The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Van Douglas McMahan

Office Address: (including county) 300 Industrial Park Drive, Selmer TN 38375 and 109 West Court Avenue, Selmer TN 38375, McNairy County

Office Phone: 731-645-3100 and 731-645-1015 Facsimile: 866-610-6893

Email Address: [redacted]

Home Address: (including county) [redacted] Selmer TN, 38375, McNairy County

Home Phone: [redacted] Cellular Phone: [redacted]

INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) 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.

The Council requests that applicants use 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 as detailed in the application instructions. Additionally you must 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 original application, or the digital copy may be submitted via email to john.jefferson@tncourts.gov .

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

McNairy County General Sessions Judge, McNairy County Juvenile Court Judge, and owner of McMahan Law Firm.

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

Year Licensed 2002. Bar Number: 022385

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.

Alabama, 8-26-1997, 5803M62V, currently voluntary inactive status due to no litigation in Alabama; Mississippi, 6-26-2008, 104389; Tennessee, 10-26-2002, 022-385.

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, other than my voluntary inactive status in Alabama.

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).

Burgess & Hale (currently Hale & Sides); Gibson & McMahan; McMahan Law Firm; McNairy County General Sessions Court Judge and McNairy County Juvenile Court Judge; Assistant District Attorney, 25th Judicial District. Prior to my legal education, I was in management with a large retail store and laborer at a paper mill while attending college.

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.

No periods of unemployment.

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.

Currently, my practice primarily consists of social security disability and bankruptcies. These areas constitute 80% of my practice. The other 20% is composed of personal injury litigation, estates, family law, medical malpractice, workers' compensation, and general civil litigation.

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 am honored to present a comprehensive recount of my legal career, which commenced in 1997 at Burgess & Hale (now Hale & Sides), where I embarked on my journey as an insurance defense attorney. During my tenure, I focused primarily on federal and state civil rights claims against governmental entities. My caseload frequently involved the defense of police officers and various governmental entities in cases that often transitioned from state to federal court.

A notable milestone in my early legal career was a complex wrongful death case appealed to the 11th Circuit Court of Appeals. The case hinged on the expert testimony regarding causation, where I successfully challenged the plaintiff's expert witness, resulting in the 11th Circuit overturning the district court's decision and ruling in favor of my client. This experience was pivotal, occurring during a time when qualified and discretionary immunity were emerging legal concepts.

Beyond civil rights litigation, my role at Burgess & Hale was diverse, encompassing defense in personal injury claims, workers' compensation, and professional liability cases, including those against architects and engineers. I represented one of Alabama's largest commercial liability insurers, handling declaratory judgment actions and complex coverage disputes following

hurricane-induced wind damage to high-rise condominiums.

Drafting insurance coverage opinions was another facet of my practice that I found particularly rewarding. My background in business management and industry experience provided a unique perspective when addressing intricate workers' compensation claims.

Transitioning to Gibson & McMahan, I embraced the role of a Criminal Justice Act (CJA) panel attorney. This foray into criminal defense was a refreshing change of pace, offering a more personal connection with clients. I handled numerous cases involving methamphetamine-related offenses, which were relatively novel at the time. My commitment to justice was further exemplified by appealing a case to the United States Supreme Court, an endeavor that, despite its outcome, was a testament to my dedication to navigating complex legal challenges.

As managing partner at Gibson & McMahan, I continued to expand my practice areas, transitioning from insurance defense to more plaintiff-oriented representation. My caseload grew to include probate, family law, real estate, criminal cases, business disputes, and personal injury.

The establishment of McMahan Law Firm marked a significant expansion in the types of cases I managed. My practice now includes medical malpractice, personal injury, employment discrimination, family law matters such as divorces and adoptions, social security disability claims, workers' compensation, product liability, bankruptcies, and representing municipalities across Alabama and Tennessee.

As I reflect on my legal career trajectory, it is clear that each phase has been instrumental in preparing me for my current judicial responsibilities and for the potential role on the Tennessee Supreme Court. After a long and dynamic career in private practice, I transitioned to the bench, where I have had the honor of serving as a judge in the general sessions and juvenile court.

In my capacity as a judge, I preside over a wide variety of cases, reflecting the broad jurisdiction of the general sessions and juvenile court. My docket includes, but is not limited to, criminal matters ranging from preliminary hearings in felony cases to misdemeanor trials, civil litigation involving contract disputes and small claims, as well as vital matters of family law. Like all other juvenile court judges, I hear termination of parental rights and dependency and neglect cases.

One of the unique aspects of my role is the authority to oversee divorce proceedings. I am one of the few general sessions judges with this jurisdictional capability. This responsibility requires a delicate balance of legal acumen and sensitivity, as I navigate the complexities of marital dissolution, child custody arrangements, division of marital assets, and alimony considerations. My approach is always to adjudicate with fairness and precision, ensuring that each party receives due process and that the best interests of any children involved are at the forefront of every decision.

Hearing divorce cases in general sessions court poses its own set of challenges, given the emotional and financial stakes for the parties involved. It demands not only a thorough understanding of family law but also an ability to manage courtroom proceedings efficiently and empathetically. My experience in this area has been profound and has provided me with invaluable insights into the nuances of family dynamics and it has enhanced my ability to serve with wisdom and integrity.

I trust that this detailed account of my judicial experience illustrates my commitment to serving justice and my qualifications for ascending to the Tennessee Supreme Court. My career thus far has been marked by a dedication to legal excellence and an unwavering pursuit of fair and equitable outcomes for all parties that come before me.

I am eager to bring my diverse legal background and judicial expertise to the Tennessee Supreme Court, where I can contribute meaningfully to our state's highest judicial body.

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

In the span of my 17-plus years as a General Sessions and Juvenile Court Judge, I have presided over a substantial caseload. While the exact count of cases processed by my court is yet to be officially confirmed, it's undeniable that General Sessions and Juvenile Court handle a higher volume of cases than any other court in the state. The diversity of cases heard is unparalleled, covering a wide spectrum of legal matters.

Notably, my court possesses the unique jurisdiction of handling divorce cases, distinguishing it as one of the select few General Sessions Courts granted such authority. This additional responsibility adds to the breadth and complexity of the cases managed by my court.

Furthermore, I took the initiative to establish and oversee the McNairy County Recovery Court, contributing to the court's multifaceted role in the legal landscape. It's worth emphasizing that these extensive responsibilities are carried out concurrently with the ongoing management of a private law practice.

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.

Since 2006, I have proudly held the position of McNairy County General Sessions and Juvenile Court Judge. As is customary for judges in these roles, my docket encompasses a diverse array of cases. This includes presiding over criminal misdemeanor and preliminary felony matters, civil cases, unlawful detainers, dependency and neglect proceedings, termination of parental rights, delinquency and unruly cases, as well as child support hearings.

Moreover, with the unique jurisdiction of handling divorce cases, my responsibilities extend to hearing divorce petitions and modifications of custody arrangements. While the sheer volume of cases prohibits me from providing specific examples, each case holds significant importance

for the litigants involved.

Among all the cases, the termination of parental rights matters stand out for their particular importance. These cases involve life-altering decisions that profoundly impact the constitutional rights of parents and the overall well-being of the children entangled in the legal process.

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.

Throughout my professional journey, I have actively undertaken roles as guardian ad litem in multiple custody cases. In this capacity, my primary responsibility is to advocate for and represent the best interests of the children involved.

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

I have sufficiently summarized my legal experience in my prior responses.

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.

None

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.

1. Freed-Hardeman University: 1986-1989. I transferred from Freed-Hardeman University to the University of Tennessee following the marriage to my wife of over 35 years. My major at Freed-Hardeman was business management.
2. The University of Tennessee at Knoxville: 1989-1990. I received my B.S.B.A in Business Management.
3. Cumberland School of Law: Doctorate of Jurisprudence 1997. I received a scholar of

merit in municipal court practices for highest grade.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 56 years of age and my date of birth is [redacted] 1967.

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

I lived in McNairy County, Tennessee from birth until college. After completing my college education in Knoxville, I left the state for a period of time for work, law school and for the onset of my legal career. In 2003, I moved back to McNairy County, Tennessee and have remained since.

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

I have now lived in McNairy County for twenty (20) years.

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

McNairy 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.

None

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.

To my knowledge, I have received two judicial complaints, with both being dismissed.

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.

Lakeview Baptist Church

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.

None

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.

The Tennessee General Sessions Judges Conference and the Tennessee Juvenile and Family Court Judges Conference 2006 to Present.

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

Making a Difference Judges Award in 2022 by the Tennessee Association of Recovery Court Professionals for outstanding work with the Recovery Court.

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

I have been cited in several judicial decisions. Nix v. Cantrell (In re J.M.N.), No. W2007-00615-COA-R3-JV, 2008 Tenn. App. LEXIS 346 (Ct. App. June 13, 2008); Hernandez v. Hernandez, No. W2018-01388-COA-R3-CV, 2019 Tenn. App. LEXIS 371 (Ct. App. July 30, 2019); Millmeyer v. Whitten, No. W2019-00586-COA-R3-JV, 2019 Tenn. App. LEXIS 543 (Ct. App. Nov. 7, 2019); In re Paetyn M., No. W2017-02444-COA-R3-PT, 2019 Tenn. App. LEXIS. 81 (Ct. App. Feb. 14, 2019); In re Dakota C.R., 404 S.W.3d 484 (Tenn. Ct. App. 2012); and possibly others.

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.

None

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 have been elected as McNairy County General Sessions and Juvenile Court Judge for three (3) terms and have served continuously since 2006.

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.

I am attaching a brief I prepared to the 11th Circuit Court of Appeals. I was responsible for not only the brief but also the legal work throughout the case including the pleadings, expert depositions, and other matters. I am also attaching various other legal documents I have prepared over the years of my law practice and judicial duties.

