The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Hillary Lawler Parham

Office Address: (including county) 109 South Highland Avenue, Suite 300
Jackson, Tennessee 38301 (Madison County)

Office Phone: 731-422-6220 Facsimile: 731-422-6668

Email Address: [redacted]

Home Address: (including county) [redacted]
Trenton, Tennessee 38382 (Gibson 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 rachel.harmon@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Assistant United States Attorney in the Western District of Tennessee.

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

2006, BPR# 025520

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

Tennessee, BPR# 025520, October 18, 2006, Active.

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

No.

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

- August 2006- February 2010, Private Practice with the Law Offices of Barron, Johnson and Parham, Trenton, Tennessee.
- February 2010 – April 2018, Assistant District Attorney General with the Twenty-Eighth Judicial District, Tennessee.
- April 2018- Present, Assistant United States Attorney, Western District of Tennessee, Jackson, Tennessee.

6. If you have not been employed continuously since completion of your legal education,

describe what you did during periods of unemployment in excess of six months.

Not Applicable.

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

My present law practice is 100% criminal prosecution in the area of Organized Crime and Drug Trafficking Offenses in the Western District of Tennessee, Eastern Division.

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.

After law school, I moved to rural West Tennessee where I found myself in a small-town private practice from 2006 until 2010. While in private practice, I handled civil and criminal litigation practicing in juvenile, general sessions, circuit, chancery, bankruptcy, and administrative law courts across rural West Tennessee. During this time, most of my practice was appointed representation of indigent individuals in criminal cases and cases involving dependent and neglected children. I found myself frequently having to switch roles between cases ranging from acting as guardian ad litem of a dependent and neglected child in one case to representing indigent parents facing allegations of dependency and neglect in the next case of children similar to those for whom I had just been advocating. The remainder of my practice was general family law, real estate transactions, wills and estates, as well as social security disability cases.

In 2010, I was given the opportunity to serve my community as an Assistant District Attorney General in the Twenty-Eighth Judicial District of the State of Tennessee. From 2010 until 2013, I handled the docket in Crockett County while occasionally assisting my colleagues with trials in other courts throughout the district. In 2013, I was assigned to manage the Circuit Court docket in the 28th District. In this role, I managed a caseload and reviewed the trial calendar, making specific case assignments by matching the strengths of each Assistant District Attorney with the facts and legal issues of each case scheduled for trial. During this time, I also

responded to motions and conducted motions hearings and bench and jury trials.

I maintained this position within the District Attorney's Office in the Twenty-Eighth Judicial District until 2018 when I was given the opportunity to begin working for the United States Attorney in the Western District of Tennessee as an Assistant United States Attorney. I work in the Eastern Division of the Western District and maintain an 18-county jurisdiction, including all of the Western Grand Division of the State of Tennessee with the exception of Shelby, Tipton, Lauderdale, and Fayette Counties. This has provided additional perspective of the climate of most of rural West Tennessee as well as an opportunity to hone my trial skills. As an Assistant in the United States Attorney's Office, you are primarily making the charging the decisions on the cases you prosecute before any charges are actually filed which allows for more oversight and analysis of the laws applicable to and the facts of your case. This requires a thorough objective analysis of the case often made before an indictment is even requested. Working at the United States Attorney's Office has provided beneficial experience to develop these skills. As an Assistant United States Attorney, I have also had the privilege of working with law enforcement across the Grand Division from local law enforcement to federal agencies.

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

During my tenure in private practice, I represented an indigent mother in her appeal of the termination of her parental rights before the Tennessee Court of Appeals, *In the Matter of B.N.T and K.A.P.*, No. W2007-01627-COA-R3-PT (Tenn. Ct. App. 2008).

The following is a short, incomplete list of cases I tried while acting as an Assistant District Attorney having tried over 55 jury trial in my career.

Murder
State v. Johnson, W2012-01271-CCA-R3-CD (Tenn. Crim. App. 2013)
State v. Thompson, W2013-00226-CCA-R3-CD (Tenn. Crim. App. 2014)
State v. Cathey, W2018-00615-CCA-R3-CD (Tenn. Crim. App. 2019)
State v. Mason, W2017-01863-CCA-R3-CD (Tenn. Crim. App. 2019)
Rape Offenses
State v. Crawford, W2011-02651-CCA-R3-CD (Tenn. Crim. App. 2012)
State v. Williams, W2013-00418-CCA-R3-CD (Tenn. Crim. App. 2014)
State v. Todd, W2018-00215-CCA-R3-CD (Tenn. Crim. App. 2019)
Robbery
State v. Barbee, W2014-00835-CCA-R3-CD (Tenn. Crim. App. 2015)
State v. Wallace, W2015-00708-CCA-R3-CD (Tenn. Crim. App. 2016)
Burglary
State v. McCoy, W2016-01619-CCA-R3-CD (Tenn. Crim. App. 2017)

As a state prosecutor we were not directly involved in the appeals of these cases but handled the matters before the trial court and assisted in preserving the record.

The following is a short, incomplete list of cases I prosecuted or assisted with the prosecution of as an Assistant United States Attorney include:

United States v. Joshua Tucker, 17-cr-10067-STA
United States v. Keaston Tipton, 1:18-cr-10026-STA
United States v. Johnny Nixon, Jr., 1:18-cr-10042-JDB
United States v. Carl Clarke, 1: 18-cr-10059-STA

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

Not applicable.

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

While in private practice from 2006-2010, I had numerous cases where I was the guardian ad litem for children in dependent and neglected cases in juvenile court, termination of parental rights proceeding in juvenile and circuit courts as well as guardian ad litem work in the Chancery Court in the Twenty-Eighth Judicial District of the State of Tennessee in Gibson County.

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

Also, while in private practice from 2006-2010, I had an opportunity to represent school boards and municipalities advising them on legal issues that arose in their daily functions.

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

Not Applicable.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including

dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

- August 1999-May 2001- Associates in Applied Science, Agriculture Business, Kaskaskia Community College, Central, Illinois.
- August 2001- May 2003- Bachelor of Science, Cum Laude in the Area of Agriculture Science and Agriculture Education, Murray State University, Murray, Kentucky.
- August 2003- May 2006 – Jury Doctor, Southern Illinois University at Carbondale, Illinois.

PERSONAL INFORMATION

15. State your age and date of birth.

40 years old [redacted] 1982.

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

16 years and 5 months.

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

16 years and 5 months.

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

Gibson County, Tennessee.

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

Not Applicable.

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

No.

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

No.

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

None.

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.

- American Quarter Horse Association
- American Paint Horse Association

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

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

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

No.

ACHIEVEMENTS

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

- 2007-Present- American Bar Association
- 2007-2010, 2018-Present- Tennessee Bar Association
- 2018- Present-Howell Edmunds Jackson American Inn of Court

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.

2018- United States Attorney's Office Spirit of Excellence

2020- United States Attorney's Office Spirit of Excellence

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

Not Applicable.

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

Tennessee District Attorney Generals Conference- Trial Advocacy Program

- 2017- Opening Statement Demonstration
- 2018- Jury Selection Demonstration and Closing Argument Lecture
- 2019- Closing Argument Lecture
- 2020- Ethical Considerations in Closing Arguments Lecture

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.

In July 2020, I unsuccessfully sought the gubernatorial appointment to fill the vacancy left by the retirement of Garry Brown, District Attorney General for the Twenty-Eighth Judicial District of the State of Tennessee.

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 have attached two appellate briefs filed in the Sixth Circuit Court of Appeals in the following cases. This is my own work. All briefs are submitted for review to the Appellate Chief of the Western District of Tennessee prior to filing. Prior to the submission for review to the Appellate Chief, multiple other Assistant United States Attorneys would have also reviewed these filings.

- *United States of America v. Joshua Tucker*, 19-5105 (6th Cir. 2019).
- *United States of American v. Johnny Nixon,* 20-5255 (6th Cir. 2020).

ESSAYS/PERSONAL STATEMENTS

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

While I enjoyed my private practice, I found that my true passion was public service and it allowed me to serve my community through prosecution. I find the area of criminal justice challenging and ever evolving. My multi-faceted experience in the law, as well as my roots within the rural West Tennessee community, will bring perspective that will be of great benefit to the Court of Criminal Appeals and to the legal issues that are presented to the Court of Criminal Appeals.

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)***

I am not allowed to practice law outside of my current or previous employment because I am employed by the federal government and previously by the State. However, in private practice I would have the occasion to help someone that needed legal assistance through pro bono work and I primarily represented indigent individuals. While as an Assistant District Attorney, I assisted with the Milan Recovery Court.

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 the appointment to the Tennessee Court of Criminal Appeals, Western Section in Jackson, Tennessee. The geographic area is very similar to the Western District of Tennessee, the area that I am currently serving. There are four judges assigned to the Western Section. My experience and connection with rural West Tennessee will bring useful experience and perspective to the Court. My personal experience in and familiarity with the trial courts throughout Western Tennessee will be beneficial to the Court.

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

From 2007-2011 I served on the Carl Perkins Center Advisory Board but resigned from the board after my employment as an Assistant District Attorney. During my tenure in prosecution, most of my time has been spent serving my community through my work. My family owns and operates a family business known currently as Parham Heating, Cooling Plumbing and Electric. As a family operated business, we are routinely involved in community events throughout rural West Tennessee. This has included a charity rodeo event to benefit the Carl Perkins Center and Juvenile Diabetes Research Foundation in 2013 as well as participating in community events like parades and fundraising events for charities.

