UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA — Plaintiff

v. — Criminal Action No. 3:22-CR-84-RGJ

BRETT HANKISON — Defendant

DEFENDANT'S MOTION FOR A NEW TRIAL AND INCORPORATED MEMORANDUM OF SUPPORT

Comes now Defendant, Brett Hankison, by counsel, and respectfully moves this Court for entry of an Order granting Defendant's Motion for a New Trial for Count 1 of the underlying indictment in this matter pursuant to Fed. R. Crim. Proc. 33 because the interest of justice so requires. A Memorandum in Support of Defendant's Motion for a New Trial is incorporated hereto.

INTRODUCTION

Defendant requests the Court find that prosecutor(s) engaged in prosecutorial misconduct throughout the course of his recent trial which deprived him of due process.

(1) More specifically the prosecutor(s) in this matter made a variety of improper arguments/comments over the course of trial, which amount to flagrant misconduct and necessitate a reversal of his conviction as to Count 1, and a new trial regarding same in the interest of justice;

(2) In the alternative, Defendant seeks the same relief based on the cumulative effect of the improper remarks made throughout the course of the trial, which amount to non-flagrant misconduct that necessitates a reversal of the conviction as to Count 1, and a new trial be granted

regarding same in the interest of justice.

STATEMENT OF FACTS

Defendant was indicted for three counts of wanton endangerment and tried by jury in state circuit court for the same conduct that gives rise to the action at issue. *Commonwealth of Kentucky v. Brett Hankison*, Case No: 20-CR-1473, Jefferson Circuit Court Division 13. After three hours of deliberating, on March 2, 2022, Defendant was found not guilty by the jury and acquitted of all three counts. On August 3, 2022, Defendant was federally indicted for two separate counts under 18 U.S.C. 242, alleging that while operating under color of law, he willfully deprived individuals of their constitutional rights while serving a search warrant at 3003 Springfield Drive, Apartment 4 on the night of March 12-13, 2020. *See Indictment*, [DE 1 at 1-4]. Officers were fired upon from inside of the apartment upon entry into the dwelling. *Id*. The indictment further alleges that two [former] LMPD officers immediately returned fire at the doorway, then Defendant moved from the doorway to the side of the apartment and discharged his firearm *Id*. More specifically, that Defendant discharged his firearm after there was no longer a lawful objective, and in the process of doing so fired projectiles that entered 3003 Springfield Drive Apartments 3 and 4 (hereinafter referred to as "Apt. 3" and "Apt. 4" respectively). *Id*.

On October 30, 2023, Defendant was tried federally for the first time regarding the two charges/counts which give rise to this action. Ultimately, after two weeks of trial and roughly three days of jury deliberations, on November 16, 2023 the Court declared a mistrial due to the jury being unable to reach an agreement on either of the two charges. [DE 134] On December 14, 2023, the government informed the Court of its intention to retry Defendant, and the second trial was set for October 15, 2024. Leading up to the second federal trial, both parties filed pretrial motions, including various motions in limine.

Due to some of the testimony in the first federal trial, the defense filed a motion seeking to exclude the prosecution from introducing improper expert and/or lay witness opinion testimony regarding Defendant's actions [DE 161]. Amongst other things, the defense's motion sought to exclude testimony from witnesses who did not personally observe Defendant's actions during the shooting (i.e. lacked personal knowledge) regarding whether his actions complied with, or violated the LMPD use of deadly force policy, were appropriate/inappropriate, or amounted to reasonable or unreasonable use of force. *Id*. The prosecution opposed various positions made by the defense in its motion, however, agreed with Defendant's posture regarding that issue.

> The government did not elicit any such testimony during the first federal trial and does not intend to elicit any during the retrial. ***Likewise, the government agrees that lay witnesses without personal knowledge of the defendant's shooting may not opine about whether the defendant acted in accordance with LMPD policies and training.*** No such testimony was offered in the first trial.
>
> […]
>
> The defendant spends much of his three-page motion arguing that the Court should not allow witnesses to testify about whether the defendant's force was "reasonable" or "appropriate." *The government agrees*. **No witness—lay or expert**—may offer opinions regarding whether the *defendant's force met applicable legal standards, such as whether it was "reasonable" under the Fourth Amendment or analogous conclusions such as whether the force was "lawful," "justified," or "appropriate*."
>
> […]
>
> **The government agrees, with one exception.** Detective M.C. [Myles Cosgrove] witnessed the defendant's shooting and therefore may offer opinions, based on his observations on scene and his personal knowledge of LMPD's policy and training, about whether the force he observed was consistent with deadly force standards.

[DE 174 at 1-2, 6, 7] (emphasis added).

On that issue, the Court concluded it would "not rule on broad categories of evidence where it appears that only one opinion from one witness will be an issue." [DE 189 at 15-16]. During

the trial, the prosecution then proceeded to elicit the precise type of testimony it agreed would be improper from seven witnesses—counting Myles Cosgrove—including from two individuals who weren't present during the shooting in question, nor were at the scene at any point in time before, during or afterwards. (e.g., Brett Routzahn, Paul Humphrey) *See* Vol. 6-B, pp. 72-73; *See* Vol. 7-A, pp. 49-53.

During the prosecution's proof, prosecutors elicited testimony from various witnesses regarding information they later discovered/corroborated, without expounding upon the basis of how that information was discovered/corroborated, and without ever introducing the underlying source of that information into evidence. This type of testimony was solicited from at least three government witnesses: Myles Cosgrove, Jason Vance, and Matt Russel. *Infra*, pp. 19-24. *See* (Tr. Vol. 5-B, pp. 22-23, LL 21-10, p. 29, LL 13-16, p. 50, LL 3-7, p. 69, LL 19-25); (Tr. Vol. 6-A, pp. 39-40, LL 1-3, pp. 56-57, LL 13-10, pp. 60-61, LL 14-5, pp. 78-79, LL 19-7); (Tr. Vol. 6-B, pp. 16-17, LL 22-10).

