08-5506-cr

To Be Argued By:
TRACY LEE DAYTON

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-5506-cr

UNITED STATES OF AMERICA,
Appellant,

-vs-

JOHN W. BELL, JR.,
Defendant-Appellee.

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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STATEMENT OF JURISDICTION

The district court (Alfred V. Covello, J.) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231. On October 23, 2008, the district court granted the defendant's motion for a new trial pursuant to Fed. R. Crim. P. 33. JA 950-967. On November 13, 2008, the government filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b)(1)(B). JA 968. Pursuant to 18 U.S.C. § 3731, this Court has jurisdiction over the government's appeal from the district court's order granting a new trial.

The Solicitor General of the United States has personally authorized this appeal.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court abuse its discretion in ordering a new trial where the court did not question the credibility of the government's witnesses but instead (1) declared, *sua sponte*, that its unchallenged jury instruction on intent was too imprecise; (2) determined that it should have used a special verdict form with interrogatories on the elements of self-defense, even though the defendant neither requested one nor objected to the general verdict form; and (3) relied upon clearly erroneous factual findings in coming to its ruling?

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Preliminary Statement

This is a government appeal from the Honorable Alfred V. Covello's rejection of a jury's determination that the defendant was not acting in self-defense when he shot at a federal law enforcement officer clad in a vest marked "POLICE" as officers attempted to serve a search warrant at a gas station in Bridgeport, Connecticut.

In ordering the new trial, the district court did not impugn the credibility of the government's witnesses.

Instead, the district court abused its discretion by relying upon facts that were irrelevant and, in some instances, expressly contradicted by the record and therefore clearly erroneous. Nor did the court identify any legal error that undermined the verdict. To the contrary, the court ruled *sua sponte* that it erred by incorrectly charging the jury on intentional conduct, even though its instruction was taken directly from Second Circuit precedent and unchallenged by the defendant. Moreover, although the court instructed the jury correctly on the law of self-defense, it held that it erred by failing to use a special verdict form that included interrogatories about the elements of self-defense – even though the defendant neither asked for a special verdict form nor objected to the use of a general verdict form.

In short, the district court's reliance upon flawed legal reasoning and clearly erroneous factual conclusions to overturn the jury's verdict constitutes an abuse of discretion and should be reversed.

Statement of the Case

This is an appeal from a ruling of the United States District Court (Alfred V. Covello, J.) ordering a new trial after a jury convicted the defendant on three of four counts.

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. JA 3.

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,[1] 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). JA 7-9.

Trial commenced on June 10, 2008. On June 12, 2008, the defendant testified and claimed that he fired his gun at the officers in self-defense. JA 675-747.

On June 13, 2008, the court convened an *in camera* charging conference that was not recorded.

On June 16, 2008, the parties presented closing arguments, and the district court charged the jury. JA 775-882. The parties then agreed on the format of the verdict form, which had been prepared by the court. JA 883-884. After the jury retired to deliberate, the defendant made an

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[1] 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.

oral motion for a judgment of acquittal, which the court took under advisement. JA 884. Later that day, the jury found the defendant guilty on Counts One, Three and Four; the jury acquitted the defendant on Count Two. JA 885-886.

On June 23, 2008, the defendant filed written motions for a judgment of acquittal and a new trial. JA 5 (Doc. Nos. 49 & 50). On July 17, 2008, he filed a memorandum of law in support of the post-verdict motions. JA 5 (Doc. No. 56). On August 4, 2008, the government filed a memorandum in opposition to the defendant's motions. JA 5 (Doc. No. 61).

On September 17, 2008, the district court entertained oral argument. JA 899-949. On October 23, 2008, the district court denied the defendant's motion for acquittal but granted the motion for a new trial. JA 950-967.

On November 13, 2008, the government filed its notice of appeal. JA 968.

The defendant is currently released on bond.

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 a gas station in Bridgeport, Connecticut. The defendant was one of two employees working at the station. As the first two officers entered the small office area of the gas station, the defendant pulled a revolver from his waist and fired twice at them. 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.

At the close of 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. After closing arguments, the court instructed the jury, comprehensively defining the law of self-defense. The defendant agreed on the general verdict form provided by the district court. After a short deliberation, 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 at 2394 East Main Street, Bridgeport for the purpose of serving a search warrant for gambling records and proceeds. JA 152-153,157-158, 276-279, 336, 531-534, 616-618.

Before serving the search warrant, the officers attended a briefing at the Trumbull Police Department conducted by FBI Special Agent Sam DiPasquale, Trumbull Detective Tim Fedor and Assistant United States Attorney David Sullivan. JA 77, 81-82, 153-154, 277, 332, 399, 532-534, 616-617. 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. JA 155-157, 279, 453, 594.

Prior to leaving the Trumbull Police Department, the officers all donned clothing and equipment that identified them as police officers. JA 162, 285-286, 620-622. 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. JA 12, 161-166, 210, 258-259; GX 3-8.[2]

Detective Murray wore his police equipment over the sleeveless t-shirt, jeans and black boots that he had worn to work that day. JA 12, 161-162, 166-168, 170. He donned the bullet-resistant vest and badge in court to show the jury how he appeared when he served the search

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[2] "GX" refers to non-photographic Government Exhibits not included in the Joint Appendix.

warrant at Buzz's Mobil. JA 170-171. Detective Murray also testified that at the time of the warrant, he had a goatee similar to the one he had at trial. JA 12, 167, 370.

The other search team members also wore police attire. Detective Hammel wore a golf shirt, jeans, a bullet-resistant vest with "POLICE" written across the chest in large yellow letters, his police badge hanging around his neck, and his holster and handcuffs at his waist. JA 13, 172, 620-623. Sergeant Gonzalez wore a black jersey with "POLICE" written in yellow on the sleeves and the chest. He also wore a gun belt around his waist that held police equipment, such as handcuffs and extra ammunition. JA 35, 36, 540-541; GX 36, 37. Lieutenant Kohloff wore a blue and yellow jacket with "POLICE" written in large yellow capital letters across the chest and back, a bullet-resistant vest under the jacket, and his gun in a holster on his right hip. JA 20, 342-343, 347-348; GX 19, 20. Detective Ayr was similarly dressed in a blue and yellow "POLICE" jacket and wore his police badge around his neck. He also wore jeans, black gloves, and a "UMass" baseball cap on his head; his gun was holstered on his right hip. JA 26, 282-284. Finally, Agent Grimm wore a blue and white striped polo shirt, jeans, brown boots and his bullet-resistant vest, which had "FBI" written across the chest in large gold letters. JA 403-406; GX 27. Agent Grimm also had a gun holstered on his right hip and his handcuffs, extra ammunition, and his badge attached to the waistband of his pants. JA 403-406; GX 27.

