No. 07-2074

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WAYLAND MULLINS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PROOF BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Because the issues presented in this appeal are straightforward, the United States does not believe that oral argument is necessary. However, the United States does not object to oral argument should the Court feel it would be useful.

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STATEMENT OF JURISDICTION

The government concurs in defendant's jurisdictional statement, except with respect to defendant's reference to 18 U.S.C. 3742. Section 3742 addresses appellate review of sentences imposed on criminal defendants. Because defendant has not challenged his sentence, Section 3742 is not applicable here.

ISSUES PRESENTED

1. Whether defendant's trial counsel invited error, thereby foreclosing

review by this Court, when he elicited allegedly inadmissible testimony during cross-examination of a government witness.

2. Whether, in the absence of invited error, the district court committed plain error by not acting *sua sponte* to prevent defendant's trial counsel from eliciting the challenged testimony.

3. Whether the record is sufficient to permit this Court to address defendant's claim of ineffective assistance of counsel, and, if so, whether the claim has merit.

STATEMENT OF THE CASE

On January 5, 2006, a federal grand jury returned an indictment charging defendant, Wayland Mullins, and a co-conspirator, Michael Richardson, with conspiracy against rights in violation of 18 U.S.C. 241 (Count I), interference with housing rights in violation of 42 U.S.C. 3631(a) and 18 U.S.C. 2 (Count II), use of fire in the commission of a felony in violation of 18 U.S.C. 2 and 18 U.S.C. 844(h)(1) (Count III), and conspiracy to obstruct justice in violation of 18 U.S.C. 371 (Count IV). (R. 1 at 1-8, Apx. ___).[1] Richardson pled guilty to all four

[1] Citations to "R. __" refer to documents in the district court record. Citations to "R.* __" refer to notations in the district court record for which there is no docket number. Citations to " __ Tr. __" refer by date and page number to the trial transcript. Citations to "Br. __" refer to Defendant-Appellant's Proof

(continued...)

counts on September 21, 2006. (R.* 9/21/06 plea hearing). Defendant went to trial on these charges in November 2006, but the jury was unable to reach a verdict. The district court declared a mistrial on November 17, 2006. (R.* 11/17/06 declaration of mistrial).

On December 14, 2006, a federal grand jury returned a superseding indictment charging defendant and another co-conspirator, Ricky Cotton, with the same four counts described above. Cotton pled guilty to Count I on April 12, 2007. (R.* 4/12/07 plea hearing). Defendant again proceeded to trial, and, on April 20, 2007, was convicted on all four counts. (R. 70, Apx. __).

On August 28, 2007, the district court sentenced defendant to 207 months' imprisonment and ordered him to pay $12,400 in restitution. (R. 78 at 3-6, Apx. ___). This appeal followed.

STATEMENT OF THE FACTS

From the evidence presented at trial, the jury reasonably could have found the following facts, which are set forth in the light most favorable to the government.

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[1](...continued)
Brief On Appeal.

1. General Background

In 2002, Reginald Doster and his family purchased a home located at 5948 Ziegler Street in Taylor, Michigan. They made a down payment in February, with the understanding that the transaction would not close until July. (Doster, 4/17 Tr. 125, 138, Apx. __). Between February 2002 and July 2002, the Dosters worked to refurbish the property. (Doster, 4/17 Tr. 125-126, Apx. __). They finished this process on or about July 28, 2002, moved in during the latter part of October 2002, and lived there until approximately August 2005. (Doster, 4/17 Tr. 123, 131-133, 149-150, 154, Apx. __). Beginning before they moved in and continuing throughout the time they lived on Ziegler Street, the Dosters, who are African-American, were the subject of racial slurs and racially-motivated actions by some of their neighbors.

2. Defendant's Reaction To The Dosters' Purchase Of The Ziegler Property

The Doster home was located across the street from the home in which defendant grew up and in which his mother and other relatives still live. (Doster, 4/17 Tr. 127, Apx. __; Richardson, 4/18 Tr. 61-62, Apx. __; Church, 4/19 Tr. 68-69, Apx. __). Defendant visited this home (the "Mullins home") often during the relevant time period, and witnesses described it as a kind of central meeting place where certain members of the neighborhood would gather to socialize and drink.

(Wurts, 4/17 Tr. 198-201, Apx. __; Daniely, 4/18 Tr. 11-13, Apx. __; Church, 4/19 Tr. 56-57, Apx. __).

As such, the Dosters' purchase of and efforts to refurbish the house across the street from the Mullins home did not go unnoticed by defendant or certain other members of the neighborhood. Indeed, it was a topic of conversation among those who were not happy about an African-American family moving into the neighborhood. (Daniely, 4/18 Tr. 17-18, Apx. __).

During the period in which the Dosters were refurbishing the property, defendant made comments to friends regarding his desire to drive the Dosters from the neighborhood. One such incident occurred during the middle part of July 2002. (Wurts, 4/17 Tr. 208-209, Apx. __). Defendant and a friend, Guy Wurts, were standing in the back of Wurts' pickup truck, which was parked in front of the Mullins home. (Wurts, 4/17 Tr. 202, Apx. __). The Dosters were out working in their yard at the time. (Wurts, 4/17 Tr. 202-203, 209, Apx. __). Defendant said something to the effect of "I got to get rid of these niggers. I'll find something to do. I don't know what. I got to get these niggers out [of] the neighborhood." (Wurts, 4/17 Tr. 209, Apx. __).[2] Defendant was looking in the Dosters' direction

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[2] Similar descriptions of defendant's statements appear elsewhere in Wurts' testimony. (Wurts, 4/17 Tr. 201-202, 209, 260, Apx. __).

when he made these comments, and said the word "nigger" loud enough for the Dosters to hear it. (Wurts, 4/17 Tr. 209-210, Apx. __). Wurts testified that defendant was a racist, and that defendant "seemed serious" when he made these statements. (Wurts, 4/17 Tr. 239-240, 259-260, Apx. __).

Debbie Daniely, a neighbor and friend of the Mullins family (Daniely, 4/18 Tr. 6-8, Apx. __), recounted similar statements by defendant. Defendant told Daniely more than once that he was very upset about the Dosters moving into the neighborhood. (Daniely, 4/18 Tr. 22, Apx. __). She testified that defendant said something to the effect of "niggers are moving in" and "[w]e have to do something about it." (Daniely, 4/18 Tr. 23, Apx. __).[3] She believed he was serious when he said such things. (Daniely, 4/18 Tr. 25, Apx. __).