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)***

For the last twelve years, I have been evaluating cases for the purposes of prosecution. I have had the opportunity and the duty to evaluate the facts and circumstances of each individual case. In addition to this factual analysis, I also must evaluate the current state of the law and determine what admissible evidence, if any, would support a conviction for certain charges. This is an important decision for a prosecutor to make as it shapes the case going forward. As a state prosecutor, I often worked in trial teams with other assistant district attorneys. As a federal prosecutor, I am much more involved in the investigation of crimes. I have had the opportunity to work with prosecution teams ranging from investigators to trial attorneys with the Department

of Justice in writing and editing Title III wiretap applications to drafting and editing affidavits to support those applications and search warrants, etc. My experience and analytical skills would better enable me to evaluate cases effectively and completely from a judicial perspective.

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

Absolutely. As a prosecutor, I have taken oaths to perform my duties as a prosecutor with fidelity. Those duties include upholding the laws of the state of Tennessee and the United States no matter my personal opinion or perspective of those laws. I have faithfully upheld both oaths for the last twelve years including enforcing laws and, upon a change in the law by either the legislature or a court, changing my position when necessary. I would accept my duties on the bench with the same loyalty and conviction.

REFERENCES

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

A. Judge J. Mark Johnson, Gibson County Juvenile Judge, [redacted] Trenton, Tennessee 38382, (Ph) [redacted]

B. Honorable Rachele Gibson, Public Defender, Twenty-Eighth Judicial District of the State of Tennessee, [redacted] Trenton, Tennessee 38382, (Ph) [redacted]

C. Garry G. Brown, District Attorney General (retired), Twenty-Eighth Judicial District of the State of Tennessee, [redacted] Alamo, Tennessee 38001, (Ph) [redacted]

D. Amanda Brown, Humboldt Law Court Clerk and Master, [redacted] Humboldt, Tennessee 38343, (Ph) [redacted]

E. Jennifer Petty, Paralegal/Abstractor, Dyer Land and Title Company, [redacted] Trenton, Tennessee 38382, (Ph) [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 of Criminal Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended 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: October 20, 2022.

Signature

When completed, return this application to Rachel Harmon 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.

Hillary Lawler Parham

Type or Print Name

Signature

October 20, 2022

Date

025520

BPR #

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

WRITING SAMPLES

No. 19-5105

United States Court of Appeals
for the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSHUA TUCKER,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Tennessee
No. 1:17-10067 (Anderson, J.)

BRIEF FOR PLAINTIFF-APPELLEE UNITED STATES

For the Appellee:

D. MICHAEL DUNAVANT
United States Attorney

HILLARY LAWLER PARHAM
Assistant United States Attorney
109 South Highland Ave., Suite 300
Jackson, Tennessee 38301
(731) 422-6220
hillary.parham@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes **Page**

Rules **Page(s)**

STATEMENT REGARDING ORAL ARGUMENT

The United States submits that the briefs adequately set forth the legal issues in this appeal. The United States, therefore, does not believe that the decisional process would be significantly aided by oral argument.

STATEMENT OF JURISDICTION

The district court had jurisdiction in this case pursuant to 18 U.S.C. § 3231, because the defendant was indicted by a federal grand jury for offenses against the laws of the United States. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, which grants this Court jurisdiction over final decisions of the district courts.

ISSUES PRESENTED

I. Did the district court properly deny Tucker's motion to suppress where Tucker was on probation at the time of the warrantless search of his residence?

II. Did the district court abuse its discretion in excluding Tucker's proposed admission of a certified copy of his prior felony conviction, after Tucker had stipulated to his prior felony conviction during the United States' case in chief?

STATEMENT OF THE CASE

A jury convicted Joshua Tucker ("Tucker") of:

- conspiracy to distribute and possess with the intent to distribute 50 grams or more of actual methamphetamine;
- distribution, attempt to distribute, possession with intent to distribute 50 grams or more of actual methamphetamine;
- distribution, attempt to distribute, possession with intent to distribute and attempt to possess with the intent to distribute 50 grams or more of actual methamphetamine;
- two counts of being a felon in possession of a firearm; and
- two counts of possession of a firearm in furtherance of a drug trafficking offense.

Indictment, R. 3, PageID 8-13; Judgment, RE 502, PageID 1927-28. He now challenges two evidentiary rulings of the district court. He does not challenge the sufficiency of the evidence or any aspect of his sentence.

I. Officers searched the residence of Tucker, who had agreed to warrantless searches as a condition of his probation.

Tucker filed a pretrial motion to suppress, Motion, RE 227, PageID 353, to which the government responded, Response, RE 245, PageID 380. After a hearing, *see* Motion to Suppress Transcript, RE 515, PageID 1978, the district court issued a

written order denying the motion to suppress, finding that reasonable suspicion is not required for a warrantless search of the property of a probationer who had agreed to warrantless searches as part of his probation, Order, RE 308, PageID 547.

The facts relevant to the suppression issue are as follows. In 2016, after being convicted of aggravated burglary, Tucker was on a form of probation with Corrections Management Corporation. *Id.* at PageID 550; Motion to Suppress Transcript, RE 515, PageID 1993-94. Tucker signed a copy of the Corrections Management Corporation Community Correction Rules, which included this provision:

> Offenders will allow their Case Officer and/or Law Enforcement Officer to conduct a search of their residence, automobile, personal belongings or their person, upon request, to control contraband or locate missing or stolen property without the necessity of a search warrant.

Response, RE 245-1, PageID 388.

Officer Matt Rickman with the McNairy County (TN) Narcotics Unit testified that in April 2017, Tucker had been under suspicion for drug-related activity for at least two years. *Id.* at PageID 1992, 2004. Officers had talked to a person who said that Tucker was "moving a lot of methamphetamine and always had guns and things like that on him." *Id.* at PageID 1992. Within a couple of months before the search, DEA Task Force Officer Keylon Mayo asked the McNairy County officers if they had heard anything on Josh Tucker; the DEA agent told the officers to put Tucker

back on their radar. *Id* at PageID 1996, 2028. DEA Task Force Officer Mayo later testified at trial that he told the officers that he could not tell them much, but he was monitoring a federal wiretap and he thought Joshua Tucker was going to be a person of interest. Trial Transcript, RE 521, PageID 2479.

Thereafter, Tucker was arrested on a probation violation and made a $50,000 bond. Motion to Suppress Transcript, RE 515, PageID 1996. Within two weeks he was re-arrested on another probation violation and made another bond that same day in the amount of $75,000. *Id.* Officers listened to Tucker's jail phone calls, on which Tucker told his girlfriend how much he was willing to pay for bails. Exhibit 2, Motion to Suppress Hearing; Motion to Suppress Transcript, RE 515, PageID 1997-98, 2020. The jail calls between Tucker and his girlfriend showed that Tucker instructed his girlfriend to pay up to $7,500 for a bail, but asked her to try and negotiate with the bail bondsmen for a $3,000 cash payment for a $75,000 bond. Exhibit 2, Motion to Suppress Hearing, at 2:30-3:00 of the first recording; Motion to Suppress Transcript, RE 515, PageID 1998. Tucker told his girlfriend to take the money from his residence but to get someone to ride with her because she would be carrying a lot of cash. Exhibit 2, Motion to Suppress Hearing, at 3:10-3:25 of the first recording. In the second call played to the district court, Tucker's girlfriend told Tucker she was successful in negotiating the deal for the bondsman to make the $75,000 bail for $3,000. Exhibit 2, Motion to Suppress Hearing, at 2:04 of the

second recording; Motion to Suppress Transcript, RE 515, PageID 1998.

These bails were posted within a two week time frame, during a time period when Tucker was unemployed. *Id.* at PageID 1999. Another officer, Kim Holley, confirmed that Tucker made bail "pretty quickly" on the two arrests. *Id.* at PageID 2032. This led the officers to believe that Tucker was able to come up with quite a bit of cash on a short notice to make his bonds. *Id.*

On April 27, 2017, McNairy County officers went to Tucker's residence to conduct a probation search. Motion to Suppress Transcript, RE 515, PageID 1999-2000. Tucker was present. The officers asked Tucker, "You're on searchable probation, right?," and Tucker answered, "Yeah." *Id.* at PageID 2000. Officers searched the residence and found firearms. *Id.* at PageID 2000-01, 2014. Officers asked Tucker to open the safe inside the residence, but Tucker said he did not know the combination anymore. *Id.* at PageID 2001, 2011. The officers went to obtain a search warrant, and Tucker fled the scene. *Id.* After officers got a search warrant, they searched the safe and found methamphetamine, scales, and cash. *Id.* at PageID 2036. The officers also found 400 grams of methamphetamine in Tucker's car. *Id.* at PageID 2037.

The officers' belief they were acting under state and federal precedent, as well as a validly issued search warrant, is evidenced by their answers to questions during the suppression hearing. Officer Rickman was asked "And did you feel like [the

search] was justified under the conditions that he signed and agreed to?" Motion to Suppress Transcript, RE 515, PageID 2007. The witness responded: "Yes, sir....I asked him if he was on searchable probation. He said yes." *Id.* The officer was again asked, "And when you approached him, your statement was, 'you're on searchable probation; is that correct?' or something to that effect?" *Id.* at PageID 2008. The witness responded again, "Yes, sir." *Id.* Officer Rickman was asked, "And he answered affirmatively or told the truth and said, 'I am'?" Officer Rickman responded, "Yes, sir." *Id.* The defense then asked, "And based just on that statement, in your mind it was okay to go search?" Officer Rickman then responded, "Yes, sir, that and the agreement." *Id.*

When asked about getting a warrant in order to search the safe, Officer Rickman responded, "When we conduct probation searches, we don't like to just go in and tear people's stuff up. *Id.* at PageID 2012. The defense asked, "Well, what is a search warrant going to do with all that?" Officer Rickman responded, "I can break open the safe." *Id.* Similarly, Officer Holley stated, "when I do a searchable probation, I try not to tear anything up. I try to move things, look, pick it up, lay it back down." *Id.* at PageID 2033.

