionist conduct and failure to understand the charges against him renders him not competent to represent himself should extend to proceedings in this Court.

The district court found Yarbrough not competent to represent himself because Yarbrough professed not to understand the charges against him and because Yarbrough engaged in a consistent pattern of disruptive behavior. Yarbrough opted to place himself before this Court on an interlocutory appeal and immediately burdened its docket with filings ranging from irrelevant to contemptuous. No law or policy requires this Court to subject itself to the disruptive conduct the district court precluded.

Although a defendant ordinarily has a constitutional right to represent himself at trial, that right is not absolute and a district court may find that a defendant is competent to stand trial but not competent to represent himself. *United States v.*

Carradine, 621 F.3d 575, 578 (6th Cir. 2010) (citing *Indiana v. Edwards*, 554 U.S. 164 (2008)). There is no analogous constitutional right to self-representation on appeal. *Martinez v. Court of Appeal of California*, 528 U.S.152, 163 (2000). The district court's finding that Yarbrough's mental state is sufficiently lacking to overcome what would otherwise be a constitutional right to self-representation should be sufficient to prevent Yarbrough's abusive litigation in a forum he has no right to inhabit.

The district court's factual finding that Yarbrough is not mentally competent to represent himself should extend to this Court alongside other lower court findings relating to representation, such as indigency. *See* 6 Cir. R 101. Similarly, the principle of continuity that maintains on appeal representation by counsel appointed by the district court weighs in favor of precluding Yarbrough from representing himself on appeal when he may not do so in the court below.[1] *See id.*

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[1] In most cases, this Court has a fairly straightforward mechanism to keep defendants found not competent to stand trial from proceeding pro se on appeal. Sixth Circuit Rule 101(a) reads "Trial counsel in criminal cases, whether retained or appointed by the district court, is responsible for the continued representation of the client on appeal until specifically relieved by this court." A defendant who was not competent to represent himself at the district level must rely on an affirmative act of this Court to represent himself here. Absent the Court's permission to proceed pro se, any abusive or frivolous filings by a represented defendant could simply be ignored. *See United States v. Martinez*, 588 F.3d 301, 328 (6th Cir. 2009) ("Martinez raises a number of additional pro se claims, but we decline to address them because he is represented by counsel."); *see also United States v. Cromer*, 389 F.3d 662, 681

Separate and apart from the specific issue of competency for self-representation, this Court has the inherent authority to protect itself from frivolous[2] and contemptuous[3] filings: "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L.Ed. 242 (1821)). It would not be a stretch of those powers to dismiss the appeal of a pro se litigant who hails his case into this Court only to bombard the Court with irrelevancies and repeatedly inform the Court that he will not comply with its order for supplemental briefing. *Cf. Link v. Wabash Railroad Company*, 370 U.S. 626, 630-31 (1962) ("The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to

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n.12 (6th Cir. 2004) ("It is well settled that there is no constitutional right to hybrid representation."). That solution was not available here because of the unusual procedural history of the case: Yarbrough filed this interlocutory appeal after one attorney had withdrawn and before the next was appointed.

[2] *See United States v. Holloway*, 11 F. App'x 398, 400 (6th Cir. 2001) ("[T]he [Uniform Commercial C]ode is not applicable in criminal proceedings. Any contention in this regard would be frivolous.").

[3] *E.g.*, Doc. 006111279114, Notice Rejecting the Court's Order (6th Cir. Mar. 2012) for Failure to Provide POC with Affidavit.

achieve the orderly and expeditious disposition of cases."). By deliberately refusing to provide the ordered briefing on potentially dispositive issues, Yarbrough has failed to prosecute his appeal and provided yet another avenue for this Court to dispose of the matter.

In sum, the mental state that led the district court to find Yarbrough not competent to represent himself has predictably resulted in contemptuous, irrelevant, and frivolous filings in the Court of Appeals. There is no constitutional requirement that Yarbrough be allowed to represent himself in this Court. Logic and experience suggest that he is more likely to prejudice his case than advance his cause if allowed to do so. As a general matter, defendants found not competent to represent themselves in the lower court ought not be permitted to relocate their pro se antics to this Court.