During closing arguments the prosecutor made a variety of remarks that presumed facts and/or outright misstated evidence in the record, attacked Defendant's and other witnesses' credibility not based on facts or evidence in the record, indirectly and directly asserted opinions regarding the reasonableness of Defendant's actions—effectively infringing upon the jury's dominion of determining whether Defendant's use of force was objectively reasonable—indirectly and directly offered opinions on the credibility of the government's witnesses not based on any facts or evidence in the record, and in the process of doing same disregarded prior instructions rendered by the Court. *Infra*, pp. 6-16.

After closing arguments, the alternate jurors were pulled and the jury began deliberations at approximately 1:20 pm on October 30, 2024. [DE 251, at 1]. The jury proceeded to deliberate

until 5: 00 pm that day, returned the following day and continued to deliberate from 9:00 am until 4:00 pm. *Id*. The jury returned the following day, Friday November 1, 2024 at 9:00 am and continued to deliberate with limited questions until reporting through a note that they did not believe they would be able to reach a unanimous verdict at 12:22 pm. *Id*. The Court proceeded to read an *Allen* charge as to both counts. *Id*. The jury continued to deliberate and at 5:52 pm reported continuing to disagree on one of the counts. *Id.* At 6:43 pm a partial verdict was rendered and the jury unanimously found Defendant not guilty as to Count 2. *Id* at 2. The partial verdict was published in open Court and a second *Allen* charge was read to the jury as to Count 1 at 7:10 pm. *Id*. The jurors the option to continue deliberating or to return Monday November 4, 2024 and continue. *Id*. At 7:22 pm the jury advised they would like to have dinner ordered for them and continue deliberating into the evening. *Id*. The jury sent a final note to the Court at 9:02 pm informing that they had reached a unanimous verdict as to Count 1, and ultimately found Defendant guilty of same, which was published in open Court at 9:22 pm. *Id*.

LAW & ARGUMENT

I. STANDARD OF REVIEW

A court "may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. Pro. 33(a). "A new trial may be granted under Rule 33 if the extraordinary circumstance arises that the evidence preponderates heavily against the verdict." *United States v. Ray*, 597 F. App'x 832, 840 (6th Cir. 2015). "The district judge may weigh the evidence and assess the credibility of witnesses in the role of a thirteenth juror." *Id.* However, "[m]otions for a new trial are not favored and are granted only with great caution." *United States v. Fritts*, 557 F. App'x 476, 479 (6th Cir. 2014) (quoting *United States v. Garner*, 529 F.2d 962, 969 (6th Cir. 1976)). A

defendant "bears the burden of proving that a new trial should be granted." *Id.* (quoting *United States v. Davis*, 15 F.3d 526, 531 (6th Cir. 1994)).

Improper comments made by the prosecutor without objection from [Defendant] are reviewed for plain error. *United States v. Young,* 470 U.S. 1, 16, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985); *United States v. Morrow,* 977 F.2d 222, 229 (6th Cir.1992) (en banc). In order for a court to correct an error not raised at trial there must be: "(1) error, (2) that is plain, and (3) that affect[s] substantial rights. If all three conditions are met, a court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.") (quotations omitted); *United States v. Monus,* 128 F.3d 376, 386 (6th Cir.1998); *See United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

The court should not, however, overturn a verdict "unless the prosecutorial misconduct is 'so pronounced and persistent that it permeate[d] the entire atmosphere of the trial, ... or so gross as probably to prejudice the defendant.' " *United States v. Tocco,* 200 F.3d 401, 420–21 (6th Cir.) (quotation omitted). When reviewing challenges to a prosecutor's remarks at trial, the prosecutor's comments should be examined within the context of the trial to determine whether such comments amounted to prejudicial error affecting the fairness of the trial. *Young,* 470 U.S. 1, 11, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

II. The Prosecutors' Remarks Were Improper

When reviewing claims of prosecutorial misconduct, the Sixth Circuit first determines whether the statements were improper. *See United States v. Krebs,* 788 F.2d 1166, 1177 (6th Cir.1986). If they appear improper, we then look to see if they were flagrant and warrant reversal. *See United States v. Carroll,* 26 F.3d 1380, 1388 (6th Cir.1994). To determine flagrancy,

the standard set by the Sixth Circuit is: 1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of the evidence against the accused. *Carroll,* 26 F.3d at 1385 (citing *United States v. Leon,* 534 F.2d 667, 679 (6th Cir.1976)).

"Prosecutorial misconduct may be so exceptionally flagrant that it constitutes plain error, and is grounds for reversal even if the defendant did not object to it." *Carroll*, 26 F.3d at 1385 n. 6.

a) The Prosecutor Disregarded the Court's Instruction to Avoid Commenting or Litigating Whether Other Officers Involved Should Have Shot or Not.