II. At trial, the court found that Tucker's prior felony conviction was inadmissible after he stipulated to being a felon under *Old Chief.*

At trial, during the government's case in chief, Tucker and the government entered into a stipulation pursuant to *Old Chief v. United States*, 519 U.S. 172, 174 (1997), that Tucker had a prior felony conviction when he possessed firearms. Trial Exhibit 1; Trial Transcript, RE 518, PageID 2085. After the government rested, and during the defendant's proof, Tucker attempted to introduce a certified copy of the prior felony conviction. Trial Transcript, RE 521, PageID 2605. The district court questioned the relevance of the document. *Id.* The government pointed out to the district court that because Tucker stipulated to the felony conviction, the government was prohibited from introducing the nature of the conviction under *Old Chief*. *Id.* at PageID 2606-07.

The court shared the government's concerns about *Old Chief's* prohibition of the evidence in a situation where there was a stipulation. *Id.*, at PageID 2607. The district court then sustained the government's objection to the introduction of the certified judgment of conviction. *Id.*, at PageID 2608.

After the jury found Tucker guilty, Tucker filed a motion for new trial. Motion, RE 471, PageID 1686. He argued that the district court should review its pretrial denial of Tucker's motion to suppress in light of trial testimony, and that the district court erred by excluding evidence of Tucker's prior felony conviction. *Id.* at PageID 1687-92. The district court denied the motion, finding: (1) the evidence

introduced at trial was immaterial to the court's suppression ruling, and (2) evidence of Tucker's prior felony conviction was irrelevant and carried the potential for unfair prejudice to Tucker. Order Denying Defendant's Motion for New Trial, RE 490, PageID 1835-37, 1840-42.

SUMMARY OF THE ARGUMENT

This Court should affirm Tucker's convictions. First, the district court properly denied Tucker's motion to suppress. The district court correctly found that the warrantless search of Tucker's residence was not an unreasonable search because of Tucker's terms and conditions of his probation; therefore, reasonable suspicion was not required. However, even if this Court holds that reasonable suspicion is required, the officers had reasonable suspicion at the time of the search. Moreover, the officers acted in good faith.

Second, the district court did not abuse its discretion in excluding evidence of the defendant's certified felony conviction at trial after the defendant stipulated to the felony conviction. Even if there were error, it was harmless.

ARGUMENT

I. The district court properly denied Tucker's motion to suppress where Tucker was on probation at the time of the warrantless search of his residence.

Standard of review

This Court, "[i]n reviewing a district court's suppression determination, [] review[s] findings of facts for clear error, and legal conclusions de novo." *United States v. Moon*, 513 F.3d 527, 536 (6th Cir. 2008) (*citing United States v. Hudson*, 405 F.3d 425, 431 (6th Cir. 2005)). In reviewing a motion to suppress, this Court "afford[s] due weight to the factual inferences and credibility determinations made by the district court." *Id.* (citing *United States v. Caruthers*, 458 F.3d 459, 464 (6th Cir. 2006)). Where there are two permissible views of the evidence, and the court simply chooses one over the other, the court's conclusions cannot be clearly erroneous. *See United States v. Worley*, 193 F.3d 380, 384 (6th Cir. 1999).

Argument

A. Officers executed a lawful search of Tucker's residence, because Tucker had agreed to warrantless searches as part of his probation.

The reasonableness of a search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). A defendant's status as a

probationer who signed a search condition is a consideration that "informs both sides of that balance." *United States v. Knights*, 534 U.S. 112, 119 (2001).

To illustrate, the Supreme Court in *Knights* found reasonable a warrantless search of a probationer's apartment, based only on reasonable suspicion, because probationers have less of a legitimate expectation of privacy. 534 U.S. at 121. Knights's probation order required that he "[s]ubmit his...person, property, place of residence, vehicle, personal effects, to search at any time, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." *Id.* at 114. The Court weighed Knights' reasonable expectation of privacy, which was "significantly diminished" by the probation agreement he signed, against the government's dual concerns of Knights successfully completing his probation and the assumption that probationers are more likely to commit criminal actions than ordinary members of the community. *Id.* at 120-21. Upon doing so, the Court concluded that this balance "requires *no more than* reasonable suspicion to conduct a search of th[e] probationer's house." *Id.* at 121 (emphasis added). The *Knights* Court did not determine that reasonable suspicion is a floor always required to search probationers. *See id.* at 120 n.6; *see also United States v. Tessier*, 814 F.3d 432, 434 (6th Cir. 2016) ("Cases *upholding* searches may imply by negative inference that the searches might not have been upheld in different circumstances, but such inferences are inherently dicta.").

The Supreme Court answered a variation of the issue left open in *Knights* in *Samson v. California*, 547 U.S. 843, 846 (2006), where it held that officers may search parolees without suspicion as authorized by a state statute mandating a search condition of release. Relying on the analysis in *Knights*, the *Samson* Court weighed the parolee's diminished expectations of privacy against the state's substantial interests in supervising parolees. *Id.* at 848. Parole is offered only where the state can condition it upon compliance with certain requirements, severely diminishing the expectation of privacy by virtue of a defendant's status as a parolee alone. *See Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998); *Samson*, 547 U.S. at 850-52. And a state has an "'overwhelming interest'" in supervising parolees in order to prevent recidivism and promote reintegration. *Samson*, 547 U.S. at 853 (quoting *Scott*, 524 U.S. at 365).

This Court applied *Knights* and *Samson* to Tennessee probationers in *Tessier*. In *Tessier*, the defendant was on probation for a 2011 Tennessee felony conviction for child exploitation. *Tessier,* 814 F.3d at 433. The probation order contained the language: "I agree to a search, without a warrant, of my person, vehicle, property, or place of residence by any Probation/Parole officer or law enforcement officer, at any time." *Id.* Officers searched Tessier's residence, and the parties agreed the search was without reasonable suspicion. *Id.* The defendant moved the district court to suppress the items found during the warrantless search. *United States v. Tessier*, No.

3:13-00077, 2014 WL 4851688, at *3 (M.D. Tenn. Sept. 29, 2014). The district court applied the totality of the circumstances test espoused in *Knights*, which balanced the defendant's expectation of privacy against the government's various interests in deferring crime and protecting society. *Id.* at *7-8. This Court adopted the district court's "well-reasoned opinion" "under the totality-of-the-circumstances reasonableness approach employed by the Supreme Court in *Knights*." *Tessier*, 814 F.3d at 433.

This case is like *Tessier*. The district court here correctly found "the *Tessier* court's reasoning persuasive" and properly applied *Tessier*'s reasoning to Tucker's case. Order Denying Motion to Suppress, RE 308, PageID 551. Under *Tessier*, the search here was reasonable, given Tucker's severely diminished expectation of privacy as weighed against the government's substantial interests in helping probationers complete their sentence while simultaneously protecting society from reoffenders. Tucker was a probationer with Corrections Management Corporation. He had been convicted of aggravated burglary, a serious offense posing a substantial risk of a violent confrontation with a property owner. *See James v. United States*, 550 U.S. 192, 203 (2007), *abrogated by Johnson v. United States*, 135 S. Ct. 2551 (2015); *cf. Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019) (holding that Tennessee aggravated burglary conviction is a violent felony under the Armed Career Criminal Act). Indeed, the Ninth Circuit has persuasively held that "a

suspicionless search, conducted pursuant to a suspicionless-search condition of a violent felon's probation agreement, does not violate the Fourth Amendment." *United States v. King*, 736 F.3d 805, 810 (9th Cir. 2013). Regardless, the Fourth Amendment does not force a state to "shut its eyes" to the risk that a probationer with Tucker's type of criminal background might be more likely than others to engage in criminal conduct again. *Knights*, 534 U.S. at 120-21. It made sense that the officers, who had received information about Tucker recidivating into criminal activity, would investigate further. This was not a search meant only "to harass the probationer," which this Court suggested in *Tessier* might be unreasonable. 814 F.3d at 435.

In addition, Tucker's reasonable privacy interests were minimal. The defendant signed and dated a probation order setting forth the rules of his probation. The order set out specifically: "Offenders will allow their Case Officer and/or any Law Enforcement Officer to conduct a search of their residence, automobile, personal belongings or their person, upon request, to control contraband or locate missing or stolen property without the necessity of a search warrant." RE 245-1, PageID 388. This provision was very similar to the provision at issue in *Knights*. Like the defendant in *Knights*, then, Tucker was a probationer subject to a warrantless search condition, and had thus significantly diminished if not extinguished his Fourth Amendment protections. *See Knights*, 534 U.S. at 119-20;

see also Samson, 547 U.S. at 852.[1] It also bears noting that, at least in a case involving parolees, "the Tennessee Supreme Court has indicated that it views the Tennessee standard search condition as permitting suspicionless searches." *Tessier*, 814 F.3d at 434 (citing *State v. Turner*, 297 S.W.3d 155, 167 n.12 (Tenn. 2009)). As expressed in *Knights,* the State's dual concerns of including "the hope that the [defendant] will successfully complete probation and be integrated back in into the community" and "the concern, quite justified, that he will be more likely to engage in criminal conduct than an ordinary member of the community" outweighed any limited expectation of privacy that Tucker possessed. *See Tessier*, 2014 WL 4851688, at *8 (citing *Knights*, 534 U.S. at 120-21).