II. The district court's order transferring a pretrial detainee from one detention facility to another for the purpose of a psychiatric evaluation does not fall within the narrow class of exceptions to the final judgment rule subject to interlocutory review.

A. The class of collateral orders subject to interlocutory review is particularly narrow in criminal cases and does not encompass an order for psychiatric evaluation that does not affect the defendant's release status.

This Court's jurisdiction is limited to appeals of final decisions of the district courts. 28 U.S.C. § 1291; *see also United States v. Mandycz,* 351 F.3d 222, 224 (6th

Cir. 2003). "However, the collateral order doctrine establishes that a small class of interlocutory appeals are immediately appealable, since they amount to final decisions within the meaning of 28 U.S.C. § 1291." *Mandycz*, 351 F.3d at 224 (internal quotations omitted). "That small class of appealable orders include only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Id.* Should an order fail to satisfy any of those requirements, it is not appealable and this Court lacks jurisdiction. *Id.*

The final judgment rule serves crucial interests in promoting judicial efficiency and limiting the ability of vexatious litigants to "harass opponents and clog the courts through a succession of costly and time-consuming appeals." *Flanagan v. United States*, 465 U.S. 259, 263-64 (1984). "The Flanagan Court stated that the policy behind the rule requiring a final judgment before considering an appeal was particularly important in criminal cases; consequently, the Court stated that the exception is applied 'with the utmost strictness in [such] cases.'" *United States v. Strouse*, 826 F.2d 1066, 1987 WL 38515 at *3 (6th Cir. 1987) (unpublished opinion) (quoting *Flanagan*, 465 U.S. at 265).

Yarbrough's voluminous and irrelevant filings in this interlocutory appeal, replete with contempt for the Court and the rule of law, are exactly the type of

vexatious and harassing litigation that the final judgment rule seeks to preclude. The order for evaluation does not resolve any issue in the case, it merely ensured that the district court had all relevant facts when determining Yarbrough's competence to stand trial and to represent himself. Yarbrough presents no reason to stretch the bounds of the collateral order doctrine and clog this Court's docket with premature issues. If Yarbrough prevails and neuters the final judgment rule, the dockets of both this Court and the district courts would suffer. Needless resources would be consumed and needless delays would be inflicted, all to the detriment of the pursuit of justice and the orderly administration of the courts.

B. Yarbrough was already in custody at the time of his evaluation, and thus the numerous cases finding a right for interlocutory appeal for defendants on bond who were ordered committed for psychiatric evaluation do not apply.

Were Yarbrough not in custody, on-point authority would support his position. "[O]rders of commitment for psychiatric examination are immediately appealable." *Mandycz*, 351 F.3d at 224 (citing *United States v. Davis*, 93 F.3d 1286, 1289 (6th Cir. 1996)). Other circuits addressing the question agree that an order committing a defendant to custody for the purpose of a psychiatric examination is immediately appealable. *See infra*. But the loss of liberty entailed by an order of commitment for psychiatric evaluation sharply distinguishes *Davis* and similar cases from the instant

case where the defendant was already in custody.

Courts that have applied the collateral order doctrine to orders of commitment for psychiatric examination place great weight on the loss of liberty associated with such orders. *See Davis*, 93 F.3d at 1289 ("no effective relief could be provided for her loss of liberty during the period of commitment"); *see also United States v. Rinaldi*, 351 F.3d 285, 288 (7th Cir. 2003) (holding an order of commitment for psychiatric evaluation subject to immediate appeal because "[w]hen an order calls for a defendant's incarceration, appellate review is proper"); *United States v. Ferro*, 321 F.3d 756, 760 (8th Cir. 2003) ("If not allowed to appeal the order at this time, his liberty right to avoid involuntary hospitalization will be lost."); *United States v. Boigegrain*, 122 F.3d 1345, 1349 (10th Cir. 1997) (en banc) (holding an order of commitment for psychiatric examination subject to immediate appeal because "[a]s in the denial of bail, if the appeal is not allowed there can be no remedy for the resulting loss of liberty"); *United States v. Weissberger*, 951 F.2d 392, 394 (D.C. Cir. 1991) ("this loss of liberty, which Weissberger seeks to avoid, would be complete and effectively unreviewable by the time of final judgment")[4].