On October 28, 2024--two days prior to summations—this Court articulated some concerns regarding the substance of closing arguments. During the conference, both parties were instructed to avoid specific arguments during closings. Amongst other things, this Court expressly stated "…[a]nd we're not litigating whether SWAT should have executed them, **and we're not litigating other officers and whether they should have shot or not.**" Tr. Vol. 9-B , p. 155, LL 13-20. The Court concluded by saying "but I just want to make sure we stay in the center of what this case is about. It's just his decisions that night based on what he knew that night and not the other stuff that surrounds that." *Id* at 156, LL 4-7. The Court offered further edification regarding the subject matter:

> MR. MALARCIK: I'm assuming, and the Government will argue, "Well, these are reasonable officers, and you should listen to them because they said they wouldn't do what Mr. Hankison did."
>
> THE COURT: So I think you are always able -- and I'll say the same thing about opinions. **Your opinion as counsel --your opinion as counsel does not matter**

Id at 158, LL 15-18 (emphasis added).

On the morning of October 30, 2024—two days later—the prosecutor proceeded to make several of the very arguments/statements the Court advised against during his closing argument:

> "So in other words, the evidence you've heard during trial proves that Sergeant Mattingly and Detective Cosgrove, when they fired immediately through the open doorway at a person they could still see who had shot at them, *they were justified,* **but the defendant ran around to the side of the apartment *later* and fired blindly through covered windows that he could not see into**, *he was not justified."*
>
> [..]
>
> "You know that no reasonable officer would have fired all of those shots into covered windows because no other officer did."
>
> […]
>
> "There were six reasonable officers on scene who all knew that someone inside the apartment had fired. They all had their weapons with them, they all had the same training, and they all took one of those two reasonable options."[1]
>
> […]
>
> "None of the other six officers fired into those windows because firing blindly into covered windows in a home was not an option based on their policy and their training and their common sense. *Firing into covered windows in an apartment building is not a valid police tactic. It's a crime*."
>
> […]
>
> "So for Count 1 you know that no reasonable officer would have fired through those closed blinds and curtains of an apartment building because no other officer did."
>
> […]
>
> "But all the officers on scene perceived that same deadly threat and none of the other officers fired through the covered windows because

[1] One of the officers did not have his firearm on hand due to carrying the ram and using same to breach the door into the dwelling. Another officer was carrying a ballistic shield which likely impaired his ability to have his firearm in the ready position. Myles Cosgrove's training differed as a former United States Marine who served for many years. Moreover, the officers did not have the same perceptions. Only three officers on scene ever saw the shooter or shot come from inside of the apartment, and all three of those officers discharged their firearms (John Mattingly, Myles Cosgrove and Brett Hankison).

> they didn't have target ID, they couldn't do it safely, and they told you that decision was not a close call because that's not reasonable." [2] [3]
>
> […]
>
> "But none of the other officers responded to that threat by going around to the side of the apartment and shooting through covered windows they couldn't see into and putting innocent lives in danger. *That's why the defendant is guilty*." [4]

Tr. Vol. 11, 36-37, LL 25-6 (emphasis added); p. 39, LL 11-13; p. 40, LL 2-5; p. 40, LL 10-15; p. 41, LL 9-11; p. 46, LL 3-8; p. 112, LL 10-15 (emphasis added).

b) Improper Vouching

Improper vouching occurs when a prosecutor supports the credibility of a witness by indicating a personal belief in the witness's credibility. In effect, thereby placing the prestige of the office of the United States Attorney behind that witness or group of witnesses. *See, e.g., Taylor v. United States,* 985 F.2d 844, 846 (6th Cir.1993); *United States v. Martinez,* 981 F.2d 867, 871 (6th Cir.1992). Generally, improper vouching involves either blunt comments, *see, e.g., United States v. Kerr,* 981 F.2d 1050, 1053 (9th Cir.1992) (stating that improper vouching occurred when prosecutor asserted own belief in witness's credibility through comments including "I think he [the witness] was candid. I think he is honest."), or comments that imply that the prosecutor has special knowledge of facts not in front of the jury or of the credibility and truthfulness of witnesses and their testimony, *see, e.g., United States v. Carroll* 26 F.3d at 1388 (concluding that improper vouching occurred when prosecutor argued that the witness testifying under a plea agreement was in jeopardy if the court or government did not find their testimony to be truthful).

---

[2] Four out of the seven officers present during the execution of the search warrant testified not including Defendant. One of whom said they understood why Defendant did what he did, and would have done the same thing. Another who said he didn't think he would have done it, but he doesn't know what Defendant saw.

[3] The jury instructions were clear that any testimony regarding training were admissible for the limited purpose of determining whether Defendant acted willfully. [DE 228 at 28].

[4] The prosecutor made these remarks during his rebuttal time.

"Improper vouching occurs when a jury could reasonably believe that a prosecutor was indicating a personal belief in a witness' credibility." *Taylor v. United States,* 985 F.2d 844, 846 (6th Cir.1993) (per curiam) (citing *Causey,* 834 F.2d at 1283). Improper vouching also occurs when the prosecutor argues evidence not in the record, *United States v. Martinez,* 981 F.2d 867, 871 (6th Cir.1992) (citation omitted), or when the prosecutor supports the credibility of a witness by expressing a personal belief in the truthfulness of the witness's testimony, thereby placing the prestige of the office of the United States Attorney behind that witness. *Francis,* 170 F.3d at 550.