Tucker cites *United States v. Herndon*, 501 F.3d 683 (6th Cir. 2007), but that case supports the government's position. The defendant in *Herndon* agreed to a probation condition that required him to consent to the search of his computer at any time. *Id.* at 685. This condition meant, according to this Court, that he had a "significantly reduced privacy interest in the contents of his computer." *Id.* at 690. And on the other side of the balance, the government had a "substantial interest" in

---

[1] It is also the government's position that Tucker's probation agreement constituted consent to a search "upon request" by a law enforcement officer. *See Tessier*, 814 F.3d at 435-36 (Siler, J., concurring) (citing *Samson*, 547 U.S. at 852). The Seventh Circuit has held as much. *United States v. Barnett*, 415 F.3d 690, 691-93 (7th Cir. 2005).

taking "special pains to monitor [Herndon's] conduct and prevent any return to criminality." *Id.* at 691. As in *Knights*, the Court held that "no more than" reasonable suspicion was required to search the computer, but because reasonable suspicion existed in *Herndon*, the Court did not squarely address or decide whether reasonable suspicion was always required. *Id.* at 691-92. The balance of the relevant factors in *Herndon* is akin to the balance of the relevant factors here, where the government's interests significantly outweighed the probationer's privacy interests.

In sum, under *Knights* and *Tessier*, law enforcement officers were entitled to conduct a search, or search in accordance with the condition of Tucker's probation—regardless whether they had reasonable suspicion of criminal activity. This Court can affirm on that basis.

B. Officers had reasonable suspicion to search Tucker's residence.

Even if the Court concludes that reasonable suspicion is the appropriate standard for a probation search, the initial search of Tucker's home was supported by reasonable suspicion. The district court did not reach this issue, but this Court can affirm on any basis supported by the record. *United States v. Gill*, 685 F.3d 606, 609 (6th Cir. 2012).

In *Terry v. Ohio*, 392 U.S. 1, 30 (1968), the Supreme Court held that the police may stop and briefly detain a person for investigative purposes when the officer has a reasonable, articulable suspicion of criminal activity. Probable cause is not

required for such stops; nor is proof of wrongdoing by a preponderance of the evidence. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). "Although an officer's reliance on a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (internal quotation marks and citations omitted).

This is true "not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *Alabama v. White*, 496 U.S. 325, 330 (1990). All that is required by the Fourth Amendment is "some minimal level of objective justification for making the stop." *Sokolow*, 490 U.S. at 7 (internal quotation marks and citation omitted).

In evaluating reasonable suspicion, courts should "look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." *Arvizu*, 534 U.S. at 273 (internal quotation marks and citation omitted); *see Sokolow*, 490 U.S. at 8; *United States v. Cortez*, 449 U.S. 411, 417 (1981). Accordingly, an investigative stop is valid if all the relative factors taken together amount to reasonable suspicion, even

if each individual factor is entirely consistent with innocent behavior when examined separately. *Sokolow*, 490 U.S. at 9; *United States v. Knox*, 839 F.2d 285, 290 (6th Cir. 1988). These relevant factors "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Cortez*, 449 U.S. at 418.

The relevant factors are also informed by the experience of the particular law enforcement officer investigating the situation:

> [T]he experience of the law enforcement officer must be taken into account in the reasonable suspicion analysis. The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same-and so are law enforcement officers .... the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement. In determining whether reasonable suspicion exists, we allow officers to make inferences from the information available to them that might well elude an untrained person.

United States v. McCauley, 548 F.3d 440, 445 (6th Cir. 2008) (internal quotation marks and citations omitted).

Here, prior to the initial search of Tucker's home, Tucker had been on the officers' "radar" for a while. Then, within a couple of months prior to the search, a DEA agent told the officers that he could not give them specific information, but if Tucker was not back on their radar then, he should be. Within a few weeks of the search, Tucker was charged with violating his probation and made a $50,000 bail.

Then, Tucker (who was unemployed at the time) was also able to post a $75,000 bail within a short time of the $50,000 bail and was heard on a jail call with his girlfriend to be discussing a significant amount of cash being stored in his home. After receiving all of this information in totality, the officers had reasonable suspicion to conduct the initial search of Tucker's home.

C. Officers acted in good faith.

The government maintains that the probation search of the defendant's home was lawful based on the terms of his probation. However, if the Court disagrees, the government submits that the search was conducted in good faith.

The good faith exception to the exclusionary rule saves the evidence from suppression even where there is a Fourth Amendment violation. *United States v. Leon*, 468 U.S. 897, 905 (1984). In determining whether the exclusionary rule should apply, the courts consider the following factors: 1) application should result in "appreciable deterrence," and the rule does not necessarily apply to all Fourth Amendment violations; 2) any deterrence must outweigh the costs of letting a guilty defendant go free; 3) justifiability of the rule varies with the culpability of the law enforcement conduct; 4) officer's culpability should be determined objectively, not subjectively; 5) whether the mistake was merely negligent, rather than deliberate, reckless, grossly negligent, or resulting from recurring or systemic negligence. *Herring v. United States*, 555 U.S. 135, 141-46 (2009).

Suppression does not apply when police act in good faith reliance on a search warrant. *United States v. Kinison*, 710 F.3d 678, 685 (6th Cir. 2013). The *Leon* exception has also been extended to other scenarios including warrantless arrests and warrantless searches. *Davis v. United States*, 564 U.S. 229, 239 (2011); *Herring*, 555 U.S. at 147-48; *United States v. De Leon-Reyna,* 930 F.2d 396, 400 (5th Cir. 1991) (en banc). The Supreme Court has declined to apply the exclusionary rule to searches conducted in "objectively reasonable reliance on binding appellate precedent." *Davis*, 564 U.S. at 249-50. Similarly, the Supreme Court has applied the good faith analysis where officers reasonably, but mistakenly, relied on consent as a basis for a search. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990).

In this case, the officers reasonably believed the warrantless search was valid under Tennessee law and federal law. The officers acted with respect to the probationer's home and also took the additional precaution of securing a search warrant prior to executing the full search of the residence. Even if somehow flawed in their actions, the evidence should not be excluded when, as in this case, the officers relied in good faith on court precedent and a valid search warrant.

II. The court properly found that Tucker's prior felony conviction was inadmissible after he stipulated under *Old Chief.*

Standard of review

This Court reviews the trial court's evidentiary decisions for abuse of discretion, *United States v. Chambers*, 441 F.3d 438, 455 (6th Cir. 2006), which "is evident when the reviewing court is firmly convinced that a mistake has been made." *Ross v. Duggan,* 402 F.3d 575, 581 (6th Cir. 2004). A court abuses its discretion when it "relies on clearly erroneous findings of fact, or when it improperly applies the law." *Id.* Under the abuse-of-discretion standard, "[b]road discretion is given to district courts in determinations of admissibility based on considerations of relevance and prejudice, and those decisions will not be lightly overruled." *Chambers*, 441 F.3d at 455 (internal citation omitted). Therefore, this Court "will leave rulings about admissibility of evidence undisturbed unless we are left with the definite and firm conviction that the district court committed a clear error of judgment." *United States v. Dixon*, 413 F.3d 540, 544 (6th Cir. 2005) (internal alteration marks and citation omitted); *see also United States v. Ray*, 549 F. App'x 428, 430–31 (6th Cir. 2013).

Argument

The district court properly found that the name or nature of Tucker's prior felony conviction was inadmissible after he stipulated under *Old Chief* to being a

felon. The defendant argues that the district court made a legal error in not allowing the defendant to present the cumulative evidence of the defendant's felony conviction after the defendant made an *Old Chief* stipulation regarding the same felony conviction. Appellant's Brief, RE 25 at 23-24.

Old Chief requires that in a prosecution under 18 U.S.C.§ 922(g), the prosecution accept a stipulation that the defendant offers rather than present the name and nature of the prior felony conviction, to avoid the risk of prejudice to the defendant. 519 U.S. at 174. The Supreme Court used the Fed. R. Evid. 401 and 403 analysis to determine if the unfair prejudice is substantially outweighed by the probative value of the offered evidence. *Id.* at 180-85.

In looking at the offered evidence by the defendant in this case, the first question is whether the evidence was relevant. In a normal *Old Chief* analysis, the proffered evidence is relevant because it goes to an element of the offense. However, in the instant case, the district court correctly rejected the evidence because after the defendant stipulated to the defendant's conviction, the relevance of the actual conviction was decreased tremendously if not entirely. As the Court in *Old Chief* reasoned, "while the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation or admission." 519 U.S. at 186.

Even if this Court finds that the evidence was relevant, the Court should look at the balancing test of Rule 403 in determining if the evidence was admissible. The district court properly weighed the proffered evidence under Rule 403:

> Rule 403 permits this Court to exclude relevant evidence if its probative value is substantially outweighed by, *inter alia*, unfair prejudice, confusing the issues, or misleading the jury. Here, not only is the name and specific nature of Defendant's prior conviction irrelevant, but the admission of his aggravated burglary conviction could have potentially unfairly prejudiced Defendant. Further, Defendant was not prejudiced by disallowing the name and nature of his prior felony.

Order Denying Defendant's Motion for New Trial, RE 490, PageID 1841. The Court in *Old Chief* specifically addressed this balancing test when holding that the evidence of the name or nature of the prior offense generally carries a substantial risk of unfair prejudice "whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning." 519 U.S. at 185.

Moreover, the Court in *Old Chief* reasoned that the prosecution should not be allowed to submit the judgment of conviction when the defendant offers to stipulate because the offer supplied "evidentiary value at least equivalent to what the Government's own evidence carried." *Id.* at 186. Here, when Tucker offered to stipulate to his conviction, the actual judgment of conviction was at least equivalent to what was already stipulated to by both the United States and Tucker, and relied upon by the United States in its case in chief. Because of the stipulation, the

government was prohibited from introducing the name and nature of the prior conviction in its case in chief. It was only after the government rested that Tucker sought to introduce that evidence. Even though Tucker was trying to admit the judgment of conviction in this matter, the United States still had an interest in a fair trial.

