No. 08-1770

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

McRAY BRIGHT,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Case No. 06 CR 342

Hon. Joan H. Lefkow, Presiding Judge

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT McRAY BRIGHT

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DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, McRay Bright, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: McRAY BRIGHT.

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court: Sarah O. Schrup (attorney of record), Nicholas P. Stabile (senior law student), and Jon A. Pulkkinen (senior law student), of the Bluhm Legal Clinic at the Northwestern University School of Law. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Illinois, Eastern Division, had jurisdiction over appellant McRay Bright's federal criminal prosecution pursuant to 18 U.S.C. § 3231 (2006), which states that the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." This jurisdiction was based on a four-count superseding indictment charging: (1) conspiracy to defraud the United States in violation of 18 U.S.C. § 371; (2) bank robbery in violation of 18 U.S.C. §§ 2113(a) and 2; (3) possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2; and (4) attempted escape from custody in violation of 18 U.S.C. § 751(a). (R. 80-2, Second Superseding Indictment.)

Bright was initially indicted on May 12, 2006. (R. 1, Indictment.) The government filed a superseding indictment on March 15, 2007 (R. 80-2, Second Superseding Indictment). On April 20, 2008, the jury returned a guilty verdict on all counts. (Trial Tr. 771-72.) Bright subsequently filed a timely motion for a new trial on June 8, 2007. (R. 115, Def.'s Mot. For New Trial.) The district court denied Bright's motion on March 19, 2008. (R. 152, Minute Entry.) The district court entered final judgment on the verdict on March 20, 2008. (R. 158, Judgment.)

This appeal followed. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2006), which grants jurisdiction of "all final decisions of the district courts of the United States" to its courts of appeal. Bright filed his timely notice of appeal on March 24, 2008. (R. 154, Notice of Appeal.)

STATEMENT OF THE ISSUES

I. Whether the district court committed plain error by admitting into evidence unreliable identification evidence procured by an unduly suggestive photo array in violation of Bright's Fifth Amendment right to due process of law.

II. Whether the district court abused its discretion under Federal Rule of Evidence 403 by admitting two pieces of prejudicial guilt-by-association evidence.

III. Whether the district court erred when it assumed that a conviction for attempted escape, 18 U.S.C. § 751(a), automatically satisfies the requirement of a specific intent to obstruct justice for purposes of a section 3C1.1 sentencing enhancement.

STATEMENT OF THE CASE

This is a direct appeal from a criminal case. The government charged McRay Bright with conspiracy in violation of 18 U.S.C. § 371, bank robbery in violation of 18 U.S.C. §§ 2113(a) and 2, and possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2. (R. 1, Indictment.) The Grand Jury returned the indictment on May 12, 2006 (R. 1, Indictment), and Bright was arrested on May 15, 2006 (Trial Tr. 509-10). He entered a plea of not guilty on July 7, 2006. (R. 27, Minute Entry.) On March 15, 2007, the government filed a superseding indictment adding an additional count of attempted escape in violation of 18 U.S.C. § 751(a). (R. 80-2, Second Superseding Indictment.)

Bright's jury trial commenced on April 16, 2007. (Trial Tr. 1.) On April 20, 2007, the jury began to deliberate. (Trial Tr. 755.) On April 23, 2007, the jury informed the district court that it was deadlocked and confused by the instructions. (Trial Tr. 757.) The next day the district court issued a supplemental instruction and told the jury to continue deliberations. (Trial Tr. 768-69.) The jury returned a guilty verdict that same day. (Trial Tr. 771-72.)

Bright filed a timely motion for a new trial on June 8, 2007 (R. 115, Def.'s Mot. For New Trial), which the district court denied on March 19, 2008 (R. 152, Minute Entry). The district court appointed a mitigation specialist to assist in sentencing. (R. 142, Minute Entry.) On March 20, 2008, the district court sentenced Bright to 181 months in prison. (Sentencing Hr'g Tr. 63.) The district court entered final judgment the next day. (R. 158, Judgment.) Bright filed his timely notice of appeal on March 24, 2008. (R. 154, Notice of Appeal.)