3. The Fire

During the afternoon of Sunday, July 28, 2002, defendant, along with Lee Vanderlinden, Don Flowers, Chuck Proctor, Michael Richardson, and Ricky Cotton,[4] were working in the yard of a neighbor, Ann Hixon. (Richardson, 4/18

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[3] Defendant later admitted to the FBI that he made such a statement to Daniely. (Rees, 4/18 Tr. 203, Apx. __).

[4] Lee Vanderlinden was the boyfriend of defendant's mother, and has lived in the Mullins home since at least 1996 or 1997. (Wurts, 4/17 Tr. 197-198, Apx. __). Don Flowers was a friend of the Mullins family who often would socialize

(continued...)

Tr. 56-58, Apx. __).[5] A group that included defendant, Richardson, Vanderlinden, Flowers, and Cotton began making comments about "the niggers next door." (Richardson, 4/18 Tr. 58-59, Apx. __). Richardson suggested burning a cross in order to drive the Dosters away. (Richardson, 4/18 Tr. 61, Apx. __). Defendant, however, went further, suggesting they "[t]orch the house," and told the others to come back later that night. (Richardson, 4/18 Tr. 62-63, Apx. __). Richardson, Vanderlinden, Cotton, and Flowers returned that evening and met defendant at the Mullins home, across the street from the Dosters. (Richardson, 4/18 Tr. 63, Apx. __).[6] They discussed "[t]orching" the Doster home, and all were in favor of doing

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[4](...continued)
with Lee Vanderlinden at the Mullins home. (Church, 4/19 Tr. 58-59, Apx. __). Chuck Proctor worked with Lee Vanderlinden and often would hang around the Mullins home. (Wurts, 4/17 Tr. 199-200, Apx. __; Church, 4/19 Tr. 57-58, Apx. __). Michael Richardson was a good friend of defendant who spent a lot of time at the Mullins home. (Wurts, 4/17 Tr. 201, Apx. __). Ricky Cotton lived nearby and also was a regular at the Mullins home. (Wurts, 4/17 Tr. 200-201, Apx. __). As noted above, Richardson and Cotton both pled guilty in this case. (R.* 9/21/06 and 4/12/07 plea hearings).

[5] Ann Hixon was called by the defense and testified that this gathering could not have taken place on Sunday, July 28. She testified that it occurred sometime during the Spring (she could not recall which year), and that it could not have been a Sunday because she always works on Sundays. (Hixon, 4/19 Tr. 37-38, Apx. __).

[6] Defendant's aunt, Casie Church, lives in the Mullins home and was called to testify by defendant. She stated that she was sitting on the front porch of the house during the late evening and early morning hours of July 28 and 29.

(continued...)

so. (Richardson, 4/18 Tr. 63, Apx. __). Each of them encouraged defendant by "[e]gging him on," and by "[d]aring" and "[i]nciting" him to do so. (Richardson, 4/18 Tr. 64, Apx. __).

Defendant took a can of gasoline from the garage of the Mullins home and went to the back of the Doster home. (Richardson, 4/18 Tr. 64-65, Apx. __). Richardson, Cotton, Flowers, and Vanderlinden served as lookouts, with Richardson following defendant to the Doster home and the other three remaining across the street. (Richardson, 4/18 Tr. 64-65, Apx. __). Upon reaching the back of the Doster home, defendant either pried open or broke a window and poured gasoline inside the house and on the windowsill. (Richardson, 4/18 Tr. 65, 111-114, Apx. __).[7] He then started the fire by holding a lighter up to the windowsill and blowing until it ignited. (Richardson, 4/18 Tr. 113, Apx. __). Once the fire was lit, defendant and Richardson ran back across the street to join the others, where they celebrated and congratulated defendant. (Richardson, 4/18 Tr. 65-66,

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[6](...continued)
(Church, 4/19 Tr. 45, Apx. __). She testified that there was no one near the garage of the Mullins home during this time. (Church, 4/19 Tr. 45, Apx. __). But she stated that she did see someone named Mike sometime between 10 p.m. and 3 a.m. (Church, 4/19 Tr. 45-46, Apx. __).

[7] Richardson's testimony indicates that it may have been a mixture of oil and gasoline. (Richardson, 4/18 Tr. 65, Apx. __).

114-115, Apx. __). Richardson testified that defendant set the fire because of the Dosters' race. (Richardson, 4/18 Tr. 82, Apx. __).

The Dosters had not yet moved into the Ziegler property, and therefore were not home at the time of the fire. They had spent Sunday, July 28, painting the Ziegler property and left sometime between 7 p.m. and 8 p.m. (Doster, 4/17 Tr. 129, 167-168, Apx. __). Reginald Doster discovered there had been a fire when he, along with his wife and ten-year-old daughter, returned to the home between 7 a.m. and 9 a.m. the next morning, by which time the fire had burned out. (Doster, 4/17 Tr. 128-129, 167, 170-171, 176-178, 180-182, Apx. __). Doster testified that a window at the back of the house had been broken and a black "tarish substance had been thrown through the window." (Doster, 4/17 Tr. 129-130, Apx. __). He also described the damage caused by the smoke and fire. (Doster, 4/17 Tr. 129, Apx. __). Upon discovering the damage, Doster called his oldest son, who was a police officer in Detroit. (Doster, 4/17 Tr. 131, Apx. __). Doster's son, in turn, came to the Ziegler property, examined the damage, and then notified the local police and fire departments in Taylor. (Doster, 4/17 Tr. 172, Apx. __).

At trial, the government presented expert testimony from two sources

regarding the origin of the fire.[8] First, Troy Teifer, a fire inspector employed by the fire department in Taylor, testified that the burn pattern he observed at the Doster home "show[ed] a burn that was pretty hot and fast," leading him "to believe that something was added to make it burn the way it did." (Teifer, 4/17 Tr. 186-189, Apx. __). Based on his observations, Teifer concluded that the fire was "intentionally set." (Teifer, 4/17 Tr. 189, Apx. __). Second, Erin Cohoe, a trace-evidence expert from the state police, testified that she found gasoline on a sample of wooden siding taken from outside the back bedroom of the home. (Cohoe, 4/17 Tr. 192-193, Apx. __).

4. Subsequent Intimidatory Actions Against The Dosters

The fire was not the only act of intimidation against the Dosters. Indeed, Reginald Doster testified that he and his family "were constantly harassed" throughout their time on Ziegler Street. (Doster, 4/17 Tr. 132, Apx. __).

At least two of these events occurred during the period between the fire (late July 2002) and the time when the Dosters moved into the Ziegler property (mid-October 2002). (Doster, 4/17 Tr. 150-151, Apx. __). First, someone drove a vehicle across the lawn of the Doster home, leaving deep tire tracks behind.