ESSAYS/PERSONAL STATEMENTS

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

I have been told my greatest strength is compassion for others. Throughout my legal journey, I have prioritized making a positive impact on others. As a criminal defense attorney, I went beyond legal representation, providing clients with Lee Strobel's "The Case for Faith" to support their faith and decision-making.

Transitioning to the bench, I've continued seeking ways to make a positive difference. Whether through attentive listening, informed decision-making, or innovative programs for issues like drug addiction and mentoring, my goal is to improve lives.

In a climate marked by hostility and incivility, I share concerns about the state of discourse. I aspire to contribute to a legal system and world characterized by empathy and understanding.

As a committed Christian and family man, I am eager to continue the legacy of compassion on the Tennessee Supreme Court and am confident in my ability to serve with distinction.

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)***

As a judge, I have led initiatives to promote community welfare, such as establishing the

McNairy County Care Program, a drug probation program, without any state funding. Thanks to the support of Governor Lee, Senator Page Walley, and Representative Ron Gant, we secured state funding to launch our own Recovery Court. Additionally, I played a role in bringing the Remote Area Medical (RAM) clinic to our community, which provided valuable healthcare services to our citizens. Building on this success, I organized a driver's license restoration day, collaborating with local district attorneys, court clerks, law enforcement officers, and other stakeholders to help individuals regain their driving privileges. Alongside my judicial work, I have also engaged in community outreach by writing articles like "Access to Justice," aimed at enhancing public understanding of the legal system. With my extensive legal and governmental experience as an Assistant District Attorney, I am fully committed to upholding justice.

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

I am seeking appointment to the upcoming vacant Supreme Court seat left by Judge Roger Page. Drawing on my experience as a general sessions and juvenile court judge, I bring a unique perspective to the Supreme Court, making my appointment a valuable addition.

General Sessions and Juvenile Court judges, situated at the forefront of the judicial system, handle a vast array of cases, providing insight into the daily workings of Tennessee's justice system. As a Supreme Court Justice, I will offer a deep understanding of the challenges faced by judges at the grassroots level, ensuring comprehensive representation.

My strength lies in compassion, a crucial quality for any judge. This attribute, coupled with my diverse experience, will contribute to fostering empathy and fairness in the Supreme Court's decision-making process.

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 am deeply rooted in my faith and committed to family values. Married for 35 years to my wife Christy, we have raised three successful adult children, all of whom have completed college and are pursuing careers in medicine or are already working. Our family has been actively engaged in various educational and extracurricular pursuits, including athletics, for over two decades.

My involvement extends to our local churches, where I have dedicated my time to teaching both children and adult Sunday school classes. Additionally, I have actively coached my children's basketball, football, and baseball teams from their early years, fostering a sense of community and teamwork. I have used these coaching positions to be a mentor for the many disadvantaged children in our community. Many of our players did not have fathers in the home or any other positive role models. I hope that my service to them has proven beneficial.

If appointed as a judge, I plan to continue and expand my community engagement. I aim to

collaborate with local organizations, schools, and churches to address the unique needs of our communities. Whether through educational initiatives, mentoring programs, or involvement in charitable organizations, my commitment to community service will remain steadfast. I believe that active participation in community affairs is vital for a judge, as it fosters a deeper understanding of the challenges faced by those who come before the court and strengthens the bond between the justice system and the community it serves.

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)***

As a candidate for judicial office on three separate occasions, I have consistently held that my role as a father has been the cornerstone of my qualifications. My journey through fatherhood, raising three children with my wife, has ingrained in me a profound understanding of fairness and the gravity of life-altering decisions. These personal experiences have been pivotal in shaping my judicial philosophy.

Beyond my familial roles, my 17-year tenure as a general sessions and juvenile court judge has provided me with a wealth of practical legal experience. The diversity of cases I have presided over and the depth of comprehension required in these roles are directly translatable to the rigors of an appellate judge position. My integrity, empathy, and steadfastness are qualities I attribute to the influence of my family and my deep-seated faith—traits that I consider fundamental to the judiciary.

My roots in a blue-collar family, where I worked in a paper mill, have given me an authentic connection to the hardworking individuals in our community. This background has instilled in me a genuine appreciation for the challenges faced by everyday Americans, fostering an ability to relate to the array of issues that come before the court. It is this blend of life experiences and personal commitments that I believe equips me with a unique perspective beneficial for service on the Tennessee Supreme Court.

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)***

My unwavering commitment to upholding the rule of law is evident in instances where personal disagreement arises. As a judge, impartiality is paramount, and I firmly advocate for the consistent application of the law, irrespective of individual beliefs. It is the duty of the judiciary to faithfully interpret and enforce the law, ensuring the fair administration of justice.

Throughout my tenure as a judge, I have encountered laws with which I personally disagreed. One notable example is the law requiring a convicted DUI defendant to maintain a breathalyzer

on their vehicle for a year, regardless of whether they drive during that period. Many litigants mistakenly believe that refraining from driving during the suspension period exempts them from installing the breathalyzer. Despite my disagreement with this law, I have consistently ruled in accordance with its provisions. In such cases, I have had to rule against defendants, upholding the law even when personal disagreement exists.

This is just one illustration of several instances where I have disagreed with the law as a judge. While there are numerous examples, my commitment to upholding the law remains steadfast. My judicial decisions consistently prioritize the faithful application of the law, underscoring my dedication to impartiality and the principles that define our legal system.

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.

Mike Smith Executive Director Southwest Human Resource Agency [redacted] Henderson, TN 38340 Phone: [redacted]
Page Walley Tennessee State Senator [redacted] Nashville, TN 37243 Phone: [redacted]
Ron Gant Tennessee State Representative [redacted] Nashville, TN 37243 Phone: (615)741-6890.
D.J. George Norton Norton Law Firm [redacted] Selmer, TN 38375 Phone: [redacted]
Mark Donahoe The Donahoe Firm [redacted]

Jackson, TN 38301

Phone: [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 [Court] 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: December 6, 2023.

Kenneth McMahan
Signature

When completed, return this application to John Jefferson at the 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.

Van Douglas McMahan
Type or Print Name

Van McMahan
Signature

December 6, 2023
Date

022385
BPR #

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

Alabama 5803M62V 8/26/97
Mississippi 104389 6/26/08

U.S.C.A. NO. 03-15502-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TIMOTHY MARK ROBINSON,	)	
	)	
Appellant,	)	
	)	
	)	**CASE NO.: 03-15502-B**
v.	)	
	)	
UNITED STATES,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION
CR-03-J-209-E

BRIEF OF APPELLANT, TIMOTHY MARK ROBINSON

Submitted By:
Van D. McMahan

OF COUNSEL:
VAN D. MCMAHAN
ATTORNEY AT LAW
188 West Houston Avenue
Selmer, Tennessee 38375
(731) 645-7222

Attorney for Appellant

U.S.C.A. NO. 03-15502-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TIMOTHY MARK ROBINSON,	)	
	)	
Appellant,	)	
	)	
v.	)	**CASE NO.: 03-15502-B**
	)	
	)	
UNITED STATES,	)	
	)	
Appellee.	)	

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following are persons or entities interested in the outcome of this case:

Van D. McMahan, attorney for Appellant, Timothy Mark Robinson;

Timothy Mark Robinson, Appellant;

Honorable Inge P. Johnson, United States District Judge,

Northern District of Alabama;

United States, Appellee;

Alice H. Martin, United States Attorney, Appellee;

William R. Hankins, Jr., United States Attorney, Appellee;

Julie Timmons, United States Probation Office;

STATEMENT REGARDING ORAL ARGUMENT

While the Appellant, Timothy Mark Robinson, submits that the bases for reversing the district court are adequately addressed in this brief, he would welcome oral argument in order to address such questions as the court may have.

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Statutes:

STATEMENT OF JURISDICTION

This is an appeal from a final decision of the district court of the United States. The Court of Appeals has jurisdiction of this case, pursuant to 26 U.S.C. Section 1291, and 18 U.S.C. Section 3742 (a) and (e). The district court had jurisdiction of this case because Appellant was indicted for violation of 18 U.S.C. Section 922 (g)(1) with penalties at 18 U.S.C. Section 924 (e)(1), and 26 U.S.C. 5861 (d).

The appeal is timely because final sentencing was imposed on October 9, 2003, and the Notice of Appeal was filed on or about October 16, 2003, (R-1-61). The case was docketed in this court on December 15, 2003 (R-1-71). The record for appeal was made final on December 15, 2003 (R-1-71), and therefore, Appellant's brief was due by January 20, 2004. However, Appellant requested and received an extension to January 27, 2004.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred when it stated that it had no discretion to sentence Appellant below the applicable guideline range following Appellant's Motion for Downward Departure.

II. Whether the district court erred when it denied Appellant's Motion to Suppress and held that the officers had probable cause to detain, question, and search Appellant.

III. Whether the district court erred when it denied Appellant's Motion to Suppress and held that the officers had probable cause to arrest Appellant.

IV. Whether the district court erred when it held that Appellant's three previous robbery convictions were committed on occasions different from one another, for purposes of imposing an enhanced sentence under 18 U.S.C. Section 924 (e)(1) and (e)(2)(B).

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The United States of America brought an indictment against the Appellant in the United States District Court for the Northern District of Alabama, alleging that Appellant possessed a firearm following a previous felony conviction, and that Appellant possessed a prohibited and unregistered firearm (R-1-1). Appellant pled guilty to these charges on or about July 7, 2003 ®-1-42). The Appellant is currently incarcerated.

II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Appellant was arraigned and served with the indictment against him on or about May 1, 2003 (R-1-1). The indictment charged that Appellant, on or about May 13, 2003, knowingly possessed a weapon made from a shotgun which had been modified to an overall length of less than 26 inches and having a barrel of less than 18 inches in length, which was not registered to him in the National Firearms Registration and Transfer Record, in violation of Title 26 United States Code, Sections 5861(d) and 5845(a)(2) (R-1-1-1), and 18 U.S.C. Section 922(g)(1). The Appellant pled guilty to the indictment against him on or about July 7, 2003 (R-1-42).