The district court carefully and correctly exercised its discretion in refusing to allow the name and nature of Tucker's prior felony conviction to be admitted to the jury after Tucker stipulated to the felony conviction. And besides, even if the district court erred, any error was harmless. Even where a district court abuses its discretion in admitting or excluding evidence, this Court reverses only when the error affected a substantial right of the party. *See United States v. White*, 492 F.3d 380, 405 (6th Cir. 2007); *United States v. Johnson*, 440 F.3d 832, 847 (6th Cir. 2006). "In determining whether an error is harmless, the reviewing court must take account of what the error meant to the jury, not singled out and standing alone, but in relation to all else that happened." *United States v. Hardy*, 228 F.3d 745, 751 (6th Cir. 2000) (internal quotation marks, citation, and alteration omitted). Where the court erred, the key question is whether "it was more probable than not that the error materially affected the verdict." *United States v. Baker*, 458 F.3d 513, 520 (6th Cir. 2006) (internal quotation marks and citation omitted).

The evidence of Tucker's guilt as to the felon-in-possession charges was substantial. In fact, Tucker has not even challenged the sufficiency of evidence on appeal. Tucker cannot establish that if the jury had learned that he had been convicted of aggravated burglary, they would not have found him guilty of illegally possessing a firearm.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Respectfully submitted,

D. MICHAEL DUNAVANT
United States Attorney

/s/ Hillary Lawler Parham
Hillary Lawler Parham
Assistant United States Attorney
109 South Highland Ave., Suite 300
Jackson, Tennessee 38301
(731) 422-6220
hillary.parham@usdoj.gov

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation provided in Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure. The brief contains 5,452 words of Times New Roman (14-point) proportional type, from the Statement of Jurisdiction through the Conclusion. Microsoft Word is the word-processing software that I used to prepare this brief.

/s/ Hillary Lawler Parham
Assistant United States Attorney

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY #'s	PAGE ID #'s
Indictment	**7/17/2019**	**2**	**1-7**
Motion to Suppress	**1/19/2018**	**227**	**353-357**
Response in Opposition	**02/02/2018**	**245; 245-1**	**380-388**
Transcript Motion to Suppress	**09/19/2018**	**515**	**1978-2068**
Order Denying Motion to Suppress	**04/13/2018**	**308**	**546-553**
Trial Proceeding September 25, 2018 Transcript	**03/28/2019**	**518**	**2071-2378**
Trial Proceeding September 26, 2018 Transcript	**04/01/2019**	**521**	**2410-2624**
Trial Proceeding September 24, 2018 Transcript	**04/02/2019**	**523**	**2781-2824**
Trial Proceeding September 27, 2018 Transcript	**04/02/2019**	**522**	**2625-2780**
Jury Verdict	**09/27/2018**	**459**	**1629-1631**
Motion for New Trial and Supplemental Motion for Judgment of Acquittal	**10/29/2018**	**471**	**1686-1693**
Response In Opposition to Motion for New Trial and Memorandum in Support	**11/13/2018**	**479; 479-1; 479-2**	**1777-1790**
Presentence Report	**1/3/2019**	**492**	**1845-1874**

Judgment	**1/28/2019**	**502**	**1927-1935**
Redacted Judgment	**1/28/2019**	**503**	**1936-1943**
Sentencing Transcript	**04/10/2019**	**527**	**2826-2889**
Notice of Appeal	**2/1/2019**	**505**	**1946**

CERTIFICATE OF SERVICE

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

David Camp
CJA Attorney for Joshua Tucker
403 North Parkway, Suite 201
Jackson, TN 38305

by filing with the Court's CM/ECF system this date: September 19, 2019.

/s/ Hillary Lawler Parham
Assistant United States Attorney

No. 20-5255

United States Court of Appeals
for the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHNNY NIXON, JR.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Tennessee
No. 1:18-cr-10042 (Breen, J.)

BRIEF FOR PLAINTIFF-APPELLEE UNITED STATES

For the Appellee:

D. MICHAEL DUNAVANT
United States Attorney

HILLARY LAWLER PARHAM
Assistant United States Attorney
Western District of Tennessee
109 South Highland Ave., Suite 300
Jackson, Tennessee 38301
(731) 422-6220
Hillary.Parham@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

The briefs adequately address the issues in this appeal. The United States, therefore, does not believe the decisional process would be significantly aided by oral argument.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231, because a federal grand jury charged defendant Johnny Lee Nixon, Jr. for violating the laws of the United States. R. 47, Superseding Indictment, PageID 76-85; R. 127, Second Superseding Indictment, PageID 284-293. A jury convicted Nixon on six counts of the indictment. R. 158, Jury Verdict, PageID 549-551.

The district court issued judgment on February 28, 2020. R. 194, Judgment, PageID 992-999. Nixon filed a timely notice of appeal five days later. R. 197, Notice. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

I. Could any rational trier of fact have found that Nixon committed conspiracy to commit robbery, robbery, and firearms crimes, where his co-defendant identified him as the perpetrator and his DNA tied him to the crimes?

II. Did the district court commit plain error in denying Nixon's motion to dismiss Count Seven?

STATEMENT OF THE CASE

This is a direct criminal appeal. A jury convicted Johnny Nixon, Jr. of conspiracy to commit robbery, robbery, and firearms offenses. Nixon claims the evidence against him was insufficient to convict. He also challenges the district court's denial of his motion to dismiss Count Seven.

I. In April 2016, Johnny Nixon, Jr. conspired with others to commit business robberies in Haywood County, Tennessee.

Within a five day period in Haywood County, Tennessee, three business were robbed at gun point by Johnny Nixon, Jr. and Cordarious Baltimore. Additionally, there were two shootings in the City of Brownsville, Tennessee, which connected the Nixon and Baltimore with the firearms used in the robberies. Nixon and Baltimore were assisted by Lacey Jeter and discussed with Jeter their involvement in each of the robberies and shootings during this conspiracy. Jeter pled guilty and testified at trial identifying Nixon and his role in the robberies. Additionally, a Tennessee Bureau of Investigation forensic analyst matched Nixon's DNA to DNA found on a pair of jeans discarded as the suspects fled the last robbery.

A. On April 20, 2016, Nixon and Baltimore rob the F&D Quick Stop in Brownsville, Tennessee.

On April 20, 2016, at around 2 p.m., Lacey Jeter was dropped off at work by her boyfriend Cordarious Baltimore. Baltimore returned around 10:30 p.m. to pick up Jeter. Nixon was present in the vehicle with Baltimore. Baltimore had an unusual amount of cash with him when he arrived to pick up Jeter. R. 205, Trial Tr., PageID

1354-56. While Jeter was at work, two masked men entered the F&D Quick Stop near closing time, one armed with a gun; demanded money from the clerk; and then ran out of the building into the rain. One of the employees at F&D Quick Stop identified Cordarious Baltimore in a lineup. R. 204, Trial Tr., PageID 1098-1102, 1114-1116; R. 205, Trial Tr., PageID 1306.

The next day, after she noticed rolled change in the change bank of their bedroom and had heard about the robbery at F&D Quick Stop, Jeter asked Baltimore if he was the one that robbed the store. Baltimore told her that he and Nixon had robbed the F&D Quick Stop and the robbery was where he had gotten the money he had with him the night before. *Id.* at 1366-68.

B. The same night after the robbery, Nixon and Baltimore buy two more guns.

When Nixon and Baltimore picked Jeter up from work after they robbed the F&D Quick Stop, Jeter drove them in her car to Chez Richardson's house where Nixon and Baltimore went in. They returned with a 9mm Springfield Armory semi-automatic pistol. Baltimore told Jeter that he and Nixon bought the gun together, but Nixon was going to hold on to the 9mm semi-automatic because Baltimore already had a 9mm revolver. *Id.* at 1359. After the three left Richardson's house, they drove to a house on Norris Street where Nixon and Baltimore went inside the house again and came out with an assault rifle. Once back inside the car, Nixon and Baltimore told Jeter that they paid $300 for the rifle. *Id.* at 1361-62.

C. Between April 21 and April 23, 2016, the firearms purchased with robbery proceeds are used in multiple shootings.

After Baltimore told Jeter that he and Nixon had robbed F&D Quick Stop, he again took her to work around 2 p.m. on April 21 and dropped her off driving her white Impala. Baltimore then picked her up around 10:30 p.m. *Id.* at 1369-70. While Jeter was at work, the Brownsville Police Department received a call about a shooting near the intersection of Hess Street and Young Street. At the scene, officers located eight .22LR shell casings and eight 9mm shell casings. *Id.* at 1307. Officers submitted these casings to the Tennessee Bureau of Investigation to see if the casings could be matched with a firearm. *Id.* at 1309.

On April 23, 2016, officers were called to another shooting at 105 East Thomas, which was the residence of Lacey Jeter and Cordarious Baltimore. *Id.* at 1272, 1365. There the officers recovered multiple shell casings and a Springfield Armory pistol magazine, but specifically noteworthy were three 9mm shell casings found under the hood of the white car that was parked in the driveway (Jeter's Impala) and a .22LR shell casing found near the rear of the residence at 105 East Thomas Street. The remaining shell casings were located in an adjacent yard. *Id.* at 1275-1277, 1280, 1293-1295. Officers submitted these casings to the Tennessee Bureau of Investigation for analysis. *Id.* at 1333.

Once Jeter arrived at her house from work and after the police and Nixon left, she and Baltimore discussed what had happened. Baltimore told her they were in

the house when the gunshots started hitting the house. Baltimore grabbed the .22LR and started shooting, and Nixon had the 9mm semi-automatic and he came up by the car and started shooting. *Id.* at 1388-89.