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[8] Defendant did not contest the qualifications of either expert. (4/17 Tr. 187, 192, Apx. __).

(Doster, 4/17 Tr. 136, 150, Apx. __). Such an event is commonly referred to in the neighborhood as a "lawn job." (Daniely, 4/18 Tr. 33-34; Holmes, 4/18 Tr. 43, Apx. __). A neighbor witnessed the lawn job at the Doster home. She gave a description of the driver and vehicle that matched defendant and defendant's vehicle, but was unable to say with certainty that it was defendant who committed the act. (Holmes, 4/18 Tr. 43-49, Apx. __). However, defendant subsequently confided to a friend that he was the one who had done the lawn job. (Boswell, 4/18 Tr. 244, Apx. __). Second, someone wrote the letters "KKK" on the door of the Doster home. (Doster, 4/17 Tr. 132, 150-151, Apx. __; Richardson, 4/18 Tr. 90, Apx. __).

Doster also testified regarding a number of incidents that occurred after his family moved into the Ziegler property in October 2002. Specifically, he stated that (1) his car was scratched on numerous occasions, and that the tires were punctured and the hood damaged (Doster, 4/17 Tr. 152, Apx. __); (2) a dead cat was left in his backyard (Doster, 4/17 Tr. 152-155, Apx. __); and (3) he had to contact the police on numerous occasions to disperse people who congregated on his lawn (Doster, 4/17 Tr. 159, Apx. __). Citing the toll on his family, Doster sold the Ziegler property and moved out in August 2005. (Doster, 4/17 Tr. 138-139, 154, 166-167, Apx. __).

5. Defendant's Admissions Of Motive And Responsibility

Shortly after the fire, defendant told longtime friend Brian Boswell what he had done. Boswell testified that he had known defendant for 32 years, and that they were "[b]est friends." (Boswell, 4/18 Tr. 238-241, Apx. __). Boswell admitted having been a racist, and described being raised in a home where his father preached racism. (Boswell, 4/18 Tr. 241, Apx. __). He testified that such attitudes were "[e]xtremely common" in the neighborhood, but that he had since come to reject these views. (Boswell, 4/18 Tr. 241-242, Apx. __).

After learning about the fire, Boswell drove by the Ziegler property to see the damage. (Boswell, 4/18 Tr. 242, Apx. __). While there, he stopped to talk to defendant. (Boswell, 4/18 Tr. 242-243, Apx. __). During their conversation, defendant described how he had broken the back window of the Doster home, poured the gasoline, and lit the fire. (Boswell, 4/18 Tr. 243-244, Apx. __). Defendant also admitted to Boswell that he was responsible for the lawn job at the Doster home. (Boswell, 4/18 Tr. 243-244, Apx. __). According to Boswell, defendant was clear in stating that he set the fire and performed the lawn job in order to "[k]eep the niggers out of here." (Boswell, 4/18 Tr. 244-245, Apx. __).

6. Defendant's Statements To The Government

Agents from the Federal Bureau of Investigation (FBI) first interviewed defendant on or about May 5, 2003. (Smith, 4/18 Tr. 137, Apx. __). During this interview, defendant told Special Agent Matthew Smith he knew nothing about the fire other than what he heard from his mother: that it was set by some "brats or punks" that lived in the neighborhood. (Smith, 4/18 Tr. 137, Apx. __).

Following his first trial, which ended in a hung jury, defendant agreed to a second interview on March 15, 2007, approximately one month before his second trial. At the outset of this interview, defendant again claimed not to have been involved in any way with the fire. (Rees, 4/18 Tr. 201, Apx. __). He told Special Agent Jeff Rees that he did not know who was responsible for the fire, and would tell Agent Rees if he did know. (Rees, 4/18 Tr. 201, Apx. __).

When asked during this second interview about racially-charged statements regarding the Dosters moving into the neighborhood, defendant's answers followed what Agent Rees described as a "progression." (Rees, 4/18 Tr. 202, Apx. __). Defendant initially admitted that others made such statements in his presence. (Rees, 4/18 Tr. 202, Apx. __). He later conceded he was in agreement with such statements and admitted making some himself, with the caveat that he never threatened anyone. (Rees, 4/18 Tr. 202-203, Apx. __). Specifically,

defendant admitted making such statements on more than one occasion and conceded he made such a statement in the presence of Daniely. (Rees, 4/18 Tr. 203, Apx. __).

When pressed on the issue of who was responsible for the fire, defendant indicated he had his suspicions. (Rees, 4/18 Tr. 203, Apx. __). While not directly accusing anyone, he gave the FBI names of people who could be involved. (Rees, 4/18 Tr. 203-204, Apx. __). However, when confronted with evidence pointing toward his own involvement in the fire, defendant "became visibly nervous" and took a break from the interview. (Rees, 4/18 Tr. 204-205, Apx. __).

Following this break, defendant's story changed. He admitted he was responsible for the fire, albeit indirectly. (Rees, 4/18 Tr. 205, Apx. __). Specifically, defendant claimed the fire was set by a man named Kyle. (Rees, 4/18 Tr. 205, Apx. __). He described how he was present, heard the sound of "glass breaking or metal bending," and saw Kyle pour gas on the window and set it on fire. (Rees, 4/18 Tr. 206, Apx. __).

According to defendant, Kyle became involved because another man, Joey Canales, owed defendant a favor. (Rees, 4/18 Tr. 206, Apx. __). Defendant claimed to have told Canales that he wanted the Doster home burned because he was angry at how the prior owner of the property had treated two families that

formerly rented the home. (Rees, 4/18 Tr. 206-207, Apx. __). Defendant explained that, in response, Canales woke him up at 3 a.m. and indicated he was prepared to repay the favor he owed. (Rees, 4/18 Tr. 206-207, Apx. __). Defendant claimed the two of them then drove to Detroit, picked up Kyle (who was carrying a gas can) in an alley, and went to the Doster home. (Rees, 4/18 Tr. 206-207, Apx. __). Defendant asserted that he tried unsuccessfully to stop Kyle. (Rees, 4/18 Tr. 207, Apx. __). He also denied that his desire to have the Doster home burned was racially motivated. (Rees, 4/18 Tr. 207, 209, Apx. __). Defendant maintained that no one else – including Richardson, Cotton, and Vanderlinden – was present or involved in setting the fire. (Rees, 4/18 Tr. 208-209, Apx. __).

SUMMARY OF ARGUMENT

On appeal, defendant challenges the district court's failure to *sua sponte* prevent his trial counsel from eliciting allegedly inadmissible statements during cross-examination of a government witness. Defendant also asserts that his trial counsel's decision to elicit such statements deprived him of his right to effective assistance of counsel. Both arguments are without merit. This Court therefore should affirm the judgment below.