The officers traveled to Buzz's Mobil in four separate cars: Detectives Murray and Hammel were in a blue

Crown Victoria driven by Detective Hammel; Sergeant Gonzalez and Detective Donaldson were in a blue Ford Explorer driven by Detective Donaldson; and Lieutenant Kohloff, Detective Ayr, Detective Washington and Agent Grimm were in a white Ford minivan driven by Lieutenant Kohloff.[3] JA 159-161, 280-281, 339-340, 402, 407, 537 580, 591, 619-620. A uniformed Bridgeport police officer, who was driving a marked police car, also joined the procession. JA 174, 409, 623. Sergeant Gonzalez had requested the marked unit for police presence in case they needed to control traffic alongside the gas station or to transport a prisoner. JA 535-536.

At approximately 8:00 p.m., the search team proceeded to Buzz's Mobil, on the corner of East Main Street and Texas Avenue in Bridgeport. JA 161, 173-177, 261-262, 286, 333-334, 403, 620.

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

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. JA 12, 19, 177, 289, 412, 466, 629. Detectives Hammel and Murray drove into the parking lot of the gas station from Texas Avenue. They parked the Crown Victoria within a few feet of the gas station office and to the left of the

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[3] Detective Blake left the Trumbull Police Department, driving a Ford Explorer, before the rest of the team in order to conduct surveillance of the gas station. JA 161.

office door; the front of the car was facing the building. JA 10, 15, 22, 136-137, 232-234, 411, 623-626. Lieutenant Kohloff also pulled the minivan into the parking lot from Texas Avenue, stopping at the pump island closest to the office, with the driver's side of the van parallel to the building and almost directly in line with the office door. JA13, 23, 176-178, 287-289, 309-310, 346, 372, 411, 435. The Ford Explorer and the marked police car entered the lot from East Main Street. Both cars parked to the right side of the parking lot, and each faced the gas station garage doors. JA 19, 411-412, 542. The Explorer was approximately half way between the two pump islands. JA 608-609. The cruiser was behind the Explorer and closer to East Main Street.

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. JA 177-178, 229, 289-290, 345-347, 350, 374, 412, 433, 591-592, 624, 703-704.

Agent Grimm and Detective Hammel saw a second person inside the gas station office as they pulled into the station. JA 412-413, 624-627. 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. JA 16, 17, 418, 437-438, 626, 649.

As Detective Hammel stopped the Crown Victoria, 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 repeated "police with a warrant" several times. JA 179-184, 627-628. 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. JA 182.

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. JA 179-182. He kept his finger alongside the barrel of the gun, rather than on the trigger. JA 179-182. Detective Murray explained that he unholstered his weapon so that it would be accessible if needed. JA 181-182. He pointed the gun at the ground, as is always his practice, for safety reasons and to avoid alarming anyone whom he might approach. JA 180-181. Detective Hammel similarly unholstered his gun as he got out of the car. JA 627-628. He, too, pointed the barrel at the ground for safety reasons, especially since Detective Murray was walking in front of him. JA 628.

Lieutenant Kohloff and Agent Grimm got out of the minivan and also began to approach Lemus. They approached from the right and to the rear of Detectives Murray and Hammel. JA 385-386, 414-415. Agent Grimm, like Detectives Murray and Hammel, drew his gun from his holster as he stepped from the minivan. JA 413. Agent Grimm explained that it is a "good idea to have your weapon out in case you need to protect yourself." JA 413. 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. JA 414-416, 446-447. 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. JA 414, 447.

3. The defendant's co-worker immediately surrenders to the police

As the officers approached the office door, Detective Murray instructed Lemus to "get [his] hands out of [his] pocket." JA 183. Lieutenant Kohloff also told Lemus, "police, put your hands up. Police, put your hands up." JA 347, 374-375. Lieutenant Kohloff explained that he repeated the phrase twice so that Lemus would know he was a police officer. JA 347, 350. 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." JA 291. Agent Grimm and Sergeant Gonzalez heard members of the search team, including Detective Murray, repeatedly state, "police with a warrant" and "police, search warrant." JA 415, 438-439, 446, 543-544, 594.

Lemus, too, clearly heard the officers announce their presence and immediately complied with their commands by raising his hands. JA 183-184, 350-351, 417, 544, 628. Detective Murray then used his left hand to briefly pat down Lemus's clothing for weapons, keeping his gun,

which was in his right hand, pointed at the ground. JA 184-185, 230-232, 417, 435-436, 455-456. Detective Murray then passed Lemus back to Lieutenant Kohloff, who was standing outside the office door to the right. JA 184-185, 204, 234, 293-294, 350, 417-419, 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. JA 185. 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. JA 185-186A, 188, 236-238, 375-376, 677-678. When he saw the defendant, Detective Murray stepped into the doorway and stated "police, police with a warrant, police with a search warrant." JA 186-187, 246-247, 645. Detective Hammel, who had stepped into the office and was standing to Detective Murray's right, also stated "police, search warrant." JA 630-631, 645. The defendant then turned and headed towards the back of the office. JA 186-186A, 649, 655-656. Detective Hammel repeatedly yelled "stop, police, police, stop." JA 631, 633, 645. Detective Murray began to follow the defendant, again stating, "police, police with a search warrant." JA 187-188, 246.

The defendant stopped short of the door to the back room and turned partially towards Detectives Murray and Hammel. JA 188, 633-635. The defendant had his back

toward but not against the right wall of the office; his left side faced the detectives. JA 188, 238-241. 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." JA 188, 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. JA 188-189, 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. JA 189, 249. The defendant, however, continued to ignore Detective Murray's commands. JA 249. 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. JA 190.

As Detective Murray stopped, he saw that the defendant had his sweatshirt or coat wrapped around his right hand near his right hip. JA 189-191. 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. JA 190-191. The defendant then pulled his right hand out from under his clothing. JA 191. 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. JA 191, 235, 678. Detective Murray yelled "gun" to alert his fellow officers that the defendant had a weapon. JA 191, 259-260, 292,

353, 366-368, 545, 596, 631-632, 646. Detective Murray then dove to the left and fired his gun at least once, but possibly twice. JA 191-192, 632-635, 658. The defendant also fired his gun twice at Detective Murray. JA 192, 235-236, 244, 635.

Both of the defendant's bullets went through the window directly behind where Detective Murray had been standing before he dove for cover. JA 27, 190. One of the defendant's bullets exited the window at 68½ inches above the ground. JA 488. The defendant's second shot exited the window several inches below the first. JA 27, 485-487. Detective Murray stands approximately five feet nine inches tall. JA 210. Accordingly, the defendant's shots were precisely at the height of Detective Murray's head and chest. JA 211.

Detective Hammel, who had been standing behind Detective Murray, saw the gun in the defendant's hand as Detective Murray dove to the ground. JA 632-635, 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. JA 633, 650. Detective Hammel fell backwards out the door of the office and rolled to the left, taking cover behind a brick wall. JA 633-636. Believing Detective Murray had been shot, Detective Hammel immediately radioed for assistance, explaining that shots had been fired and that there was a barricaded suspect in the office. JA 636-639.

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 from the defendant's gun. JA 354-355, 379. Lieutenant Kohloff estimated that the defendant was within eight feet of Detectives Murray and Hammel at the time the defendant started shooting. JA 362.