D. On April 22, 2016, Nixon and Baltimore rob Discount Tobacco & More in Brownsville, Tennessee.

On April 22, 2016, while at 105 East Thomas, Nixon, Baltimore, and "Willie" discussed robbing the discount tobacco store in Brownsville down the road from the house. They developed their plan to take Willie's car (a white four-door); gathered clothing to wear during the robbery from the house; and left. *Id.* at 1373-76. The trio was gone about 15 minutes and returned to 105 East Thomas with money in a zebra printed tote bag, which belonged to Jeter's children. *Id.* at 1376-78. The three men and Jeter dumped the money out on her bed and divided the money. *Id.* at 1377-1378. Jeter, Nixon, and Baltimore left the house and travelled to Jackson, where Jeter dropped Nixon off at some apartments in Jackson. *Id.* at 1379. Then she and Baltimore rented a hotel room at Old Hickory Inn with the robbery proceeds. *Id.*

E. Nixon, Baltimore and Jeter rob the Bells Express Truck Stop in Brownsville, Tennessee and evade law enforcement.

On April 25, 2016, Nixon, Jeter and Baltimore were all at Jeter's residence at 105 East Thomas when Jeter and Baltimore decided to rob a store because she needed money. *Id.* at 1391-93. So, they called Nixon to the back bedroom to assist. The three of them developed a plan to rob the Bells Truck Stop because it was right

along the interstate. *Id.* at 1392-93. So, Jeter drove the three of them to Family Dollar to steal some gloves for the Nixon and Baltimore to use in the robbery. *Id.* at 1394-97.

From the Family Dollar store, Jeter, Nixon and Baltimore travelled to the Bells Truck Stop. *Id.* at 1398. When they arrived at the store, they scoped out the store to determine their getaway route before Jeter dropped Nixon and Baltimore off. *Id.* She parked near some semi-trailers that were blocking her car from view from the store. *Id.* at 1398-99. Jeter pulled down toward Cane Creek Extended near some garbage cans to wait on Nixon and Baltimore to return with their loot. *Id.* at 1399. Baltimore, wearing jeans, a pink hoodie, and grey tennis shoes, and carrying the 9mm semi-automatic pistol, got out of the passenger seat and headed toward the store, while Nixon got out of the backseat wearing a black hoodie and dark jeans. *Id.* at 1401, 1403-1404.

While Jeter waited by the dumpsters in her car, Baltimore entered the store waving the semi-automatic firearm in the clerk's face demanding money. *Id.* at 1405; R. 204, Trial Tr., PageID 1155-56. The clerk saw two men: the one with the gun in front of her in the pink hoodie demanding money and cigarettes, and the other that stood at the door where her view was a bit obstructed for the food hot box. *Id.* at 1156, 1158. The clerk handed Baltimore the entire money tray from the cash

register and a handful of Newport cigarettes and waited for them to leave so she could call the police. *Id.* at 1157-58.

As Nixon and Baltimore ran out the door, they dropped the money tray. *Id.* at 1158-59. Both men stopped to pick up the spilt money in the doorway of the store. *Id.* They ran toward the dead end road with the money and cigarettes and jumped into the waiting car. *Id.* Jeter saw the two running toward her car, so she pulled away from the dumpsters and met them half-way. R. 205, Trial Tr., PageID 1405. They jumped into her car and turned down a driveway that appeared to be a road. *Id.* She turned around in the yard of that house and then turned left at the dumpsters again down a dead end road. *Id.* That is when Jeter pulled into Lawrence Reed's driveway, turning around. While she was turning around, Baltimore was seen getting out of the passenger seat and getting in the back seat and laying down with Nixon. R. 204, Trial Tr., PageID 1178-80; R. 205, Trial Tr., PageID 1405.

As Jeter drove away, Nixon threw his jeans out of the window of the car; Jeter grabbed the pink hoodie Baltimore was wearing and tossed it out of the window. *Id.* at 1405-07. Jeter, Nixon and Baltimore headed back to 105 East Thomas to divide the proceeds. *Id.* at 1408. Then they all three went back to Jackson to rent motel rooms with the robbery proceeds. *Id.* at 1409.

When the police arrived at Bells Express Truck Stop in response to the

robbery call, officers noticed a pink hoodie from the interstate. This observation led them to secure the area and gather the evidence. R. 204, Trial Tr., PageID 1190-92. Once investigators arrived, they secured the area around the pink hoodie, dark jeans and gloves; collected them as evidence; and submitted them to the Tennessee Bureau of Investigation for DNA examination. R. 205, Trial Tr., PageID 1214-1224.

The next day, after Jeter and Baltimore returned to Brownsville from Jackson, they were heading to his mother's house when Brownsville Police Department Corporal Colvin noticed Jeter's car. *Id.* at 1242-43, 1417. Corporal Colvin had information from his sergeant that Jeter had been hiding Nixon, who was wanted. *Id.* Corporal Colvin noticed Jeter had a male passenger, but could not identify him as he was slumped in the passenger seat. *Id.* at 1245-46. As Corporal Colvin passed Jeter, he noticed that her tag light was not functioning, so he attempted a traffic stop. *Id.* at 1246, 1417. However, Jeter refused to stop and led Corporal Colvin on a chase through Brownsville and toward rural Haywood County; she eventually crashed the car and fled on foot into a wooded area. *Id.* at 1248-51, 1417-19.

At the scene of the crash, officers recovered two firearms, a Springfield Armory 9mm and a Taurus 9mm revolver, which were sent to the Tennessee Bureau of Investigation. *Id.* at 1255, 1315-16, 1418. Jeter was apprehended by law enforcement on April 28, 2016. R. 206, Trial Tr., PageID 1471.

F. Officers execute a search warrant at the residence of 105 East Thomas Street and later recover the .22LR.

After the shooting at 105 East Thomas, the robberies of Discount Tobacco & More and Bells Express Truck Stop, as well as officers recovering the firearms from the area near Jeter's vehicle on April 26, 2016, officers obtained a search warrant for the residence of Baltimore and Jeter to search for firearms and evidence related to the robberies. R. 205, Trial Tr., PageID 1285-86. During the execution of the search warrant, officers recovered a pair of grey tennis shoes similar to those seen on the video surveillance from the Bells Truck Stop robbery; a grey and white tote bag with the name "McKenzie" on it; tan slip-on men's shoes; and two pairs of white cotton gloves; which were all items similar to clothing described in the Discount Tobacco robbery. *Id.* at 1288-90.

The day after the execution of the search warrant, Brownsville Police Department received a call from Jeter's mother asking that Investigator Black come back to 105 East Thomas. *Id.* at 1291. While cleaning out Jeter's belongings from the house Mrs. Brown found a gun behind the water heater. *Id.* She asked Investigator Black to climb onto a chair and recover an AR-15 styled rifle hidden behind the water heater. *Id.* Investigator Black collected the firearm and sent it to the Tennessee Bureau of Investigation crime laboratory for analysis. *Id.* at 1295.

G. The Tennessee Bureau of Investigation analyzes the evidence obtained by local agencies.

After the Tennessee Bureau of Investigation had received firearms evidence

from the Brownsville Police Department, Agent Kasia Lynch was assigned for firearms identification. *Id.* at 1322. Agent Lynch determined that the firearm recovered from Jeter and Baltimore after the police chase on April 26, 2016 was the firearm that fired the 9mm shell casings found at the shooting at the intersection of Hess and Young on April 21, 2016, as well as the 9mm shell casings recovered from the shooting at 105 East Thomas on April 23, 2016. *Id.* at 1256, 1278, 1313-16, 1326-28. Agent Lynch was not able to conclusively determine that the .22LR rifle fired the .22LR casings recovered at the same locations. However, as she compared the tool marks on the .22LR shell casings recovered from the shooting at Hess and Young to the .22LR recovered from Jeter and Baltimore's residence, she determined that they have the same class characteristics, but lack the individual characteristics for a conclusive opinion as to whether the cartridges has been fired from the rifle. *Id.* at 1307-12, 1331-33.

Furthermore, once the Tennessee Bureau of Investigation received the clothing items discarded during the Bells Express Truck Stop robbery and the standard DNA samples from the defendants, Agent Militza Kennedy was able to compare the DNA profiles from the items of clothing to the standard DNA profiles of the defendants. She was able to match the DNA of Jeter to the DNA profile found on the pink hoodie recovered from Cane Creek Extended, as well as Nixon's DNA to the DNA profile found on the dark colored jeans recovered from Cane Creek

Extended. *Id.* at 1214-15, 1221-22, 1442-45, 1447-50.

II. A jury convicts Nixon of conspiracy to commit robbery, robbery, and firearms offenses involving the Bells Truck Stop, including Counts Six and Seven.

The United States charged Nixon, Baltimore, and Jeter in a Second Superseding Indictment with various crimes relating to the robberies and shootings during the period of April 20, 2016 through April 26, 2016. The indictment charged Nixon with:

- Conspiracy to commit Hobbs Act robbery of businesses including F&D Quick Stop, Discount Tobacco & More and Bells Truck Stop, in violation of 18 U.S.C. § 1951 (Count One);
- Hobbs Act robbery of F&D Quick Stop in violation of 18 U.S.C. § 1951 (Count Two);
- Using and brandishing a firearm during and in relation to the Hobbs Act robbery of F&D Quick Stop, in violation of 18 U.S.C. § 924(c) (Count Three);
- Hobbs Act robbery of Discount Tobacco & More, in violation of 18 U.S.C. § 1951 (Count Four);
- Using and brandishing a firearm during and in relation to the Hobbs Act robbery of Discount Tobacco & More, in violation of 18 U.S.C. § 924(c) (Count Five);
- Hobbs Act robbery of Bells Express Truck Stop in violation of 18 U.S.C. § 1951 (Count Six);
- Using and brandishing a firearm during and in relation to the Hobbs Act robbery of Bells Express Truck Stop, in violation of 18 U.S.C. § 924(c) (Count Seven);
- Receiving a firearm while under indictment, in violation of 18 U.S.C. § 922(n) (Count Eleven);

- Receiving a firearm while under indictment, in violation of 18 U.S.C. § 922(n) (Count Twelve); and
- Receiving a firearm while under indictment, in violation of 18 U.S.C. § 922(n) (Count Thirteen).

