

**09-4964-cr**

*To Be Argued By:*  
SANDRA S. GLOVER

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 09-4964-cr**

UNITED STATES OF AMERICA,

*Appellee,*

-vs-

JOHN W. BELL, JR.,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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DAVID B. FEIN  
*United States Attorney  
District of Connecticut*

SANDRA S. GLOVER  
*Assistant United States Attorney*  
TRACY LEE DAYTON  
MICHAEL J. GUSTAFSON  
*Assistant United States Attorneys (of counsel)*

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## Statement of Jurisdiction

The district court (Alfred V. Covello, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on November 24, 2009. Government's Supplemental Appendix ("GSA") 9;<sup>1</sup> Joint Appendix ("JA") 1029. On November 25, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). GSA10; JA1032. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

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<sup>1</sup> The government is submitting a proposed supplemental appendix with the complete docket sheet and color copies of some of the photographic exhibits introduced at trial.

### **Statement of Issue Presented for Review**

When viewed in the context of an otherwise fair trial, did a handful of isolated, allegedly improper comments during the government's rebuttal summation cause the defendant substantial prejudice, or amount to reversible plain error, when those comments were based on the evidence and were responses to the defendant's testimony and arguments?

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

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*Appellee,*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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### **Preliminary Statement**

On October 1, 2007, the defendant, John W. Bell, Jr., shot at a federal law enforcement officer as he and other officers attempted to serve a search warrant at Buzz's Mobil gas station in Bridgeport, Connecticut. As a result of this incident, the defendant was charged with the attempted murder of a federal officer and related offenses. At trial, the defendant testified, claiming that he shot at the officer in self-defense. The jury rejected that defense and convicted him after a three-day trial.

On appeal, the defendant raises one argument: that isolated statements in the prosecutor's rebuttal summation – to which he did not object – deprived him of a fair trial. A review of the record, however, reveals no impropriety, much less substantial prejudice to the defendant or reversible plain error. The prosecutor's rebuttal summation was based on the evidence presented at trial, including the defendant's own testimony. The prosecutor challenged the defendant's story about what happened on October 1, 2007, and drew on the evidence (and logical inferences from that evidence) to counter the defendant's story with an alternative explanation of the events that day. And even if some of the prosecutor's comments were improper, they do not warrant reversal when viewed in the context of the entire trial, an otherwise fair proceeding.

The judgment should be affirmed.

#### **Statement of the Case**

On December 21, 2007, the defendant was charged in a criminal complaint with knowingly and intentionally attempting to kill an officer of the United States who was engaged in the performance of official duties, in violation of 18 U.S.C. § 1114. GSA4.

On January 17, 2008, a federal grand jury sitting in Bridgeport, Connecticut, returned a four-count indictment charging the defendant with: (1) attempted murder of a federal officer and (2) attempted murder of a person

assisting a federal officer,<sup>2</sup> both in violation of 18 U.S.C. §§ 1114 and 1114(3); (3) assaulting, resisting, opposing, impeding or interfering with a federal officer, in violation of 18 U.S.C. §§ 111(a)(1) and 111(b); and (4) using a firearm in connection with the crimes charged in Counts One through Three, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). GSA5; JA7-9.

Trial began on June 10, 2008. GSA6. On June 12, 2008, the defendant testified and claimed that he fired his gun at the officers in self-defense. JA675-747.

On June 16, 2008, the parties presented closing arguments, and the district court charged the jury. JA775-882. After the jury retired to deliberate, the defendant made an oral motion for a judgment of acquittal, which the court took under advisement. JA884. Later that day, the jury found the defendant guilty on Counts One, Three and Four; the jury acquitted the defendant on Count Two. JA885-86.

On June 23, 2008, the defendant filed written motions for a judgment of acquittal and a new trial. GSA7. On July 17, 2008, he filed a memorandum of law in support of the

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<sup>2</sup> The victim in Count One, Detective Scott Murray, was a federally deputized officer. By contrast, the victim in Count Two, Detective Kevin Hammel, was not deputized as a federal officer. It is undisputed, however, that Detective Hammel was acting in cooperation with and under the control of federal officers in a matter involving the enforcement of federal laws at the time of the incident.

post-verdict motions. GSA7. On September 17, 2008, the district court heard oral argument on the motions. JA899-949. On October 23, 2008, the district court denied the defendant's motion for acquittal but granted the motion for a new trial. JA950-67.

The government appealed the district court's order, and on October 20, 2009, this Court reversed the district court, remanding for reinstatement of the verdict and sentencing. *See United States v. Bell*, 584 F.3d 478 (2d Cir. 2009) (per curiam).

On November 16, 2009, the district court (Alfred V. Covello, J.) sentenced the defendant to 156 months' imprisonment, to be followed by three years' supervised release. JA1026. Judgment entered on November 24, 2009, GSA9; JA1029, and the defendant filed a timely notice of appeal on November 25, 2009, GSA10; JA1032.

The defendant is currently serving the sentence imposed by the district court.

## **Statement of Facts and Proceedings Relevant to this Appeal**

### **A. Overview of the trial**

On the evening of October 1, 2007, members of a Federal Bureau of Investigation (“FBI”) task force attempted to serve a search warrant at Buzz’s Mobil, a gas station in Bridgeport, Connecticut. The defendant was one of two employees working at the station. When the first two members of the search team entered the small office area of the gas station, the defendant pulled a revolver from his waist and fired twice at the officers. The officer closest to the defendant returned fire simultaneously. The defendant sustained non-life-threatening injuries. He then retreated to a back room, where he stayed for several minutes. The officer, who had ducked for cover near a soda machine, was able to escape from the office with the assistance of fellow officers. The defendant demanded to see a uniformed police officer before surrendering to authorities.

At trial, the defendant asserted that he acted in self-defense, which obligated the government to prove beyond a reasonable doubt that the defendant did not act in self-defense when he shot at the detectives.

To sustain its trial burden, the government called six of the nine members of the search team to testify and submit to cross-examination. Together, these officers had approximately 150 years of experience. Photographs depicting the witnesses’ clothing at the time of the search

were admitted into evidence. The crime scene examiner also testified.

Following the government's case-in-chief, the defendant testified that he fired his gun in self-defense because he thought he was being attacked by an "unknown assailant." He then offered three character witnesses. The government followed with a brief rebuttal case, and counsel for both parties presented closing arguments.

The jury acquitted the defendant on Count Two but convicted him on Counts One, Three and Four.

## **B. The government's case**

### **1. The officers don police clothing and equipment.**

On October 1, 2007, FBI Task Force Officers Detective Scott Murray, Sergeant Juan Gonzalez, Jr., Detective Richard Donaldson, and Detective Terrence Blake, along with FBI Special Agent Mark Grimm, Trumbull Police Department Detective Kevin Hammel and Branford Police Department Officers Lieutenant Arthur Kohloff, Detective Duncan Ayr and Detective Ronald Washington, went to Buzz's Mobil Gas Station on East Main Street in Bridgeport for the purpose of serving a search warrant for gambling records and proceeds. JA 152-53, 157-58, 276-79, 336, 531-34, 616-18.

Before serving the search warrant, the officers attended a briefing at the Trumbull Police Department. JA 77, 81-

82, 153-54, 277, 332, 399, 532-34, 616-17. In addition to being advised that the warrant authorized them to search for receipts, notes, ledgers, cash, betting slips and other items related to gambling, the officers were told that two gas station employees likely would be working when they served the warrant. JA155-57, 279, 453-54, 594-95.

Prior to leaving the Trumbull Police Department, the officers all donned clothing and equipment that identified them as police officers. JA161-62, 285-86, 620-22. For example, Detective Murray wore a bullet-resistant vest that had "POLICE" written across the front and back of the vest in large yellow letters; a police badge, which he hung around his neck and clipped to the front of the vest; his gun, a holster and handcuffs, each of which was attached to his belt; a brown hat that said "Life is good" and "What up Dog"; and a pair of black gloves. JA12, 161-66, 210, 258-59.

Detective Murray wore his police equipment over the sleeveless t-shirt, jeans and black boots that he had worn to work that day. JA12, 161-62, 166-68, 170. Detective Murray donned the bullet-resistant vest and badge in court to show the jury how he appeared when he served the search warrant at Buzz's Mobil. JA170-71. Detective Murray also testified that at the time of the warrant, he had a goatee similar to the one he had at trial. JA12, 167.

The other search team members also wore similar police attire. All members of the team wore jackets or vests with the word "POLICE" or "FBI" across the front. *See* JA13, 172-73, 620-23 (Detective Hammel); JA35,

540-41 (Sergeant Gonzalez); JA20, 342-43, 347-48 (Lieutenant Kohloff); JA26, 282-84 (Detective Ayr); JA403-406 (Agent Grimm).