On or about May 22, 2003, Appellant filed a Motion to Suppress and Dismiss.

(R-1-15). On June 25, 2003, Magistrate Judge John E. Ott heard testimony from two of the arresting officers and one witness and denied Appellant's motion to suppress. (R-1-31). The district court denied Appellant's Motion to Suppress on July 14, 2003. (R-1-50).

On or about September 2, 2003, the United States Probation Office filed its presentence investigation report, which recommended that Appellant receive a base offense level of 26 under U.S.S.G. Section 2K2.1(a)(4)(B)(i) because he possessed a firearm described at 26 U.S.C. Section 5845(a), and he was a prohibited person due to a prior felony conviction (R-1-58-5). Furthermore, the report suggested that the offense level be increased to 34 levels pursuant to 18 U.S.C. 924 (e)(1) and (e)(2)(B), because the Appellant had three prior violent felony convictions on occasions different from one another. (R-1-58-6). The Appellant filed objections to the probation office's recommendations on or about September 22, 2003. (R-1-54). The district court denied Appellant's objections and found that Appellant's three previous felony convictions were on occasions different from one another and sentenced Appellant under the enhanced penalties of 18 U.S.C. 924(e). (R-4-67-5).

Appellant also filed a Motion for Downward Departure, based upon the fact that the Appellant's criminal history category over-represented the seriousness of his prior criminal history. (R-1-55). The district court denied Appellant's Motion for

Downward Departure at the sentencing hearing on October 9, 2003. (R-4-67-10).

The district court executed judgment against the Appellant on or about December 1, 2003. (R-1-71).

III. STATEMENT OF FACTS

On or about August 2, 2002, agents of the Calhoun County Task Force ("CCDTF"), and Piedmont Police Officers stopped, detained, questioned, and arrested the Defendant for possession of a short barreled shotgun. (R-1-58-4). According to the officers' report, agents of the CCDTF were executing a drug search warrant at 590 Porter Johnson Road in Piedmont, Alabama on the date in question. (R-1-58-4).

According to Steve Tidwell of the Piedmont Police Department, the Piedmont Police Department and the Calhoun County Task Force were executing a search warrant on Porter Johnson Road on the night in question. (R-3-41-4). Officer Tidwell was assigned to perimeter security. (R-3-41-4). According to officer Tidwell, the search began around 9:30 or 10:00 p.m. (R-3-41-4). During the search of the premises, the officers took some individuals into custody at the residence, and one person was arrested on an outstanding warrant. (R-3-41-4). The officers stopped all other cars that happened to be traveling down Porter Johnson Road and, all such people were asked to have their vehicles searched. (R-3-41-6, 14, 28).

The house that was the subject of the officers' search warrant was one of three

homes on Porter Johnson Road. (R-3-41-26). All three homes were located after you pass a fork in Porter Johnson Road. (R-3-41-26). According to the officers' testimony, the officers had set up a road block stopping everyone that drove by the area, and in particular at the point where the road forked. (R-3-41-31,32). Although there were three different homes located on Porter Johnson Road, only one of which was subject to the officers' search warrant, the officers set up a road block so that vehicles could not reach any of the three homes without being searched. (R-3-41-31,32).

On the night in question, Appeliant was a passenger in the vehicle driven by Natalie Sanders. (R-1-58-4). According to testimony of Officer Tidwell, Ms. Sanders drove her vehicle down Porter Johnson Road and came to a stop some 40 yards from the house being searched. (R-3-41-6, 29). When Ms. Sanders' vehicle came to a stop, the officers approached her vehicle and began questioning both Ms. Sanders and the Appellant. (R-3-41-7-10). One of the officers, Officer Tidwell, did not see Appellant's vehicle back up at all. (R-3-41-7). Another officer, Officer Wigley, could only testify that he saw the vehicle back up slowly for approximately 20 yards, but that he did not believe the vehicle was attempting to flee. (R-3-41-47-48).

The officers' only explanation for why they approached and stopped

Appellant's vehicle was because of concerns for their safety. (R-3-41-9). After approaching the vehicle, Officer Tidwell noticed that the Appellant was wearing a fishing knife around his waist and ordered the Appellant out of the vehicle. R-3-41-47-48). However, the Appellant, refused to exit the vehicle. (R-1-58-4). Subsequently, Officer Wigley approached the vehicle to assist and claims to have discovered a shotgun shell lying in plain view on the center console. (R-3-41-40). Officer Tidwell then removed Appellant from the vehicle. (R-3-41-40).

After the Appellant had been removed from the vehicle, a search revealed a Remington 870 16 gauge shotgun on the floorboard of the vehicle. (R-3-41-11). Neither the Appellant, nor the driver of the vehicle gave consent to search the vehicle. (R-3-41-64).

IV. STANDARD OF REVIEW

The standard of review is *de novo* for the sentencing court's Federal Sentencing Guidelines application to these facts. United States v. Rodriguez, 959 F.2d 193, 195 (11th Cir.1992).

The standard of review for the district court's denial of Appellant's Motion to Suppress involves mixed questions of fact and law, and is reviewed for clear error, and its application of the law to the facts *de novo*. United States v. Ramos, 12 F.3d 1019, 1022 (11th Cir.1994); United States v. Diaz-Lizaraza, 981 F.2d 1216, 1220

(11th Cir.1993).

SUMMARY OF THE ARGUMENT

1) The district court erred when it stated that it had no authority to grant Appellant a downward departure based upon his criminal history category being over represented. It is clear that district courts are vested with the authority to depart downward when the circumstances permit or warrant and the court's position that it cannot is clear error. District court judges must be free to make decisions to depart downward from the sometimes very harsh and unfair sentencing guidelines when the circumstances so warrant.

2) The district court erred when it denied the Appellant's Motion to Suppress. It is clear in this case that the officers did not have sufficient information to stop, question, or detain the Appellant, pursuant to a "Terry stop." Therefore, Appellant's Motion to Suppress was due to be granted.

3) The district court erred when it denied Appellant's Motion to Suppress and held that the officers had probable cause to arrest Appellant. It is clear in this case that the officers lacked any information that the Appellant was involved in any criminal activity, and therefore, the officers did not have probable cause to arrest.

4) The district court erred when it found that Appellant's three previous felony convictions were on occasions different from one another for purposes of 18 U.S.C.

Section 924 (e)(1) and (e)(2)(B), and therefore erred when it found that Appellant is an armed career criminal.

ARGUMENT

The Appellant's criminal history category is greatly over-represented by the application of the sentencing guidelines, and the district court erred when it stated that it had no discretion to sentence Appellant below the applicable guideline range following Appellant's Motion for Downward Departure.

The district court erred when it held that it had no discretion to downwardly depart following Appellant's Motion for Downward Departure. The Appellant filed a Motion for Downward Departure on September 22, 2003, wherein he requested the district court to depart downward because the sentencing guidelines over represented Appellant's criminal history category. (R-1-55). The district court wrongfully denied Appellant's Motion for Downward Departure on the day of sentencing. ®-4-67-10). Following oral argument of Appellant's Motion for Downward Departure, the District Court Judge, Inge Johnson, stated the following: "The case I've cited on the record just a little while ago makes it perfectly clear that, under the law of the 11th Circuit, and the statute and the sentencing guidelines, you are considered an armed career criminal for purposes of sentencing, and **I don't have any discretion to change that.**" (R-4-67-10).

Contrary to the district court's position, the district court did have discretion to order a downward departure. The district court had authority to downwardly

depart from the sentencing guideline calculations, as determined in the probation office's sentencing report, based upon U.S.S.G Section 4A1.3., Adequacy of Criminal History Category (Policy Statement). U.S.S.G

Section 4A1.3. provides as follows:

> If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:
>
> (a) prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses);
>
> (b) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;
>
> (c) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;
>
> (d) whether the defendant was pending trial or sentencing on another charge at the time of the instant offense;
>
> (e) prior similar adult criminal conduct not resulting in a criminal conviction.

Moreover, the commentary to the above mentioned section provides, in part, as follows:

"There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. An example might include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of

prior criminal behavior in the intervening period. The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category (Category II), and therefore consider a downward departure from the guidelines."

In United States v. Baker, 19 F.3d 605 (11th Cir. 1994), this circuit held that a defendant may appeal a district court's failure to downwardly depart on the grounds that the court erroneously believed that it lacked the authority to depart. Id. at 615.

The case law in this circuit is clear, that when the applicable sentencing guidelines provide for departure, as the one in question does, courts have discretion to depart downward. United States v. Webb, 139 F.3d 1390 (11th Cir. 1998).

The present case is exactly the type of case contemplated by Section 4A1.3 and the above mentioned commentary. The Appellant's criminal history category of VI, as stated by the probation office's report on page 11, paragraph 29, (R-1-58-11), clearly over-represents the seriousness of the Appellant's criminal history category and the likelihood that the Appellant will commit another crime.

The bulk of Appellant's criminal history points (9), comes from what happened in 1990, thirteen years ago, when the Appellant was only 21 years old. Moreover, all these points stem from a single night in Appellant's life over a mere 55 minute time period. Furthermore, the Appellant has not had a substantial criminal history since

the day in question some thirteen (13) years ago.

At the time of his arrest in the present case, Appellant was trying to earn a living and live a good life. He was not active in any type of criminal activity, as evidenced by his inability to provide the government with any type of assistance to help reduce his sentence. He was simply not engaged with any type of crime or criminal life. Surely, if there has ever been a case that fits the parameters and intent of this provision it is this case.