[4] *Weissberger* does include some language suggesting interests other than the defendant's liberty interest are at stake. *See Weissberger*, 951 F.2d at 398 ("[T]he order conclusively determines that there is an issue as to Weissberger's competency."), though query whether "determining that there is an issue" is sufficient to satisfy the narrow criteria of the collateral order doctrine in a criminal case. The

The concern in *Davis* and the other cases that gave rise to interlocutory review was a liberty interest that is not at stake here. The court resolved the issue of Yarbrough's pretrial liberty well before the order for mental evaluation. *See* R.E. 44, Order of Detention Pending Trial.

C. The sole on-point decision supporting Yarbrough is an unpublished opinion founded on a misreading of a Supreme Court case focused not on the transfer to a mental facility but rather the loss of liberty inherent in involuntary mental treatment.

Yarbrough points to a single authority holding that an order for mental evaluation constitutes a final judgment, an unpublished Tenth Circuit case. *See United States v. Visnaiz*, 96 F. App'x 594 (10th Cir. 2004). *Visnaiz* holds that a significant difference exists between the loss of liberty entailed by incarceration and the separate deprivation that comes from being committed to a mental hospital. *Id.* at 597. In reaching this conclusion, the *Visnaiz* relies entirely on an unduly broad reading of *Vitek v. Jones*, 556 U.S. 480 (1980). *Vitek* delt with a convicted felon transferred to a mental hospital without an opportunity to contest the determination that he was mentally ill.

The *Vitek* opinion makes clear that the Supreme Court's concern was with the

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D.C. Circuit later recognized that *Weissberger* may not apply to a pretrial detainee who has already lost his liberty prior to commitment for psychiatric evaluation. *See United States v. Weston*, 194 F.3d 145, 148 (D.C. Cir. 1999).

"involuntary psychiatric *treatment*" to which the prisoner was consigned by an administrative decision with no provision for the prisoner to contest it or a court to review it. 445 U.S. at 494 (emphasis added); *see also id.* at 492 ("*Compelled treatment* in the form of *mandatory behavior modification programs*, to which the District Court found [the petitioner] was exposed in this case, was a proper factor to be weighed by the District Court.") (emphasis added); *id.* at 493 ("None of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to *institutional care* in a mental hospital.") (emphasis added); *id.* at 495 ("the interest of the prisoner in not being arbitrarily classified as mentally ill and *subjected to unwelcome treatment* is also powerful . . . .") (emphasis added). The *Visnaiz* court ignores the issue of treatment despite its central importance in *Vitek* and so reaches the wrong conclusion.

It is not the confinement in a mental hospital but the efforts to tamper with the integrity of the prisoner's mind against his will that drove the decision in *Vitek*. Yarbrough was sent not for treatment but for evaluation. The objective was to simply to observe his mental state and not adjust it in any fashion. The *Visnaiz* court's mistaken explication of *Vitek* led it to an unduly broad application of the collateral order doctrine. Yarbrough's case is more akin to a transfer of a prisoner from one

detention facility to another than an effort to subject him to psychiatric treatment against his will. *Cf. Meachum v. Fano*, 427 U.S. 215, 228 (1976) (no due process right to contest transfer from one prison facility to another). The order for mental evaluation is not a final judgment and interlocutory appeal should not be permitted.

III. The appeal is moot because Yarbrough has already been evaluated and returned to the Western District of Tennessee.

A. This case does not present a live controversy.

As Yarbrough has already been evaluated and left the medical facility, his appeal does not present "a real and substantial controversy admitting of specific relief through a decree of a conclusive character." *Neighbors Organized to Insure a Sound Environment, Inc. v. McArtor*, 878 F.2d 174, 178 (6th Cir. 1989) (quoting *Aetna Life Ins. Co. V. Haworth*, 300 U.S. 227, 240-41 (1937)). This Court's jurisdiction is limited to cases and controversies. *See Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309 (6th Cir. 2004); U.S. Const. art. III, § 2. "Generally, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Chirco*, 384 F.3d at 309 (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)) (internal quotations omitted).

The district court's order has been fulfilled in its entirety, Yarbrough's evaluation is concluded, and he is no longer at the medical facility where he was sent

for his evaluation. This case presents no live controversy for the Court to resolve and should be dismissed as moot.