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. JA 420-421. 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. JA 15, 420-423, 439-444. Agent Grimm explained that he was authorized to return fire because the defendant was trying to shoot him and the other officers. JA 422.

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. JA 192-193. As Detective Murray fired, Sergeant Gonzalez yelled at Detective Murray to "get down, get down." JA 193, 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 193-196, 561. That 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 561-564; GX 47. In response to Donaldson's call, numerous police vehicles rushed to Buzz's Mobil with lights flashing and sirens blaring. JA 197-199, 263-264, 294-295, 359-361, 424, 563-565, 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 545-549, 558-559, 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, 550. 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 545-546, 559-561, 581-583. 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. JA 545-547, 549-550, 558-560, 580-582, 583-584. Sergeant Gonzalez then yelled at the defendant, "police, put the gun down, police." JA 424-425, 561. 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. JA 587.

Detective Murray was trapped in the office for several minutes. JA 198. 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." JA 196-198, 548, 560-561, 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." JA 199, 360, 564-566. Detective Murray then ran from the office in a crouched position so that he would be "less of a target." JA 199-200, 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. JA 199-201. 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. JA 565, 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. JA 250-251. The defendant never said a word to either

Detective Murray or Detective Hammel throughout the entire interaction in the office. JA 209-210, 245.

6. The defendant initially refuses to surrender

After Detective Murray escaped, the defendant remained barricaded for approximately ten minutes. JA 638B, 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. JA 316, 450, 638B, 659-660. 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." JA 197-199, 263, 295, 359, 361, 423-424, 563-565, 607, 638B, 660-661, 680. Several minutes later, the defendant emerged from the office still carrying his gun. JA 324, 425. Sergeant Gonzalez yelled at the defendant to "drop the gun, drop the gun" but did not shoot at the defendant. JA 638A. The defendant ultimately put his gun on the desk just inside the office door and walked into the parking lot. JA 24, 471-472, 476, 681-682, 695-696.

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, and a gun permit, among other things. JA 37, 468-471, 525, 682, 700; GX 43. 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." JA 31, 471-472, 738-739; GX 42. The gun was a gift to the defendant for having been the best man in a friend's wedding. JA 739.

In the course of the shoot-out, Bell sustained two wounds: one to his left wrist and one to his right arm. JA 509, 679, 683-684, 754-755. Although Detective Murray was not shot, fellow officers insisted that he seek treatment at the hospital. JA 221, 265, 271, 589, 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. JA522-523. Because the gas station was already well lit, the CSP did not need additional illumination to conduct the scene analysis. JA 466, 510.

Detective Reilly described the office in which the shooting took place as "rather cramped." JA 474. 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. JA 477. 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. JA 478, 528-529.

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. JA 480-484, 493. None of the other officers on scene fired their guns. JA 480-484. Finally, Detective Reilly testified that all of the officers' guns held far more rounds of ammunition than they actually fired. JA 480-484.

C. The defendant's case

The defendant testified that he had worked at Buzz's Mobil for 16 years. JA 677. On October 1, 2007, he consumed a 16-ounce beer shortly before going to work at the gas station. The defendant admitted that he then drank another beer at work. JA 702. The defendant said that he was not intoxicated, had full control of his faculties, and could both see and hear. JA 703.

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. JA 286, 687-688, 694-695. He then returned to the office, leaving the clipboard in the back room. JA 688. According to the defendant, when he reached the door between the back room and the office, he noticed that Detective Murray[4] had entered the office and was standing near the desk, about seven or eight feet from the defendant. JA 677-678, 705-707. 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. JA 719-725.

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[4] During trial, the defendant consistently referred to Detective Murray as "the assailant."

As Detective Murray advanced to approximately the middle of the office, the defendant turned quickly toward him. JA 707-708, 711. The defendant then testified that he saw Detective Murray's gun, turned his head away for a moment, and reached for his own weapon. JA 708-709. The defendant acknowledged – *contrary to the district court's findings* – that Detective Murray was standing directly squared to him as this occurred. JA 190, 709, 711. The defendant then described how he reached under his outer garment, "pulled [the clothing] up and 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." JA 709-711. 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. JA 713.

After the shots were fired, the defendant retreated to the back room. JA 677-678. The defendant claimed that, fearing for his safety, he refused to come out until he saw a police officer or uniform. JA 680-681. 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. JA 689, 717-719. Rather, the defendant said that at some point he heard someone call "John, come out" and explained that he "peeked 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. JA 25, 681-682, 715-718. The defendant then walked to the office door with his gun in his hand, set the weapon on the desk and walked outside. JA 681-682.

The defendant acknowledged that he was the owner of seventeen weapons, at least nine of which were handguns, and several of which were not registered in his name. JA 695-699, 734-737, 743-747. The defendant also stated that he always carried a gun at Buzz's Mobil. JA 736. Finally, the defendant stated that he 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. JA 720-723, 732-733. The defendant also denied having ever seen the betting materials that were recovered from Buzz's Mobil following the shooting. JA 724-725, 732-734.

The defense also called 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. JA 749, 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 went to the defendant's home and interviewed him. JA 756. Agent Lauer asked the defendant if he was aware that Joseph Buzzanca was operating a gambling

organization from Buzzanca's home in Trumbull, as well as from Buzz's Mobil. JA 757-758. The defendant replied that he knew Buzzanca "gambl[ed] with his friends." JA 758. 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. JA 758. 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. JA 757-759. The defendant further acknowledged that he would note the collections in a black ledger that also contained entries regarding legitimate gas station business. JA 758-759. 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. JA 759-760.

E. The jury charge

On June 12, 2008, the parties rested and the district court excused the jury, adjourning to chambers for an off-the-record charging conference. JA 770. The court entertained the parties' proposed charges and advised that it would make a record of any exceptions when court reconvened.

On June 16, 2008, Judge Covello noted on the record "that everything that had not been in the charge that [the defendant] requested to be put in the charge was, in fact, done . . . with the following exceptions. First, the

Defendant's . . . request regarding direct and circumstantial evidence[.] Second, the Defendant's request . . . on self-defense regarding infallible judgment, time to reflect, and possible mistake as to the existence of an actual threat." JA 773-774.

Following closing arguments, JA 775-860, the court instructed the jury. JA 860-882. The court defined a host of terms:

> The term knowingly as used in these instructions to describe the alleged state of mind of the Defendant means that he was conscious and aware of his action, realized what he was doing or what was happening around him, and did not act because of ignorance, mistake or accident.
>
> The term willfully as used in these instructions to describe the alleged state of mind of the Defendant means that he knowingly performed an act deliberately and intentionally as contrasted with accidentally, carelessly or unintentionally.
>
> Before you can find that the Defendant acted intentionally you must be satisfied beyond a reasonable doubt that he acted deliberately and purposefully. That is, the Defendant's acts must have been the product of his conscious objective rather than the product of a mistake or accident.
>
> The intent of a person or the knowledge that a person possesses at any given time may not

> ordinarily be proved directly because there's no way of directly scrutinizing the workings of the human mind. In determining the issue of what a person knew or what a person intended at a particular time you may consider any statements made or acts done or not done by that person and all other facts and circumstances received in evidence which may aid in your determination of that person's knowledge or intent. You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It's entirely up to you to decide what facts to find from the evidence received during the trial.