**2. The officers enter the station to serve the warrant.**

At approximately 8:00 p.m., traveling in four separate cars, the search team proceeded to Buzz's Mobil. JA159-61, 173-77, 261-62, 286, 333-34, 403, 620.

When the officers arrived at Buzz's Mobil, the gas station was well lit by both the overhead lights at the pumps and the lights inside the gas station office. JA19, 177, 289, 412, 466, 629. When the officers pulled into the gas station, the door to the office was propped open and a Hispanic male, who was later determined to be a gas station employee named Fidel Lemus, stood near the door. JA177-78, 229, 289-90, 345-47, 350, 374, 412, 433, 591-92, 624, 703-704.

Agent Grimm and Detective Hammel saw a second person inside the gas station office as they pulled into the station. JA412-13, 624-27. That second person, later determined to be the defendant, was standing to the right of the soda machine and generally in the area near the back room. JA16, 17, 418, 437-38, 626, 649; GSA12.

As Detective Hammel stopped the car he was driving, both Detectives Hammel and Murray got out of the car and approached Lemus. Detective Murray immediately announced, "police, police with a search warrant," and

Detective Hammel similarly stated “police with a warrant” several times. JA179-84, 627-28. Detective Murray explained that he regularly uses the same terminology so that everybody at a search location hears the word “police” and is thus advised that law enforcement officers are present. JA182.

As he got out of the car, Detective Murray removed his gun from his holster and pointed the barrel at the ground, along his right thigh, with the gun tucked slightly behind his leg. JA179-82. Detective Murray kept his finger alongside the barrel of the gun, rather than on the trigger. JA179-82. Detective Murray explained that he unholstered his weapon so that it would be accessible if needed. JA181-82. He pointed the gun at the ground, as is always his practice, for safety reasons and to avoid alarming anyone whom he might approach. JA180-81. Detective Hammel similarly unholstered his gun as he got out of the car. JA627-28. He, too, pointed the barrel of the gun at the ground for safety reasons, especially since Detective Murray was walking in front of him. JA628.

Lieutenant Kohloff and Agent Grimm got out of their vehicle, and also began to approach Lemus. Lieutenant Kohloff and Agent Grimm approached from the right and to the rear of Detectives Murray and Hammel. JA350-51, 414-15. Agent Grimm, like Detectives Murray and Hammel, drew his gun from his holster as he stepped from the minivan. JA413. Agent Grimm explained that it is a “good idea to have your weapon out in case you need to protect yourself.” JA413. Agent Grimm pointed the barrel toward the ground, along his right thigh, and tucked it

behind his right leg as he saw Detective Murray had done. JA414-16, 446-47. Agent Grimm explained that he kept the gun behind his leg because he was responsible for interviewing the occupants of the gas station and thought they would be more receptive if he did not initially approach with his gun visible. JA414, 447.

**3. The defendant's co-worker immediately complies with the officers' instructions.**

As the officers approached the office door, Detective Murray instructed Lemus to “get [his] hands out of [his] pocket.” JA183. Lieutenant Kohloff also told Lemus, “Police, put your hands up, police, put your hands up.” JA347, 350, 374-75. Lieutenant Kohloff explained that he repeated the phrase twice so that Lemus would know he was a police officer. JA347. While Detective Ayr, Agent Grimm and Sergeant Gonzalez did not themselves say “police” as they initially approached the office, each heard other officers announcing the presence of law enforcement. For instance, Detective Ayr heard Lieutenant Kohloff announce “police.” JA291. Agent Grimm and Sergeant Gonzalez heard members of the search team, including Detective Murray, repeatedly state, “police with a warrant” and “police, search warrant.” JA415, 438-39, 446, 542-44, 594.

Lemus, too, clearly heard the officers announce their presence and immediately complied with their commands by raising his hands. JA183-84, 350-51, 417, 544, 628. Detective Murray then used his left hand to conduct a brief pat down of Lemus's clothing for weapons, keeping his

gun, which was in his right hand, pointed at the ground while he did so. JA184-85, 230-32, 417, 435-36, 455-56. Detective Murray then passed Lemus back to Lieutenant Kohloff who was standing outside the office door to the right. JA184-85, 204, 234, 293-94, 350, 417-19, 436, 630.

**4. Detective Murray encounters the defendant who is armed and refuses to comply with Detective Murray's commands.**

As Detective Murray passed Lemus to Lieutenant Kohloff, he too noticed the defendant inside the office. JA185. The defendant was approximately eight to ten feet from Detective Murray, near the door to a room at the back of the office, but facing Detective Murray and walking in his direction. JA185-86A, 188, 236-38, 375-76, 677-78. When he saw the defendant, Detective Murray stepped into the doorway and stated "police, police with a warrant, police with a search warrant." JA186-87, 246-47, 645. Detective Hammel, who had stepped into the office and was standing to Detective Murray's right, also stated "police, search warrant." JA630-31, 645. The defendant then turned and headed towards the back of the office. JA186-86A, 649, 655-56. Detective Hammel repeatedly yelled "stop, police, police, stop." JA631, 633, 645. Detective Murray began to follow the defendant, again stating, "police, police with a search warrant." JA187-88, 246.

The defendant stopped short of the door to the back room and turned partially towards Detectives Murray and Hammel. JA188, 633-35. The defendant had his back

toward but not against the right wall of the office; his left side faced the Detectives. JA188, 238-41. Detective Murray saw that the defendant had his hand in the area of his pocket on the right side of his clothing. Detective Murray instructed the defendant, “get your hand out of your pocket.” JA188, 246. Although the defendant was within four feet of Detective Murray and looking directly at him, the defendant did not comply with Detective Murray’s commands. JA188-89, 245. Initially, Detective Murray continued to move toward the defendant, again stating “police,” in an effort to prevent the defendant from escaping, retrieving a weapon or destroying evidence. JA189, 249. The defendant, however, continued to ignore Detective Murray’s commands. JA249. Accordingly, Detective Murray determined that it was not safe to move any closer to the defendant. Instead he stepped to the left toward the soda machine, stopped and stood face-to-face with the defendant. JA190.

As Detective Murray stopped, he saw that the defendant had his sweatshirt or coat wrapped around his right hand near his right hip. JA189-91. Detective Murray yelled to the defendant, “show me your hand.” At that point, and for the first time, Detective Murray raised his gun and pointed it at the defendant. JA190-91. The defendant then pulled his right hand out from under his clothing. JA191. As he did, Detective Murray saw that the defendant had a silver revolver in his hand, which the defendant raised and pointed at Detective Murray; the defendant’s finger was on the trigger. JA191, 235, 678. Detective Murray yelled “gun” to alert his fellow officers that the defendant had a weapon. JA191, 259-60, 292, 353,

366-68, 545, 596, 631-32, 646. Detective Murray then dove to the left and fired his gun at least once, but possibly twice. JA191-92, 632-35, 658. The defendant also fired his gun twice at Detective Murray. JA192, 235-36, 244, 635-36.

Both of the defendant's bullets went through the window directly behind where Detective Murray had been standing before he dove for cover. JA27, 190; GSA13 (photographic exhibit showing bullet holes in window).<sup>3</sup> One of the defendant's bullets exited the window at 68½ inches above the ground. JA488. The defendant's second shot exited the window several inches below the first. JA27, 485-87. Detective Murray stands approximately five feet nine inches tall. JA210-11. Accordingly, the defendant's shots were precisely at the height of Detective Murray's head and chest.

Detective Hammel, who had been standing behind Detective Murray, saw the gun in the defendant's hand as Detective Murray dove to the ground. JA632-35, 650, 662. He then immediately heard gunshots, saw muzzle flashes from the defendant's gun and felt the concussion from the gun blast on his face. JA633, 650. Detective Hammel fell backwards out the door of the office and rolled to the left, taking cover behind a brick wall. JA633-36. Believing Detective Murray had been shot, Detective Hammel immediately radioed for assistance, explaining that shots

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<sup>3</sup> As established by the crime scene investigation, the defendant's bullet holes were on either side of the piece of wood running down the middle of the window. JA486-87.

had been fired and that there was a barricaded suspect in the office. JA636-39.

Lieutenant Kohloff, who was outside the office when the shooting began, recalled that he heard gunshots, took cover and then fired three shots in the direction of the muzzle flashes he saw coming from the defendant's gun. JA354-55, 379. Lieutenant Kohloff estimated that the defendant was within eight feet of Detectives Murray and Hammel at the time the defendant started shooting. JA362.

Agent Grimm, who was also outside the office when the shooting began, testified that his initial attention on the defendant inside the office was diverted by Lemus being led away from the office. After Lemus crossed his field of vision, Agent Grimm looked back toward the doorway and saw a muzzle flash from the defendant's gun. JA419-21. Agent Grimm immediately moved to the left, took cover and fired six shots at the defendant who was standing in the office near the doorway to the back room. JA420-23, 439-44; GSA13. Agent Grimm explained that he was authorized to return fire because the defendant was trying to shoot him and the other officers. JA422.