R. 127, Second Superseding Indictment, PageID 284-292.

Nixon was tried on August 19 to 21, 2019. R. 150, 152, 154, Minute Entries. The government introduced the proof described above in section I. During trial Lacey Jeter laid out the conspiracy and what happened during the conspiracy, including purchasing and swapping firearms amongst the codefendants; details of the shootings that occurred in the City of Brownsville; as well as what led up to and happened during the robberies of the F&D Quick Stop, Discount Tobacco & More, and Bells Express Truck Stop. R. 205, Trial Tr., PageID 1346-1425.

Furthermore, several other witnesses corroborated Jeter's testimony by testifying about physical evidence that was collected from the various scenes:

- Sergeant Anthony Rankin recovered .22LR casings and 9mm shell casings at the intersection of Hess Street and Young Street. *Id.* at 1306-16.
- Investigator Patrick Black testified that he recovered 9mm shell casings at 105 East Thomas Street near the front of Jeter's car, like someone was firing in the direction of the yard where the other groupings of shell casings were recovered. *Id.* at 1271-95.
- Agent Kasia Lynch testified that the 9mm shell casings recovered at Hess and Young Street and 105 East Thomas were shot out of the firearm that was recovered where Jeter and Baltimore evaded law enforcement. *Id.* at 1326-28.

- Jennifer Bishop described a larger cloth bag as the bag in which she was forced to deposit the money for the robbers. R. 204, Trial Tr., PageID 1127-28.
- Investigator Black recovered a zebra print cloth bag from Jeter's house. R. 205, Trial Tr., PageID 1287-88.
- Video evidence showed Baltimore brandishing a black semi-automatic pistol during the robbery at Bells Express Truck Stop instead of the revolver. Trial Exs. 6 and 15.
- Lawrence Reed identified two black males with a white female who turned around in his driveway and sped off the afternoon of the Bells Express Truck Stop robbery. R. 204, Trial Tr., PageID 1177-88.
- Officer Bynum found the pink hoodie on Cane Creek Extended. *Id.* at 1190, 1192.
- Lieutenant Shawn Williams collected the black jeans on Cane Creek Extended. R. 205, Trial Tr., PageID 1214-15.
- DNA profiles matching Jeter and Nixon were found on the pink hoodie and black jeans. *Id.* at 1442-45, 1447-50.

Nixon and the United States stipulated at the beginning of the trial that all of the businesses listed in the indictment were engaged in interstate commerce. R. 204, Trial Tr., PageID 1142-43. An additional stipulation included the fact that Nixon was under indictment during April 20, 2016 through April 26, 2016, and that he knew that he was under indictment for a crime punishable by imprisonment for a term exceeding one year. *Id.* at 1142. Furthermore, an agent testified that all three firearms were involved in interstate or foreign commerce. R. 205, Trial Tr., PageID 1261-67.

Nixon presented alibi witnesses that all claimed that he was in Jackson,

Tennessee at his second cousin's apartment complex while he was wanted by the Brownsville Police Department. R. 206, Trial Tr., PageID 1528-1543, 1550-55.

The jury convicted Nixon of the following offenses:

- Conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (Count One);
- Hobbs Act robbery of Bell Express Truck Stop, in violation of 18 U.S.C. § 1951 (Count Six);
- Use and carry of a firearm during and in relation to the Hobbs Act robbery of Bells Express Truck Stop, in violation of 18 U.S.C. § 924(c) (Count Seven);
- Receiving a firearm while under indictment, in violation of 18 U.S.C. § 922(n) (Count Eleven);
- Receiving a firearm while under indictment, in violation of 18 U.S.C. § 922(n) (Count Twelve); and
- Receiving a firearm while under indictment, in violation of 18 U.S.C. § 922(n) (Count Thirteen).

R. 158, Jury Verdict, PageID 549-551. The jury found Nixon not guilty of the robbery and accompanying firearms offenses related to the F&D Quick Stop robbery (Counts Two and Three), as well as the Discount Tobacco & More robbery (Counts Four and Five).[1] *Id.*

[1] On March 14, 2019, Lacey Jeter pled guilty to conspiracy to commit Hobbs Act robbery in Count One, Hobbs Act robbery of Discount Tobacco & More in Count Four, Hobbs Act robbery of Bells Express Truck Stop in Count Six, use and carry of a firearm during in relation to the Hobbs Act robbery of Bells Express Truck Stop in Count Seven, and receiving a firearm while under indictment in Counts Fourteen, Fifteen and Sixteen of the indictment. Trial. Ex. 57. She is set for sentencing on August 20, 2020. R.213, Order, PageID 1704. Cordarious

III. After trial, the district court denied Nixon's motion to dismiss Count Seven.

After trial and before sentencing, Nixon filed a "Motion to Dismiss Count Seven of Indictment *Nunc Pro Tunc*." R. 189, Motion, PageID 940-943. In his motion Nixon cited *United States v. Davis*, 139 S. Ct. 2319 (2019), which had been decided (before Nixon's trial) on June 24, 2019. R. 189, Motion, PageID 940. The United States filed a response in opposition to the defendant's motion. R. 182, Response, PageID 930-932.

On February 27, 2020, the district court denied Nixon's motion to dismiss Count Seven. R. 193, Order, PageID 988-991. The court ruled that the qualifying crime of violence for Count Seven's § 924(c) conviction was the "substantive Hobbs Act robbery of the Bells store" charged in Count Six. *Id.* at 990. On the same date the district court sentenced Nixon to a total of 160 months in prison. R. 194, Judgment, PageID 992-999.

This appeal followed.

Baltimore is currently set for trial on December 14, 2020. R.211, Minute Entry.

SUMMARY OF THE ARGUMENT

This Court should affirm Nixon's convictions. First, there was ample evidence for a rational juror to find that Nixon conspired to rob F&D Quick Stop, Discount Tobacco & More, and Bells Express Truck Stop; robbed Bells Express Truck Stop at gunpoint; and received three firearms while under indictment. On appeal, Nixon raises the same arguments about witness credibility that the jury rejected. But this Court must construe the evidence in the light most favorable to the jury's verdict. A cooperating co-defendant identified Nixon as the one of the robbers, and the physical evidence also directly tied him to the crimes. Nixon cannot meet his heavy burden of showing the evidence was insufficient.

Second, Nixon argues that the district court erred in denying his post-trial motion to dismiss Count Seven. However, Nixon concedes that his 924(c) conviction (Count Seven) would be proper if the predicate count was Count Six. Count Six was the predicate, as the district court noted below. The district court did not err, much less plainly err, in denying Nixon's motion.

For these reasons, the Court should affirm.

ARGUMENT

I. There was ample evidence at trial to support Nixon's convictions.

Standard of Review

Generally, upon a challenge to the sufficiency of the evidence, this Court reviews the evidence in the light most favorable to the government, to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Avery*, 128 F.3d 966, 971 (6th Cir. 1997). The Court "draw[s] all available inferences and resolve[s] all issues of credibility in favor of the jury's verdict." *Id.* "[A] defendant claiming insufficiency of the evidence bears a very heavy burden." *United States v. Abboud*, 438 F.3d 554, 589 (6th Cir. 2006) (citation and internal quotation marks omitted). "Circumstantial evidence alone is sufficient to sustain a conviction under this deferential standard of review." *United States v. Fekete*, 535 F.3d 471, 476 (6th Cir. 2008).

Furthermore, regarding the creditability of witnesses, those issues are for the jury and they receive special deference with regard to the resolution of questions of credibility. *United States v. Latouf*, 132 F.3d 320, 330-31 (6th Cir. 1997). In fact, "[o]nce a jury has 'ample opportunity' to hear the evidence impeaching a witness and still choses to believe that witness, it is generally 'not for this Court to substitute its opinion for that of the jury in determinations of credibility.'" *United States v.*

Davis, 306 F.3d 398, 410 (6th Cir. 2002) (quoting *Latouf*, 132 F.3d at 331); *United States v. Gallo*, 763 F.2d 1504, 1519 (6th Cir. 1985).

Argument

The evidence against Nixon was more than sufficient to sustain his convictions. Nixon essentially argues that Jeter, who identified him and explained his involvement in these crimes, was lying. Nixon also suggests that Willie Wilson was the real culprit. But Nixon made these same credibility arguments to the jury. The jury saw it differently, and this Court must now defer to the jury's assessment.

To sustain a conviction for Hobbs Act robbery under 18 U.S.C. § 1951, the government must show (1) that the defendant took money from someone against that person's will; (2) the defendant did so by actual or threatened force or violence or fear of injury immediately to the person; (3) that the defendant did so knowingly; and (4) that as a result, instate commerce was affected in any way or degree. *See* 18 U.S.C. § 1951; *see also United States v. Gooch*, 850 F.3d 285, 291 (6th Cir. 2017). To prove a violation of 18 U.S.C. § 924(c)(1)(A), the government must show that defendant committed a crime of violence, and during or in relation to the crime of violence, defendant used, carried, or brandished a firearm. *See* 18 U.S.C. § 924(c). Hobbs Act robbery and aiding and abetting Hobbs Act robbery are "crimes of violence." *See United States v. Richardson*, 948 F.3d 733, 741-742 (6th Cir. 2020).