The prosecutor made a variety of statements which amounted to expressing his personal opinion about the truthfulness and/or reliability of witnesses' testimony. Specifically, by imploring the jury to apply more weight to the testimony of officers called by the government throughout the entirety of his closing:

> He [Defendant] gravely underestimated the courage and character of those fellow officers. No policeman ever wants to testify against one of their fellow officers, but officer after officer came into court during this trial and told you that firing into covered windows in an apartment building when an officer can't see inside violated not just the most basic rules that they're taught in their training ***but also what they stand for***.
>
> Chief Humphrey told you when that happens, it breaks down the trust that police have to have in the community and end up making the job of police officers more difficult and more dangerous. All those officers came forward because they knew the defendant violated the oath that they all swore to protect human life.
>
> They knew the defendant did a disservice to all the law enforcement officers who put on their uniform every day to protect and serve. He dishonored every one of them when he fired blindly into the homes of innocent people.
>
> […]
>
> "But one thing you can keep in mind when you're evaluating their testimony, as the judge instructed you is their connection to different parties in the case. And here you should keep in mind that none of the police officers who testified have any connection to the government, none of them work for the federal government, none of

> them got any deals or special treatment, and almost all of them worked at the defendant's agency. Many of them were his friends. [5]
>
> **You know that police officers don't get any medal if they come into court and testify against one of their fellow officers. That's a hard thing for them to do, so you know when those officers took the stand, they had every incentive to try to shade their testimony in the defendant's favor**. *And the fact that so many of them didn't, that they told you in clear terms that what the defendant did was wrong, that officers cannot shoot through covered windows into homes where people live, that tells you how outrageous the defendant's conduct was.*"

Tr. Vol. 11, p. 34, LL 1-18 (emphasis added); p. 107, LL 8-25 (emphasis added).

A prosecutor has a special obligation to avoid improper suggestions and insinuations, which means "a prosecutor has no business telling the jury his individual impressions of the evidence." *Kerr,* 981 F.2d at 1053.

c) Improper Attacks of Defendant's Credibility Not Based on Evidence or Facts Before the Jury.

> The defendant's own good friend -- good friend for 18 years, Detective Nobles, told you that he would not have fired those shots and he told you that the defendant firing through those windows **made all police**, quote, **look like horrible cops and criminals.**
>
> […]
>
> So the defendant claimed that as he ran around to the side of the apartment, he thought that he heard the person inside the apartment marching up through that hallway through the living room shooting at his officers in the doorway, but even if the defendant somehow really thought he did hear that, it's no defense.
>
> […]
>
> And you also know that the defendant's story about supposedly hearing the shooter moving up inside into the living room doesn't make sense because as soon as he fired those five shots into the living room, he immediately without any break turned and fired five more shots in the opposite direction into a different room at the other end of the apartment.
>
> […]

[5] Only two officers testified to being friendly with Defendant—Mike Nobles, and John Mattingly. Mattingly also testified to having only interacted with Defendant outside of work on two occasions. Counsel did object to these remarks as being intentionally misleading. Vol. 11, pp. 112-117.

It's obviously wrong for an officer to fire bullets into a home through covered windows when he can't see what's inside. The defendant knew that just like anybody else would.

[…]

He knew that his response to the threat was unreasonable, so that's more than enough to find that the defendant acted willfully. But that's not even the tip of the iceberg here. The overwhelming evidence of the defendant's willfulness comes from all that evidence you heard about how the defendant was trained.

[...]

…[T]he defendant knew the rules about using deadly force before he got to Breonna's home that night. The defendant just didn't care about the rules. He knew that someone inside had fired at the police and he wanted to get himself to cover and then shoot back at that person no matter the cost, no matter if he couldn't see inside[.]

[…]

The defendant knew it was wrong to shoot through covered windows in an apartment building just like anybody else would know that. That proves he acted willfully."

[…]

He thought he'd get away with it because he knew that someone inside had shot at the police and **he never thought his fellow officers would come into this courtroom and testify against him**.[6] The defendant was wrong about that. Shooting into people's homes through covered windows was so outrageous that officer after officer in the defendant's own department came forward and they did what no police officer ever wants to do; they testified against their fellow officer in open court.

From patrol deputies to SWAT officers to detectives to the chief of police, **they told you that police officers *cannot*** take the law into their own hands **by firing through covered windows into people's *homes no matter what happened before that.*** [7]

In this country, police officers cannot do that. Those officers had all taken the same oath as the defendant.

---

[6] Counsel quite literally manufactured the notions that Defendant "thought he'd get away with it" and never thought his fellow officers would testify against him. By this point in time the overwhelming majority of witnesses called to testify against him had previously done so in one, or both of the prior proceedings.

[7] In making this statement the prosecutor yet again misled jurors into believing the LMPD training policies carried relevance beyond being weighting to the element of willfulness. If this testimony was elicited by any of the officer witnesses called by the government, it amounts testimony being introduced that the prosecution knew and acknowledged was improper and assured wouldn't be sought. [DE 174].

> […]
>
> The defendant is just asking you to excuse it just like he expected his fellow officers on scene to excuse it, but those officers did not excuse it because they knew that firing bullets blindly into the homes of innocent people is not law enforcement. It's a crime.

Tr. Vol. 11, p. 40, LL 16-20; p. 48, LL 2-7; p. 48, LL 10-14; p. 51-52, LL 24-7; p. 52, LL 8-13; p. 54, LL 1-9; p. 54, LL 18-20; p. 56, LL 10-25; p. 57, LL 6-11;

Defendant has never once testified to discharging his firearm because he heard someone marching inside of the apartment as claimed by the prosecutor. *Id*. at 48, LL 2-7. In all three of his trials he has consistently maintained that as he rounded the corner of the vestibule/entryway of the apartment he thought the shooter was advancing based increased sound and loud percussion of the gunfire, as well as the corresponding bright illuminations of the sliding glass door from the muzzle flashes. Tr. Vol. 9-B, p. 129. Further, he testified that due to the visual and auditory stimuli, he believed the shooter was advancing on his fellow officers and executing them with an AR-15 in the fatal funnel. *Id.* at 135.