#### **5. Detective Murray is trapped in the office.**

After the initial volley of shots, Detective Murray reached around the side of the soda machine and fired two rounds toward where he had last seen the defendant. JA192-93. As Detective Murray fired, Sergeant Gonzalez yelled at Detective Murray to "get down, get down." JA193, 257, 359, 561. Detective Murray then crouched

down in a very small area and remained focused on the side of the soda machine, waiting to see if the defendant was going to come after him. JA 16, 197, 546, 560, 583. As he attempted to take cover, Detective Murray heard Sergeant Gonzalez yell “Scotty’s trapped, Scotty’s trapped,” and instruct Detective Donaldson to radio for help. JA 193-96, 561-62. Detective Donaldson’s radio call, which was played for the jury, advised that shots had been fired at Buzz’s Mobil and requested that all police officers in the vicinity respond immediately to an officer who needed assistance. JA 561-64. In response to Donaldson’s call, numerous police vehicles rushed to Buzz’s Mobil with lights flashing and sirens blaring. JA 198-99, 263-64, 294-95, 359-61, 424, 563-65, 607, 638B-639.

Sergeant Gonzalez testified that when the shooting began he ran to the pump island and took cover near the front end of the minivan. JA 545-49, 558-59, 564, 578, 598. Sergeant Gonzalez and Lieutenant Kohloff, as well as other officers, yelled several times to the defendant, “police” and “police with a search warrant, police with a search warrant.” JA 385, 548, 561. Sergeant Gonzalez explained that, from his vantage point at the front of the minivan, he could see the defendant’s outstretched arm and the gun in the defendant’s hand. Sergeant Gonzalez also saw that every time Detective Murray tried to move, the defendant extended his arm around the doorway from the back room and pointed his gun at Detective Murray. JA 545-46, 559-61, 581-83. The first time this occurred, immediately after Detective Murray fired two shots around the soda machine, Sergeant Gonzalez fired his gun at the defendant because he believed the defendant was going to

shoot Detective Murray. JA545-47, 549-50, 558-60, 580-82, 583-84. Sergeant Gonzalez then yelled at the defendant, “police, put the gun down, police.” JA424-25, 561, 587. The defendant neither responded nor put his gun down. Instead, Sergeant Gonzalez saw the defendant point his gun toward Detective Murray several more times. Each time, Sergeant Gonzalez yelled to the defendant “police, put the gun down, police” immediately causing the defendant to retract his hand. JA587.

Detective Murray was trapped in the office for several minutes. JA198. During that time, Sergeant Gonzalez repeatedly called to Detective Murray to ask if he had been shot and told Detective Murray that we have “got to get you out of there” and “I’ll tell you when.” JA196-98, 548, 560-61, 565.

When Sergeant Gonzalez determined that it was safe for Detective Murray to attempt to flee the office, he yelled to Detective Murray, “go, go.” JA199, 360, 564-66. Detective Murray then ran from the office in a crouched position so that he would be “less of a target.” JA199-200, 202, 360, 565. As he crossed between the soda machine and the door, Detective Murray protected himself by firing two final shots toward the location where he had last seen the defendant. JA199-201. Sergeant Gonzalez also fired his gun into the office at that time because he saw the defendant aim his gun at Detective Murray as he dove from the office and feared that the defendant was going to shoot Detective Murray in the back. JA565, 599-600.

Detective Murray estimated that from the time he initially entered the office until the time the shooting began, approximately eight to ten seconds elapsed. JA250-51. The defendant never said a word to either Detective Murray or Detective Hammel throughout the entire interaction in the office. JA209-10, 245.

**6. The defendant initially refuses to surrender.**

After Detective Murray escaped, the defendant remained barricaded for approximately ten minutes. JA638B, 681. During that time, officers yelled “police” and Sergeant Gonzalez repeatedly commanded the defendant to put down his gun and come out of the office. JA316, 450, 638A-38B, 659-60. Eventually, and despite the presence of dozens of uniformed officers who had arrived on scene within minutes of the shooting, the defendant yelled that he wanted to see a “uniform, a Bridgeport uniform.” JA197-99, 263, 359, 361, 423-24, 563-65, 607, 638B, 660-61, 680. Several minutes later, the defendant emerged from the office still carrying his gun. JA324, 425. Sergeant Gonzalez yelled at the defendant to “drop the gun, drop the gun” but did not shoot at the defendant. JA638A. The defendant ultimately put his gun on the desk just inside the office door and walked into the parking lot. JA24, 471-72, 476, 681-82, 695-96; GSA14.

The defendant was taken into custody and searched. Inside his pants pocket, officers located four extra rounds of .44 special hollow-point ammunition, which were in addition to the five rounds already in his weapon, a money clip with \$140, some pocket change, and a gun permit,

among other things. JA37, 468-71, 525, 682, 700. The defendant's gun, a Taurus .44 Special loaded with the three remaining unexpended rounds of ammunition, was recovered from the desk. Inscribed on the side of the weapon were the words "To Jon, From Big Boy '98." JA31, 471-72, 738-39. The gun was a gift to the defendant for having been the best man in a friend's wedding. JA738-39.

In the course of the shoot-out, the defendant sustained two wounds: one to his left wrist and one to his right arm. JA509, 679, 683-84, 754-55. Although Detective Murray was not shot, fellow officers insisted that he seek treatment at the hospital. JA221, 265, 271, 589-90, 653.

#### **7. The crime scene investigation.**

Detective Matthew Reilly, a crime scene investigator, testified that he and others from the Connecticut State Police ("CSP") conducted a crime scene investigation at Buzz's Mobil. JA522-23. Because the gas station was already well lit, the CSP did not need additional illumination to conduct the scene analysis. JA466, 510.

Detective Reilly described the office in which the shooting took place as "rather cramped." JA474. Detective Reilly also explained that a back room to the rear of the main office contained a fan that was running when the CSP arrived. JA477. While Detective Reilly stated that the fan was noisy, it did not prevent him from conversing in a normal voice while in close proximity to the fan. JA478, 528-29.

Detective Reilly determined through ballistic comparisons that Detective Murray fired five times; Sergeant Gonzalez fired either four or five times; Lieutenant Kohloff fired three times; Agent Grimm fired six times; and the defendant fired twice. None of the other officers on scene fired their guns. JA480-84, 493. Finally, Detective Reilly testified that all of the officers' guns held far more rounds of ammunition than they actually fired. JA481-83.

### **C. The defendant's case**

The defendant testified that he had worked at Buzz's Mobil for 16 years. JA677. On October 1, 2007, the defendant consumed a beer shortly before going to work at the gas station. The defendant admitted that he then drank another beer while at work. JA702. The defendant stated that he was not intoxicated, had full control of his faculties, and could both see and hear. JA703.

The defendant further testified that, at approximately 8:20 p.m., he was in the back room counting cigarettes and making notations on a clipboard. JA686, 687-88, 694-95. He started moving towards the office, and as he reached the door between the back room and the office, he saw a movement out of the corner of his eye. JA677, 688-89 (identifying his location by markers 57 and 58 as shown in the exhibit reproduced at GSA16), 693-96 (testifying that he was on the red carpet in the back room, and agreeing that the view in Exhibit 25 (reproduced at GSA15) represented his vantage point when the incident started), 705. He turned toward the movement and "saw the gun

and . . . looked directly into the barrel of the gun.” JA707, 677-78.

The defendant testified that when he saw the gun, the “assailant,” Detective Murray,<sup>4</sup> had entered the office and was standing near the desk, about seven or eight feet from the defendant, but was moving toward him. JA677-78, 705-708. The defendant testified that he saw only Detective Murray, even though both Detectives Murray and Hammel entered the office, and that he never saw any of the other members of the search team. JA705-13.

The defendant testified that when he saw Detective Murray’s gun, he turned his head away for a moment and reached for his own weapon. JA708-709. The defendant acknowledged that Detective Murray was standing directly squared to him as this occurred. JA190, 709, 711. The defendant then described how he reached under his outer garment, “pulled [the clothing] up and I grabbed my gun, I pulled it out and I pointed it, and fired. The gunshots went off, and I don’t know who shot first.” JA709-711. The defendant fired two shots in succession at Detective Murray. The defendant claimed that he thought he was being robbed and that he was shooting to protect his life. JA713.

After the shots were fired, the defendant retreated to the back room. JA677-78. The defendant claimed that, fearing for his safety, he refused to come out until he saw

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<sup>4</sup> During trial, the defendant consistently referred to Detective Murray as “the assailant.”

a police officer or uniform. JA680-81. The defendant also claimed that he did not see the lights or hear the sirens of the myriad law enforcement units that had arrived on scene and that he never heard the officers yelling to him from the parking lot. JA689, 717-19. Rather, the defendant said that at some point he heard someone call “John, come out” and explained that he “pe[e]ked through the shelving of the metal rack where the oil was alongside the refrigerator . . . and I saw the left side of a short sleeve blue uniform with [sergeant] stripes on it . . . on the other side of the van, through the window,” referring to an officer standing at least 25 feet away on the opposite side of the minivan that was parked by the gas pump. JA25, 681-82, 715-18; GSA15. The defendant then walked to the office door with his gun in his hand, set the weapon on the desk and walked outside. JA681-82.