JA 870-871. The defendant did not object to these definitions.

The court then addressed the crimes charged in the indictment, beginning with the concept of self-defense:

> Let's talk now about the relevant law with respect to the charges here. The evidence in this case raises the defense of self-defense. This does not mean, however, that the Defendant must prove that he acted in self-defense. Rather, as my colleagues have stated, the burden of proof is upon the Government to prove beyond a reasonable doubt that the Defendant did not act in self-defense.
>
> A person acting in self-defense is justified in using the force that person reasonably believes is

necessary in the defense of himself against the immediate use of unlawful force by another against him. If you find that the Defendant knew that Scott Murray and Kevin Hammel were law enforcement officers or that their purpose was to serve a search warrant, then the Defendant has no valid claim of self-defense. If, however, you find the Defendant did not know of the official identity or purpose of Mr. Murray and Mr. Hammel and that he reasonably believed that he was the subject of a hostile and imminent attack against his person, then he was entitled to use reasonable force to defend himself.

The use of force likely to cause death or great bodily harm is justified in self-defense only if the person believes that the other person was using or about to use force likely to cause death or great bodily harm. A reasonable belief is one which a reasonably prudent person would have in the same circumstances.

As noted earlier, once self-defense has been raised in a case, the burden to disprove self-defense remains on the Government. Thus in addition to proving all of the elements of each count beyond a reasonable doubt the Government must also prove beyond a reasonable doubt that the Defendant did not act in self-defense.

Because the charges on all four counts are based on a single set of events, if you find the

> Defendant acted in self-defense with respect to those events, that is, if you find that the Government has not proven beyond a reasonable doubt that the Defendant did not act in self-defense, then you must find the Defendant not guilty on all four counts. For this reason it may be helpful for you to resolve this question at the outset of your deliberations.

JA 873-874.

Upon completion of the charge, Judge Covello instructed the parties to review the verdict form he had prepared. JA 883. Defense counsel neither objected to the verdict form nor requested a special verdict form. The defendant then orally moved for a judgment of acquittal and reserved the right to file a formal motion at a later date. JA 884.

F. The verdict

After about two hours of deliberation, during which the jury neither asked questions nor requested readbacks of testimony, the jury convicted the defendant 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).

G. Judge Covello orders a new trial

In his post-verdict motions, the defendant argued for a new trial under Federal Rule of Criminal Procedure 33, claiming that the verdicts were contrary to the clear weight of the evidence and that it would be a manifest injustice to let the guilty verdicts stand. In particular, the defendant continued to argue, as he did at trial, that he acted in self-defense and therefore did not have the requisite intent.

On September 17, 2008, the district court entertained argument on the defendant's motions. At the close of the defendant's argument, the district court addressed defense counsel as follows:

> Let's assume that the Court agrees with you, and that specifically that this is an extraordinary case, and, two, that *everybody told the truth*, and that there is a real concern here about whether an innocent person has been wrongly convicted, in this very unique set of circumstances, *and the record may reflect that the Court is simulating taking off his hat, and is looking for a hook to hang the hat on.*
>
> And *I think your point of view would be better supported if we could look at a mistake*, where I made a mistake, where did you, where did Attorney Dayton, where did Attorney Gustafson, and our collaboration about this charge, convey something to the jury *that caused them to get it wrong*, as you advocate?

> Was there something in the charge, did the interrogatory perhaps not fully enough articulate issues that the jury was to have determined? And, just by way of a closing remark on your part, could you just focus for a minute on the process, and I'm happy to be assisted in how you made a mistake, or how we all made a mistake. . . . [i]t would be, I think, helpful to your point of view if you had a view with respect to that.

JA 924-925 (emphasis added).

On October 23, 2008, Judge Covello issued a written ruling denying the motion for a judgment of acquittal but granting the motion for a new trial. JA 950.

1. The district court's legal findings

In ordering a new trial, the court identified what it described as two legal mistakes that, in its opinion, irrevocably tainted the trial.

First, Judge Covello announced that he had provided a flawed definition of "intentional" conduct because the instruction stated that the defendant's acts "must have been the product of his conscious objective *rather than* the product of mistake or accident." JA 963 (emphasis in original). Judge Covello ruled that he should have instructed the jury more precisely by using the words "were not" in lieu of "rather than[.]" JA 963. Judge Covello further pronounced his jury charge deficient because he defined intentional misconduct only once.

Second, the court determined that it should have used a special verdict form to "specifically address[] the elements and burdens associated with self-defense via interrogatories. The verdict form did not require the jury to make a discrete finding that the government had disproved self-defense beyond a reasonable doubt." JA 965-966.

2. The district court's factual findings

In addition to those two legal infirmities, Judge Covello held:

> Viewing the evidence in sum, it is apparent that this event would never had occurred but for the the [sic] task force's imprudent decision to allow no less than nine officers, eight of whom were clad in casual, "thug-like" street clothing, to descend upon Buzz's in Bridgeport, at night, at closing time, with guns drawn. Members of the task force had conducted surveillance on the property earlier that day, and were aware that only two employees were on the premises, neither of whom were the subject of the alleged gambling investigation. Moreover, the interior of the gas station, which consisted of only two cramped rooms, was clearly visible through plate-glass windows, and there was only one door leading in and out of the building. Nevertheless, at least nine officers approached the gas station that evening in order to execute the search warrant. The officers that Bell saw were not dressed in uniform, but rather in the

aforementioned clothing, and Murray's gun was drawn. Indeed, the presence of Murray's drawn weapon, and his discharge of that weapon, is undoubtedly what precipitated this entire event. Further, this event unfolded within split seconds. *See, e.g., Brown v. United States*, 256 U.S. 335, 343 (1921) (explaining that "[d]etached reflection cannot be demanded in the presence of an uplifted knife").

* * *

Similarly, there is not competent, satisfactory and sufficient evidence that proves beyond a reasonable doubt that the defendant did not act in self-defense. While the government did not need to prove that Bell had the knowledge that Murray was a federal officer, the government did need to prove beyond a reasonable doubt that the defendant did not act in self-defense. If an officer's conduct "might reasonably be interpreted as the unlawful use of force directed at either the defendant or his property" then he "might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent." *United States v. Goldson*, 954 F.2d 51, 54-55 (2d Cir. 1992) (quoting *United States v. Feola*, 420 U.S. 671, 684 (1975)). In the present case, the government failed to prove beyond a reasonable doubt that Bell did not believe, in good faith, that he was acting in lawful defense of his person. Detective Murray fired his weapon first while Bell

> was retreating to the back room, and Bell's reaction and behavior following the initial violent encounter between himself and the task force officers militates heavily in favor of a finding that Bell was acting in self-defense, and the government failed to prove otherwise.
>
> In addition, the evidence strongly suggests that Bell was unclear as to the identity of the officers due to their potentially confusing street clothing. The evidence further suggests that he fired his gun in reaction to the shots fired by Murray, in an act of self defense, before he understood the true nature of what was happening, or the true identity of the people confronting him. On this record, there is not sufficient evidence to conclude, beyond a reasonable doubt, that Bell did not reasonably believe that he was the subject of a hostile and imminent attack.