The only time the phrase 'marching' was mentioned during Defendant's testimony is while he was being cross-examined by the prosecutor. *See* Tr. Vol. 10 (Q: "You said that you knew that your officers were still trapped in the breezeway, you said you knew that the suspect inside was marching up the apartment toward the front door. Do you remember saying those things? A. Yes, sir."). The prosecutor distorted his testimony in closing by stating the defendant claimed to have heard someone marching down the hall. He then proceeded to say it was no defense even if the defendant really thought he heard marching (i.e., indirectly calling him a liar). The jury instructions were painfully clear that "it is also possible for a mistaken belief to be reasonable under the facts and circumstances." [DE 228 at 12].

Similarly, there was not sufficient evidence or testimony in the record to reasonably infer or assert that Defendant knew what he did was wrong, or knew that his response to the threat was

unreasonable as was proclaimed during the prosecutor's closing. Tr. Vol. 11, p. 51-52, LL 24-7; p. 52, LL 8-13; p. 54, LL 1-9; p. 54, LL 18-20. There was however evidence on the record provided by numerous witnesses that the department has never provided a training scenario similar to what Defendant was faced with, and that the training provided fell woefully short of preparing the officers for what they encountered that evening. (e.g.,Myles Cosgrove when asked if the paper targets and shoot simulations prepared them for what they encountered March 13, 2020 ("A. Absolutely not. **It is a disgrace** to send a policeman to the shooting range less than -- I'm not sure what the exact amount was. We'll say five times a year. We'll say ten times a year. That is re -- that is, **in my opinion, completely negligent on their part**.") Vol. 5-B, p 61, LL 12-19 (emphasis added).

Arguably the most inflammatory, misleading, and prejudicial excerpt above from the prosecutor's closing is the claim that Mike Nobles said he would not do what the defendant did, and that by firing through the window, he made all of the officers look like criminals. *Id.* at 40, LL16-20. These excerpts are deeply troubling for several reasons. First, speaking to the criminality of a defendant's conduct is exclusively within the dominion of the jury and inherently prejudicial. Second, the statements don't accurately depict the witness's testimony from the most recent trial, nor the preceding federal trial in 2023. Mike Nobles's pertinent testimony from the most recent proceeding is as follows:

> Q. Not only that, your honest reaction was that the defendant shooting through covered windows made the whole team look like horrible cops and criminals; right?
>
> A. Not just -- not just those actions, but it didn't look good.
>
> Q. And your reaction to the defendant's shooting was that him shooting through covered windows made all the officers on scene look like horrible cops and criminals?
>
> A. All surrounding made us look like horrible cops and criminals. Now, if that direct question was asked and that's how I answered, then that's what I answered. **But if that was two years ago, that**

> **was two years ago. I don't remember our conversation verbatim. I've had a lot go on since then. So, yes, we looked bad.**

Tr. Vol. 8-B, p. 84, LL 1-14 (emphasis added).

The discrepancies between the witness's actual testimony and what was regurgitated during closing argument speak for itself. What's further troubling about this particular line of dialogue is that prosecutors attempted to ask the witness the same line of inquiry in the preceding trial—while waving around FBI 302 form as if it were a legitimate transcript—and Mike Nobles testified that the four words in between quotes memorialized in the FBI 302 were not directed towards Defendant. *See Infra*.

> Q. And you told the FBI that the defendant's actions made the whole team on scene that night look like, quote, "Horrible cops and criminals."
> A. **I don't believe that was because of Brett's actions**. I – I thought I was talking about the search warrant in general, but if -- you have to read it off. It's been a long time.
>
> […]
>
> Q. And when you were asked about Defendant Hankison's actions, you told the FBI that it made the team look like criminals and horrible cops.
>
> A. **I don't recall saying that**. If I said it, it's -- that's what I said, but

November 8, 2023 Tr. Vol. 8-B, p. 45, LL 15-20; p. 46, LL 5-9 (emphasis added).

The majority of the excerpts referenced above from the prosecutor's closing argument consist almost entirely of personal opinions, distortions, or fabrications. In the Sixth Circuit "…[t]he law is clear that, while counsel has the freedom at trial to argue reasonable inferences from the evidence, counsel cannot misstate evidence." *United States v. Carter*, 236 F.3d 777, 784 (6th Cir. 2001).

In light of the fact that a jury will normally place great confidence in the faithful execution of the obligations of a prosecuting attorney, improper insinuations or suggestions are likely to carry

more weight against a defendant than such statements by witnesses. *Berger v. United States,* 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

d) Impermissible Appeals to the Jury to Act as the Community Conscience

> The fairness or unfairness of comments appealing to the **national or local community interest**s of jurors in a given instance will depend in great part on the **nature of the community interest** appealed to, and its **relationship to, and the nature of, the wider social-political context to which it refers**. *The correlation* between the **community interest comments** and **the wider social-political context to a large extent controls** the determination of whether an appeal is deemed impermissible because it is calculated to inflame passion and prejudice.

United States v. Solivan, 937 F.2d 1146, 1151–52 (6th Cir.1991) (citing *Viereck v. United States,* 318 U.S. 236, 247–48, 63 S.Ct. 561, 87 L.Ed. 734 (1943)).

The Supreme Court in *Viereck* tailored the inquiry to incorporate both the purpose and effect of the comments. In that case, the Court concluded that in light of contemporaneous events, which had great impact on the emotions and perceptions of jurors, the remarks "could only have ... arouse[d] passion and prejudice." *See id.* at 247, 63 S.Ct. at 566.