STATEMENT OF THE FACTS

On the morning of March 28, 2006, three undisguised African American men, armed with guns, entered a LaSalle Bank on Chicago's North Side and robbed it of over $83,000 in cash. (R. 1, Complaint/Affidavit, at 2-3.) The robbers forced ten employees and one customer behind the teller counter (Trial Tr. 189) and told them to help stuff money from the vault into duffel bags (Trial Tr. 185). Two employees were struck with a gun during the course of the robbery (Trial Tr. 180, 185), and others were threatened with guns (Trial Tr. 179, 186). In one instance, a robber pointed his gun at bank teller Jessica Lopez as he ordered her to hold open a bag while another employee put money from the teller drawers into it. (Trial Tr. 186.) After collecting most of the cash from the drawers and substantial sums from the vault, the robbers fled the scene before the police arrived. (Trial Tr. 185-88.)

Though none of the robbers wore masks or gloves (Trial Tr. 201), investigators were unable to produce any suspects based upon either fingerprint evidence or color photos from bank surveillance cameras recovered from the scene (Trial Tr. 173-74). The only evidence found at the scene, a personal check handled by one of the robbers, was traced to the account of Tierre Dean, a resident of the far South Side of Chicago. (Trial Tr. 537, 539.) No fingerprints could be removed from the check. (Trial Tr. 591.)

Later that day, the FBI arrived to question witnesses (Trial Tr. 571), including Jessica Lopez, bank manager Thanh Huynh-Staley, and security guard Larry Williams (Trial Tr. 210, 268, 303). When asked to describe the first robber to enter the bank, Lopez said he was "light complexioned" and African American.

(Trial Tr. 216.) When pressed for more detail, Lopez offered that he looked "like a medium, like a caramel candy, like a square caramel." (Trial Tr. 216.) At trial, Lopez explained that all African Americans look similar to her, stating, "see, I'm not African American. You know, I only have two family members that are. So to me, everyone is the same." (Trial Tr. 214.) Huynh-Staley, describing the same robber, said he "reminded [her] a little bit of Dave Chappelle [the comedian]. So a lighter skin tone." (Trial Tr. 271.) Concerning this robber's age, Lopez's description placed him between 20 and 30 years old (Trial Tr. 208, 212), Huynh-Staley said he was in his late 20s (Trial Tr. 269-70), and Williams said "late 20s or early 30s" (Trial Tr. 320).

With almost no physical evidence and only vague and generalized descriptions from the witnesses, the government continued its investigation for the next four weeks.

Meanwhile, eighteen-year-old McRay Bright (Trial Tr. 171) was often seen around Chicago's South Side (Trial Tr. 335). Bright was rootless. As a teenager he spent nights in many different locations (Trial Tr. 421) while holding down a job cleaning his aunt Belinda Deneal's home and daycare center (Trial Tr. 667). With significant financial help from two of his sisters, Bright had recently purchased a car.[1] (Trial Tr. 609, 614.) His sisters hoped that the car, by increasing his independence and mobility, would enable Bright to return to high school. (Trial Tr.

[1] At trial, one of Bright's sisters testified that she and another sister contributed a combined $2,500 to the purchase of the car (Trial Tr. 614), which she believed to be its full price (Trial Tr. 610). The seller of the car, however, claimed that he received $5,000 for it. (Trial Tr. 656.)

615.) While Bright had some experience with Gage Park High School, a mere two blocks away from Deneal's residence (Trial Tr. 616), he did not live with Deneal (Trial Tr. 359) and was said to have "lived," if anywhere, at the home of his girlfriend Lorreil Brown, 5612 South LaSalle Street (Trial Tr. 640, 645), over three miles away from Gage Park.

Predictably, Bright fell in with a bad crowd. A close friend, Antonio Harris (Trial Tr. 399), was himself in jail in 2006 (Trial Tr. 722) and was dead not long after the bank robbery (Trial Tr. 415). Cheri Avery, a drug offender who served time in prison (Trial Tr. 414), later claimed to have been present at a dice game prior to the robbery at which Harris bragged to Bright about "hitting a lick" (Trial Tr. 402). Avery was unsure of what Harris meant (Trial Tr. 415) but guessed he was referring to stealing (Trial Tr. 427). Avery claimed that Bright responded that stealing was something he would like to do.[2] (Trial Tr. 406.)