B. The exception to the mootness doctrine does not apply because there is no reasonable expectation that Yarbrough will be subjected to the same action again.

A court may retain jurisdiction over a case that would otherwise be moot if the issue is "capable of repetition, yet evading review." *Chirco*, 384 F.3d at 309 (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)). That exception applies only in "situations where: '(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Chirco*, 384 F.3d at 309 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975)). If both factors are not satisfied, no exception permits the Court to issue an advisory opinion on the dead controversy.[5]

[5] The Tenth Circuit has twice found orders for mental evaluation to be capable of repetition yet evading review, but in each case the court did so with minimal reasoning and failed to address the second *Weinstein* factor. *See United States v. Boigegrain*, 122 F.3d 1345 (10th Cir. 1997) (en banc); *United States v. Deters*, 143 F.3d 577 (10th Cir. 1998) (citing *Boigegrain*, 122 F.3d 1345). In neither case did the Tenth Circuit confront the requirement of a reasonable expectation that the same complaining party would be subject to the same action again. Instead, the *Boigegrain* court summarily asserted that "[b]ecause commitments ordered pursuant to § 4241(d) will often be concluded before the appellate process is complete, the issue presented here is capable of repetition, yet evading review." 122 F.3d at 1347 n.1 (quotations omitted). The *Deters* court offered a similarly brief analysis. 143 F.3d at 578 n.2.

> The Supreme Court
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> > has never held that a mere physical or theoretical possibility was sufficient to satisfy the test stated in *Weinstein*. If this were true, virtually any matter of short duration would be reviewable. Rather, we have said that there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party.

Murphy v. Hunt, 455 U.S. 478, 482 (1982). The Eighth Circuit relied on *Murphy* when it held moot an appeal of an order for mental evaluation, explaining that the appellant "has not shown a demonstrable probability that he will once again be in a position to challenge an order that he undergo a mental evaluation as to his competence to represent himself or assist in his own defense." *United States v. Sanders*, 276 F. App'x 532, 533 (8th Cir. 2008). Because he failed to make the requisite showing under the second prong of the *Weinstein* test, "Sanders has not met his burden of demonstrating that this court has subject matter jurisdiction." *Id.*

Yarbrough similarly has no reasonable expectation that he will be dispatched again for a second mental evaluation. Yarbrough vigorously asserts his competency, *see* R.E. 130, Transcript of Proceedings, June 20, 2011, at 46, and the United States does not contest that he is competent to stand trial. Meanwhile, his abusive and frivolous pro se filings present conclusive evidence that he is not competent to represent himself such that no future examination would be necessary if any party

seeks to revisit the issue.

As Yarbrough has not demonstrated a likelihood of recurrence, he fails to satisfy the narrow exception to the mootness doctrine and his appeal lies beyond this Court's jurisdiction. The Court is "not in a position to prevent what has already occurred." *Neighbors Organized to Insure a Sound Environment, Inc.*, 878 F.2d at 178.

C. If this Court has interlocutory jurisdiction, the order does not evade review.

If the order for a mental evaluation falls within an exception to the final judgment rule allowing for interlocutory review, it does not evade review because the Court retains authority to stay the order and promptly review it. Where this Court may issue a stay against an order to preserve the issue, the issue does not evade review. *See United States v. Taylor*, 8 F.3d 1074, 1076-77 (6th Cir. 1993) (if defendant could have petitioned this Court for a stay pending interlocutory appeal, the issue does not evade review); *see also, e.g.*, *New York City Employees' Retirement System v. Dole Food Co., Inc.*, 969 F.2d 1430, 1435 (2d Cir. 1992) ("Where prompt application for a stay pending appeal can preserve an issue for appeal, the issue is not one that will evade review."). If "any future order of a mental examination by a Government doctor is immediately reviewable and, presumably, subject to a stay

pending review . . . the defendant's interest in avoiding the intrusion of the examination will be protected." *United States v. Weston*, 194 F.3d 145, 149 (D.C. Cir. 1999).[6]

The mere fact that the Court declined to issue a stay in this case does not mean the issue evades review. The Court's declination reflects a determination by this Court that Yarbrough's chances of success on the merits and the minimal harm of proceeding could not outweigh the requisite delay. *See* Doc. 006111070220. As the cited cases demonstrate, the mere opportunity for a stay is sufficient to overcome the "evading review" prong of the exception to the mootness doctrine.