Like *Viereck*, the case at bar had a tremendous impact on the emotions of the jury. This was evidenced by the amount of tears that were shed throughout the proceeding. When viewed in the broader context as outlined in *Viereck*, the prosecutor unequivocally and unfairly appealed to the local and national interests of the jury when he made the following statements during closing arguments:

> "**He gravely underestimated the courage and character of those fellow officers**. No policeman ever wants to testify against one of their fellow officers, but officer after officer came into court during this trial and told you that firing into covered windows in an apartment building when an officer can't see inside violated not just the most basic rules that they're taught in their training **but also what they stand for**."

Chief Humphrey told you when that happens, **it breaks down the trust that police have to have in the community and end up making the job of police officers more difficult and more dangerous**. **All those officers came forward because they knew the defendant violated the oath that they all swore to protect human life**.

They knew the defendant did a disservice to all the law enforcement officers who put on their uniform every day to protect and serve. **He dishonored every one of them when he fired blindly into the homes of innocent people**."

[…]

He thought he'd get away with it because he knew that someone inside had shot at the police and **he never thought his fellow officers would come into this courtroom and testify against him**. The defendant was wrong about that. Shooting into people's homes through covered windows was so outrageous that officer after officer in the defendant's own department came forward and they did what no police officer ever wants to do; they testified against their fellow officer in open court.

From patrol deputies to SWAT officers to detectives to the chief of police, they told you that police officers cannot take the law into their own hands by firing through covered windows into people's homes no matter what happened before that. **In this country, police officers cannot do that**. Those officers had all taken the same oath as the defendant.

[…]

"The evidence proves that the defendant committed that crime. **You can recognize the courage of those fellow officers who came forward and hold the defendant accountable for the crime that he committed. Find him guilty**."

[…]

"But one thing you can keep in mind when you're evaluating their testimony, as the judge instructed you is their connection to different parties in the case. And here you should keep in mind that none of the police officers who testified have any connection to the government, none of them work for the federal government, none of them got any deals or special treatment, and almost all of them worked at the defendant's agency. Many of them were his friends.

You know that police officers don't get any medal if they come into court and testify against one of their fellow officers. That's a hard thing for them to do, so you know when those officers took the stand, they had every incentive to try to shade their testimony in the defendant's favor. And the fact that so many of them didn't, that they

> told you in clear terms that what the defendant did was wrong, that officers cannot shoot through covered windows into homes where people live, that tells you how outrageous the defendant's conduct was."

Tr. Vol. 11, p. 34, LL 1-18; p. 57, LL 11-15; p. 107, LL 8-25 (emphasis added).

It's important to contextualize the community interest and the wider social-political context in which the guilty verdict at issue was rendered. The jury informed the Court that it had reached a unanimous verdict as to Count 1 at 9:02 pm on November 1, 2024—four days before the presidential election. [DE 251]. An election cycle in which police excessive use of force cases were emphasized as a major policy agenda by one of the predominant political parties. It's worth noting that Breonna Taylor was even referenced by a speaker during the Democratic National Convention. *See Jasmine Crocket DNC Speech Article*, pp. 1-2 (attached hereto as **Exhibit "1"**).

Speaker and Texas Rep. Jasmine Crocket stated "I know a good prosecutor when I see one. Kamala Harris is the kind of prosecutor we long for in the cases like those of Breonna Taylor. She was the first attorney general in the nation to order that her officers wear body cams and she started the back on track program to reduce recidivism." *Id.* Every juror in this case was well aware of the local ramifications brought on by the death of Ms. Taylor. The aftermath of her death and the demonstrations, protests, riots, etc. which occurred in Louisville afterwards were nationally and globally spotlighted for a considerable length of time. Several of the jurors recalled the protests and riots that occurred as a result, and many of them expressed fear that riots or other civil unrest could occur again depending on the outcome/verdict rendered in Defendant's case.

In *Solivan,* the Sixth Circuit reversed a defendant's conviction where the prosecutor, in his closing argument, urged the jury to find the defendant guilty, saying "I'm asking you to tell [defendant] and all of the other drug dealers like her ... that we don't want that stuff in Northern

Kentucky...." *Id.* at 1148. It was held that this single statement was "so inflammatory in the context of the ongoing drug war" that it deprived the defendant of a fair trial. *Id.* at 1155.

When viewing this matter from the sociopolitical lens called for in *Viereck* and *Sollivan*, the circumstances satisfy, or exceed the standard necessary to qualify as unfair and impermissible appeals to the jury to act as the community conscience.

e) Improper Witness Bolstering

Improper vouching and bolstering are very much alike, however both "go to the heart of a fair trial." *United States v. Francis*, 170 F.3d 546, 551 (6th Cir. 1999). Bolstering occurs when the prosecutor infers or implies that the witness's testimony is corroborated by evidence known to the government but not known to the jury. *Id* (citing *United States v. Sanchez,* 118 F.3d 192, 198 (4th Cir.1997)). A prosecutor may ask a government agent or other witnesses whether they were able to corroborate what they learned in the course of a criminal investigation. However, if the prosecutor pursues this line of questioning, they **must** also draw out testimony explaining how the information was corroborated and where it originated. *Francis*, 170 F.3d at 551 (citing *United States v. Lewis,* 10 F.3d 1086, 1089 (4th Cir.1993)) (emphasis added).

Over the course of the government's case-in-chief, prosecutors engaged in improper bolstering with numerous witnesses. The individuals who immediately come to mind are Myles Cosgrove, Jason Vance and Matt Russel.