Furthermore, the district court erred when it failed to order a downward departure in Appellant's sentence pursuant to U.S.S.G. Section 5K2.0, and 18 U.S.C. Section 3553(b), because the Appellant's criminal history, as applied to this case, is an encouraged factor under the guidelines and the guidelines do not adequately take the Appellant's criminal history into account with respect to 18 U.S.C. Section 924 (e)(1) and U.S.S.G. Section 4B1.4(b)(3)(A).

The district court had discretion to make a downward departure in this case, pursuant to U.S.S.G. Section 5K2.0, and 18 U.S.C. Section 3553(b). Koon v. United States, 518 U.S. 81 (1996). In Koon, the Court held that 18 U.S.C. Section 3553(b) allows a departure from the sentencing guidelines range if the court finds "there exists an aggravating or mitigating circumstance of a kind, to a degree, not adequately taken into consideration" by the Sentencing Commission in formulating the

Guidelines. Id. The Commission prohibits consideration of a few factors, and it provides guidance as to the factors that are likely to make a case atypical by delineating certain of them as "encouraged" bases for departure and others as "discouraged" bases for departure. Id. Courts may depart on the basis of an encouraged factor if the applicable Guideline does not already take the factor into account. Id. A court may depart on the basis of a discouraged factor, or an encouraged factor already taken into account, however, only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case. Id.

A downward departure is warranted in the present case because the adequacy of the Appellant's criminal history, as discussed above, is an encouraged factor under the sentencing guidelines. As Koon held, Courts may depart on the basis of an encouraged factor if the applicable Guideline does not already take the factor into account. Id. The Sentencing Guideline in question here is U.S.S.G. 4B1.4 (b)(3)(A). This guideline provision does not take into consideration the remoteness, or staleness, of the Appellant's three prior robberies or the issue of whether these three crimes, occurring on the same day, two within 12 minutes of each other, constitute simultaneous crimes for which the enhancement will not apply, or successive crimes for which the enhancement could apply. The sentencing guidelines

are completely silent with respect to these issues. Therefore, under Koon and 18 U.S.C. Section 3553(b), the district court had discretion to make a downward departure under the guidelines.

Even if it is determined that the sentencing guidelines do effectively take into account the issues of staleness and whether the prior felonies were simultaneous or successive, the district court had authority to depart from the guidelines, and should have so departed, because this case is different from the ordinary case. This case is exceptionally different from the ordinary case because all of the Appellant's alleged violent felonies occurred some thirteen (13) years ago and all occurred on the same day, and two within 12 minutes of the other.

The Appellant pled guilty and accepted responsibility for his actions, and he understood and fully expected to be punished. However, a fifteen (15) year sentence in this case, for mere possession of a gun, following three crimes that were committed a very long time ago and all at basically one point in time, would not represent justice.

The district court judge's decision that she had no discretion to depart downward is a clear error.

II. The police officers did not possess facts within their knowledge sufficient to constitute reasonable suspicion to stop, detain, or question the

Appellant.

The facts of this case clearly do not support probable cause or reasonable suspicion to detain, question, investigate, or search the Appellant's vehicle, and therefore, the district court erred when it failed to grant Appellant's Motion to Suppress the evidence.

The Appellant, like all Americans, is entitled to be free from unwarranted searches and seizures. The Fourth Amendment to the Constitution of the United Sates of America provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Based upon the Fourth Amendment, the general rule is that warrantless searches and seizures are presumptively unreasonable. Horton v. California, 496 U.S. 128, 133, 110 S.Ct. 2301, 2306, 110 L.E.2d 112 (1990). Defendant recognizes that the Court has carved out a very narrow exception allowing in certain limited situations for the government's interest to outweigh the individual's privacy interest. This narrow exception is the well known "Terry stop," wherein the Courts have said that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that

criminal activity is afoot. Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673 (2000). To make this showing the officer must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity. Id. (quoting Terry v. Ohio, 392 U.S. 1 (1968).

In this case, Terry mandates that the officers must have had a reasonable and articulable suspicion that the Appellant was engaged in some type of criminal activity, prior to stopping, questioning, investigating, detaining, or arresting Appellant. As the above mentioned facts make clear, the officers' only reason for stopping, questioning, and initially detaining the Appellant was that they were conducting a search warrant at 590 Porter Johnson Road. (R-3-41-9). According to Officer Tidwell, the officers searched every vehicle that traveled by their road block. (R-3-41-31,32). When Officer Tidwell was asked whether there were any other reasons, other than the search warrant and safety concerns, for the officers approaching the Appellant's vehicle, asking questions of the Appellant, Officer Tidwell stated as follows: "**Just for officer safety concerns, that it was approached in an area that we were serving the high-risk search warrants.**" (R-3-41-16). Officer Tidwell could simply not point to anything that would make a reasonable person believe the Appellant was committing or about to commit a crime.

Officer Wigley stated that the only facts within his knowledge that Appellant

was committing or about to commit a crime was the activity of the vehicle pulling up, backing up, someone going to the trunk, and the vehicle sitting in the roadway. (R-3-41-55). Officer Wigley further testified that the decision to approach the Appellant was for officer safety. (R-3-41-55). Officer Wigley's facts, however, fall well short of remotely establishing that he, or the other officers, had sufficient information to make them believe that Appellant had committed or was about to commit a crime. It is important to note here that Officer Tidwell took the lead and was approaching the vehicle before Officer Wigley, and therefore, Officer Tidwell's reason or justification for stopping and questioning the Appellant is more important and should be the basis for determining whether the officers had sufficient and reliable information to believe that criminal activity was going on, rather than a mere hunch. (R-3-41-40). In fact, Officer Wigley was several yards behind Officer Tidwell. (R-3-41-40). Officer Tidwell's only reason or basis for approaching the vehicle was for officer safety. (R-3-41-9).

It is clear the officers abused and went beyond their authority when they searched all the vehicles on Porter Johnson Road, including Appellant's vehicle. Even though Ms. Sanders testified that the officers told her that they had the right to search any vehicle in the area (R-3-41-63), the officers testified that they did not have authority to stop and search every vehicle in the area. (R-3-41-57). Therefore

the search of Appellant's vehicle was beyond the scope of the officer's authority under the warrant.

It is important to note that the officers did not see the firearm in question until after the illegal search was conducted. (R-3-41-41). Also, the officers did not see any ammunition until after they unlawfully stopped and questioned the Appellant. (R-1-41-40). Therefore, neither the firearm, nor the alleged shell casing, should be considered in the case to determine whether the officers' "Terry stop" was justified.

The officers simply did not have any information to make them believe that Appellant was involved in criminal activity. The officers did not have any reason to believe that the Appellant was traveling to the subject property to purchase drugs or take part in any other type of illegal activity. Surely, just because officers may have reason to believe that criminal activity is going on at one particular location does not mean that they are authorized to stop, investigate, and search anyone that may happen to drive by during the search. It is clear that the officers cannot point to any facts that support a reasonable belief that the Appellant was involved in criminal activity.

The officers did not testify, nor did the police reports state, that anyone was in fact arrested for drug activity on this particular day in question, except for the people living at the 590 Porter Johnson Road address. (R-3-41-33) and (R-1-58-4,5). Therefore, it cannot be said that because other people were driving to the subject

property to purchase drugs, the Appellant could have been as well, and therefore, the reason for the stop. Importantly, the officers did not mention in their testimony that they ever suspected that the Appellant was involved in any criminal activity involving the property or any drugs where the officers were conducting the search warrant.

The only action taken by the Appellant prior to being stopped or detained by the officers was that the vehicle he was riding in stopped on a road where there just happened to be a search warrant being carried out at one specific residence. The Appellant was simply not doing anything illegal at the time he was first approached by the officers. In fact, the Appellant and his companion were simply visiting a relative that lived nearby where the drug search was being conducted. (R-3-41-54).

The simple fact that the Appellant's vehicle stopped in a high crime area, or in an area where the police believed criminal activity was going on, does not warrant probable cause or reasonable suspicion to believe that he may be involved in criminal activity. In United States v. Gordon, 231 F.3d 750 (11th Cir. 2000), the court found that the defendant's actions warranted or justified a "Terry stop," when the officers stopped and questioned the defendant after the officers observed defendant in a high crime area. **Importantly, the court noted that the presence of a person in a high crime area is not sufficient standing alone to make a "Terry stop."** Id. at 755.

The court found that the officers were justified in their apprehension of defendant, because defendant made a clear attempt to flee upon sighting the law enforcement officers. Id. at 756 and 757. However, in the present case, there is simply no evidence whatsoever that Appellant attempted to flee after being sighted by the officers. (R-3-41-48).

Moreover, the search of the Appellant's vehicle is not warranted under any other theory. The Appellant did not give his consent, nor did the Appellant's driver, Natalie Sanders, give consent to the search of the vehicle, and therefore, the search of the vehicle was not valid by lawful consent. (R-3-41-64). Furthermore, the search of the Appellant's vehicle was prior to his arrest, and therefore, the government cannot argue that the search was valid following a lawful arrest.

Simply stated, the above mentioned facts fall well short of supporting the government's position that the officers had an objective justification or reasonable suspicion for stopping and questioning the Appellant. Therefore, any evidence obtained during or after the officers' stop or investigation of the Appellant on or about August 2, 2003, should have been suppressed.

III. The police officers did not possess facts within their knowledge sufficient to constitute probable cause to arrest Appellant following the initial

traffic stop.

The officers clearly lacked sufficient information or knowledge to believe that Appellant was committing a crime. Probable cause to arrest requires that the law enforcement officials have facts and circumstances within their knowledge sufficient to warrant a reasonable belief that the suspect had committed or was committing a crime. United States v. Gonzalez, 969 F.2d 999, 1002 (11th Cir. 1992).