1. Any error that may have occurred with regard to the admission of the

challenged statements was invited error, as it was defense counsel who elicited the statements during cross-examination of a government witness. Thus, the issue is not reviewable unless this Court determines that the interests of justice require review. No such determination is appropriate here.

2. If the Court were to determine that the invited-error doctrine does not apply, review is for plain error. But defendant has not argued plain error. Nor could he establish it even if he had properly advanced the issue.

Defendant cannot satisfy the third and fourth prongs of the plain-error inquiry – which require a showing that the error affected both the outcome and "the fairness, integrity, or public reputation" of the trial – because the evidence supporting his conviction is overwhelming. The government produced evidence establishing that defendant (1) spoke openly to others during the weeks leading up to the fire regarding his desire to force the Dosters from the neighborhood; (2) was the one who set the fire at the Doster home; (3) confided to a friend afterward that he both set the fire and performed the lawn job at the Doster home, and that his intent in doing so was to drive the Dosters away because of their race; and (4) told conflicting stories to the FBI during the course of its investigation, one of which included an admission that he was at least indirectly involved in setting the fire. Accordingly, the jury would have reached the same conclusion even in the absence

of the challenged statements.

In addition, defendant failed to carry his burden of demonstrating that the challenged statements were inadmissible in the first instance. Thus, he also cannot satisfy the first two prongs of the plain-error inquiry.

3. With regard to defendant's ineffective-assistance-of-counsel claim, the record is not sufficiently developed. This Court therefore should follow its well-established practice of declining to address such claims on direct appeal. Moreover, even if the Court were to address the merits of defendant's ineffective-assistance claim on direct appeal, he cannot satisfy the second prong of the inquiry – which requires a showing of prejudice – for the same reason that he cannot satisfy the third and fourth prongs of the plain-error inquiry: the evidence of his guilt, even apart from the challenged statements, is overwhelming.

ARGUMENT

Defendant challenges a series of statements elicited by his retained trial counsel during cross-examination of an FBI agent who testified as part of the government's case-in-chief. The full text of these exchanges may be found at the following points in the trial transcript: 4/18 Tr. 173-174, Apx. __; 4/18 Tr. 183-188, Apx. __; 4/18 Tr. 190-199, Apx. __.

In broad terms, the challenged statements indicate (1) the agent believed the

testimony of Richardson; (2) Cotton told the agent he was present and watched defendant set the fire; and (3) the agent believed Cotton lied several times, but that the final version of events that Cotton told the government was true and "matches the evidence." Defense counsel also elicited during these exchanges that Cotton (4) told "numerous lies"; (5) was charged with the same crimes as defendant; and (6) made a deal with the government and pled guilty to certain charges in exchange for the dismissal of others.

Defendant contends (1) this testimony was inadmissible hearsay, and constituted improper vouching with respect to certain testimony; and (2) his retained trial counsel, by eliciting such testimony, failed to provide effective assistance of counsel. For the reasons set forth below, defendant's arguments have no merit and should be rejected.

I

ANY ERROR WITH REGARD TO THE CHALLENGED STATEMENTS CONSTITUTES "INVITED ERROR," AND THUS SHOULD NOT BE REVIEWED BY THIS COURT

A. Standard Of Review

Defendant is correct in noting (Br. 3) that evidentiary rulings typically are reviewed for abuse of discretion. *United States* v. *Hadley*, 431 F.3d 484, 495-496 (6th Cir. 2005), cert. denied, 127 S. Ct. 47 (2006). Here, however, defendant did

not object at trial, and the statements he now challenges on appeal were in fact elicited by his own trial counsel. Accordingly, this Court should invoke the invited-error doctrine and decline to review the challenged statements under any standard. *United States* v. *Namey*, 364 F.3d 843, 846 (6th Cir. 2004), cert. denied, 543 U.S. 875 (2004). In the alternative, if this Court determines that the invited-error doctrine does not apply, it should (as discussed below in Section II) review admission of the challenged statements for plain error. *Ibid.*

B. The Invited-Error Doctrine

"Under the doctrine of invited error, a party may not complain on appeal of errors he himself invited." *Namey*, 364 F.3d at 846. See also *United States* v. *Barrow*, 118 F.3d 482, 490 (6th Cir. 1997); *United States* v. *Jackson*, 124 F.3d 607, 617 (4th Cir. 1997), cert. denied, 522 U.S. 1066 (1998) ("The 'invited error' doctrine recognizes that a court cannot be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request.") (citation and internal quotations omitted). "This doctrine is a branch of the doctrine of waiver by which courts prevent a party from inducing an erroneous ruling and later seeking to profit from the legal consequences by having the verdict vacated." *Barrow*, 118 F.3d at 490-491.

Some courts have held that the existence of invited error forecloses any

review – even for plain error. See, *e.g.*, *United States* v. *Baker*, 432 F.3d 1189, 1216 (11th Cir. 2005), cert. denied, 547 U.S. 1085 (2006) ("It is a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party. * * * Where invited error exists, it precludes a court from invoking the plain error rule and reversing."); *United States* v. *Fulford*, 980 F.2d 1110, 1116 (7th Cir. 1992) ("It is well-settled that where error is invited, not even plain error permits reversal."). This Court, however, has recognized an exception, holding that "[i]nvited error * * * does not foreclose relief when the interests of justice demand otherwise." *Barrow*, 118 F.3d at 491. In this Circuit, the question "[w]hether the circumstances of a particular case justify deviation from the normal rule of waiver under this doctrine is left largely to the discretion of the appellate court." *Ibid.* Nevertheless, "[u]nder the invited error doctrine, an error introduced by the complaining party will cause reversal only in the most exceptional situation." *United States* v. *Tandon*, 111 F.3d 482, 489 (6th Cir. 1997) (citation and internal quotations omitted).