The FBI got a break in the case in early May 2006 when it received a call from a cooperating witness, Lakeisha Dean, who claimed that McRay Bright was involved in the LaSalle Bank robbery. (Trial Tr. 573-74.) FBI Agent Nikkole

[2] Prior to trial defense counsel moved *in limine* under Federal Rules of Evidence 401 and 403 to exclude evidence of any prior bad acts not charged in the indictment and, in particular, "certain acts that others have accused Bright of committing, namely, that of hitting his girlfriend Lorreil Brown." (R. 92, Def.'s Consolidated Mot. in Limine, at 3.) When the government assured the district court that it did not intend to introduce evidence "of the defendant's abuse of his girlfriend," the court deemed the motion moot and thus did not issue a ruling with regard to other bad acts. (Trial Tr. 9.) Bright also moved to exclude improper guilt-by-association evidence pursuant to Federal Rules of Evidence 403 and 404(b) and, in particular, evidence of drug dealing and gang affiliation (R. 92, Def.'s Consolidated Mot. in Limine, at 1-2), which the district court granted (Trial Tr. 8). Finally, at trial, defense counsel moved to suppress Avery's testimony about this conversation between Bright and Harris, a known gang member, as hearsay and as unduly prejudicial. (Trial Tr. 402.) The district court denied the motion. (Trial Tr. 400-01.)

Robertson, who had interviewed three of the witnesses on the day of the robbery (Trial Tr. 577) and read all of the witnesses' descriptions of the robbers (Trial Tr. 234), quickly attempted to corroborate this new lead. Rather than arrange a live line-up, Robertson input Bright's booking photo into a computer program that generated fillers for a photographic lineup (Trial Tr. 233) and then chose five to include with Bright (Trial Tr. 234). Although multiple witnesses had described even the youngest of the robbers as in his late 20s (Trial Tr. 270) or early 30s (Trial Tr. 320), the computer program provided only fillers who matched Bright's age (Trial Tr. 231). In addition, although several witnesses affirmatively described the youngest robber as light complexioned (Trial Tr. 216, 271), Robertson's photo array included only two light-complexioned subjects, one of whom was Bright (Trial Tr. 220).

After creating this photo array, Agent Robertson returned to the LaSalle Bank on May 2, 2006 to ask bank employees Jessica Lopez and Larry Williams if they could identify any of the robbers from the lineup. (Trial Tr. 230.) Williams was unable to identify a suspect. (Trial Tr. 316.) Lopez cautiously noted that the headshots did not allow her to see the height or build of those pictured, nor the details of their ears, all of which she believed to be important. (Trial Tr. 193, 220, 222.) Though she also noted that his eyes looked different from what she remembered, she nevertheless identified Bright as one of the robbers. (Trial Tr. 221.) Lopez later asserted that she would describe four of those pictured as "dark

complexion[ed]" and only two–including Bright–as "light complexioned." (Trial Tr. 220.)

Bright was arrested on May 15, 2006. (Trial Tr. 509-10.) On May 16, 2006, FBI Agents arrived at the Chicago Police Department to take custody of Bright and transfer him for FBI processing. (Trial Tr. 510.) Bright repeatedly asked the agents questions about the state of the case against him until one Agent told him to "shut the f*ck up," after which Bright, with his hands cuffed behind his back, took off running. (Trial Tr. 513-14.) He made it no farther than the police parking lot before he was apprehended (Trial Tr. 518-19), but this act added a count of attempted escape to the charges against him (Trial Tr. 169).

About six weeks after the initial photo line-up, the FBI scheduled an in-person lineup (Trial Tr. 259), and this time invited three bank employees (R. 30, Mot. H'rg, at 4).[3] None of the employees were able to identify Bright (R. 30, Mot. H'rg, at 4), including bank manager Huynh-Staley (Trial Tr. 275), who later claimed that during the robbery she had a direct and lengthy confrontation with Bright during which they exchanged words and he struck her (Trial Tr. 245-51). Despite her initial failure to identify Bright, Huynh-Staley testified that she called Agent Robertson a "couple of days" after the in-person line-up to say that, in fact, she had recognized someone but did not mention it at the time because she was unsure. (Trial Tr. 279-80.) This testimony "[came] as a complete surprise" to defense

[3] On June 14, defense counsel moved for non-suggestive line-up procedures to be used, such as a sequential rather than simultaneous lineup. (R. 48, Mot. H'rg, at 4-7.) The motion was denied. (R. 48, Mot. H'rg, at 11.)

counsel, who did not receive any information regarding this conversation during discovery. (Trial Tr. 282.) At sidebar, defense counsel characterized this as a "serious discovery violation," and the government agreed to not raise the subject during Agent Robertson's testimony. (Trial Tr. 534-35.) Nevertheless, the jury had already heard Huynh-Staley testify to her belated identification, and the government referenced it again during closing statements. (Trial Tr. 684.) In addition, despite their initial inability to identify Bright, both Huynh-Staley and Williams confidently pointed to the defendant as one of the robbers at trial. (Trial Tr. 262, 293-94.)