JA 961-962, 964-965.

SUMMARY OF ARGUMENT

The district court abused its discretion in ordering a new trial.

The purported deficiencies in the jury charge and verdict form are not legal error, let alone plain error, especially where the defendant did not object to either the definition of "intentional" or the use of a general verdict form. The court's instruction to the jury accurately and

repeatedly explained the nature of intentional conduct, and tracked language that this Court has previously approved. Moreover, there is no meaningful difference between the instruction that the jury heard (asking whether the defendant's actions were "the product of his conscious objective *rather than* the product of mistake or accident") and the one that Judge Covello suggested he should have given (whether the defendant's actions were "the product of his conscious objective and *were not* the product of mistake or accident"). Finally, given the court's legally sound explanation of self-defense, Judge Covello's use of a general verdict form was both proper and consistent with the longstanding policy that disfavors special verdicts in criminal cases.

Factually, Judge Covello made several clearly erroneous findings. First, he opined that Detective Murray fired first and at a retreating defendant. In contrast, even the defendant acknowledged that he did not know whether he or Detective Murray fired first and that the shots were fired while he and Detective Murray were squarely facing one another. Second, the court improperly concluded that Detective Murray's drawn weapon precipitated the shooting. The court ignored the fact that Detective Murray's gun remained pointed at the ground and concealed behind his leg until the defendant refused to comply with Detective Murray's commands to show his hands, and instead reached for his own gun. Third, because the defendant testified that he saw only Detective Murray, the court's emphasis on the number of officers present to serve the warrant and their attire was completely irrelevant. Fourth, the court unduly emphasized that the

incident occurred at night since the testimony established that the entire gas station was well lit. Fifth, the court incorrectly found that the defendant did not have sufficient time to form the requisite intent; the defendant's own testimony demonstrated that he had ample time to assess the situation before deciding to shoot. Sixth, the court unjustifiably concluded that the defendant's post-shooting behavior militated in favor of self-defense when, in fact, the defendant's decision to barricade himself in the back room revealed that he understood that he had just fired at police officers, as opposed to a robber as he claimed.

Accordingly, the convictions should be reinstated and this matter remanded for sentencing.

ARGUMENT

I. The district court abused its discretion in ordering a new trial.

A. Governing law and standard of review

This Court reviews a decision to grant a new trial for abuse of discretion. *United States v. Ferguson*, 246 F.3d 129, 133-34 (2d Cir. 2001); *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992). A district court abuses its discretion when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision – though not necessarily the product of a legal error or a clearly erroneous factual finding – cannot be located within the range of permissible decisions. *United States v. Owen*, 500 F.3d 83, 87 (2d Cir. 2007).

The test for deciding whether to grant a new trial is principally whether letting a conviction stand would result in manifest injustice. *Sanchez*, 969 F.2d at 1413. Rule 33 gives a court "broad discretion . . . to set aside a verdict and order a new trial to avert a perceived miscarriage of justice." *Ferguson*, 246 F.3d at 133.

Although Rule 33 contemplates that a court may evaluate the weight of the evidence and the credibility of the witnesses, it is well settled that only in "exceptional circumstances" – for example, where the testimony is "patently incredible or defies physical realities" – should the jury's assessment of witness credibility be discarded.

Sanchez, 969 F.2d at 1413. Even if a court does conclude that a government witness was not credible, the court should not grant a new trial unless it would be a "manifest injustice" to let the verdict stand, i.e., where, in light of the record as a whole, there is "a real concern that an innocent person may have been convicted." *Id*. Simply put, the district court "may not wholly usurp the jury's role." *United States v. Autuori*, 212 F.3d 105, 120 (2d Cir. 2000).

This Court, therefore, has established appropriately strict limits on a district court's authority to grant a new trial based on post-trial challenges to the weight of the evidence. Such claims necessarily require courts to overrule the credibility and weight determinations that are delegated exclusively to the jury and which are based on unanimous agreement on factual matters that the government has proven beyond a reasonable doubt. Consequently, in the context of a motion for a new trial under Rule 33, this Court has instructed trial judges:

> *It long has been our rule that trial courts must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses. It is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment.* Where testimony is *patently incredible* or *defies physical realities*, it may be rejected by the court, despite the jury's evaluation. But the trial judge's rejection of all or part of the testimony of a witness or witnesses does not automatically entitle a defendant

> to a new trial. The test is whether it would be a manifest injustice to let the guilty verdict stand.
>
> Manifest injustice cannot be found simply on the basis of the trial judge's determination that certain testimony is untruthful, unless the judge is prepared to answer "no" to the following question: "Am I satisfied that competent, satisfactory and sufficient evidence in this record supports the jury's finding that this defendant is guilty beyond a reasonable doubt?" In making this assessment, the judge must examine the totality of the case. All the facts and circumstances must be taken into account. An objective evaluation is required. There must be a real concern that an innocent person may have been convicted. It is only when it appears that an injustice has been done that there is a need for a new trial "in the interest of justice." Although a trial court has broader discretion to grant a new trial pursuant to Rule 33 than to grant a motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29, where the truth of the prosecution's evidence must be assumed, that discretion should be exercised sparingly.

Sanchez, 969 F.2d at 1414 (emphasis added, internal quotation marks and citations omitted) (reversing the grant of a new trial based on the district court's conclusion that the convictions were not supported by the weight of the evidence).

B. Discussion

1. The court's instructions on intentional conduct were legally correct and, therefore, not a basis to order a new trial

Judge Covello instructed the jury on the applicable *mens rea* as follows:

> The term knowingly as used in these instructions to describe the alleged state of mind of the Defendant means that he was *conscious and aware of his action, realized what he was doing or what was happening around him, and did not act* ***because of*** *ignorance, mistake or accident.*
>
> The term willfully as used in these instructions to describe the alleged state of mind of the Defendant means that he knowingly *performed an act deliberately and intentionally* ***as contrasted with*** *accidentally, carelessly or unintentionally.*
>
> Before you can find that the Defendant acted intentionally you must be satisfied beyond a reasonable doubt that he acted deliberately and purposefully. That is, the *Defendant's acts must have been the product of his conscious objective* ***rather than*** *the product of a mistake or accident.*

JA 870 (emphasis added). In his written ruling, Judge Covello opined that a new trial was mandated because he used the term "rather than" to distinguish intentional

conduct from mistaken or accidental action. Judge Covello ruled that, in hindsight, he should have instead set these differing degrees of culpability apart with the term "were not." JA 963.

The district court's parsing of the meaning of "rather than" and "were not" is a distinction without a difference and constitutes an abuse of discretion. First, the charge as delivered was legally sound, having been derived directly from two respected sources: *Modern Federal Jury Instructions* and this Court.