C. Any Error By The District Court In Permitting The Challenged Statements Was Invited Error, And Therefore Should Not Be Reviewed By This Court

Here, all of the challenged statements were elicited by defendant's retained trial counsel. Br. 15-24. This plainly constitutes invited error. See *United States*

v. *Parikh*, 858 F.2d 688, 695 (11th Cir. 1988) ("We hold that the admission of out of court statements by a government witness, when responding to an inquiry by defense counsel, creates 'invited error.'"). See also *Baker*, 432 F.3d at 1215-1216 (defendant "cannot now complain about the district court's error" where his counsel "invited the error" by eliciting hearsay during cross-examination); *United States* v. *Neal*, 78 F.3d 901, 904 (4th Cir. 1996) (defendant "invited the error," and it therefore "provides no basis for reversal," where, "[a]t trial, [defendant] did not object to any of the statements he now challenges" and "most were elicited by his own attorney from a government witness during cross-examination"); *United States* v. *Reyes-Alvarado*, 963 F.2d 1184, 1187 (9th Cir. 1992), cert. denied, 506 U.S. 890 (1992) (finding invited error and refusing to reverse where "appellant's counsel solicited the testimony which he now claims should have been excluded" and "did not seek to strike this testimony at the time it was given").[9]

As a threshold matter, it bears noting that defendant fails to acknowledge the existence of invited error and makes no argument as to why "the interests of justice," *Barrow*, 118 F.3d at 491, require this Court to refrain from applying the invited-error doctrine. Accordingly, defendant has waived any right to invoke the

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[9] This Court has reached a similar conclusion, albeit in an unpublished decision. See *United States* v. *Ali*, 38 Fed. Appx. 220, 224 (6th Cir. Mar. 26, 2002) (unpublished).

interests-of-justice exception recognized by this Court. See *United States* v. *Samour*, 199 F.3d 821, 822 n.1 (6th Cir. 1999) (defendant "waived his right to argue the applicability of [favorable precedent] by failing to raise the issue on appeal").

Even if not waived, however, the interests of justice do not require this Court to depart from the general rule that relief is foreclosed by invited error. The challenged statements were not the result of mere oversight or an isolated error by defendant's trial counsel. Rather, this appears to be a classic example of trial strategy gone awry – not a situation in which failure to reverse contravenes the interests of justice. Indeed, in this case the interests of justice weigh *in favor* of invoking the invited-error doctrine, as defendant presumably sought to benefit from eliciting the challenged statements, and thus should not now be heard to argue their inadmissibility simply because his strategy failed. See *Reyes-Alvarado*, 963 F.2d at 1187 ("From the transcript, it appears that counsel thought his pursuit of this line of questioning might benefit his client. His tactics backfired, and his client was convicted. * * * A defendant cannot have it both ways. This was invited error and therefore not grounds for reversal.").

Moreover, the government's trial counsel showed an abundance of caution by specifically raising the issue and asking whether it should be discussed at

sidebar.[10] This too weighs against a finding that the interests of justice require reversal. See *Neal*, 78 F.3d at 904 ("At one point, the prosecutor even tried to warn [defendant's] attorney about pursuing a line of questioning relating to the defendant's prior conduct, but [defendant's] attorney persisted. Under these circumstances, [defendant] cannot complain of error which he himself has invited.") (citation and internal quotations omitted).

Simply put, this case precisely illustrates both the purpose behind the

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[10] The following exchange occurred when defense counsel elicited statements from the witness regarding what Ricky Cotton told the government:

[Defense Counsel:] * * * Just tell us what Ricky Cotton said and let me -- tell us what obviously is hearsay. I'll sit down. Tell us what Ricky Cotton --

[Government Counsel:] Your Honor, should we have a sidebar on this?

[The Court:] What for?

[Government Counsel:] I'm not sure, to figure out where we are.

[Defense Counsel:] This is where we are, what Ricky Cotton said.

[The Court:] Are you objecting?

[Government Counsel:] If he doesn't have any objection to the witness saying what Ricky Cotton said, that's fine.

[Defense Counsel:] Let's go. Tell us what Ricky Cotton said.

(4/18 Tr. 173-174, Apx. __).

invited-error doctrine and the need to enforce it strictly. Defendant's appeal does not challenge any action by the government. Nor does he take issue with the district court's instructions to the jury, the sufficiency of the evidence to support his conviction, or the reasonableness of his sentence. He also does not contend the district court improperly ruled on any objection made by his trial counsel. Rather, his arguments on appeal arise solely from the actions of his own retained trial counsel. Such claims must be rejected on their face, as a contrary rule would create perverse incentives for defendants to invite some small amount of error in every trial so as to create grounds for appeal. Accordingly, this Court should apply the invited-error doctrine and affirm the judgment below without reaching the question whether plain error exists.

II

THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR IN FAILING TO SUA SPONTE PREVENT DEFENDANT'S TRIAL COUNSEL FROM ELICITING THE CHALLENGED TESTIMONY

As noted above in Section I.A., if this Court determines that the invited-error doctrine does not apply, it should review admission of the challenged statements for plain error. *United States* v. *Namey*, 364 F.3d 843, 846 (6th Cir. 2004).

A. The Plain-Error Doctrine

"The plain error doctrine mandates reversal only in exceptional circumstances and only where the error is so plain that the trial judge and prosecutor were derelict in countenancing it." *United States* v. *Gardiner*, 463 F.3d 445, 459 (6th Cir. 2006) (quoting *United States* v. *Carroll*, 26 F.3d 1380, 1383 (6th Cir. 1994)). It "is to be used sparingly, only in exceptional circumstances, and solely to avoid a miscarriage of justice." *United States* v. *Phillips*, 516 F.3d 479, 487 (6th Cir. 2008) (quoting *United States* v. *Cox*, 957 F.2d 264, 267 (6th Cir. 1992)).

"To show plain error, a defendant must establish the following: (1) error, (2) that is plain, and (3) that affects substantial rights. If these three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Arnold*, 486 F.3d 177, 194 (6th Cir. 2007), cert. denied, 128 S. Ct. 871 (2008) (citation and internal quotations omitted). "The phrase 'affects substantial rights' 'means prejudicial: It must have affected the outcome of the district court proceedings.'" *United States* v. *Mooneyham*, 473 F.3d 280, 288 (6th Cir.), cert. denied, 128 S. Ct. 531 (2007) (quoting *United States* v. *Olano*, 507 U.S. 725, 734 (1993)). If the fourth prong of

the above-described standard is not met, this Court need not address the question whether the other prongs are satisfied. See *Arnold*, 486 F.3d at 194.

B. Defendant Fails To Argue Plain Error On Appeal

Under the plain-error doctrine, defendant bears "the burden of proof in demonstrating plain error." *United States* v. *Abboud*, 438 F.3d 554, 588 (6th Cir.), cert. denied, 127 S. Ct. 446 (2006). "Defendant[] cannot meet [his] burden by merely uttering the words that plain error occurred; [he] must actually demonstrate the error to this court." *Ibid.*

Here, defendant's brief does not even "utter[] the words." *Abboud*, 438 F.3d at 558. It makes no mention of the term "plain error." Nor does it make any effort to address the four prongs of the plain-error doctrine described above. Accordingly, defendant's argument should be rejected on this basis alone, as he has failed to carry his burden of demonstrating plain error. See *United States* v. *Layne*, 192 F.3d 556, 566-567 (6th Cir. 1999), cert. denied, 529 U.S. 1029 (2000) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived") (quoting *McPherson* v. *Kelsey*, 125 F.3d 989, 995-996 (6th Cir. 1997)).