Based upon the facts of the present case, the officers had absolutely no reasonable belief that the Appellant committed or was going to commit the crimes charged or any other crime. Specifically, prior to the Appellant's arrest, the officers had absolutely no reason to believe or suspect that the Appellant was in possession of an illegal firearm. The Appellant was taken out of the car, detained, and placed under arrest immediately after the officers allegedly noticed a shotgun shell casing on the console and a hunting knife on the Appellant's belt. (R-3-41-40). Because it was not unlawful to carry the knife, or have a spent shell casing, the officers had no reason to believe that Appellant was committing a crime. (R-3-41-17). Therefore, the officers in this case lacked probable cause to arrest or detain the Appellant. Because the officers lacked probable cause to arrest, any and all evidence obtained after the stop and during or after the arrest should have been suppressed.

IV. The Appellant's three prior felony convictions were committed on occasions different from one another, and therefore, the district court erred when it found the Appellant was an armed career criminal, pursuant to U.S.S.G. Section 4B1.4(b)(3)(A).

The Appellant's three prior robberies were not separate and distinct robberies, but instead were part of one continuous and uninterrupted crime spree, and therefore, they were not committed on occasions different from one another for purposes of 18 U.S.C. Section 924 (e)(1).

The case law of this circuit makes it clear that the standard for determining whether the enhancement found at 18 U.S.C. Section 924 (e) applies to a particular case is whether the prior felonies were committed on occasions different from one another. United States v. Sweeting, 933 F.2d 962 (11th Circuit 1991). In determining whether crimes were committed on occasions different from one another the court looks to see if the crimes were successive or simultaneous. United States v. Lee, 208 F.3d 1306 (11th Circuit 2000). The crimes are considered separate if the Defendant had a meaningful opportunity to desist activity before committing the second or later crime(s). United States v. Lee, 208 F.3d 1306 (11th Circuit 2000).

The Appellant was convicted in Calhoun County Circuit Court of three

different felony robbery convictions, case numbers CC 90-908, CC 90-909, and CC 90-1208. (R-1-58-7-11). The prior robberies all occurred on the same date, May 9, 1990. (R-1-58-7-11). The first robbery occurred at 1:50 a.m., the second at 2:33 a.m., and the third at 2:45 a.m. (R-1-58-7-11).

Although the Appellant was convicted under three separate case numbers in Calhoun County, it is clear that the Appellant's prior robberies were not committed on occasions different from one another. The Appellant was caught up in a crime spree that was a continuous and ongoing from the point of the first robbery. The Appellant's prior felonies were simultaneous, as opposed to successive, because he did not have a meaningful opportunity to desist following the first robbery to the second robbery. Moreover, the Appellant clearly did not have time to desist from the second robbery to the third and last robbery.

The small amount of time between the second and third robbery, only 12 minutes, simply did not give the Appellant a meaningful opportunity to desist. As the police reports and probation report all indicate, the Appellant did not enter the stores, hold a knife to anyone, or threaten the use of force against anyone. Furthermore, because the third robbery occurred at another location and in such a very short amount of time from the second robbery, the Appellant did not have a meaningful opportunity to desist from the crime spree.

In United States v. Sweeting, 933 F.2d 962, the underlying facts in consideration for the court in determining whether the above mentioned enhancement applies were that the Defendant burglarized one home and fled to another when the police approached and then hid in the closet of the second home. Like in the present case, the defendant in Sweeting did not have a meaningful opportunity to desist. The Court found that the second crime, entering the second home and hiding from the police, should not count as a second and separate offense for purposes of determining whether the enhancement applies even though they were separate punishable acts. Id.

Likewise, in the present case, because there was such a short period of time between the second and third robberies, 12 minutes, the Appellant did not have a meaningful opportunity to desist. The Appellant did not get out of the vehicle and enter the stores, but instead remained in the car. The Appellant was faced with tremendous peer pressure, under the influence of drugs and alcohol, and was simply not in a position to stop the ongoing crime spree he and others were on. All the robberies occurred so close together in both time and proximity that the Appellant had no real and meaningful opportunity to desist from the crime spree.

Because the Appellant did not have a meaningful opportunity to desist from the crime spree, the above mentioned prior robberies should not be considered separate convictions for purposes of the enhancement, and the harsh and excessive

punishment created by the enhancement should not apply to the facts of the present case.

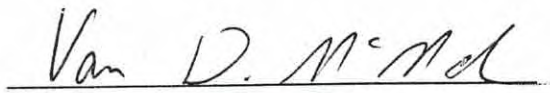
CONCLUSION

This is a case where the Appellant should have never been arrested. The officers had absolutely no reasonable justification for stopping defendant and searching the vehicle. The police officers in question vastly over reached their boundaries and wrongfully searched Appellant's vehicle. Moreover, after the officers made their investigation, they had absolutely no basis for arresting the Appellant.

The unfair treatment of the Appellant did not stop there. The district court erred in two respects in this case, as argued above. First, the district court erred when it stated that it did not have discretion to downwardly depart from the sentencing guidelines. Second, the district court erred when it found that the Appellant's three prior felony convictions were committed on occasions different from one another.

This is a clear case where the sentencing guidelines are too harsh and result in excessive punishment against the Appellant. The harshness and unfairness of Appellant's sentence in this case, fifteen (15) years for possession of a firearm, is even more exaggerated by the district court's failure to make a downward departure, when it was clearly warranted under the facts and circumstances of this case.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

This brief complies with the 14,000 word type-volume limitation of Rule 32(a)(7), of the Federal Rules of Appellate Procedure.

The word processor used to prepare this brief, WordPerfect 11.0, indicated that there are approximately 6,404 words in this brief.

Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true copy and an electronic copy of the above and foregoing Brief of Appellant has been served upon counsel of record listed below by U.S. mail properly addressed, or by hand delivery, on this the 27th day of January, 2004

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U.S.C.A. NO. 03-15208-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GABRIEL CARDENAS,	)	
	)	
Appellant,	)	
	)	
v.	)	**CASE NO.: 03-15208-E**
	)	
UNITED STATES,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION
CR-03-BE-154-W

BRIEF OF APPELLANT, GABRIEL CARDENAS

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U.S.C.A. NO. 03-15208-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GABRIEL CARDENAS,	)	
	)	
Appellant,	)	
	)	
v.	)	**CASE NO.: 03-15208-E**
	)	
UNITED STATES,	)	
	)	
Appellee.	)	

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following are persons or entities interested in the outcome of this case:

Van D. McMahan, attorney for Appellant, Gabriel Cardenas;

Gabriel Cardenas, Appellant;

Honorable Karen Bowdre, United States District Judge,

Northern District of Alabama;

United States, Appellee;

Alice H. Martin, United States Attorney, Appellee;

Clark Morris, United States Attorney, Appellee;

STATEMENT REGARDING ORAL ARGUMENT

While the Appellant, Gabriel Cardenas, submits that the bases for reversing the district court are adequately addressed in this brief, he would welcome oral argument in order to address such questions as the court may have.

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Trooper Martin did not have probable cause to detain and question the Appellant beyond what was reasonably required for the initial traffic stop, and therefore, the subsequent search, detainment, and questioning about drugs following the initial traffic stop and investigation was unwarranted, inappropriate and a violation of the Appellant's Constitutional rights.

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STATEMENT OF JURISDICTION

This is an appeal from a final decision of the district court of the United States. The Court of Appeals has jurisdiction of this case, pursuant to 26 U.S.C. Section 1291, and 18 U.S.C. Section 3742 (a) and (e). The district court had jurisdiction of this case because Appellant was indicted for violation of 21 U.S.C. Sections 841 (a)(1) and (b)(1)(A).

The appeal is timely because final sentencing was imposed on October 6, 2003, and the Notice of Appeal was filed on or about October 6, 2003, (R-1-48). The case was docketed in this court on December 15, 2003 (R-1-49). The record for appeal was made final on January 15, 2004 (R-1-56), and therefore, Appellant's brief was due by January 19, 2004. Appellant has asked for and received a 7 day extension for filing his brief making it due on January 26. 2004.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district court erred when it denied Appellant's Motion to Suppress and held that the officer had probable cause to detain, question, and search Appellant and his vehicle.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The United States of America brought an indictment against the Appellant in the United States District Court for the Northern District of Alabama, alleging that Appellant knowingly, intentionally, and unlawfully possessed with intent to distribute more than 5 kilograms of cocaine, in violation of 21 U.S.C. Sections 841 (a)(1) and (b)(1)(A). (R-1-1). Appellant pled guilty to this charge on or about May 22, 2003. (R-1-32). The Appellant is currently incarcerated.

II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Appellant was arraigned and served with the indictment against him on or about March 28, 2003. (R-1-1). The indictment charged that Appellant, on or about February 25, 2003, did knowingly, intentionally, and unlawfully possess with intent to distribute more than 5 kilograms of cocaine, in violation of 21 U.S.C. Sections 841

(a)(1) and (b)(1)(A). (R-1-1). Appellant pled guilty to this charge on or about May 22, 2003. (R-1-32).

On or about April 25, 2003, Appellant filed a Motion to Suppress and Dismiss. (R-1-11). On May 13, 2003, Magistrate Judge Harwell G. Davis denied Appellant's Motion to Suppress. (R-1-25). District Court Judge, Karen O. Bowdre denied Appellant's Motion to Suppress on June 5, 2003. (R-1-37).

III. STATEMENT OF FACTS

The Appellant, native Mexican, was stopped on or about February 25, 2003, by Alabama State Trooper, Charlton L. Martin, (hereinafter referred to as "Trooper Martin or Trooper") on Interstate 20 in Sumpter County, Alabama. (R-3-54-4,5,6). At the time of the arrest, the Appellant was driving a Ford Windstar Van, with a New York License Plate. (R-3-54-5,6). According to the Trooper, he made a traffic stop on the Appellant because he believed the Appellant was following another vehicle too closely. (R-3-54-5). Trooper Martin and other officers were conducting a "Felony Apprehension Program." (R-3-54-4 and 30).