In *United States v. Townsend*, 987 F.2d 927 (2d Cir. 1993), this Court expressly suggested the use of the very charge employed by Judge Covello, in order to "forestall" problems in future cases:

> Before you can find that the defendant acted intentionally, you must be satisfied beyond a reasonable doubt that the defendant acted deliberately and purposefully; that is, defendant's act must have been the product of defendant's conscious objective *rather than* the product of a mistake or an accident.

Id. at 930 (emphasis added); *see also* 1 L. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS 3A-4 (2008) (same).

In addition to using the formulation expressly suggested by this Court in *Townsend*, a review of the entire charge shows that Judge Covello repeatedly

emphasized in clear and concise terms that the government had to show more than mistaken or accidental conduct. For instance, when defining "knowingly," the court explained that the government had to prove the defendant "was conscious and aware of his action, realized what he was doing or what was happening around him, and *did not act because of* ignorance, mistake or accident." JA 870 (emphasis added). Similarly, the court advised the jury that the term "willfully" required that the government show that the defendant "knowingly performed an act deliberately and intentionally *as contrasted with* accidentally, carelessly or unintentionally." JA 870 (emphasis added). Finally, when Judge Covello discussed the admission of other-act evidence and explained that such evidence was admitted for the limited purpose of providing evidence regarding the defendant's motive and intent, the jury was told:

> If you determine that the Defendant committed the acts charged in the indictment and the prior acts as well, that being the gambling business, then you may but need not draw an inference that in doing the acts charged in the indictment he acted knowingly and intelligently and *not because of* mistake or some other innocent reason.

JA 872 (emphasis added).

Accordingly, in a relatively short jury charge, the court used "rather than," "did not act because of," "as contrasted with," and "not because of" to highlight the distinction between intentional acts and accidental or mistaken

conduct. Clearly, the repeated admonition was sufficient to alert the jury to the distinction between intentional conduct and that which is the product of mistake or accident. The district court's post-trial determination that the term "were not" provides more clarity than "rather than" does not amount to plain error, but rather is a matter of meaningless semantics.

Second, the defendant did not object to the charge. Therefore, before this Court "can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) 'that affect[s] substantial rights.'" *See United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (quoting *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544 (1997)). Where all three conditions are met, "an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson*, 520 U.S. at 467, 117 S.Ct. 1544 (quoting *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770 (1993)).

Given that the charge was a direct citation of this Court's recommended definition of intentional conduct, the use of that charge was not error, much less plain error.

2. The use of a general verdict form was not plain error and, therefore, not a basis to order a new trial

The second legal ground articulated by the district court for granting a new trial is the alleged error attendant

to the verdict form vis-à-vis the self-defense claim. Specifically, the district court did not identify error with the self-defense charge itself. Rather, the court posited that the jury should have been given a special verdict form to dramatically emphasize the self-defense issue.

While the decision whether to utilize special interrogatories is generally within the broad discretion of the district court, *see United States v. Ruggiero,* 726 F.2d 913, 922-23 (2d Cir. 1984), there is a historical preference for general verdicts, and a "traditional distaste for special interrogatories," in the criminal law. *United States v. Ogando,* 968 F.2d 146, 148 (2d Cir. 1992); *United States v. Coonan*, 839 F.2d 886, 891 (2d Cir. 1988). Moreover, "defendants may not demand special interrogatories as of right, let alone demand a specific form of special interrogatory." *Ogando,* 968 F.2d at 149.

Here, in the context of a trial involving a single shooting incident, as opposed to a complex racketeering case, *see e.g. Ferguson*, 246 F.3d at 137, it was clear to all the participants – the government, the defense and the judge – that a general verdict form was adequate. In his charge, Judge Covello aptly oriented the jury to the seminal issue in the case and advised the jury to resolve the self-defense issue as a threshold matter:

> Because the charges on all four counts are based on a single set of events, if you find the Defendant acted in self-defense with respect to those events, that is, if you find that the Government has not proven beyond a reasonable

> doubt that the defendant did not act in self-defense, then you must find the Defendant not guilty on all four counts. *For this reason it may be helpful for you to resolve this question at the outset for your deliberations*.

JA 874 (emphasis added).

In light of the clarity of the instructions, and the defendant's failure to either request a special verdict form or object to the lack of a special verdict form, the district court did not err, let alone plainly err.

3. The district court abused its discretion because its decision to grant a new trial rests on clearly erroneous factual findings

The district court ordered a new trial claiming "there is not competent, satisfactory and sufficient evidence that proves beyond a reasonable doubt that the defendant did not act in self-defense." JA 964. In reaching this flawed conclusion the court did not undertake a thorough review of the record. Nor did the court determine that any of the government's witnesses provided testimony that was "patently incredible" or "defie[d] physical realities." *Sanchez*, 969 F.2d at 1413. In fact, the district court credited the officers' testimony as truthful and specifically declined to base its ruling on any inconsequential discrepancies in their testimony. JA 924, 955. Instead, the court made several clearly erroneous factual findings including that: (1) Detective Murray fired first, shooting at a retreating defendant; (2) at all times, Detective Murray's

gun was drawn and pointed at the defendant; (3) nine officers, clad in "thug-like" street attire, descended upon the defendant; (4) the incident happened in the darkness of night; (5) the defendant did not have enough time to form an intent to assault or kill a federal officer; and (6) the defendant's conduct following the gun fire was highly probative of his self-defense claim. These demonstrably incorrect findings, as well as the significant and uncontradicted facts that the district court disregarded in reaching its ruling, are addressed below. The analysis demonstrates that the trial record does not warrant a new trial.

The defendant was not shot while retreating: Judge Covello's view that the defendant acted in self-defense is predicated on his fundamental misunderstanding that Detective Murray was the first to shoot, firing at a retreating target. In particular, Judge Covello stated: "Detective Murray *fired his weapon first while Bell was retreating* to the back room[,]" and "the evidence further suggests [the defendant] fired his gun in reaction to the shots fired by Murray[.]" JA 965 (emphasis added).

Juxtaposed to the court's erroneous finding is the defendant's own testimony during cross-examination:

> Q: And when did you see the gun for the first time, fixated on the gun?
>
> A: When I turned towards the movement coming at me and I saw the gun and I looked directly into the barrel of the gun.

Q: [Detective Murray] was about eight feet [away] at that point?

A: Could have been seven, eight feet, seven, eight feet.

Q: Didn't get any closer than that, is that right?

A: I don't recollect. I don't know. He could have moved, the assailant could have moved toward me more. I don't know. I don't remember. Could have been one or two steps.

Q: *At that point you didn't run and duck back into the room where the cigarette rack is, right?*

A: *No. I turned towards the assailant*. . . . He was approaching me.

* * *

Q: *And your testimony is you didn't turn and run but rather put your hand up?*

A: When I turned my face away real quick I put my hand up not to get shot in the face.

Q: Understood. And then you also had the presence of mind now to go for your weapon?

A: I went for my weapon, and then shots were fired. *I don't know who shot first*, and I felt pain in my left wrist.