<u>Myles Cosgrove</u>

> Q. And you said you, at the time, couldn't see whoever was firing from out there, right? A. Correct. *Q. Did you eventually learn who it was? A. I did. Yes, sir.* Q. And who was that? A. Brett Hankison. Q. Now, based on what you saw and experienced that night, what was your reaction when you learned that those shots in the parking lot were fired by your fellow officer? A. Well, again, I knew I -- I thought I was missing a vital piece of the puzzle. I was a little concerned, because, again, what did I miss? That's what I'm

> thinking. What vital information did I miss? Then I was a little, you know, just shocked over that, that I may have missed a piece of the puzzle.
>
> […]
>
> Q. Did the shots through those windows put you personally in any danger that night? A**. They did. It wasn't until later on that I had found that out, but yes, they did.**
>
> […]
>
> Q. And I think you testified that Mr. Walker was the first person to engage and fire; is that correct? A. Yes. *In gathering information later, yes*. Q. Okay. And you were perceiving this threat and you engaged Mr. Walker and returned fire; is that fair? A. Yes, correct.
>
> […]
>
> "Q. So I think you've told us you initially thought you had fired a low amount of rounds, perhaps six rounds, ***and then you later learned that you actually fired sixteen.*** Did that surprise you when you were told that? A. It did. Yes, it did.

Tr. Vol. 5-B, pp. 22-23, LL 21-10; p. 29, LL 13-16; p. 50, LL 3-7; p. 69, LL 19-25

Jason Vance

> Q. And was that casing later matched to a handgun owned by Kenneth Walker? A. It was. Q. **And just to pause there for a minute. Can citizens in Kentucky own handguns for protection?** A. Yes. Q**. And did you review documents that showed Kenneth Walker had an active permit to carry a concealed weapon?** A. **I did.** Q. Other than that one nine-millimeter shell casing that was matched to Mr. Walker's gun, did you find any other nine-millimeter shell casings? A. No. Just the one.
>
> Q. Did you find any drugs in the apartment? A. No. Q. Did you find large amounts of money in the apartment? A. No, we did not. Q. Did you find any drug paraphernalia in the apartment? A. No. Q. Did you find any scales used to weigh drugs? A. No. *Q. **Did you find any evidence at all of any drug dealing?*** A. There was some correspondence between Ms. Taylor and a known drug trafficker in the apartment. That was it. Q. You found a piece of mail, right? . Yes. Q**. *No evidence of drug dealing?*** A. ***No.***

Tr. Vol. 6-A, pp. 39-40, LL 1-3 (emphasis added).

These questions and statements were strategically made to appeal to various misnomers that have circulated both locally, and nationally regarding the shooting at issue, and arouse anti-

police sentiment amongst the jurors.[8] Interestingly, the questioning and testimony regarding no evidence of any drug dealing being found directly conflicts with the contents of the investigative summary Sgt. Vance prepared about this very incident. Sgt. Vance's report states "At the time of the dismissal investigators were reviewing a forensic examination report of Kenneth Walker's cell phone. The examination showed **Walker was clearly trafficking in marijuana and prescription medication. The report contained communications between other parties confirming Walker's drug trade.**" *See J. Vance's Redacted Investigative Summary*, pp. 9-10 (attached hereto as **Exhibit "2"**). This investigative summary was within the prosecution's possession and was propounded as evidence. It's well known that prosecutors have an affirmative obligation to correct any false, misleading or perjured testimony of a witness.

The other profoundly misleading testimony elicited from Sgt. Vance during trial pertained to the discussion of firearms. Generally speaking Kentuckians do have a right to own a gun for protection. However, on March 13, 2020—the night of the shooting—Kenneth Walker openly admitted to investigators during his interview at the Public Integrity Unit to smoking marijuana twice that week, including earlier that evening, five times that month, approximately twenty times the month before that, and smoking once a day for prolonged periods of time. *See Kenneth Walker PIU Tr.*, pp. 42-43 (attached hereto as **Exhibit "3"**). In light of his open admissions **which were known to the prosecution**, per federal regulations, the notion that Kenneth Walker was a lawful possessor of a firearm is patently false. Not only was Kenneth Walker not a lawful possessor of a

[8] *See* e.g., Tr. Vol. 5-A, p. 9, LL 17-19 ("Lots of people -- lots of law-abiding citizens keep guns for self-defense and there is always a chance that officers might surprise the people inside who may try to defend their homes."

firearm, he was unequivocally an *unlawful possessor* of a firearm. *See* 18 U.S.C. 922(g). The improperly bolstering continued.

> Q. Did you find one nine-millimeter bullet in this entryway? A. We did. Q. Can you please show us where it was? A. It was marker 37. Q. **Was that bullet later identified as having been fired from Kenneth Walker's gun? A. It was.** Q. Were there any other bullets matched to Mr. Walker's gun? A. No. Q. **The bullet at marker 37 that you circled is the only one identified as having been fired from Mr. Walker's gun?** A. **Yes.**
>
> […]
>
> Let's talk about the shell casings you felt were relevant to the defendant's shooting. How many fired shell casings did you find in the parking lot? A. Ten. Q. And we don't see all of them here 'cause they're sort of clumped; is that right? A. Yes. Q. But were they all in the parking lot? A. Yes. Q. And will you remind us how many bullets the defendant fired into Apartment 4? A. Ten. Q. *And were those shell casings that you recovered in the parking lot* **later matched** *to a particular weapon?* A. *Yes.* Q. *Whose?* A. *Mr. Hankison.*
>
> […]
>
> Q. How many bullets did the defendant fire through the **bedroom window** A. **Five.** Q. **And did you later learn that the defendant did fire through that sliding glass door and the window? A. I did** Q. What was your reaction when you learned that an officer had fired bullets into the covered bedroom window based on your training and experience and based on your observations on scene?