As soon as Appellant pulled off the highway, Trooper Martin approached the passenger side of Appellant's vehicle and asked the Appellant for his drivers license. (R-3-54-6). The Appellant handed Trooper Martin his drivers license as soon as the traffic stop was made. (R-3-54-32). Trooper Martin asked the Appellant to exit the

van and go back to the patrol car. (R-3-54-6). Trooper Martin then immediately called for backup, as he walked back to the patrol car. (R-3-54- 33,38,39).

When Trooper Martin and the Appellant got into the patrol car, Trooper Martin immediately, and prior to any questions concerning the title or registration, asked the Appellant the following questions: 1) how long Appellant had lived in New York; 2) the name of the passenger; 3) how long he had known the other passenger; 4) where Appellant was coming from; and 5) how long the Appellant had been in Houston or Port Arthur. (R-3-54-34,35, and 40).

According to the Trooper, the reasons for his further investigation beyond the initial traffic stop, was that the Appellant's hands were shaking, that he had Texas Drivers license, there were two males in the van, and the Appellant had New York tags or plates. (R-3-54-7, and generally). Trooper Martin also smelled fresh paint in the van, but this was well after the initial traffic stop and detainment, when Trooper Martin returned to the van to get the registration. (R-3-54–13 and 40). It was only during the search of the Appellant's van that Trooper Martin saw white paint over-spray on the back of the console. (R-3-54-13 and 40).

Sometime after the traffic stop and questioning, Trooper Martin asked for Appellant's consent to search the vehicle. (R-3-54-42). However, at the time Appellant gave his consent to search the vehicle, Trooper Martin was still in

possession of Appellant's driver's license and registration.

IV. STANDARD OF REVIEW

The standard of review for the district court's denial of Appellant's Motion to Suppress involves mixed questions of fact and law, and is reviewed for clear error, and its application of the law to the facts *de novo*. United States v. Ramos, 12 F.3d 1019, 1022 (11th Cir.1994); United States v. Diaz-Lizaraza, 981 F.2d 1216, 1220 (11th Cir.1993).

SUMMARY OF THE ARGUMENT

The district court erred when it denied the Appellant's Motion to Suppress. It is clear in this case that the officers did not have sufficient information to stop, question, or detain the Appellant, pursuant to a "Terry stop." Therefore, Appellant's Motion to Suppress was due to be granted.

ARGUMENT

Trooper Martin did not have probable cause to detain and question the Appellant beyond what was reasonably required for the initial traffic stop, and therefore, the subsequent search, detainment, and questioning about drugs following the initial traffic stop and investigation was unwarranted, inappropriate and a violation of the Appellant's Constitutional rights.

The facts of this case clearly do not support probable cause or reasonable suspicion to detain, question, investigate, or search the Appellant's vehicle, and therefore, the district court erred when it failed to grant Appellant's Motion to Suppress the evidence.

The Appellant, like all Americans, is entitled to be free from unwarranted searches and seizures. The Fourth Amendment to the Constitution of the United Sates of America provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Based upon the Fourth Amendment, the general rule is that warrantless searches and seizures are presumptively unreasonable. Horton v. California, 496 U.S. 128, 133, 110 S.Ct. 2301, 2306, 110 L.E.2d 112 (1990). Appellant recognizes

that the Court has carved out a very narrow exception allowing in certain limited situations for the government's interest to outweigh the individual's privacy interest. This narrow exception is the well known "Terry stop," wherein the Courts have said that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673 (2000). To make this showing the officer must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity. Id. (quoting Terry v. Ohio, 392 U.S. 1 (1968).

In this case, Terry mandates that the officers must have had a reasonable and articulable suspicion that the Appellant was engaged in some type of criminal activity, prior to stopping, questioning, investigating, detaining, or arresting Appellant. As the above mentioned facts make clear, Trooper Martin did not have probable cause to extend his investigation beyond what was related to the traffic violation, and therefore, the questions, search, and investigation concerning the non-traffic stop issues, were inappropriate. Because the further questioning and search of Appellant's vehicle were unreasonable and beyond what was necessary to conduct a routine traffic investigatory stop, all evidence obtained by Trooper Martin, and other law enforcement personnel, following the initial traffic stop should have been

suppressed.

In United States v. Pruitt, 174 F.3d 1215 (11th Cir. 1999), the 11th Circuit Court of Appeals faced a case almost exactly on point with the facts of the present case. In Pruitt, the defendant, also a Native Mexican, was stopped by police officers near an Interstate 40 exit ramp in Memphis, Tennessee, for speeding. United States v. Pruitt, 174 F.3d 1215 (11th Cir. 1999). After the initial traffic stop for speeding, and after the defendant entered the policeman's patrol car, the officer continued to ask the defendant non-traffic stop questions, including the following: 1) where defendant's family resides in Memphis; 2) to identify the three other van passengers; 3) how much he paid for the van; 4) what kind of work he does for a living; 5) whether the passenger is his brother; and 6) why they have different last names. Pruitt, 174 F.3d 1215 (11th Cir. 1999). After these questions the officer then postponed writing the defendant's ticket and asked the defendant if he had anything illegal in the van; and the defendant said "no." Id. After a search of defendant's van, the officers found a large amount of illegal drugs. Id.

In Pruitt, the court addressed the constitutionality of the officer's detention of the defendant following the routine traffic stop. The court noted that since the issuance of United States v. Tapia, 912 F.2d 1367 (11th Cir.1990), this Circuit has consistently held that once an officer has briefly stopped a motor vehicle operator for

the purpose of issuing a traffic violation (*i.e.*, a ticket), the officer's continuing detention of the vehicle's occupants is authorized under the Fourth Amendment only if the officer can point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." Id. (citing, 912 F.2d 1367 at 1370) *accord* United States v. Holloman, 113 F.3d 192, 196 (11th Cir.1997) (per curiam) (noting that a police stop cannot otherwise last "any longer than necessary to process the traffic violation"). The Court also noted that other sister circuits are of the same view, and in particular pointed out United States v. Hunnicutt, 135 F.3d 1345 (10th Cir.1998), wherein the 10th Circuit, consistent with Tapia, found as follows: "An officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation." See United States v. Gonzalez-Lerma, 14 F.3d 1479, 1483 (10th Cir.), cert. denied, 511 U.S. 1095, 114 S. Ct. 1862, 128 L. Ed. 2d 484 (1994).

An investigative detention usually must "last no longer than is necessary to effectuate the purpose of the stop," and "the scope of the detention must be carefully tailored to its underlying justification." Id.; Florida v. Royer, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325, 75 L. Ed. 2d 229 (1983).

In Pruitt, the Court further held that the officer's questioning following the stop should have been directed to securing the defendant's license, registration and

insurance papers. Pruitt, 174 F.3d 1215 (11th Cir. 1999). In such circumstances, additional "fishing expedition" questions such as "What do you do for a living?" and "How much money did your van cost?" are simply irrelevant, and constitute a violation of Terry. Id. The Court in Pruitt further stated as follows: "Although we resist the temptation to read an improper motive into the officer's conduct, we are concerned that this appears to be yet another case in which a driver, once stopped, is unreasonably detained because of his/her race or national origin (Hispanic), or because the driver is from out-of-state. Id." The Court held that once such brief questioning was completed, the defendant, and the others should have been free to go, as the officer was provided at that time with no reasonable suspicion of their criminal activity. Pruitt, 174 F.3d 1215 (11th Cir.1999).

In the present case, Trooper Martin should have limited his questioning and investigation to the facts and circumstances surrounding the issue of Appellant following too closely, or the traffic citation at hand. It was simply inappropriate for Trooper Martin to engage in a "fishing expedition."

Trooper Martin's subsequent search and questioning about drugs and matters not related to the initial traffic stop was not valid and reasonable under the circumstances, because Trooper Martin did not have a reasonable and articulable basis for believing that a crime was occurring. According to Trooper Martin, the

reasons for his further investigation beyond the initial traffic stop investigation, was that the Appellant's hands were shaking, that he had Texas Drivers license, there were two males in the van, and the Appellant had New York tags or plates. (R-3-54-7, and generally). After Trooper Martin pulled the Appellant over for following too closely, Trooper Martin approached Appellant's van and asked for and received Appellant's driver's license. (R-3-54-6). When Trooper Martin and the Appellant got into the patrol car, Trooper Martin immediately, and prior to any questions concerning the title or registration, asked the Appellant the following questions: 1) how long Appellant had lived in New York; 2) the name of the passenger; 3) how long he had known the other passenger; 4) where Appellant was coming from; and 5) how long the Appellant had been in Houston or Port Arthur. (R-3-54-34,35, and 40). At the time of Trooper Martin's questioning, he did not have any reasonable facts in his possession pointing towards criminal activity. Trooper Martin was simply on a fishing expedition, which is not allowed under the Constitution.

The above mentioned non-traffic related questions occurred while Trooper Martin and the Appellant were in Trooper Martin's patrol car immediately following the initial traffic stop. (R-3-54-33,34,35). Importantly, at the time Trooper Martin asked the above mentioned questions, and other, non-traffic related questions, Trooper Martin had absolutely no articulable and arguable basis for his belief that

further criminal activity was occurring. Trooper Martin's only real and articuable basis for believing that Appellant may have been involved in criminal activity was Trooper Martin's discovery of the fresh paint. However, Trooper Martin did not discover the paint or odor until after he had already begun his non-traffic related questioning and investigation. (R-3-54–13 and 40).

It is very important to note that Trooper Martin's non-traffic related questions occurred prior to Trooper Martin smelling paint in the van and noticing spray paint behind the console. As noted above, Trooper Martin's questions concerning non-traffic related issues, including questions about Appellant's family, where Appellant lives in New York, and other questions, were asked immediately following Appellant's entry into Trooper Martin's patrol car and prior to Trooper Martin discovering the paint. Therefore, Trooper Martin's smelling of fresh paint and seeing paint behind the console cannot be considered in determining whether Trooper Martin had probable cause to further or lengthen Appellant's detainment beyond the initial traffic stop. Moreover, even if Trooper Martin had discovered the odor and paint prior to beginning his non-traffic related investigation, that information would still not rise to the level of creating a reasonable or articulable suspicion of illegal activity.