* * *

Q: So you have your hand up . . . [and] you're able to get underneath the fleece [jacket that was covering the defendant's weapon].

A: I pulled it 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*.

* * *

Q: You got your hand up, you turned, you manage to get your hand underneath the fleece –

A: Right.

Q: – and for the first time in your life you're trying to pull your gun out?

A: Right.

Q: And did you fumble with it, or did you get it out?

A: No, I got it out.

Q: *Then you went and squared back at the person?*

A: The assailant, *yes*.

* * *

Q: *You never tried to retreat back into the back room?*

A: Not after, *not until after the shots were fired* and I – to hide from the assailant.

Q: *So you squared back at him and pointed your gun?*

A: *Yes.*

JA 707-712 (emphasis added). In addition to the defendant's own account, his injuries, which consisted of gun shot wounds to the front of his arm and to his wrist, belie the notion that he was wounded while retreating. The wounds are instead consistent with the defendant being shot while his arm was raised to fire his weapon.

It is not clear how Judge Covello determined, in light of the defendant's own testimony, that Detective Murray fired first, and at a retreating target as he failed to cite the trial record to support his clearly erroneous conclusions.

For example, the defendant twice testified that he did not know who shot first. JA 709-711. Accordingly, it was

plain that the defendant's decision to shoot was *not* prompted by prior shots from Detective Murray. Detective Murray similarly stated that he did not know who fired first, but opined that he (Murray) may have done so when he saw the defendant's weapon pointed at him. JA 235, 243-244. The most reasonable conclusion, therefore, is that the shots were fired nearly simultaneously.

Detective Murray's gun was unholstered but not pointed at the defendant: The district court also erroneously found that "the presence of Murray's drawn weapon, and his discharge of that weapon, is undoubtedly what precipitated this entire event." JA 962; JA 954 (stating that when Detective Murray entered the office, his "firearm was already out of its holster and drawn at this time").

This finding, quite simply, is not supported by the record. Detective Murray, whose testimony and credibility the court did not doubt, stated that he drew his weapon from its holster prior to entering the gas station, but that he pointed it at the ground and kept it tucked behind his right leg as he entered the office. JA 190-191. Detective Murray's testimony was supported by that of every other witness, including Special Agent Grimm and Detective Hammel, again neither of whose credibility the court questioned. JA 415-416, 435, 446-447, 455, 627-628.

Detective Murray did not level his gun or point it at the defendant until the defendant failed to comply with numerous verbal commands to remove his hands from his waistband area and show his hands to the detective.

Moreover, as is evident and uncontradicted in the testimony, Detective Murray and his fellow officers were lawfully at the gas station for the purpose of serving a search warrant. Once the defendant not only failed to comply with Detective Murray's lawful commands, but instead resisted and pointed a gun at the officers, Detective Murray was not required to be fired upon, or shot, before acting to protect himself. JA 268.

The number of officers, their attire, and their facial hair did not cause this incident: In overturning the verdict, the court needlessly second-guessed the tactical decisions made by the search team, holding that "it is apparent that this event would never have occurred but for the the [sic] task force's imprudent decision to allow no less than nine officers, eight of whom were clad in casual, 'thug-like' street clothing, to descend upon [the gas station] at night, at closing time, with guns drawn." JA 961-962. This analysis is fraught with subjectivity and error.

The wisdom of having more than one officer on hand to effectuate the search warrant – regardless of the officers' attire – became indisputably and utterly irrelevant to the question of whether the defendant acted in self-defense once the defendant testified that he saw only one person, Detective Murray. JA 677-678. At that point, the court's subjective view concerning how many officers should have been used to serve the warrant and what constitutes "thug-like" clothing – as compared to clearly marked, police-department-issued, life-saving vests – is inconsequential. Because the defendant testified that he

saw only Detective Murray, Judge Covello's focus on the other officers or their attire is properly relegated to the domain of the irrelevant.

When Judge Covello focused on Detective Murray, he made the following, subjective observation to bolster his unfounded conclusion that the defendant acted in self-defense:

> Nor was [Murray] dressed in everyday civilian attire. Rather, Murray wore a sleeveless "muscle shirt," brown baseball cap which read "What's up dog, life is good," blue jeans, black boots, black gloves, a bullet proof vest with the word "police" on the front and back, and a Trumbull police badge on a chain around his neck. When Murray faced sideways, the "police" insignia was not visible.

JA 952.

In this same vein, the Judge oddly determined that Detective Murray "had a partial beard that was not characteristic of a law enforcement officer," JA 952-953, despite uncontroverted testimony to the contrary that it is quite characteristic of law enforcement officers to have facial hair. JA 370-371. Lastly, Judge Covello held that "the evidence strongly suggests that Bell was unclear as to the identity of the officers due to their potentially confusing street clothing."[5] JA 965.

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[5] As noted above, the defendant testified that Detective (continued...)

Juxtaposed to Judge Covello's subjective characterizations is the trial record, which is replete with photographs of Detective Murray and several of the other officers involved in the search of the gas station. These photographs, which were approximately three feet by four feet in size, accurately depicted the officers' appearance from the waist up at the time of the incident. JA 12, 13, 20, 26, 39.[6] In addition, the officers' vests, outer jackets and other items of clothing were introduced as evidence. GX 3-8 (Detective Murray's vest, badge, gun, holster, handcuffs and hat); 19, 20 (Lieutenant Kohloff's jacket and holster); 27 (Agent Grimm's vest); and 36, 37 (Detective Gonzalez's shirt and belt). Detective Murray and Special Agent Grimm both donned their vests, and Lieutenant Kohloff his "police" jacket, for the jury.

Following the government's presentation of the above evidence, the defendant self-servingly testified that he (1) thought he was being robbed, (2) never heard any of the officers announce "police with a warrant" and "show me

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[5] (...continued)
Murray was the only officer that he saw. Therefore, following Judge Covello's reasoning, it should be irrelevant how the other officers were dressed.

[6] The photographs of Detective Murray, JA 12 and 39, were taken while he was at the hospital undergoing treatment in the wake of the shooting incident.

your hands" and (3) did not see the bright yellow letters marking "POLICE" across Detective Murray's chest. [7]

To begin, the court's statement that "[w]hen Murray faced sideways, the 'police' insignia was not visible[,]" is of no consequence. JA 952. There is no evidence that the defendant *ever* viewed Detective Murray from the side. To the contrary, the defendant clearly testified that he and Detective Murray stood squarely facing one another and were facing one another at the time of the shooting. JA 709, 711. The only person to suggest that the defendant viewed Detective Murray from the side was defense counsel, whose arguments, obviously, are not evidence.[8]

The jury in this case had the opportunity to view the evidence and to judge it in the context of the witnesses' and the defendant's accounts. As evidenced by the verdict, the jury unequivocally rejected the defendant's rendition of the event, including his claim that he did not know that Detective Murray was a law enforcement officer and, therefore, he was acting in self-defense. Accordingly, the district court's resuscitation of the defense theory cannot

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[7] The defendant does not challenge that the officers were wearing clothing that signified they were law enforcement officers. Rather, he testified, quite incredibly, that he neither saw the police markings nor heard any of the officers announce that they were the police.