On September 18, 2006, the FBI arrested Brandon Lee as one of the three men who robbed the LaSalle Bank. (Trial Tr. 378-79.) Lee identified Bright and subsequently agreed to testify to Bright's involvement in the robbery in the hopes of a substantially lower sentence for himself. (Trial Tr. 330-31.)

The government continued its investigation, and the case against Bright went to trial on April 16, 2007. (Trial Tr. 1.) With only one positive eyewitness identification, the testimony of an acknowledged bank robber, and lacking any direct, physical evidence tying Bright to the robbery (Trial Tr. 174), the government sought to support its case with a broad range of circumstantial evidence. Although it was established that Bright was gainfully employed (Trial Tr. 425, 667-68), FBI Agents investigated the extravagance of his expenses during the period between the robbery and his arrest. At trial, the government produced one witness who said that a man purchased $530 of jewelry from her store on April 14, 2006. (Trial Tr.

439-40.) The name on the receipts, however, was "James Goodman." (Trial Tr. 443.) Another witness testified that in April 2006, Bright gave him $1,100 for a used car. (Trial Tr. 474, 482.) Finally, the government introduced evidence to show that, on the day of the bank robbery, Antonio Harris was bonded out of jail for $1,500. (Trial Tr. 555.) However, the bond was signed by Serena Harris, Antonio Harris's mother. (Trial Tr. 555.)

The government also introduced evidence at trial, via birth certificates, establishing that Ruby Parker had children with an uncle of Bright's (Trial Tr. 590) and was a senior teller at the LaSalle Bank until January of 2005 (Trial Tr. 507). George Quiroga, a LaSalle Bank investigator and government witness (Trial Tr. 502), testified that Parker would have known that Brinks trucks delivered money weekly to the bank on Tuesdays, a schedule that was in fact maintained until the time of the robbery (Trial Tr. 505-07). Such a delivery was attempted on the day of the robbery, but only after the robbers fled the scene. (Trial Tr. 506.) The government did not establish that Bright had any contact with Parker at any time, that he knew where she worked in years prior to the robbery, or that she ever discussed any details of that work with him. Defense counsel moved *in limine* to exclude the birth certificate evidence as both irrelevant and prejudicial. (R. 99, Motion, at 1.) The motion was denied (R. 96, Minute Entry, at 1), and the evidence was submitted to the jury over defense counsel's repeated objections (Trial Tr. 565-66).

In closing arguments, the government focused on bank teller Lopez's identification of Bright (Trial Tr. 683, 733), as well as Huynh-Staley's belated identification (Trial Tr. 684, 734). The government also relied heavily on Cheri Avery's description of the dice game she observed (Trial Tr. 695, 736, 739), Brandon Lee's testimony (Trial Tr. 686, 734), and on Bright's connection to the LaSalle Bank by way of Ruby Parker (Trial Tr. 690, 738).

On April 20, 2007, the district court instructed the jury as to its responsibilities and the law (Trial Tr. 741-55), and the jury began deliberations (Trial Tr. 755). The jury considered the four counts charged in the indictment: Count 1, conspiracy; Count 2, bank robbery; Count 3, possession of a firearm in furtherance of a crime of violence; and Count 4, attempted escape. (R. 80-2, Second Superseding Indictment.) On April 23 the jury reported that it was deadlocked. (Trial Tr. 757.) The following day, the jurors notified the court that they could not reconcile two of their instructions. (Trial Tr. 762.) They were initially instructed to consider each of the Counts separately (Trial Tr. 753), but they were also told that if they found the defendant guilty of Count 1, conspiracy, then they could also find him guilty of Counts 2 and 3 (Trial Tr. 751). The district court clarified these instructions and the bases on which Bright could be found guilty for each separate count. (Trial Tr. 768-69.) Later that day, the jury returned a verdict of guilty on all counts. (Trial Tr. 771-72.)