C. The Third And Fourth Prongs Of The Plain-Error Doctrine Are Not Satisfied In This Case Because Other Evidence Supporting Defendant's Conviction Is Overwhelming

Even if the issue were fully briefed, a finding of plain error would be improper because defendant cannot satisfy the third or fourth prongs of the inquiry. The third prong of the plain-error inquiry – *i.e.*, the requirement that the error "affects substantial rights," *Arnold*, 486 F.3d at 194, by "affect[ing] the outcome of the district court proceedings," *Mooneyham*, 473 F.3d at 288 – is not satisfied where the evidence against the defendant is overwhelming. See *Mooneyham*, 473 F.3d at 288; *United States* v. *Hines*, 398 F.3d 713, 718-719 (6th Cir.), cert. denied, 545 U.S. 1134 (2005).

Likewise, the fourth prong of the inquiry – *i.e.*, the requirement that the error be said to have "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," *Arnold*, 486 F.3d at 194 – also is not met when other evidence is "overwhelming" and "essentially uncontroverted." See *United States* v. *Cotton*, 535 U.S. 625, 632-633 (2002); *Johnson* v. *United States*, 520 U.S. 461, 469-470 (1997); *Hines*, 398 F.3d at 718-719. Indeed, as both the Supreme Court and this Court have recognized with regard to the fourth prong of the inquiry, in some cases "it would be *the reversal* of a conviction * * * which would have th[e] effect" of "seriously affect[ing] the fairness, integrity or public

reputation of judicial proceedings." *Johnson*, 520 U.S. at 470 (internal quotations omitted) (emphasis added); see also *United States* v. *McGhee*, 119 F.3d 422, 424-425 (6th Cir. 1997). This is so because "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Johnson*, 520 U.S. at 470 (citation and internal quotations omitted); see also *McGhee*, 119 F.3d at 424-425.

In view of the foregoing, courts often cite the presence of overwhelming evidence as the basis for concluding that a defendant has failed to meet *both* the third and fourth prongs of the plain-error inquiry. See *Hines*, 398 F.3d at 718-719; *United States* v. *Dedhia*, 134 F.3d 802, 809 (6th Cir.), cert. denied, 523 U.S. 1145 (1998); see also *United States* v. *Birk*, 453 F.3d 893, 898 (7th Cir. 2006); *United States* v. *Taylor*, 284 F.3d 95, 102 (1st Cir.), cert. denied, 536 U.S. 933 (2002). This Court should follow that approach here, as there is overwhelming evidence – separate and apart from the challenged statements – to support defendant's conviction. Specifically, as explained more fully below, testimony at trial established that defendant (1) spoke openly to others during the weeks leading up to the fire regarding his desire to force the Dosters from the neighborhood; (2) was the one who set the fire; (3) confided to a friend afterward that he both set the fire and performed the lawn job with the intent to drive the Dosters away because of

their race; and (4) told conflicting stories to the FBI during the course of its investigation, one of which included an admission that he was at least indirectly involved in setting the fire.

1. Defendant's Statements Prior To The Fire

Two witnesses offered detailed accounts of conversations they had with defendant prior to the date of the fire. During these conversations, defendant expressed his desire to drive the Dosters from their home.

Guy Wurts testified that, in mid-July 2002, Defendant said something to the effect of "I got to get rid of these niggers. I'll find something to do. I don't know what. I got to get these niggers out [of] the neighborhood." (Wurts, 4/17 Tr. 208-209, Apx. __). Wurts testified that defendant looked in the Dosters' direction when he made these comments, and said the word "nigger" loud enough for the Dosters – who were working in their yard at the time – to hear it. (Wurts, 4/17 Tr. 202-203, 209-210, Apx. __). Wurts further testified that defendant "seemed serious" when he made these statements. (Wurts, 4/17 Tr. 259, Apx. __).

Debbie Daniely recounted similar statements by defendant. Specifically, defendant told Daniely more than once that he was very upset about the Dosters moving into the neighborhood, saying something to the effect of "niggers are moving in" and "[w]e have to do something about it." (Daniely, 4/18 Tr. 22-25,

Apx. __). Defendant later admitted to the FBI that he made such a statement to Daniely. (Rees, 4/18 Tr. 203, Apx. __). Like Wurts, Daniely believed defendant was serious when he made these statements. (Daniely, 4/18 Tr. 25, Apx. __).

Accordingly, there was ample evidence that, during the time period leading up to the fire, defendant made known his desire to drive the Dosters from the neighborhood because of their race.

2. Eyewitness And Expert Testimony Regarding The Fire

Michael Richardson, one of defendant's co-conspirators, testified in detail as to what occurred the day of the fire. Richardson explained that, on the afternoon of July 28, 2002, he, defendant, and others were gathered in the yard of a neighbor. (Richardson, 4/18 Tr. 57-58, Apx. __). They began making comments about "the niggers next door," and Richardson admitted he suggested burning a cross in order to drive the Dosters away. (Richardson, 4/18 Tr. 58-61, Apx. __). Defendant, however, went further, suggesting they "[t]orch the house," and instructed the others to come back later that night. (Richardson, 4/18 Tr. 62-63, Apx. __).

Richardson described how they met that evening and discussed "[t]orching" the Doster home. (Richardson, 4/18 Tr. 63, Apx. __). He testified that defendant, carrying a can of gasoline, went to the back of the Doster home. (Richardson,

4/18 Tr. 64-65, Apx. __). Richardson and the others served as lookouts, with Richardson following defendant to the rear of the Doster home while the other three remained across the street. (Richardson, 4/18 Tr. 64-65, Apx. __). Richardson explained how defendant, upon reaching the back of the Doster home, either pried open or broke a window, poured gasoline inside the house and on the windowsill, and then started the fire by holding a lighter toward the windowsill and blowing until it ignited. (Richardson, 4/18 Tr. 65, 111-114 Apx. __). Richardson further testified that defendant set the fire because the Dosters were African-American. (Richardson, 4/18 Tr. 82, Apx. __).