[8] As is apparent from the trial record, defense counsel's theory was advanced at trial but controverted not only by the government witnesses but by the defendant himself and, ultimately, rejected by the jury. JA 39, 190, 709, 711.

be characterized as an objective evaluation of the evidence, but rather a usurpation of the fact-finding function of the jury and, as such, an abuse of discretion.

The gas station was well lit: The district court also unduly emphasized that the incident occurred at night to justify its subjective conclusion that the search team caused the shooting: "it is apparent that this event would never have occurred but for the the [sic] task force's imprudent decision . . . *to descend upon [the gas station] at night, at closing time*, with guns drawn." JA 961-962.

First, the officers arrived on-scene at approximately 8:30 p.m., while the gas station was still open. An 8:30 p.m. arrival placed the officers well within the proper time limits for the service of a warrant. *See* Fed. R. Crim. P. 41(a)(2)(B). Moreover, the uncontroverted testimony of every witness confirmed that the gas station was very well lit by both overhead lights in the gas station and the lights inside the office. For example, the crime scene investigators did not need additional illumination to conduct their analysis at the gas station. JA 466, 510. Like the other irrelevant issues flagged by the district court in its ruling, the hour at which the warrant was served goes more to the judge's decision to second-guess the operational plan than to the facts put before the jury on the issue of self-defense.

The defendant had ample time to form criminal intent: The district court incorrectly found that the defendant did not have enough time to form criminal intent: "this event unfolded within split seconds." JA 962.

But as the defendant testified, he had sufficient time to assess the situation and to form a conclusion. Granted, the defendant self-servingly testified that he concluded he was being robbed and, therefore, decided to reach under his fleece, pull out his gun, aim it at Detective Murray and shoot twice in an effort to kill the alleged "assailant." JA 713. However, as the government argued to the jury, if the defendant allegedly had time to determine that he was being robbed, then he similarly had time to conclude that the man standing in front of him stating "police with a search warrant" was a police officer.

The defendant's behavior after shooting at Detective Murray does not "militate heavily in favor" of self-defense: The district court also postulated that the defendant's "reaction and behavior following the initial violent encounter between himself and the task force officers *militates heavily in favor* of a finding that Bell was acting in self-defense, and the government failed to prove otherwise." JA 965 (emphasis added).

However, an analysis of the defendant's testimony provides a more compelling explanation of the defendant's behavior, that he barricaded himself rather than confront the police from whom he had failed to escape. Specifically, the defendant testified that after he fired his gun, he retreated to the back room. JA 678. The defendant claimed that, fearing for his safety, he refused to come out from the back room until he saw a police officer or a police uniform. JA 680-681. The defendant also claimed that he did not see the lights or hear the sirens of the myriad law enforcement units that had already arrived on scene and

that he never heard the officers yelling to him from the parking lot. JA 689, 717-719. Rather, the defendant said that at some point he heard someone call "John, come out" and explained that he "peeked 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. JA 309, 681-682, 715-718.

When pointedly asked whether he heard the officers shouting "police," the defendant responded, "No, not at all. They didn't declare they were police officers when they were shouting in either." Apparently recognizing that he had, in effect, answered in the alternative, i.e., "I did not hear them but, in the event I did, they were not saying 'police,'" the defendant tried in vain to correct his error by repeatedly stating that he actually "didn't hear a thing." JA 715-718. Quite understandably, the jury rejected this implausible account.

The district court nonetheless overruled the jury's determination that the defendant's testimony deserved no weight. In doing so, Judge Covello did not even attempt to label the officers' testimony as incredible. Rather, he created "facts" and ignored the uncontroverted evidence to validate his subjective belief that the defendant should not have been convicted. The district court's ruling amounts to nothing more than the court inserting itself as the "thirteenth juror," *see Ferguson*, 246 F.3d at 139 (Walker, J., dissenting).

Setting aside the possible competing interpretations between the parties' accounts, at a minimum the jury was free to conclude that the defendant knowingly sequestered himself in the back room in order to protect himself from what he likely speculated would be angry police officers whom he had just attempted to murder. In other words, the defendant's post-shooting conduct is consistent with that of other criminals who choose to barricade themselves rather than confront an obvious police presence. The defendant's conduct did not, as Judge Covello misguidedly concluded, "militate[] heavily in favor of a finding that Bell was acting in self-defense." Rather, as the jury reasonably concluded, it supported the jury's finding that the defendant was not being truthful when he claimed that he acted in self-defense.

4. The district court abused its discretion when it failed to evaluate the entire trial record

Finally, Judge Covello ignored this Court's admonition in *Sanchez* that when ruling on a new trial motion, "the judge must examine the totality of the case. All the facts and circumstances must be taken into account. An objective evaluation is required." *Sanchez*, 969 F.2d at 1414; *see also Ferguson,* 246 F.3d at 134 ("The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation.").

In *Ferguson*, for example, the district court objectively examined the totality of the record, including the evidence

that was *actually* presented by *both* the government and the defense. For instance, the court analyzed the evidence the government presented to prove the motive requirement of 18 U.S.C. § 1959, such as a payment made to the defendant (as proof of pecuniary gain) and the defendant's involvement with the gang (as proof of the membership motive). Following the court's objective and complete evaluation, the court determined that the evidence was nonetheless incompetent to sustain the required proof of motive. *See Ferguson*, 246 F.3d at 136.

Here, in stark contrast, Judge Covello engaged in an exceedingly narrow, incomplete and skewed review of the facts, focusing solely on the defendant's closing argument rather than upon the evidence presented at trial. Moreover, rather than objectively analyzing the evidence, the district court engaged in a subjective re-evaluation of the testimony, e.g., describing the officers as "thug-like" despite the lack of support in the record for such a characterization. In doing so, Judge Covello literally created "facts" to enable him to reach a conclusion that the defendant acted in self-defense – a finding that was squarely rejected by the jury that heard both the victim and the defendant testify. JA 961-962. Had the district court engaged in an objective and thorough review of the totality of the record, as was done in *Ferguson*, it would have been clear that the evidence did not "preponderate[] heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *Sanchez,* 969 F.2d at 1415 (citing *United States v. Martinez*, 763 F.2d 1297, 1313 (11th Cir. 1985)).

The district court failed to identify "exceptional circumstances" or "patently incredible" testimony that, in some circumstances, would warrant an intrusion upon the function of the jury. *Sanchez,* 969 F.2d at 1414. Instead the court relied upon a series of demonstrably erroneous factual findings in deciding to grant a new trial. As such, the district court abused its discretion and improperly usurped the role of the jury. *See United States v. Cox,* 995 F.2d 1041, 1044 (11th Cir. 1993).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, the verdict reinstated and the matter remanded for sentencing.

Dated: March 24, 2009

Respectfully submitted,

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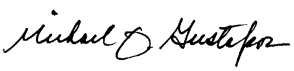

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

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 13,685 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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