The defendant acknowledged that he was the owner of 17 weapons, at least 9 of which were handguns, and most of which were not registered in his name. JA696-98, 734-37, 743-45. The defendant also acknowledged that one of his weapons was a sawed-off firearm, a firearm that he knew to be legal because the barrel was one inch longer than the law requires. JA697. The defendant stated that he fired his weapons at multiple shooting ranges, and that he went skeet shooting. JA743-44. He also stated that he went on an annual hunting trip and had done so for at least 30 years. JA743. In addition, the defendant stated that he always carried a gun at Buzz’s Mobil, although not always the same gun. JA736-37.

Finally, the defendant stated that he had heard rumors of a gambling operation that was being conducted at Buzz's Mobil, but denied that he had been involved in the operation or had seen it first hand. JA721-23, 732-34. The defendant specifically denied collecting gambling proceeds, or even witnessing anybody making gambling payments. JA722-23, 740. The defendant also denied having ever seen the betting materials that were recovered from Buzz's Mobil following the shooting, JA724-25, 732-34, and specifically denied recording gambling payments for the gas station's owner, JA723, 740. In addition, the defendant expressly denied telling a law enforcement officer that he had recorded gambling information in a black notebook. JA723-24.

The defense rested after calling three character witnesses: Mark Melfi, an employer; Sandra Kopek, a family friend; and Patricia Bell, the defendant's wife. In substance, these witnesses testified that, as far as they knew, the defendant was neither aggressive nor violent. JA749, 751, 754.

#### **D. The government's rebuttal case**

FBI Special Agent Mark Lauer testified in the government's rebuttal case that on December 6, 2007, he interviewed the defendant at the defendant's residence. JA755-56. Agent Lauer asked the defendant if he was aware that Joseph Buzzanca was operating a gambling organization from Buzz's Mobil. JA757-58. The defendant replied that he knew Buzzanca "gamb[ed] with his friends." JA758. When asked how long Buzzanca had

been running the gambling operation, the defendant responded that he had been aware of it for at least ten years. JA758. While the defendant denied involvement in the gambling operation, he did admit that he, and all of the employees at Buzz's Mobil, accepted "collections," or envelopes of cash, on Buzzanca's behalf. JA757-59. The defendant further acknowledged that he would note the collections in a black ledger that also contained entries regarding legitimate gas station business. JA758-59. Finally, the defendant explained that on one occasion he was present when an individual attempted to extort money from Buzzanca at Buzz's Mobil. The defendant opined that the police followed that individual, which, he believed, likely spawned the gambling investigation. JA759-60.

## **E. The closing arguments**

### **1. The government's opening summation**

In the government's opening summation, the prosecutor reviewed the testimony and evidence concerning the events of October 1, 2007 at Buzz's Mobil. He described the appearance of the officers and how they carried their weapons, the officers' testimony about what was said as they approached the station, and the reaction of Fidel Lemus to the officers' arrival. JA778-89. After recounting this evidence, the prosecutor called into question the defendant's story that he was in the back room counting cigarettes when he saw Detective Murray's gun, arguing based on common sense, that the defendant

must have been in the office, not the back room. JA791, 793.

After reviewing the events of October 1, 2007, the prosecutor turned to the question of credibility, and specifically challenged the defendant's credibility on several parts of his testimony. He noted, for example, that although he had worked at Buzz's Mobil for 16 years, the defendant had testified that he "had no idea there was a gambling operation, just a rumor." As the prosecutor concluded, "[s]urely he would have known there was a gambling operation there." JA802. The prosecutor also questioned the defendant's professed ignorance about why his gun was loaded with hollow-point bullets, noting that this ignorance was inconsistent with the defendant's admitted familiarity with weapons and regular visits to the shooting range. JA802.

The prosecutor concluded his remarks by offering a theory, based on the evidence, about the events of October 1, 2007. According to the prosecutor, the defendant saw the police enter the office, and made a split second decision to shoot – a decision made when he "had been drinking beer, carrying a fully loaded revolver with hollow point bullets in it on his hip, four backups in his pocket" – a decision that he probably later came to regret. JA803-804.

## **2. The defense summation**

Counsel for the defense argued that the crux of the case was whether the defendant acted in self-defense. JA808. He attacked the testimony offered by the law enforcement officers at trial, arguing that their testimony was not reliable because they were testifying about a chaotic situation, because some of them had not been interviewed immediately after the incident, and because some of their testimony was different from statements they had given immediately after the incident. JA811-13, 819, 821-25. He also noted that the officers had offered inconsistent testimony about certain details of the incident. JA813-18.

He continued by arguing that the officers' testimony was undermined by the physical evidence in the case, and that by contrast, the physical evidence corroborated the defendant's testimony. JA830-31, 836. In addition, he argued that the fact that the defendant survived the shooting was "evidence of [sic] he was exactly where he said he was when it began, and he's exactly where he says he was during the shooting that occurred, and that was wedged up against that wall behind the oil rack." JA839-40.

Further, defense counsel argued that as a matter of common sense, the defendant reasonably perceived the officers to be committing a robbery. JA834. Moreover, defense counsel argued that it would have been out of character for the defendant to shoot at the police unless he thought the station was being robbed:

[B]ut John Bell, the guy working the two jobs, the reputation of peaceful non-violence, the gas station, at night, after the full daytime job, is this the guy, is this the guy who's going to know that it's a police officer and for what reason shoot out.

JA835.

### **3. The government's rebuttal summation**

In the government's rebuttal summation, the prosecutor began by arguing that the defendant had a motive to shoot on October 1, 2007: protecting the gambling operation that he had known about and participated in for over a decade. JA844-45. The prosecutor noted that the defendant could have just let the police search the gas station, but he made a different "really bad choice[]." JA845. Putting this decision in perspective, while at the same time calling into question the credibility of the defendant's testimony on his weapons, the prosecutor noted that the defendant was experienced with weapons and made the decision to shoot while under the influence of alcohol, which "lowers your inhibitions":

So how did that translate for a gun fanatic like the Defendant, a guy with nine handguns, seven long guns and a sawed-off shotgun? Who has a sawed-off shotgun? He wants you to believe he's hunting with it. You don't hunt with a sawed-off shotgun any more than you hunt with a .357 or a .44 that says to John, love Big Boy, thanks for being in my wedding.

The Defendant carries a different weapon every single day. He accessorizes with it, kind of changes it like a woman changes her purse. Here's the Defendant carrying this backup ammunition, hollow point bullets. You can take a look at these back in the courtroom. Jiggling around in his pocket with his spare change, as if he's just waiting for a shootout. Why? I don't know, maybe the gun makes him feel tough.

So when the police came in, he's sitting there surrounded by the evidence of gambling, and he made a choice contrary to what law abiding people do. Like in the example I gave earlier, generally speaking, even if someone's been drinking and they get in their car and they start to drive, the cops go to pull you over, you stop. You comply with their commands. Game over. You're caught. My bad.

Not the Defendant. He's sitting there with his gun, and he's got his backup ammo, and he's a little juiced up, and he made a different decision. He didn't want to get caught. So he turned around and he sized up the competition, Detectives Murray and Hammel, and he thought to himself, I could take 'em. They don't even have their guns up. Wise choice? Perhaps not. But a choice nonetheless.

JA846-47.

The prosecutor continued by questioning the credibility of the defendant's testimony on a variety of topics. For

example, she questioned his testimony that he was able to unholster his weapon from under his fleece, without fumbling, and shoot at Detective Murray's head, even though he was "scared out of his mind." JA848-49. She also questioned the defendant's assertion that the station was located in a high-crime neighborhood, noting that there was no evidence of robberies or other crimes in the area, and further that the defendant himself left his keys in his truck at the station. JA852-53. In addition, the prosecutor challenged the defendant's assertions that he was in the back room of the station when the shooting started, arguing that this argument (and the testimony to that effect) were simply implausible:

And then there was these myriad questions about the Defendant's alleged position in the back room when the shooting started. The Defendant was not in the back room. He testified he was not in the back room. He then confirmed that when he said, I don't know where the clipboard was. I don't know if I had it with me, or if I had left it in the back room. Which by definition would put him somewhere other than the back room.

He then tried to retract that statement saying oh, wait wait wait, no, no, okay, yeah, I was over the threshold inside the door, yeah, Government's Exhibit 25, that shows where I was. It's very important that you take a look at Government's Exhibit 25, where the Defendant claimed that he was, because what you cannot see is even more important than what you can see in that photo. You

cannot see the Defendant's bullet holes, which means he could not have fired from that vantage point.