In United States v. Tapia, 912 F.2d 1367 (11th Cir.1990), the Court held that the factors cited by the district court in that case, *e.g.*, being Native Mexican, having

few pieces of luggage, being visibly nervous or shaken during a confrontation with a state trooper, or traveling on the interstate with New York license plates (not yet a crime in Alabama), do not provide a minimal, particularized basis for a conclusion of reasonable suspicion on the part of the officer. Id. The Court held that even when considered together and in light of all the facts, such observations fail to suggest that Appellant and his brother were engaged in any criminal activity other than speeding on the highway." Id..

Appellant believes the sole cause of Trooper Martin's questions, search ,and investigation beyond the initial traffic stop was the fact that Appellant is Native Mexican and had a New York License Plate. This is evidenced by the fact that Trooper Martin and other officers were out on patrol and trying to apprehend felons. On the day in question, Trooper Martin and other officers were conducting a "Felony Apprehension Program." (R-3-54-4 and 30). Moreover, Trooper Martin called for backup almost immediately, which he admitted he did not do unless he felt like he needed it. (R-3-54-28, 39). Trooper Martin's call for backup was immediate and well before any questioning of the Appellant and the discovery of any inconsistent facts.

Trooper Martin simply had his mind made up from the beginning, and before any facts indicating criminal activity, that Appellant was involved in a crime. This

type of violation or infringement is exactly what the Fourth Amendment and case law forbids.

Like in Pruitt and Tapia, it is very clear in the present case that Trooper Martin did not have a reasonable and articulable basis for believing that a crime was occurring, and therefore, Trooper Martin's questions about drugs and matters unrelated to the initial traffic stop were not appropriate because they were beyond the scope of the initial stop.

CONCLUSION

This is a classic case where the officer lacked justification for lengthening and prolonging his investigation beyond what is allowed under Terry for a routine traffic stop. At the time of the initial traffic stop, Trooper Martin simply did not have any articulable facts within his knowledge that reasonably suggested that the Appellant was involved in any type of criminal activity.

As mentioned above, upon the Appellant entering Trooper Martin's vehicle, Trooper Martin immediately began asking Appellant questions unrelated to the traffic stop. At that point Trooper Martin's questioning should have been limited to the license and registration issues. If not for Trooper Martin's fishing expedition, he never would seen the fresh paint, which is arguably the only thing that could possibly lead to a reason for believing that criminal activity was occurring. As the above mentioned cases make perfectly clear, Trooper Martin violated Appellant's constitutional rights when he inappropriately questioned Appellant about non traffic related issues, and thereby, unnecessarily lengthened the "Terry stop."

Furthermore, the likely reason that Trooper Martin stopped the Appellant was not because he was following too closely, but instead was because the Appellant was Hispanic and had an out of state license plate. This is evidenced by the fact that Trooper Martin called for backup immediately and prior to any specific inconsistent

facts or the smell of fresh paint. Appellant's constitutional right to be free from unwarranted searches and seizures was clearly and grossly violated. Trooper Martin and the other officers were doing exactly what he said they were doing, apprehending felons. However, the problem with what they were doing is that they were singling out Hispanics with out of state tags.

Respectfully submitted,

Van D. McMahan

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CERTIFICATE OF COMPLIANCE

This brief complies with the 14,000 word type-volume limitation of Rule 32(a)(7), of the Federal Rules of Appellate Procedure.

The word processor used to prepare this brief, WordPerfect 11.0, indicated that there are approximately 3,872 words in this brief.

Van O. McMahon

Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true copy and an electronic copy of the above and foregoing Brief of Appellant has been served upon counsel of record listed below by U.S. mail properly addressed, or by hand delivery, on this the 23rd day of January, 2004.

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OF COUNSEL

U.S.C.A. NO. 02-14317D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GARY MICHAEL TAYLOR,	)	
	)	
Appellant,	)	
	)	
v.	)	**CASE NO.: 02-14317D**
	)	
	)	
UNITED STATES,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
JASPER DIVISION
CR-02-5-0073J

BRIEF OF APPELLANT, GARY MICHAEL TAYLOR

Submitted By:
Van D. McMahan

OF COUNSEL:
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U.S.C.A. NO. 02-14317D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GARY MICHAEL TAYLOR,	)	
	)	
Appellant,	)	
	)	
vs.	)	**CASE NO. 02-14317D**
	)	
UNITED STATES	)	
	)	
Appellee.	)	

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following are persons or entities interested in the outcome of this case:

Van D. McMahan, attorney for Appellant, Gary Michael Taylor;

Gary Michael Taylor, Appellant;

Honorable Lynwood Smith, United States District Judge,

Northern District of Alabama;

United States, appellee;

Alice H. Martin, United States Attorney, appellee;

Russell E. Penfield, United States Attorney, appellee;

Kimberly Franklin, United States Probation Office;

United States Probation Office, Birmingham.

STATEMENT REGARDING ORAL ARGUMENT

While the Defendant, Gary Michael Taylor, submits that the bases for reversing the district court are adequately addressed in this brief, he would welcome oral argument in order to address such questions as the court may have.

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STATEMENT OF JURISDICTION

This is an appeal from a final decision of the district court of the United States. The Court of Appeals has jurisdiction of this case, pursuant to 28 U.S.C. Section 1291, and 18 U.S.C. Section 3742 (a) and (e). The district court had jurisdiction of this case because Defendant was indicted for violation of 21 U.S.C. Sections 846 and 841 (a)(1).

The Appeal is timely because Final Sentencing was imposed on July 25, 2002, and the Notice of Appeal was filed on or about August 2, 2002. The case was docketed in this court on August 8, 2002. The record for appeal was made final on August 20, 2002, and therefore, Defendant's brief is due by September 30, 2002.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district court applied the correct standard when determining whether Defendant's role in the conspiracy was minimal or minor, pursuant to U.S.S.G. Section 3B1.2, and therefore, warranting a sentence reduction under the sentencing guidelines.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The United States of America brought an indictment against the Defendant in the United States District Court for the Northern District of Alabama, Jasper Division alleging that Defendant conspired to manufacture, distribute, and possess with intent to distribute methamphetamine. (R-1-1-1,2, and 3). The Defendant pled guilty to these charges on or about April 25, 2002. (R-4-404-1). The Defendant is currently incarcerated. (R-12-792-2).

II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

The Defendant was arraigned and served with the indictment against him on or about April 16, 2002. (R-2-148-) The indictment charged that the Defendant and thirty (30) other Defendants, from April 1, 2000, to February 19, 2002, knowingly and intentionally conspired and agreed with other persons to knowingly, intentionally, and

unlawfully manufacture, distribute, and possess with intent to distribute fifty (50) grams or more of methamphetamine in violation of Title 21 Sections 841 (a)(1); 841 (b)(1)(a), and 846. (R-1-1-1,2, and 3). The Defendant plead guilty to the indictment against him on or about April 25, 2002. (R-4-404).

On or about June 19, 2002, the United States Probation Office filed its pre-sentence investigation report, which failed to recommend that Defendant receive a reduction in his sentence for playing a minor or minimal role in the conspiracy, pursuant to U.S.S.G. Section 3B1.2. (R-10-725-19). Defendant filed an objection to the probation office's report and argued that he is entitled to a reduction in sentence, pursuant to U.S.S.G. Section 3B1.2. (R-8-660-1,2, and 3). The district court judge denied Defendant's objections and held that Defendant did not play either a minor or minimal role in the offense charged. (R-11-758-11,12). The district court executed judgment against the Defendant on or about July 30, 2002, and ordered that Defendant serve a sentence term of 87 months. (R-12-792-1,2).

III. STATEMENT OF FACTS

As the indictment alleges, and as the Defendant has pled, Defendant was involved in the manufacturing of methamphetamine from April 1, 2000, to February 19, 2002. (R-1-1-1,2, and 3). During this time frame the Defendant served as the clean-up person at various different methamphetamine cooks. (R-11-758-11,12) (R-8-

660-1,2 and 3).

The indictment charges thirty (30) other people, in addition to the Defendant, with the conspiracy. (R-1-1-1,2, and 3). The probation office's report indicates that all of the defendants were involved with different methamphetamine cooks, and importantly, they all had varying and different roles. (R-10-725-17,18). Moreover, the district court judge specifically found that the roles varied among the defendants, and in particularly from this Defendant to others. (R-11-758-11,12).

The district court held that there were many different roles with respect to the conspiracy. (R-11-758-11,12). The Court found that some of the defendants stole pills, some crushed pills to make powder, some cooked, some distributed, and some cleaned up. (R-11-758-11,12). The only thing attributed to this Defendant is that he cleaned up following some methamphetamine cooks. (R-11-758-11,12) (R-8-660-1,2 and 3). Defendant never organized any of the cooks. (R-11-758-11,12) (R-8-660-1,2 and 3). The Defendant did not provide any of the raw materials or pills. (R-11-758-11,12) (R-8-660-1,2 and 3). The Defendant did not recruit any users or buyers of the final product. (R-11-758-11,12) (R-8-660-1,2 and 3). The Defendant did not arrange or coordinate any methamphetamine cooks. (R-11-758-11,12) (R-8-660-1,2 and 3). The Defendant did not participate in large scale selling of the methamphetamine. (R-11-758-11,12) (R-8-660-1,2 and 3). Instead, the Defendant's primary role in the

conspiracy was to clean up and take any crumbs that the major players may have left behind. (R-11-758-11,12) (R-8-660-1,2 and 3).