Richardson's testimony regarding how defendant set the fire was consistent with that given by the government's expert witnesses. Teifer, a fire inspector, testified that the burn pattern he observed at the Doster home "show[ed] a burn that was pretty hot and fast," leading him "to believe that something was added to make it burn the way it did" and that the fire was "intentionally set." (Teifer, 4/17 Tr. 186-189, Apx. __). And Cohoe, a trace-evidence expert, testified that she found gasoline on a sample of wooden siding taken from outside the back bedroom of the home. (Cohoe, 4/17 Tr. 192-193, Apx. __). Richardson's testimony also matches what Doster found when he returned to the home the morning after the fire. Doster testified that a window at the back of the home had

been broken and a black "tarish substance had been thrown through the window." (Doster, 4/17 Tr. 129-130, Apx. __).

Thus, the jury heard eyewitness testimony from a co-conspirator regarding how the fire was set, and this testimony was consistent with that of both the homeowner and the experts who examined physical evidence relating to the fire.

3. Defendant's Confession

Following the fire, defendant confided to longtime friend Boswell that he was responsible for both the fire and the lawn job at the Doster residence. (Boswell, 4/18 Tr. 242-244, Apx. __). Boswell testified that, with regard to the fire, defendant described how he had broken the back window of the Doster home, poured the gasoline, and lit the fire. (Boswell, 4/18 Tr. 243-244, Apx. __). According to Boswell, defendant was clear in stating that he set the fire and performed the lawn job in order to "[k]eep the niggers out of here." (Boswell, 4/18 Tr. 244-245, Apx. __).

Significantly, Boswell's testimony directly corroborates testimony from Richardson, Doster, and the two expert witnesses as to how the fire was set. It also corroborates Richardson's testimony regarding defendant's motive for setting the fire.

4. Defendant's Statements To The FBI

In two interviews nearly four years apart, defendant told the FBI he knew nothing about the fire. (Smith, 4/18 Tr. 137; Rees, 4/18 Tr. 201, Apx. __). During the second interview, he tried casting suspicion on others. (Rees, 4/18 Tr. 203-204, Apx. __). Only when confronted with evidence against him – and given a break to compose himself – did defendant admit any involvement in the fire. (Rees, 4/18 Tr. 204-205, Apx. __). Even then, defendant denied having set the fire, blaming it instead on someone named Kyle. (Rees, 4/18 Tr. 205, Apx. __).

This final version of events told by defendant is significant in two respects. First, defendant's description of how Kyle supposedly set the fire – *i.e.*, how defendant heard the sound of "glass breaking or metal bending," and saw Kyle pour gas on the window and set it on fire (Rees, 4/18 Tr. 206, Apx. __) – matches Richardson's description of how defendant set the fire. The only substantive difference in defendant's version of the story is that he substituted Kyle for himself.

Second, defendant claimed Richardson was not involved in setting the fire. (Rees, 4/18 Tr. 208-209, Apx. __). Thus, in order to accept defendant's version of events, the jury would have to have concluded that Richardson's testimony regarding the fire was fabricated, and that he agreed to plead guilty and cooperate

with the government despite having not been involved in the fire.

5. The Challenged Statements Had No Impact On The Proceeding Below

In view of the foregoing, it is clear the challenged statements were largely cumulative or otherwise unnecessary, and thus added little to the government's case. Even without such statements, the evidence of defendant's guilt was overwhelming. Accordingly, the challenged statements did not affect defendant's "substantial rights," *Arnold*, 486 F.3d at 194, because they did not "affect[] the outcome of the district court proceedings." *Mooneyham*, 473 F.3d at 288. They also did not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Arnold*, 486 F.3d at 194. Thus, defendant is unable to satisfy either the third or fourth prongs of the inquiry, and there can be no finding of plain error.

D. Defendant Fails To Demonstrate Error In The First Instance

As noted above, defendant bears "the burden of proof in demonstrating plain error." *Abboud*, 438 F.3d at 588. Although it is unnecessary for this Court to reach the issue in view of the fact that defendant is unable to satisfy the third or fourth prongs of the plain-error inquiry, see *Arnold*, 486 F.3d at 194, the government does not concede that defendant has carried his burden of

demonstrating that the first two prongs of the plain-error inquiry are satisfied.

Defendant's brief simply reproduces large passages from the trial transcript and asserts that they contain inadmissible statements. There is no attempt to parse the statements and explain precisely which – if any – are inadmissible, or to identify what basis exists for excluding each statement. In addition, because no objection was made at trial, the government was not given the opportunity to contemporaneously offer possible bases for admission, such as an assertion that the challenged statements are not hearsay, or that they fall within an exception to hearsay such as the one for statements against interest.

These shortcomings underscore why this Court should – as explained in Section I above – invoke the invited-error doctrine and decline to review the challenged statements. In the alternative, they also clearly demonstrate that defendant failed to carry his burden with regard to satisfying the first two prongs of the plain-error inquiry. See *Abboud*, 438 F.3d at 588; *Layne*, 192 F.3d at 566-567.

III

THE RECORD DOES NOT SUPPORT DEFENDANT'S INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIM

A. Standard Of Review

This Court "review[s] de novo claims of ineffective assistance of counsel because they are mixed questions of law and fact." *United States* v. *Wagner*, 382 F.3d 598, 615 (6th Cir. 2004).

B. The Record In This Direct Appeal Is Insufficient To Permit Review Of Defendant's Claim

"As a general rule, a defendant may not raise ineffective assistance of counsel claims for the first time on direct appeal, since there has not been an opportunity to develop and include in the record evidence bearing on the merits of the allegations." *United States* v. *Martinez*, 430 F.3d 317, 338 (6th Cir. 2005), cert. denied, 547 U.S. 1034 (2006) (quoting *United States* v. *Wunder*, 919 F.2d 34, 37 (6th Cir. 1990)). "This rule stems from the fact that a finding of prejudice is a prerequisite to a claim for ineffective assistance of counsel, and appellate courts are not equipped to resolve factual issues." *United States* v. *Graham*, 484 F.3d 413, 421 (6th Cir. 2007), cert. denied, 128 S. Ct. 1703 (2008). Accordingly, "[t]his Court has 'routinely concluded that such claims are best brought by a defendant in a post-conviction proceeding under 28 U.S.C. § 2255 so that the

parties can develop an adequate record on the issue.'" *Martinez*, 430 F.3d at 338 (quoting *United States* v. *Brown*, 332 F.3d 363, 368 (6th Cir. 2003)). "There is, however, 'a narrow exception' to this rule 'when the existing record is adequate to assess properly the merits of the claim.'" *United States* v. *Hynes*, 467 F.3d 951, 969 (6th Cir. 2006) (quoting *United States* v. *Franklin*, 415 F.3d 537, 555-556 (6th Cir. 2005)). See also *United States* v. *Winkle*, 477 F.3d 407, 421 (6th Cir. 2007) ("This Court typically will not review a claim of ineffective assistance on direct appeal except in rare cases where the error is apparent from the existing record.") (quoting *United States* v. *Lopez-Medina*, 461 F.3d 724, 737 (6th Cir. 2006)).