Therefore, the evidence shows that the Defendant's version of the, you know, the event is false, unless of course the Defendant had loaded his weapon with magic bullets. Shocking but true. Twice in one century. Lee Harvey Oswald and John W. Bell, magic bullets. Because for the Defendant's version of the events to be true, he would have had to fire his weapon, they would have come out of his gun, come to a screeching halt like in the Roadrunner cartoons, taken a hard right, then a hard left before blasting out the window. That did not happen.

JA853-55.

The prosecutor concluded by questioning the defendant's assertion that he did not recognize the officers as law enforcement officers on October 1, 2007, arguing that this assertion was implausible given the clothing and gear worn by the officers, the entire context of the situation, the defendant's own testimony about what he observed that night, and the self-serving nature of the defendant's assertion. JA855-60.

#### **F. The charge and verdict**

At the conclusion of closing arguments, the court charged the jury, and the jury retired to deliberate. JA860-

882. After deliberations, the jury returned with a verdict, finding the defendant guilty of attempted murder of a federal officer, Detective Murray (Count One); assaulting, resisting, opposing, impeding or interfering with a federal officer, Detective Murray (Count Three); and using a firearm in connection with the crimes charged in Counts One and Three (Count Four). The jury acquitted the defendant of the attempted murder of a person assisting a federal officer, Detective Hammel (Count Two). JA885-86; GSA7.

### **G. The post-trial proceedings**

On October 23, 2008, the district court granted the defendant's motion for a new trial, GSA8; JA950, and the government appealed. On October 20, 2009, this Court reversed the district court's order, and remanded for sentencing. *Bell*, 584 F.3d at 487.

On November 16, 2009, the district court sentenced the defendant to 156 months' imprisonment, three years' supervised release, and a \$300 special assessment. JA1026. Judgment entered November 24, 2009, GSA9; JA1029, and the defendant filed a timely notice of appeal on November 25, 2009, GSA10; JA1032.

## Summary of Argument

The government's rebuttal summation did not deny the defendant a fair trial. The defendant argues that three different parts of the government's rebuttal summation – to which he did not object – deprived him of a fair trial by inflaming the passions of the jury and distorting the evidence.

A review of the record reveals no impropriety, however. The challenged comments were all based on the evidence in the record, and were direct responses to the testimony and theories advocated by the defense. Although the prosecutor used sarcasm and rhetorical flourishes to make her points, the use of rhetorical devices is not prohibited, much less misconduct.

But even if the prosecutor's statements were improper, they neither resulted in substantial prejudice to the defendant, nor rose to the level of reversible plain error. The "misconduct" was not severe in the context of an otherwise fair trial, the district court expressly instructed the jury that it should decide based on the evidence (which did not include the lawyers' arguments), and there is every reason to believe that the defendant would have been convicted even without the prosecutor's comments. The jury's split verdict reveals that it decided the case based on the evidence, not its passions, and the evidence was strong that the defendant and his story lacked credibility.

## Argument

### **I. Isolated statements in the prosecutor’s rebuttal summation were not improper, and in any event, did not cause the defendant substantial prejudice in an otherwise fair trial, much less rise to the level of reversible plain error.**

#### **A. Governing law and standard of review**

A prosecutor enjoys wide latitude in giving her closing argument so long as she does not misstate the evidence, or offer comments calculated solely to inflame the passions of the jury. *United States v. Edwards*, 342 F.3d 168, 181 (2d Cir. 2003); *United States v. Tocco*, 135 F.3d 116, 130 (2d Cir. 1998); *United States v. Myerson*, 18 F.3d 153, 163 (2d Cir. 1994); *United States v. Shareef*, 190 F.3d 71, 79 (2d Cir. 1999); *United States v. Modica*, 663 F.2d 1173, 1180 (2d Cir. 1981). The prosecutor is also given broad range regarding the inferences she may suggest to the jury during her summation. *Edwards*, 342 F.3d at 181; *United States v. Nersesian*, 824 F.2d 1294, 1327 (2d Cir. 1987).

In addition, when a defendant testifies at trial, and thus places his credibility in issue, the prosecutor is permitted to give a fair appraisal of the defendant’s testimony and demeanor. *Edwards*, 342 F.3d at 181. In short, a prosecutor is “ordinarily entitled to respond to the evidence, issues, and hypotheses propounded by the defense.” *United States v. Marrale*, 695 F.2d 658, 667 (2d Cir. 1982).

Moreover, as the prosecutor makes her arguments, the law does not require her to unilaterally disarm when entering rhetorical battles with defense counsel. As this Court explained, “[t]o shear [the prosecutor] of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice.” *DiCarlo v. United States*, 6 F.2d 364, 368 (2d Cir. 1925). Accordingly, this Court has held that a “prosecuting attorney is not an automaton whose role on summation is limited to parroting facts already before the jury,” *United States v. Wilner*, 523 F.2d 68, 74 (2d Cir. 1975), and that the prosecutor’s summation need not consist of “such detached exposition as would be appropriate in a lecture.” *United States v. Wexler*, 79 F.2d 526, 530 (2d Cir. 1935) (Hand, J.). In other words, “a prosecutor is not precluded from vigorous advocacy, . . . the use of colorful adjectives,” or the deployment of rhetorical devices or sarcasm. *United States v. Jaswal*, 47 F.3d 539, 544 (2d Cir. 1995) (quoting *United States v. Rivera*, 971 F.2d 876, 884 (2d Cir. 1992)); *United States v. Rodriguez*, 587 F.3d 573, 583 (2d Cir. 2009) (approving prosecutor’s use of sarcasm in closing to “consider the implausibility” of the defendant’s claim); *United States v. Bagaric*, 706 F.2d 42, 60 (2d Cir. 1983) (use of rhetorical devices and sarcasm permissible).

“Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding.” *United States v. Young*, 470 U.S. 1, 11 (1985); *accord Modica*, 663 F.2d at 1184 (“Reversal is an ill-suited remedy for prosecutorial misconduct . . .”); *United States*

*v. Burden*, 600 F.3d 204, 221 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 251 (2010) and *cert. denied*, No. 10-679, 2011 WL 55823, \_\_\_ S. Ct. \_\_\_ (Jan. 10, 2011). To warrant reversal, prosecutorial misconduct must “‘cause[] the defendant substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process.’” *United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005) (quoting *Shareef*, 190 F.3d at 78); *see also Shareef*, 190 F.3d at 78 (“Remarks of the prosecutor in summation do not amount to a denial of due process unless they constitute ‘egregious misconduct.’”) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974)).

This Court looks at three factors when considering whether an improper comment caused substantial prejudice: “1) the severity of the misconduct; 2) the measures the district court adopted to cure the misconduct; and 3) the certainty of conviction absent the improper statements.” *Burden*, 600 F.3d at 222; *see also United States v. Melendez*, 57 F.3d 238, 241 (2d Cir. 1995). “The ‘severity of the misconduct is mitigated if the misconduct is an aberration in an otherwise fair proceeding.’” *United States v. Thomas*, 377 F.3d 232, 245 (2d Cir. 2004) (quoting *United States v. Elias*, 285 F.3d 183, 191 (2d Cir. 2002)).

Moreover, where, as here, a defendant does not object to allegedly improper comments during a summation, this Court reviews for plain error. *United States v. Caracappa*, 614 F.3d 30, 41 (2d Cir.), *cert. denied*, 131 S. Ct. 675 (2010). Under plain error review, “an appellate court may,

in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an ‘error’; (2) the error is ‘clear or obvious, rather than subject to reasonable dispute’; (3) the error ‘affected the appellant’s substantial rights, which in the ordinary case means’ it ‘affected the outcome of the district court proceedings’; and (4) ‘the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009)); see also *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir.), *cert. denied*, 130 S. Ct. 2394 (2010).

This Court has made clear that “plain error” review “is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings.” *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, “the error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant’s failure to object.” *United States v. Lombardozi*, 491 F.3d 61, 73 (2d Cir. 2007) (internal quotation marks omitted).

## **B. Discussion**

### **1. The prosecutor's statements in rebuttal summation were based on the evidence and were proper responses to the arguments and testimony presented by the defendant.**

The defendant's claim of improper statements in rebuttal summation focuses on three parts of that summation: (1) the prosecutor's reference to Lee Harvey Oswald and the "magic bullet" theory, JA854-55; (2) the prosecutor's description of the defendant's familiarity with weapons, JA846; and (3) the prosecutor's explanation of events the night of the shooting, JA846-47. All of these statements, when read in context, were proper. They responded to the defendant's arguments and were based on the evidence in the record.

#### **a. Lee Harvey Oswald and the magic bullet theory**

The defendant directs most of his attention to the prosecutor's alleged equation of him with Lee Harvey Oswald, "perhaps the most hated murderer in a century." Defendant's Br. at 6-7. According to the defendant, this comment was not a direct response to any defense arguments and the government specifically chose this comparison to inflame the jury's passions. *Id.* at 16. The defendant's argument rests on a mis-reading of the trial record.