IV. STANDARD OF REVIEW

A sentencing court's determination of a defendant's role in an offense is a factual finding reviewed for clear error. United States v. Everett, 129 F.3d 1222, 1224 (11th Cir.1997). However, the standard of review is *de novo* for the sentencing court's Federal Sentencing Guidelines application to those facts. United States v. Rodriguez, 959 F.2d 193, 195 (11th Cir.1992).

SUMMARY OF THE ARGUMENT

The district court erred when it failed to hold that Defendant's role in the conspiracy offense was not minor or minimal, and therefore, reduce Defendant's sentence pursuant to U.S.S.G. Section 3B1.2. The district court applied an incorrect standard in making its determination of whether Defendant played a minor or minimal role in the offense. According to the district court's interpretation of this particular section of the sentencing guidelines, if someone participates in a conspiracy, no matter what the role, as long as the amount of the controlled substance attributable to the Defendant is equal to or greater than other defendants, his role will be not be considered minor or minimal. This line of reasoning is clearly in error, and therefore, the district court's holding should be overruled.

ARGUMENT

The District Court erred when it applied an incorrect standard, which was based solely upon the weight of the methamphetamine, in determining that the Defendant did not play a minor or minimal role in the conspiracy, and therefore, was not entitled to a sentence reduction under U.S.S.G. Section 3B1.2.

The district court erred when it held that Defendant did not play a minor or minimal role in the conspiracy, because, as discussed below, it applied the incorrect standard in determining whether Defendant's role was minor or minimal, pursuant to U.S.S.G. Section 3B1.2.

Defendant submitted in his objections to the probation office's final sentencing report that he was entitled to a reduction in his sentence pursuant to U.S.S.G. Section 3B1.2. U.S.S.G. Section 3B1.2 provides as follows:

> Mitigating Role
> Based on the defendant's role in the offense, decrease the offense level as follows:
> (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
> (a) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.
>
> In cases falling in between (a) and (b), decrease by 3 levels.
>
> The commentary to the Guidelines instructs that a four-level reduction "is

intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group .... [and their] lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant. U.S.S.G. Section 3B1.2, comment (4). Comment (3) of U.S.S.G. Section 3B1.2 describes a minor participant as any participant who is less culpable than most other participants, but whose role could not be considered minimal.

In the present case, the Defendant's conduct was less culpable than most other defendants, and as such, Defendant should be considered a minor participant at the very least, pursuant to U.S.S.G. Section 3B1.2.

In making its determination of whether Defendant was entitled to a sentence reduction pursuant to the sentencing guidelines, the district court applied the incorrect standard. The district court relied solely upon the amount of methamphetamine attributed to the Defendant in determining whether he played a minor or minimal role in the conspiracy. (R-11-758-11,12). The district court failed to measure the Defendant's role against the relevant conduct for which he was held accountable at sentencing. The district court stated that although there were various roles played by individuals, the issue of relative culpability doesn't turn on the fact that the Defendant cleaned up and washed utensils, as opposed to actually cooking the meth. (R-11-758-

11,12).

The district court's holding concerning relative culpability hinges solely upon the issue of how much methamphetamine the Defendant is responsible for and ignores the very important fact that the roles varied among the defendants. The court specifically found that because the Defendant was responsible for between 1.5 Kilograms and 5 Kilograms, he did not play a minor or minimal role in the conspiracy. (R-11-758-11,12). This reasoning fails to take into account the rule, discussed below, that requires the court to measure the Defendant's role against the relevant conduct for which he is held accountable.

In U.S. v. Rodriguez De Varon, 175 F.3d 930 (11th Cir. 1999), the court held that a district court's determination of a defendant's mitigating role in the offense should be informed by two modes of analysis: First, the district court must measure the defendant's role against the relevant conduct for which she was held accountable at sentencing; Second, the district court may also measure the defendant's role against the other participants, to the extent that they are discernable, in the relevant conduct.

The district court has failed to utilize the first, and mandatory, prong of the above mentioned standard in its analysis. The district court should have measured the Defendant's conduct compared to the conduct of others in conspiring to sell, manufacture, possess, and distribute methamphetamine. Instead, the district court

merely stated that because Defendant was thought to have been involved with as much methamphetamine measured in weight as others that his role in the charged offense is not minor or minimal. (R-11-758-11,12). Such an analysis misses the point of truly comparing Defendants's conduct with the conduct of others in the conspiracy, or the conduct for which he is held accountable at sentencing.

The standard used by the district court obviously fails to consider the important fact that the roles varied from one defendant to another regardless of the amount or weight of methamphetamine; and therefore, some defendants were simply more culpable than others with respect to the agreement or conspiracy to manufacture, sell, possess, and distribute Methamphetamine, because of the specific role played as opposed to a mere comparison of weight or amount attributed to a particular defendant.

It is important in the present case to examine the varying roles with respect to the charge of conspiracy. Such an analysis is beneficial in determining who is more culpable with respect to the conspiracy. The Probation Office's report at page 10, paragraph 39, states that the roles of the conspirators varied from the actual "cook," to those who assisted in the "cook" and assisted to the cleanup, to those who provided the pseudoephedrine pills or anhydrous ammonia for the "cook," to those who assisted in the distribution of finished methamphetamine. (R-10-725-10). The Defendant's role, clean-up person, surely is less important and minor compared to the individuals that

organized, planned, supplied materials, sold, and recruited people to participate in this unlawful behavior.

Also, the probation office's report contains a paragraph summary of each defendant's role in the offense starting on page 10 and ending on page 15. (R-10-725-10,11,12,13,14 and 15). Importantly, these summaries indicate that many of the other defendants were responsible for supplying pills, tanks of ammonia, and other items. (R-10-725-10,11,12,13,14 and 15). However, the Defendant's summary only indicates that Defendant participated in methamphetamine activities. (R-10-725-14).

The probation office's final sentencing report further indicates that, according to the United States Attorney and the federal agent, all of the defendants were involved with different methamphetamine cooks, and importantly, they all had varying and different roles. (R-10-725-17,18). Moreover, the district court judge specifically found that the roles varied among the defendants, and in particularly from this Defendant to others. (R-11-758-11,12).

The Court found that some of the defendants stole pills, some crushed pills to make powder, some cooked, some distributed, and some cleaned up. (R-11-758-11,12). However, the only thing attributed to this Defendant is that he cleaned up following some methamphetamine cooks. (R-11-758-11,12) (R-8-660-1,2 and 3). Defendant never organized any of the cooks. (R-11-758-11,12) (R-8-660-1,2 and 3).

The Defendant did not provide any of the raw materials or pills. (R-11-758-11,12) (R-8-660-1,2 and 3) (R-10-725-10,11,12,13,14 and 15). The Defendant did not recruit any users or buyers of the final product. (R-11-758-11,12) (R-8-660-1,2 and 3). The Defendant did not arrange or coordinate any methamphetamine cooks. (R-11-758-11,12) (R-8-660-1,2 and 3). The Defendant did not participate in large scale selling of the methamphetamine. (R-11-758-11,12) (R-8-660-1,2 and 3). Instead, the Defendant's only role in the conspiracy was to clean up and take any crumbs that the major players may have left behind. (R-8-660-1,2 and 3). In the words of the federal agent, Fred Gasboro, during the Defendant's interview in preparation for entering into a guilty plea, the Defendant was simply taken advantage of. (R-8-660-2,3).

According to the district court's analysis or standard, as long as the amount of the controlled substance is the same for each person, there can never be a minor or minimal role played by a defendant. According to the district court's standard, it simply does not matter what actual role a particular defendant played, it only matters that the defendant was involved with a certain weight of controlled substance. In essence, according to this standard, in a conspiracy case, U.S.S.G. Section 3B1.2, can never be applied when the weight of the controlled substance is the same for each defendant.

The district court's standard fails one of the U.S.S.G.'s main purposes, which is to punish similarly situated defendants in a like-minded way. It is simply unfair for all dissimilar defendants to be punished in the same manner and degree. This is in clear contrast to the goals of the U.S.S.G.

Moreover, a conspiracy such as the present case is the perfect example of when the court should pay particular attention to the specific roles played by each party, as opposed to a mere assement of the weight of the controlled substance involved. In U.S. v. Rodriguez De Varon, 175 F.3d 930 (11th Cir. 1999), the court reasoned as follows:

> "given the relatively broad definition of relevant conduct under Section 1B1.3, some defendants may be held accountable for conduct that is much broader than their specific acts. A conspiracy conviction is the classic example of this phenomenon. In such cases, a defendant's relevant conduct may be coextensive with the entire conspiracy even though her role in that conspiracy was relatively minor. Under these circumstances, a district court may adjust the defendant's sentence for her mitigating role in this broad criminal conspiracy. This adjustment allows a district court to impose a sentence that more closely mirrors the defendant's actual conduct, furthering the Guidelines' goal of imposing comparable sentences for similar acts."

The present case falls squarely within the above mentioned phenomenon. The present case is the perfect situation in which a reduction for a minor role should be applied. Without the aid of a reduction under U.S.S.G. Section 3B1.2, the Defendant will be held accountable for conduct much broader and more severe than his own limited role.

It is clear that had the district court applied the correct, fair, and just standard and measured the Defendant's conduct or role to the conduct or role of others in conspiring to sell, manufacture, possess, and distribute methamphetamine, and not relying solely upon the weight or amount of the controlled substance, it would have determined that Defendant's role in the offense was minor, if not minimal.

CONCLUSION

The order of the district court is erroneous. The district court misapplied the applicable standard for determining whether the Defendant played a minor or minimal role in the conspiracy and should be entitled to a reduction in his sentence pursuant to U.S.S.G. Section 3B1.2. Therefore, the district court's holding that Defendant did not play a minor or minimal role should be reversed and Defendant given a 2,3, or 4 level reduction in sentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the 14,000 word type-volume limitation of Rule 32(a)(7), of the Federal Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above and foregoing Brief of Defendant has been served upon counsel of record listed below by U.S. mail properly addressed, or by hand delivery, on this the 26th day of September, 2002

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