Vol. 6-A, pp. 56-57, LL 13-10; pp. 60-61, LL14-5; pp. 78, LL 16-25

Matt Russel

> Q. **All right. Agent Russell, I'll ask again. Are you aware of other statements that Kenneth Walker made the same night of this incident where he discussed who fired the shot at the police when the door to their home flew open?** A. **Yes.** Q. All right. And in those statements that Kenneth Walker made the same night as the video we just watched, who did he say had fired the shot at the police? A. He said that he [*sic*] had.[9] Q**. All right. So he quickly corrected this and took responsibility for it?** A. He later said that, yeah. Q. The same night as the shooting? A. Same night.

[9] In the video being referenced, after being called out from the dwelling Kenneth Walker denied firing the weapon and told officers that Breonna Taylor had in fact shot at the police.

Tr. Vol. 6-B, pp. 16-17, LL 22-10

Based on the start time of Kenneth Walker's interview with the LMPD Public Integrity Office (PIU), Mr. Walker did not take responsibility for shooting at the officers and nearly killing one before 3:53 am. **Ex. 3**, p.8. The shooting occurred at approximately 12:40-12:43 am. Accordingly, that means Mr. Walker waited at least three hours before claiming responsibility for shooting at officers, as opposed to quickly taking responsibility as the prosecutor suggested.

III. The Prosecutor's Misconduct Was Flagrant and Deprived the Defendant of Due Process

1) The Statements Tended to Mislead the Jury and/or Prejudice Defendant.

Virtually all of the questioning, testimony and remarks referenced above had the effect of misleading the jury, or outright prejudicing Defendant—particularly the litany of improper statements made during closing arguments. *Supra*, pp. 7-23. *See Simpson v. Warren*, 475 Fed.Appx. 51, 63 (6th Cir. 2012) (finding it "significant" that prosecutor's misstatements occurred "shortly before deliberations") (citation omitted).

2) The Improper Comments Were Pervasive and in Some Instances so Destructive as to Individually merit reversal.

The next step is whether the prosecutor's comment was "isolated or pervasive." *Carroll,* 26 F.3d at 1385. However, it bears emphasizing that the Sixth Circuit recognizes there are instances where a "single misstep" on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated. *See Pierce v. United States,* 86 F.2d 949 (6th Cir.1936). In this case, the improper conduct complained of occurred at every stage of the trial (during opening statements, the prosecution's case-in-chief, and during closing).

3) The Statements Were Deliberately Before the Jury.

"The intentionality of the prosecutor's improper remarks can be inferred from their

strategic use," and noting that the prosecutor "opted to select inappropriate arguments and use them repeatedly during summation." *Bates v. Bell*, 402 F.3d 635, 648 (6th Cir. 2005). The substance, similar theme, and frequency of the improper statements introduced in this matter are indicative of the prosecutor(s) opting to select inappropriate arguments.

4) The Evidence of Guilt in this Matter is Not Overwhelming.

See United States v. Carroll, 26 F.3d 1380, 1387 (6th Cir.1994) (reversing conviction where prosecutor inappropriately and misleadingly vouched for credibility of government witnesses where proof of guilt was not overwhelming) (citing *United States v. Solivan,* 937 F.2d 1146, 1150 (6th Cir.1991)).

Defendant has had three trials over the same conduct at issue in this matter. The sheer fact those proceedings have resulted in a full acquitted of all three counts during his state trial, a hung jury on both counts in the first federal trial, and his most recent trial resulted in an acquittal on Count 2, and a guilty verdict on Count 1, which was only rendered after he jury sent two separate notes indicating they could not come to an agreement on this count, two *Allen* charges being read, and roughly twenty-two to twenty-three hours of deliberating, is indicative of just how little evidence of guilt there is in this matter.

IV. The Misconduct Deprived Defendant of a Fair Trial

United States v. Warshak, 631 F.3d 266, 307 (6th Cir. 2010) ("[T]he prosecutor's intent in making certain remarks is a fairly rough proxy for the ultimate question, which is whether the remarks at issue contaminated the trial with unfairness."); *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.").

"Prosecutorial misconduct may be so exceptionally flagrant that it constitutes plain error, and is grounds for reversal even if the defendant did not object to it." *Carroll*, 26 F.3d at 1385 n. 6.

Counsel respectfully submits to this Court that the litany of conduct outlined within this Motion had the effect of deprived Defendant of fundamental at trial, and amounted to prosecutorial misconduct so flagrant that it amounts plain error, and grounds for reversal.

CONCLUSION

For all of the foregoing, Defendant respectfully requests the Court to reverse the guilty verdict rendered as to Count 1 and grant his Motion for a New Trial as to Count 1 as the interest of justice so requires.

Respectfully submitted,
/s/ Ibrahim Farag
Ibrahim A. Farag
FARAG LEGAL SERVICES, PLLC
4010 Dupont Cir. Suite 309
Louisville, Kentucky 40207
[redacted]

Donald J. Malarcik
121 South Main Street, Suite 520
Akron, Ohio 44308
[redacted]
Counsel for Defendant

Jack Byrd
Law Offices of Jack Byrd, PLLC
545 Mainstream Dr., Suite 420
[redacted]
Counsel for Defendant

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was this 15th day of November 2024, served upon the following via the CM/ECF system and/or electronic mail and/or U.S. Mail:

Michael Songer
U.S. Department of Justice –
Civil Rights Division
[redacted]

Anna Mary Gotfryd
U.S. Department of Justice-Criminal Section
[redacted]

/s/ Ibrahim A. Farag
FARAG LEGAL SERVICES, PLLC