The prosecutor's statement was not intended to inflame the jury, but rather to emphasize the utter implausibility of the defendant's testimony on a key point at trial. Specifically, the prosecutor's reference to Lee Harvey Oswald and the magic bullet theory was a direct – albeit sarcastic and mocking – response to the defendant's testimony, highlighting for the jury, through a popular culture reference, the physical implausibility of the defendant's claim about where he was standing when he fired his weapon. *See Edwards*, 342 F.3d at 181 (government is entitled to argue that defendant's testimony lacked credibility); *Rodriguez*, 587 F.3d at 583 (approving use of sarcasm by prosecutor to call attention to implausibility of the defendant's argument).

The defendant's precise location when he fired his weapon was a hotly disputed issue at trial. According to the government's witnesses, the defendant fired his weapon while standing in the front office. JA185-86A, 191-92, 241, 354-55, 632, 635, 651. From this vantage point, the defendant would have had a clear view of the officers (including their police gear and insignia), would have been well-placed to hear their announcements of "police with a warrant," along with Detective Murray's commands to show his hands, and could have observed Lemus comply with the officers' instructions. If, by contrast, the defendant was in the back room when he fired his weapon, he might not have had a good view of the police and their insignia, might not have heard their statements identifying themselves as police, and might not have observed Lemus comply with the officers' instructions. And so, consistent with his theory, the

defendant testified repeatedly that he was in the back room when he first noticed Detective Murray and fired his weapon. *See, e.g.*, JA677, 688-89 (identifying his location by markers 57 and 58 as shown in the exhibit reproduced at GSA16), 693-96 (testifying that he was on the red carpet in the back room, and agreeing that the view in Exhibit 25 (reproduced at GSA15) represented his vantage point when the incident started), 705. Defense counsel, too, made this point, arguing that the evidence showed that the defendant was in the back room when he fired his weapon. *See* JA817-18, 820, 821, 839-40.

With this issue fully joined, the prosecutor was well within proper bounds of advocacy to point out to the jury that the defendant's contention was physically implausible. *See Marrale*, 695 F.2d at 667 (prosecutor is "ordinarily entitled to respond to the evidence, issues, and hypotheses propounded by the defense"). Specifically, as argued by the prosecutor, if the defendant was standing in the back room, it would have been physically impossible for his bullet holes to end up where they did in the gas station's front window. *See* JA854; *see also* GSA15 (showing the view that the defendant stated he had when he fired his weapon), GSA13 (showing the defendant's bullet holes in the middle of the front window); JA486-87 (testimony establishing that the defendant's bullet holes were on either side of the wood divider in the middle of the front window).

The prosecutor underscored her implausibility point by use of a popular cultural reference, namely the "magic bullet" theory. But far from equating the defendant with

Lee Harvey Oswald, the prosecutor's comments merely invoked the frequently criticized single bullet (or "magic bullet") theory of the Warren Commission to emphasize that the defendant's theory was physically implausible. The Warren Commission concluded that a single bullet passed through President Kennedy's neck and Governor Connally's chest and wrist before embedding itself in the Governor's thigh, *see* Warren Commission Report at 18-19, but this conclusion has been the subject of significant public criticism and analysis based on questions about the plausibility of such a scenario. *See* Single bullet theory, [http://en.wikipedia.org/w/index.php?title=Single\\_bullet\\_theory&oldid=408255893](http://en.wikipedia.org/w/index.php?title=Single_bullet_theory&oldid=408255893) (last visited Jan. 16, 2011) (describing criticism of the Warren Commission's single bullet, or "magic bullet" theory). By sarcastically equating the defendant's theory about where he was standing when he shot at Detective Murray with the magic bullet theory, the prosecutor used a handy cultural reference to argue that the defendant's theory was utterly implausible.

To be sure, the prosecutor could have made the same point without a reference to the magic bullet theory, but she was not required to "parrot[] facts already before the jury," *Wilner*, 523 F.2d at 74, or issue a "detached . . . lecture," *Wexler*, 79 F.2d at 530. Nor was she required to eschew the use of sarcasm as a tool to question the plausibility of the defendant's story. *See Rodriguez*, 587 F.3d at 583 (approving prosecutor's use of sarcasm in closing to "consider the implausibility" of the defendant's claim).

In short, there was nothing improper about the prosecutor's use of a popular cultural reference to question the plausibility of the defendant's testimony on a hotly contested issue.

**b. The defendant's familiarity with guns**

The defendant contends that the prosecutor's description of him as a "gun fanatic" who had multiple weapons and carried a different one every day, distorted the record, was designed to inflame the jury, and amounted to an argument about propensity. Defendant's Br. at 16, 20-21, 26-27. All of these arguments miss the mark. The prosecutor's description of the defendant was a fair characterization of the evidence and a fair response to his testimony.

First, the prosecutor's statements were firmly based in the trial record, which demonstrated that the defendant owned, and was familiar with, multiple weapons.<sup>5</sup> The defendant testified that he owned 17 guns, including 9 pistols and 7 long guns, one of which was a sawed-off shotgun. JA696-97. He admitted that he knew his sawed-off shotgun was legal because the barrel was one-inch longer than the law requires. JA697. He explained that his wife bought him some of his guns and that one of his weapons – the one he fired at Detective Murray – was

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<sup>5</sup> This Court upheld the admission of the firearms evidence at trial, and accordingly, that evidence was properly discussed by counsel in closing arguments. *See Bell*, 584 F.3d at 486.

given to him by a friend for being best man in the friend's wedding. JA736, 738-39. Three of the defendant's guns were registered in his name; according to the defendant, the others were registered in someone else's name. JA735-36.

The defendant's testimony further demonstrated that he not only owned 17 weapons, but also carried and used them frequently. The defendant carried a weapon every day at Buzz's Mobil, although he did not always carry the same gun. JA736-37. He went to the shooting range regularly and on an annual hunting trip. JA698, 743-44. And finally, the record showed that when the defendant first encountered Detective Murray in the office of Buzz's Mobil, he was carrying his gun fully-loaded with hollow-point bullets, and had four back-up bullets in his pocket. JA699-700.

On this record, the prosecutor fairly characterized the defendant as a "gun fanatic" who carried a different weapon every day. He had 17 guns, some of which he received as gifts. In this 17, he had 9 pistols and 7 long-guns, including a sawed-off shot-gun that he knew was legal because the barrel was one inch longer than required by law. He used his guns on hunting trips and on trips to the shooting range. By his own testimony, he carried a weapon every day, although he did not always carry the same one. And on October 1, 2007, when he shot at the officers serving the search warrant, his weapon was fully loaded with hollow-point ammunition, and he had back-up bullets in his pocket.

Although the defendant disagrees with this characterization – preferring instead to portray himself as a law-abiding citizen who carried a lawfully registered firearm for protection – the government’s alternative view of the same evidence was not wrong or distorted. Just as the defendant was free to highlight those parts of the record that were helpful to his defense, so, too, was the government free to highlight the parts of the record helpful to *its* case. The government’s view of the evidence may not have been the only permissible take on the record, but it was certainly a reasonable and permissible one. *See Edwards*, 342 F.3d at 181 (“The government has broad latitude in the inferences it may reasonably suggest to the jury during summation.”) (quoting *United States v. Zackson*, 12 F.3d 1178, 1183 (2d Cir. 1993)); *Myerson*, 18 F.3d at 163 (“It is well settled that the prosecution and defense are entitled to broad latitude in the inferences they may suggest to the jury during closing arguments, provided they do not misstate the evidence.”) (internal quotation omitted).

Moreover, the prosecutor’s description of the defendant’s gun collection was a direct response to the defendant’s testimony, and a challenge to the credibility of that testimony. Through his testimony, the defendant portrayed himself as a law-abiding citizen who owned guns primarily for hunting.<sup>6</sup> JA678, 698, 743, 746. In addition, he attempted to portray himself as somewhat

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<sup>6</sup> Although the defendant testified that he considered Buzz’s Mobil to be in a dangerous neighborhood, JA746, he never claimed that he carried a weapon for self-defense.

naive about guns, professing ignorance about the purpose for hollow-point bullets. JA701. In response, in the opening summation, the prosecution argued that this profession of ignorance about hollow-points bullets was wholly incredible given the defendant's extensive gun collection and obvious familiarity and experience with weapons. JA802. And in rebuttal, the prosecutor argued that given the nature of his weapon collection, it was simply not credible that he owned those guns for hunting. JA846. These direct comments on the defendant's credibility were proper topics for closing argument.