No basis exists for departing from the general rule against addressing ineffective-assistance claims on direct appeal. As this Court has noted, "[t]he trial process contains a myriad of complex decisions that, for strategic reasons, are sound when made, but may appear unsound with the benefit of hindsight." *United States* v. *Davis*, 306 F.3d 398, 422 (6th Cir. 2002), cert. denied, 537 U.S. 1208 (2003) (quoting *United States* v. *Fortson*, 194 F.3d 730, 736 (6th Cir. 1999)). Moreover, "[j]udicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

Strickland v. *Washington*, 466 U.S. 668, 689 (1984). Thus, to establish ineffective assistance, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Ibid.* (quoting *Michel* v. *Louisiana*, 350 U.S. 91, 101 (1955)).

Here, the decision by defendant's retained trial counsel to elicit the challenged statements during cross-examination of a government witness undeniably constitutes an element of trial strategy that cannot be analyzed at this stage of the proceedings. In particular, because this is a direct appeal, there is no evidence in the record regarding defense counsel's trial strategy. This Court repeatedly has refused to review ineffective-assistance claims under such circumstances. See, *e.g.*, *Lopez-Medina*, 461 F.3d at 737 ("Absent evidence specifically addressing counsel's performance, we cannot determine whether his actions reflected a reasoned trial strategy."); *United States* v. *Sullivan*, 431 F.3d 976, 986 (6th Cir. 2005) ("Without an explanation from trial counsel as to why he failed to call the alibi witness we have no basis to determine whether this decision was the result of inadequate representation or reasonable trial strategy."); *United States* v. *Allison*, 59 F.3d 43, 47 (6th Cir.), cert. denied, 516 U.S. 1002 (1995) ("[T]he sparse record before this court does not reveal whether the attorney's actions could be considered sound trial strategy."); *United States* v. *Snow*, 48 F.3d

198, 199 (6th Cir. 1995) ("The record before this court simply is insufficient to show whether the alleged wrongful acts could be considered sound trial strategy."). Thus, defendant's ineffective-assistance claim must be examined – if at all – in a separate collateral proceeding brought pursuant to Section 2255.

C. The Evidence That Is Available In The Record Does Not Support A Finding Of Ineffective Assistance Of Counsel

As stated above, the government's position is that the current record is not sufficient to permit this Court to address defendant's ineffective-assistance claim in this direct appeal. However, if the Court disagrees – or desires in the interest of judicial economy to address defendant's claim on direct appeal – it should reject the claim because defendant fails to satisfy the second prong of the ineffective-assistance inquiry.[11]

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[11] The government does not concede that the first prong of the *Strickland* inquiry is satisfied in this case. Rather, as noted above, it is not possible to resolve the issue at this point because the record does not indicate precisely what defendant's trial counsel was thinking, what his strategy was, or why he elected to pursue certain lines of questioning. In the event that defendant elects to bring a collateral challenge pursuant to Section 2255, the government reserves the right to address the first prong of *Strickland* inquiry and to further develop its argument as to the second prong. The government's decision not to do so in this brief is based on the incomplete nature of the record with regard to the *Strickland* inquiry, and should not be construed as a waiver or forfeiture of any arguments relating to defendant's ineffective-assistance claim.

1. Standard For Establishing Ineffective Assistance Of Counsel

To prove ineffective assistance of counsel under *Strickland*, a defendant first "must demonstrate that counsel's performance fell 'below the objective standard of reasonableness.'" *Ivory* v. *Jackson*, 509 F.3d 284, 294 (6th Cir. 2007), cert. denied, 128 S. Ct. 1897 (2008) (quoting *Strickland*, 466 U.S. at 688)). "The defendant must then demonstrate that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome.'" *Ibid.* (quoting *Strickland*, 466 U.S. at 694).

Significantly, this Court "need not decide whether defense counsel performed deficiently if disposing of an ineffective-assistance claim on the ground of lack of sufficient prejudice would be easier." *Hynes*, 467 F.3d at 970. See also *Ivory*, 509 F.3d at 294 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. * * * If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.") (quoting *Strickland*, 466 U.S. at 697).

2. Defendant Is Unable To Demonstrate Sufficient Prejudice, And Therefore Cannot Satisfy The Second Prong Of The Inquiry

"To show prejudice, [defendant] must demonstrate that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Harrison* v. *Motley*, 478 F.3d 750, 756 (6th Cir.), cert. denied, 128 S. Ct. 444 (2007) (quoting *Strickland*, 466 U.S. at 694)). As set forth above in Section II.C., the evidence of defendant's guilt is overwhelming, and the result therefore would not have been different absent the challenged statements. This Court repeatedly has determined that the second prong of the *Strickland* inquiry is not met under such circumstances. See, *e.g.*, *Harrison*, 478 F.3d at 757 (defendant "failed to show that his attorneys' alleged conflict of interest resulted in prejudice" where "the evidence admitted against [defendant] at trial was 'overwhelming'"); *Hicks* v. *Collins*, 384 F.3d 204, 215 (6th Cir. 2004), cert. denied, 545 U.S. 1155 (2005) (holding that defendant cannot satisfy the second prong of *Strickland* where "there was overwhelming evidence of [defendant's] guilt"); *Campbell* v. *United States*, 364 F.3d 727, 736 (6th Cir. 2004), cert. denied, 543 U.S. 1119 (2005) ("Given the overwhelming evidence establishing [defendant's] guilt, we believe that he would not have been able to show that, but for his attorney's failure to object to the prosecutor's alleged

misconduct, the result would have been different.").

Accordingly, even if this Court determines that the record is sufficient for it to address defendant's ineffective-assistance claim on direct appeal, it should reject this claim based on his failure to satisfy the second prong of the *Strickland* inquiry.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Per WordPerfect 12 software, the brief contains 9,022 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

DIRK C. PHILLIPS
Attorney

DATED: June 18, 2008

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2008, a copy of the foregoing PROOF BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLEE was served by first class mail, postage prepaid, on counsel of record at the following address:

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Attorney

APPELLEE'S DESIGNATION OF APPENDIX CONTENTS

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Appellee United States of America designates the following items to be contained in the Joint Appendix:

Description	Date	Record No.
Indictment	1/6/2006	1
Verdict Form	4/20/2007	70
Trial Transcript Vol. 1, pages 123, 125-133, 136, 138-139, 149-155, 159, 166-168, 170-172, 176-178, 180-182, 186-189, 192-193, 197-203, 208-210, 239-240, 259-260	12/5/2007	89
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