The combination of the final judgment rule and the mootness doctrine necessarily deprives this Court of interlocutory jurisdiction. If the argument in Section II is correct and the order for mental evaluation is not a final judgment subject to interlocutory review, then this Court lacks jurisdiction and the case must be dismissed. If the Court instead determines that the order *is* a collateral order subject to interlocutory appeal, then the issue is moot, this Court lacks jurisdiction, and the case must be dismissed.

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[6] The *Weston* court confronted a case similar to this one. Faced with a decision between holding that it lacked jurisdiction under the final judgment rule and holding that the appeal was moot by virtue of being reviewable on interlocutory appeal, the D.C. Circuit effectively punted the issue and declined to settle the jurisdictional issue with specificity. *See* 194 F.3d at 195.

IV. The district court did not abuse its discretion when it ordered Yarbrough evaluated following his repeated assertions that he did not understand the charges against him yet insisted on representing himself.

The district court appropriately exercised its discretion when it ordered a mental evaluation to determine Yarbrough's competency to stand trial and to represent himself.

> The district court possesses the statutory authority to order a competency hearing at any time prior to sentencing "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."

United States v. Back, 307 F. App'x 876, 878 (6th Cir. 2008) (quoting 18 U.S.C. § 4241(a)). "Prior to such a hearing, the court may order a psychiatric or psychological examination of defendant." *Id.* (citing § 4241(b)). Yarbrough gave the district court reasonable cause when he repeatedly stated that he did not understand the nature of the charges against him.

Had the district court not ordered the evaluation, Yarbrough could attack any conviction by claiming he was not competent to stand trial or not competent to represent himself. The mental evaluation ensures that any appeal will be based on a solid record and not on speculation in the absence of facts. District courts have a "legitimate wish . . . that their judgments remain intact on appeal." *Wheat v. United*

States, 486 U.S. 153, 161 (1988). In light of the record that Yarbrough created, the district court exercised its discretion in a reasonable and conscientious fashion.

CONCLUSION

For the reasons set forth above, this Court should dismiss or deny Yarbrough's interlocutory appeal.

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 6851 words of Times New Roman (14-point) proportional type from the Summary of Jurisdiction through the Conclusion. WordPerfect X4 is the word-processing software that I used to prepare this brief.

/s/ Jonathan T. Skrmetti
JONATHAN T. SKRMETTI

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	08/11/2010	1
Minute Entry – Detention Hearing	10/13/2010	43
Order of Detention Pending Trial	10/13/2010	44
Superseding Indictment	01/12/2011	80
Minute Entry – Special Report Date	06/20/2011	116
Order Granting United States' Motion for Pretrial Psychiatric Examination of Defendant Pursuant to Title 18, United States Code, Section 4241 and 4247(b)	06/22/2011	117
Motion to Reconsider Mental Examination and to Dismiss the Indictment	06/24/2011	118
Notice of Appeal (Interlocutory)	06/28/2011	121
Motion to Stay the Order Granting United States' Motion for Pre-Trial Psychiatric Examination of Defendant Pursuant to Title 18, United States Code, Section 4241 and 4247(b); Pending Appeal	06/29/2011	124
Order denying 118 Motion for Reconsideration	07/11/2011	126
Notice of Filing of Official Transcript	08/26/2011	130

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NO.
Affidavit of Judicial Notice	09/26/2011	137
Motion Notification of Correspondence	11/09/2011	147
Minute Entry – Special Report Date	11/10/2011	149
CJA 20 and 21 Appointment of Attorney	11/16/2011	150
Order granting 107 Motion for Hearing and Order Terminating Self-Representation	11/18/2011	154
Notice of Filing of Official Transcript	02/29/2012	171

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Plaintiff-Appellee United States was mailed to Defendant-Appellant,

Terrence Yarbrough
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via the United States Postal Service this 4th day of June, 2012.

/s/ Jonathan T. Skrmetti
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