Understood, in context, as a comment on the defendant's credibility and a response to his arguments, the prosecutor's statements about the defendant's familiarity with guns were not "propensity" arguments. *See* Defendant's Br. at 26-27. Because the defendant testified, his credibility was at issue and was a fair topic for closing argument. *See, e.g., United States v. Resto*, 824 F.2d 210, 212 (2d Cir. 1987) (upholding propriety of prosecutor's summation that challenged credibility of defendant who testified at trial). Thus, the prosecutor discussed the defendant's experience with guns to challenge his self-portrayal as someone who owned weapons only for hunting and target practice, not to argue that he had a propensity for gun violence. *See Zackson*, 12 F.3d at 1183 (rejecting claim that prosecutor's description of defendant as "experienced drug dealer," *inter alia*, was improper propensity argument because in context, the comment was an argument that the defendant's innocent explanation for his relationship with another individual was implausible).

The government's responses to the defendant's testimony were reasonable and responsible. They used facts in the record and asked the jury to draw reasonable inferences from those facts, both about the defendant and his credibility as a witness. There was no error in these comments.

**c. The prosecutor's explanation of events of the night of October 1, 2007**

Finally, the defendant argues that the prosecutor's description of the events of October 1, 2007 was improper because it was inflammatory and distorted the record. Defendant's Br. at 17-18, 23-24. Again, the defendant's arguments miss the mark.

The defendant presented himself as a law-abiding, hard-working individual with an innocent explanation for the shooting: he reasonably believed he was being robbed, so he fired in self-defense. While that was one story that could be told about October 1, 2007, it was not the only explanation that could be offered based on the evidence at trial. The government had a different view of the evidence, and presented that alternative view to the jury.

The prosecutor began her rebuttal summation by focusing the jury's attention on a potential motive for the defendant's actions: he wanted to avoid getting caught as part of the illegal gambling operation being run out of Buzz's Mobil. JA844-45. Thus, to counter the defendant's argument that he had no motive to shoot at the police, JA835, the prosecutor highlighted the evidence that

showed he was part of the gambling operation, including evidence that he took bets and kept records on those bets. JA844.

The defendant takes issue with this language, arguing that it “falsely portrayed him as a gambler,” Defendant’s Br. at 25, but this argument is misplaced. The prosecutor never stated that the defendant was a “gambler,” but she *did* argue that he participated in the gambling operation. JA844-45. That argument, which was based on the testimony of Agent Lauer, was a fully proper comment on the evidence. *See* JA758 (testimony of Agent Lauer regarding the defendant’s admission that he participated in gambling operation). Of course, when the defendant testified at trial, he denied being part of the gambling operation, JA721-23, 734, 740, but the defendant’s denial does not mean that the prosecutor falsely portrayed him as a participant in the gambling operation. The prosecutor was entitled to discount the defendant’s testimony and rely instead on other evidence in the record when arguing to the jury about the defendant’s motive.

Moreover, given the evidence that the defendant was a participant in the gambling operation at Buzz’s Mobil for a decade, the prosecutor was entitled to draw the reasonable inference that it could not have come as a surprise to the defendant that the police eventually showed up to investigate that operation. JA845. Far from being inflammatory or a distortion of the evidence, this statement was merely a common sense observation that long-running criminal activity is likely to come to the attention of law enforcement.

After describing a potential motive for the defendant's actions on October 1, 2007, the prosecutor described the defendant's decision to shoot at the officers as a "really bad choice[]," JA845, and then proceeded to put that choice in context. She noted that the defendant had been drinking and that alcohol "lowers your inhibitions." JA845-46. She then asked what that meant for a person, like the defendant, who had 17 guns and carried a weapon every day. JA846. In a further description of the context, the prosecutor noted, based on the evidence, that the defendant was carrying back-up ammunition – hollow-point bullets – in his pocket "as if he's just waiting for a shootout. Why? I don't know, maybe the gun makes him feel tough." JA846.

The defendant objects to this passage, arguing that it was inflammatory and distorting to talk about the bullets in his pocket and to describe him as an "*armed gunman, lying in wait for a shootout with police . . .*" Defendant's Br. at 13 (emphasis added). *See also id.* at 17 (the prosecutor constructed an image of the defendant as "*a gunman, lying in wait for an armed encounter with police . . .*") (emphasis added); 23 ("When government counsel described Mr. Bell as an *armed gunman lying in wait for police, . . .*") (emphasis added); 25 (arguing that the government portrayed the defendant "*as an armed gunman waiting for a long expected violent encounter with the police*") (emphasis added); 25 (arguing that government falsely portrayed the defendant as "*a gambler and a gunman*") (emphasis added); 10 ("[The prosecutor] argued that Mr. Bell had waited, armed and ready, over the course

of a decade *for an expected shootout with law enforcement officers.*”) (emphasis added).

But the prosecutor said no such thing. Although she noted that the defendant could not have been surprised by a police investigation into an illegal gambling ring, JA845, she *never* described the defendant as “lying in wait,” much less as lying in wait for “a shootout with the police.” And although she described the defendant’s familiarity with weapons, she *never* described him as a “gunman,” much less as an “armed gunman.” The defendant’s repeated suggestions to the contrary present a misleading picture of the record. *See* Defendant’s Br. at 10, 13, 17, 23, 25.

Turning from the defendant’s mis-characterization of the record to the prosecutor’s actual words, the defendant’s arguments lose steam. He contends that the prosecutor’s statement that he had bullets “[j]iggling around in his pocket with his spare change, as if he’s just waiting for a shootout” was inflammatory and distorting. But he admitted that he was carrying back-up bullets in his pocket, JA699-700, and indeed, those bullets were in his pocket with some spare change, JA37, 468-71, 525, 700. And one inference to draw from the fact that the defendant – who carried a gun every day – was carrying back-up bullets, in addition to his fully-loaded firearm, was that he was ready for a shootout when he would need more than the five bullets in his gun. *See* JA700. Again, it is not the only inference that can be drawn from the evidence, but it was certainly one inference, based on the evidence in the record. *See Edwards*, 342 F.3d at 181 (“The government has broad latitude in the inferences it may reasonably

suggest to the jury during summation.’”) (quoting *Zackson*, 12 F.3d at 1183).

After describing the context of the scene at Buzz’s Mobil that night, the prosecutor returned to her theme that the defendant made a bad choice. She contended that he could have complied with the officers, but chose not to:

He’s sitting there with his gun, and he’s got his backup ammo, and he’s a little juiced up, and he made a different decision. He didn’t want to get caught. So he turned around and he sized up his competition, Detectives Murray and Hammel, and he thought to himself, I could take ‘em. They don’t even have their guns up. Wise choice? Perhaps not. But a choice nonetheless.

JA847.

This passage offered the jury an alternative explanation for the shooting, based on the evidence, to counter the defendant’s self-defense narrative. The evidence showed that the defendant was in Buzz’s Mobil with a fully-loaded gun, and that he had been drinking.<sup>7</sup> JA700, 702. Furthermore, there was evidence that the defendant was involved in an illegal gambling operation, JA758, and thus the government reasonably inferred that one possible motive for the shooting was to avoid getting caught with

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<sup>7</sup> Contrary to the assertion in the defendant’s brief, the prosecutor never said that the defendant was “juiced up on beer and schnapps.” *See* Defendant’s Br. at 7.

that operation. Finally, the evidence showed that when Detectives Murray and Hammel entered the office and encountered the defendant, they did not have their weapons up. JA179-82, 190-91, 627-28. On this evidence, and with no direct evidence of what was in the defendant's mind, the prosecutor provided the jury with an alternative, plainly plausible explanation for what transpired that night. In context, the prosecutor's comments were simply a reasoned view of the evidence and an attempt to make sense of what happened in Buzz's Mobil based on the evidence presented at trial.

**2. Even if the comments were improper, they did not cause substantial prejudice.**

The Supreme Court has instructed that “[i]nappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding.” *Young*, 470 U.S. at 11. Accordingly, even if this Court were to find any of the prosecutor's comments improper, it should not reverse the defendant's conviction unless those comments resulted in substantial prejudice to the defendant, when considered in the context of the trial as a whole. *See Burden*, 600 F.3d at 221 (“We will not reverse a criminal conviction arising from an otherwise fair trial solely on the basis of inappropriate prosecutorial comments.”). When evaluating whether an error resulted in substantial prejudice, this Court considers “1) the severity of the misconduct; 2) the measures the district court adopted to cure the misconduct; and 3) the certainty of conviction absent the improper statements.” *Id.* at 222.

Here, there is no basis for finding that the prosecutor's comments caused the defendant substantial prejudice. *First*, the allegedly improper statements did not amount to severe misconduct, especially when considered in the context of the whole trial. As described above, the prosecutor used sarcasm and other rhetorical devices to question the defendant's story and present an alternative view of the evidence. All of her comments were based on the evidence, and were direct responses to arguments made by the defendant or defense counsel. Direct responses to a defendant's arguments that are based on the evidence presented at trial hardly qualify as "severe" misconduct. Moreover, the defendant has identified no other errors, much less any alleged prosecutorial misconduct, in the rest of the trial. Thus, at most, the prosecutor's comments, if improper, were "an aberration in an otherwise fair proceeding." *Thomas*, 377 F.3d at 245 (quoting *Elias*, 285 F.3d at 191).