Finally, to establish a violation of 18 U.S.C. § 922(n), the government must show (1) the defendant was under indictment for a crime punishable by imprisonment for a term exceeding one year, and knew of that status; (2) the defendant knowingly received a firearm; and (3) the firearm traveled in interstate commerce. *See* 18 U.S.C. § 922(n); *see also Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019).

Most of these elements were essentially undisputed at trial and remain so on appeal. Rather, Nixon's argument below, which he repeats in his brief, was that the government's witnesses were lying when they testified that Nixon committed these crimes. Essentially, his defense was (and is) that he was in Jackson, Tennessee during this time period and couldn't have committed these offenses. R. 206, Trial Tr., Page ID 1609; ECF No. 16, Appellant Br., p. 28.

Because Nixon is merely challenging the credibility of the witnesses and the weight of the evidence, the Court should reject his claim and affirm his convictions. When reviewing the sufficiency of evidence, this Court must "refrain from independently judging the credibility of witnesses or weight of the evidence." *United States v. Welch*, 97 F.3d 142, 148 (6th Cir. 1996). That is because "[a]ttacks on witness credibility are simple challenges to the quality of the government's evidence and not the sufficiency of the evidence." *United States v. Gibbs*, 182 F.3d 408, 424 (6th Cir. 1999) (internal quotation marks and citation omitted).

The quality of the proof against Nixon was strong. Nixon's accomplice Jeter testified in detail about Nixon's involvement in the conspiracy and robberies in Haywood County in April 2016. She also told the jury about Nixon's involvement in two shootings in Brownsville on April 21, 2016 and April 23, 2016, and where and how Nixon obtained the firearms used in those shootings. The circumstantial and physical evidence—including but not limited to the forensic matching of the Nixon's DNA with the pants discarded at the scene of the last robbery, and the forensic matching of the shell casings to the 9mm semi-automatic pistol—corroborated Jeter's trial testimony. R. 205, Trial Tr., PageID 1447-50; 1326-28.

Jeter identified Nixon in open court. Moreover, the physical evidence tied Nixon directly to the crimes. Officers found Nixon's pants with his DNA discarded in the road near the Bells Express Truck Stop just as Jeter testified. Additionally, the firearm that Baltimore and Nixon purchased together with robbery proceeds was the firearm that fired the casings recovered at the shooting at Hess and Young Streets, as well as, the shootout at Jeter's two nights later, while she was at work.

Nixon quibbles over what he says were defects in the government's proof—such as not calling Keenan Bond, Willie Wilson, Chez Richardson, Malik Walker and the like to testify. However, Nixon fails to mention that he presented Willie Wilson as a witness at his detention hearing on April 19, 2019, where Mr. Wilson repeatedly invoked his Fifth Amendment privilege against self-incrimination when

asked about the events that occurred in Brownsville on April 20 to 27, 2016. R. 135, Det. Hrg. Tr., PageID 359-364.

In any event, these quibbles are beside the point. These arguments go to the weight of the evidence, not the sufficiency of the evidence. The bottom line is there is more than enough proof in the record to support the jury's verdict. Nixon argued to the jurors that they should not believe the government's witnesses. The jury was entitled to (and did) reject this argument. Now, this Court must draw all inferences in the government's favor, so it too must reject Nixon's challenge to the witnesses' credibility.

This Court's "mandate is to affirm when the jury's choice was a rational one." *United States v. Arnold*, 486 F.3d 177, 182 (6th Cir. 2007) (en banc). Because there was more than enough evidence for a rational juror to convict Nixon, the Court should affirm.

II. The district court properly denied Nixon's motion to dismiss Count Seven.

Standard of Review

Under Federal Rule of Criminal Procedure 12(b)(3), the defendant must raise a defective indictment argument pre-trial. When a defendant does not raise a defective indictment claim pretrial, that failure may result in a waiver of that claim. Therefore, this Court should review this claim under the plain error standard. *See United States v. Bankston*, 820 F.3d 215, 228 (6th Cir. 2016); *see United States v.*

Edmond, 815 F.3d 1032, 1043 (6th Cir. 2016), *vacated on other grounds*, 137 S. Ct. 1577 (2017); *United States v. Soto*, 794 F.3d 635, 655-56 (6th Cir. 2015) (holding that failure to raise a claim of defective indictment under Rule 12(b)(3) resulted in plain-error review on appeal).

Argument

The Supreme Court of the United States decided *United States v. Davis*, 139 S. Ct. 2319 (2019), on June 24, 2019. In the present case the United States re-indicted the defendants in a superseding indictment addressing the legal issues raised by *Davis* on July 15, 2019. R. 127, Second Superseding Indictment, PageID 284-293. The defendant was tried on August 19 to 21, 2019. R. 150, 152, 154, Minute Entries.

Nixon filed his *Davis*-based claim regarding Count Seven first on January 8, 2020 and then the amended motion on February 13, 2020. R. 179, 189. Nixon clearly forfeited any challenge to defects in the indictment because he did not address it pre-trial. The district court entered a ruling on February 27, 2020 setting forth the basis for denying Nixon's motion to dismiss Count Seven. R. 193, Order, PageID 988-991.

Even if Nixon did not waive the claim of a defective indictment by failing to raise it pre-trial, the claim lacks merit. The defendant was convicted of Count Seven, a violation of 18 U.S.C. § 924(c), which was charged in the indictment as:

> On or about April 25, 2016, in the Western District of Tennessee, the defendants, Johnny Lee Nixon, Jr., Cordarious Baltimore, and Lacey Jeter aided and abetted, each other, during and in relation to a crime of violence, specifically interference with commerce by threats or violence involving the Bells Express Truck Stop, at 9730 Highway 70, Bells, Tennessee, in violence of Title 18 United States Code, Section 1951, specifically Count 6 of the Superseding Indictment, which Count is realleged and incorporated herein, did knowingly possess, use, carry and brandish a firearm, in violation of 18 U.S.C. §§ 2 and 924(c).

R. 127, Second Superseding Indictment, PageID 287-88. The predicate violent felony which triggered the enhanced punishment of Count Seven was a substantive count of robbery, alleged in Count Six, which was the robbery of the Bells Express Truck Stop.

This case is like *Davis*, where one § 924(c) conviction, "the one that charged *robbery* as a predicate crime of violence, could be sustained under the elements clause." *Davis*, 139 S. Ct. at 2325. The district court correctly noted in its order that *Davis* had no effect on the elements clause. *Richardson*, 948 F.3d at 741. As the district court also noted, this Court in *Richardson* specifically held that aiding and abetting Hobbs Act robbery satisfied the elements clause. *Id.*; *see also* R. 193, Order, PageID 990.

The jury did convict the defendant of conspiracy in Count One; however, the predicate violent felony in Count Seven was a substantive count of robbery alleged and convicted in Count Six. Even after the Supreme Court's decision in *Davis*,

substantive Hobbs Act robbery is still a crime of violence for the purposes of 18 U.S.C. § 924(c).

Nixon maintains that there is no way to determine what predicate act (Count One or Count Six) the jury relied on. ECF 16, Appellant Br., p. 34. However, the indictment made clear that Count Six was the qualifying predicate offense for Count Seven. If for some reason the indictment was not clear enough, the district court instructed the jury that Count Six was the qualifying predicate offense in support of Count Seven. R. 206, Trial Tr., PageID 1642, 1652. It is also clear that the jury understood that Count Six was the qualifying predicate offense for Count Seven by their verdict. The jury found Nixon not guilty on Counts Two through Five, but convicted him on Counts Six and Seven. R. 158, Jury Verdict, PageID 549-551.

The district court committed no error, plain or otherwise, in denying Nixon's motion to dismiss Count Seven. This Court should affirm the district court's ruling.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Respectfully submitted,

D. MICHAEL DUNAVANT
United States Attorney

/s/ Hillary Lawler Parham
Hillary Lawler Parham
Assistant United States Attorney
109 South Highland, Suite 300
Jackson, Tennessee 38301
(731)622-4220
Hillary.parham@usdoj.gov

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation provided in Rules 32(a)(5) and (a)(7)of the Federal Rules of Appellate Procedure. The brief contains 5,781 words of Times New Roman (14-point) proportional type, from the Statement of Jurisdiction through the Conclusion. Microsoft Word is the word-processing software that I used to prepare this brief.

/s/ Hillary Lawler Parham
Assistant United States Attorney

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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

DESCRIPTION OF ENTRY	RECORD ENTRY #	PAGE ID #'s
ECF	16	
Superseding Indictment	47	76-85
Second Superseding Indictment	127	284-293
Detention Hearing	135	359-364
Minute Entry	150	
Minute Entry	152	
Minute Entry	154	
Jury Verdict	158	549-551
Motion	179	
Response	182	930-32
Amended Motion	189	940-43
Order	193	988-91
Judgment	194	992-999
Notice	197	
Trial Transcript	204	1098-1102, 1114-1116, 1127-28, 1142-43, 1155-59, 1177-88, 1190-92

Trial Transcript	205	1212-1224, 1242-51, 1255-56, 1261-67, 1271-95, 1306-16, 1322, 1326-28, 1331-33, 1346-1425, 1442-45, 1447-50
Trial Transcript	206	1471, 1528-43, 1550-55, 1609, 1642, 1652
Minute Entry	211	
Order	213	1704
Trial Exhibit	6	
Trial Exhibit	15	
Trial Exhibit	57	
Appellant Brief		28, 34

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Plaintiff-Appellee United States was served upon counsel for Defendant-Appellant, by filing with the Court's CM/ECF system this date: June 18, 2020.

/s/ Hillary Lawler Parhm
Assistant United States Attorney