*Second*, the district court adopted appropriate measures to mitigate the impact of any improper comments. Because the defendant did not object to any of the prosecutor's summation, the court had no opportunity to respond directly to the arguments now raised by counsel. Nevertheless, the court instructed the jury to base its decision solely on the evidence in the record, and specifically told the jury that the arguments of counsel were not evidence. JA863-64, 866. *See Elias*, 285 F.3d at 192 (court's instruction that statements of attorneys were not evidence was sufficient to cure potential prejudicial impact of prosecutor's improper remarks in closing argument). There is no reason to believe that the jury could

not follow these basic instructions, and thus they mitigate the impact of any alleged improper comments.

*Finally*, even absent the prosecutor's challenged remarks, the defendant would almost certainly still have been convicted. As a preliminary matter, the jury's split verdict – guilty on three counts but not guilty on another – demonstrates that his convictions “were the result of the jury's assessment of the evidence, not the result of improper argument by the prosecutor.” *Nersesian*, 824 F.2d at 1328; *see also Young*, 470 U.S. at 18, n.15.

Moreover, the evidence against the defendant, and specifically the evidence undermining his self-defense theory, was strong. From the beginning, this case turned on the defendant's claim that he fired on the officers in self-defense. *See, e.g.*, JA59 (defense opening argument). To this end, the government presented evidence about the actions and appearance of the officers during the incident, seeking to demonstrate that there was no question that they were law enforcement officers when they encountered the defendant at Buzz's Mobil. The defendant, for his part, portrayed himself (both through his testimony and the argument and questions of counsel) as a peaceful, hard-working man with two jobs, who reasonably believed he was being robbed when he fired on the officers.

As this Court recognized, the choice between these competing stories about what happened that night at Buzz's Mobil “turned almost entirely on matters of credibility.” *Bell*, 584 F.3d at 485. The prosecutor's challenged remarks went straight to that issue, challenging

the defendant's self-portrait as a peaceful, non-violent man, and his claim that he shot at the officers in self-defense. Thus, the prosecutor's reference to the "magic bullet" theory highlighted the implausibility of the defendant's testimony about his location in the back room when he encountered Detective Murray, and therefore undermined his argument that he did not see or hear the officers until moments before the shooting began. Similarly, the prosecutor's references to the defendant's familiarity with weapons countered his self-portrait as a law-abiding, yet naive, gun owner, unfamiliar with the purpose of hollow-point bullets, who only owned weapons to go hunting. And the prosecutor's explanation of the events that night, including all of the surrounding context, offered a direct challenge to the defendant's self-defense narrative.

But even without the prosecutor's challenged remarks, the defendant's credibility, and thus the plausibility of his self-portrait and his self-defense story, was already severely damaged. Indeed, some of the same points made by the prosecutor at issue here had already been made in the unchallenged, opening summation by the government. Thus, for example, while the rebuttal summation mocked the defendant's claim that he was in the back room as implausible by comparing it to the "magic bullet" theory, the opening summation had already made the same point. There, the prosecutor had argued that the defendant could not have been in the back room, because had he been in that room, common sense said that he would have ducked for cover instead of firing in the face of a gun. JA791. Similarly, while the rebuttal summation used colorful

adjectives to emphasize that the defendant was familiar with weapons, the opening summation had made a similar point, noting that the defendant's professed ignorance about the purpose for hollow-point bullets was undermined by his regular trips to the shooting range and his ownership of multiple guns, including a sawed-off shotgun that he knew was legal based on the length of the barrel. JA802.

Putting aside these two points, though, the defendant's story and credibility were severely undermined by other pieces of evidence, such that there can be little doubt that any mis-statements by the prosecutor in rebuttal had no impact on the jury's verdict. Specifically, other evidence that undermined the defendant's story and credibility including the following:

- The defendant testified that although he had worked at Buzz's Mobil for 16 years, he had no direct knowledge of, or involvement in, a gambling operation, but had heard only rumors about the operation. JA721-22. As the prosecutor noted in summation, this claim itself was implausible given the length and nature of his employment. JA802. The defendant's claim was further undermined by his admission to the FBI that he had received collections for the gambling operation and recorded those collections in a black ledger. JA758.
- The defendant asserted that he was a law-abiding gun owner, emphasizing that the gun he used in the shooting was registered. JA678. On cross-examination,

however, he admitted that he owned at least 17 weapons, but that only a small number of them, maybe as few as 3, were registered in his name. JA734-36.

- The defendant claimed that Buzz's Mobil was in a dangerous neighborhood, JA746, but aside from the defendant's self-serving testimony, there was no evidence of crime rates in the area, or recent robberies. Indeed, under questioning, Sergeant Gonzalez, a life-long resident of Bridgeport with a 23-year career in the police department, testified that he did not consider Buzz's Mobil to be located in a high-crime area. JA568-72. The defendant himself undercut the "dangerous neighborhood" theory when he testified that he left the keys to his truck inside the vehicle, which he parked in the gas station lot. JA747.
- The defendant claimed that he did not see the police markings, badges, or insignia on the officers as they entered the station, and further did not hear them identify themselves as police serving a warrant. JA705-706, 737. This testimony was substantially undermined by the evidence about the officers' appearance and actions at the gas station, *see generally* Statement of Facts, Parts B.1-2, as well as by Lemus's immediate compliance with the officers' instructions, *see* Statement of Facts, Part B.3. Further, the defendant's claim that after the initial shooting he did not hear anyone identify themselves as police, or even the loud sirens of arriving police cars, JA718, was implausible given the consistent testimony by all others present about the events after the shooting and the obvious and

loud police presence in the wake of the shooting, JA198-99, 263-64, 294-95, 359-61, 424, 563-65, 607, 638B-639.

In sum, the evidence that challenged the defendant's credibility and story, and hence his self-defense theory, was abundant. Thus, even without the prosecutor's comments on rebuttal, the jury would have convicted the defendant on the record before it.

**3. The isolated comments identified by the defendant do not constitute reversible plain error.**

Because the defendant did not object to the prosecutor's statements, this Court reviews for plain error. *Caracappa*, 614 F.3d at 41; *Rodriguez*, 587 F.3d at 583. The inquiry into plain error overlaps to some extent with the questions already considered. Thus, as described above, there was no error in this case, *see* Section B.1., *supra*, and even if there was error, there was no impact on the defendant's substantial rights because the trial was otherwise fair, and the defendant cannot show that the prosecutor's statements affected the outcome, *see* Section B.2, *supra*.

In addition, the defendant cannot show that any error in this case was "plain," in the sense of being so clear and obvious, that the district court itself was derelict in failing to notice it. *See Lombardozzi*, 491 F.3d at 73. Here, even if the parties and the court missed the allegedly obvious errors at the time of trial, they also missed these allegedly

obvious errors throughout the briefing on the defendant's new trial motion, the oral argument on that motion, and the briefing and argument to this Court in the first appeal. At no point during this long consideration of the fairness of the defendant's trial did defense counsel or the court ever mention the government's rebuttal summation, even though the defendant raised multiple issues to support his motion and the court invited him to raise even more. *See* JA924-25 (inviting counsel to identify any additional trial errors that might warrant a new trial); *Bell*, 584 F.3d at 483 (describing the grounds for the district court's decision granting the motion for new trial and the defendant's alternative arguments in support of that motion). In short, even if there was error here, that error was far from obvious.

## Conclusion

The prosecutor's rebuttal summation was not improper. The comments challenged here were based on the evidence and were direct responses to the testimony and arguments presented by the defendant. But even if they were improper, the prosecutor's comments did not cause substantial prejudice to the defendant or rise to the level of plain error. The judgment of the district court should be affirmed.

Dated: January 18, 2011

Respectfully submitted,

DAVID B. FEIN  
UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT



SANDRA S. GLOVER  
ASSISTANT U.S. ATTORNEY

TRACY LEE DAYTON  
MICHAEL J. GUSTAFSON  
Assistant United States Attorneys (of counsel)

**CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)**

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,464 words, exclusive of the Table of Contents, Table of Authorities and this Certification.

A handwritten signature in cursive script, reading "Sandra S. Glover".

SANDRA S. GLOVER  
ASSISTANT U.S. ATTORNEY

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Zeldes, Needle & Cooper, P.C.  
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Bridgeport, CT 06604  
ssadin@znclaw.com

*Attorney for Defendant-Appellant  
John W. Bell, Jr.*

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THOMAS L. BURKE

Record Press, Inc.  
229 West 36<sup>th</sup> Street, 8<sup>th</sup> Floor  
New York, New York 10018  
(212) 619-4949