On August 14, 2007, the district court approved the appointment of a Mitigation Specialist. (R. 142, Minute Entry, at 1.) Two Mitigation Specialists

spent over seven months investigating Bright's background and conducting interviews with his family, his friends, and Bright himself. (Sentencing H'rg Tr. 1-13.) The specialists ultimately submitted a comprehensive report that detailed the circumstances of Bright's youth and argued in favor of sentencing mitigation. (Sentencing H'rg Tr. 1-13.)

At the sentencing hearing on March 20, 2008, the government argued that a two-level enhancement for obstruction of justice should be added to Bright's base offense level. (Sentencing H'rg Tr. 27.) The government based its argument primarily on Bright's conviction for attempted escape. (Sentencing H'rg Tr. 28.) Defense counsel explained that Bright's flight was predictable in light of his age, the abuses that he suffered earlier in his life, and the angry "cussing" directed at him by his FBI handler. (Sentencing H'rg Tr. 29.) In ruling, the district court unequivocally stated,

> [i]t's not necessary to get into a discussion [of these considerations] . . . in light of the conviction for the escape, which . . . is a clear enhancement under . . . 3(c)1.1, obstruction of justice. So we'll move on with that.

(Sentencing H'rg Tr. 31.) This enhancement increased Bright's base offense level to 30, which, alongside his criminal history of level 1, suggested a Guidelines range of 97 to 121 months. (Sentencing H'rg Tr. 33, 39, 62.) The district court, staying within that range, ultimately sentenced Bright as follows: 60 months on Counts 1 and 4, to run concurrently with 97 months for Count 2, followed by 84 months on Count 3, for a total of 181 months. (Sentencing Hr'g Tr. 63.)

SUMMARY OF ARGUMENT

This Court should reverse Bright's conviction because the district court erroneously admitted into evidence an unreliable identification as well as prejudicial guilt-by-association testimony. Also, this Court should remand for resentencing because the district court erroneously interpreted and applied the Sentencing Guidelines.

The district court committed plain error when it admitted Lopez's identification testimony, which was procured by an impermissibly suggestive photo array, into evidence. Due process requires the exclusion of identification evidence procured by an impermissibly suggestive confrontation unless the identification is bolstered by independent indicia of reliability.

Here, the FBI constructed a six-person photo array to show Lopez that included only two African Americans with a medium complexion, the characteristic that matched Lopez's pre-identification description. Thus, the six-person array was converted into a de facto and unduly suggestive two-person array.

Further, the circumstances surrounding the robbery and Lopez's identification of Bright offer no independent indicia of reliability to overcome the corrupting effect of the photo array. Lopez's hysteria and fear, coupled with her inability to distinguish between African Americans, does not bolster the reliability of her identification.

Because the suggestiveness of the array and the unreliability of Lopez's identification were obvious, the error of admitting them was plain. Further, the

identification evidence more than probably contributed to Bright's conviction because the remaining identifications were not credible and the remainder of the government's circumstantial evidence was weak. Finally, because the introduction of Lopez's identification testimony violated Bright's due process rights, the fairness and integrity of Bright's trial were compromised. Thus, this Court should find plain error and reverse Bright's conviction.

The district court also abused its discretion by admitting two pieces of guilt-by-association evidence whose probative value was substantially outweighed by their prejudicial effect. Cheri Avery's testimony regarding Bright acquaintance Antonio Harris's prior robbery proved little more than Bright's association with robbers and was, therefore, unduly prejudicial. Similarly, birth certificate evidence showing Bright's distant relation to Ruby Parker, a former LaSalle Bank employee, led the jury to infer Bright's guilt by implying that she had breached her employer's trust by revealing the bank's Brinks schedule to Bright. The introduction of this guilt-by-association evidence was not harmless, as it solidified the government's otherwise-weak circumstantial case. For these reasons, the district court abused its discretion in admitting the prejudicial guilt-by-association evidence, and Bright's conviction should be reversed.

Finally, this Court should vacate Bright's sentence and remand for resentencing because the district court improperly interpreted and applied an obstruction-of-justice enhancement under the Guidelines. Initially, the court erred by assuming that a conviction for attempted escape, which requires mere

"knowledge" of unauthorized flight, automatically satisfied the applicable "willful" obstruction of justice mens rea required by the Guidelines. Because the district court erroneously found the wrong mens rea, it consequently erred by not making the required finding of willful intent before imposing the enhancement. Thus, this Court should remand for resentencing.

ARGUMENT

I. The District Court Committed Plain Error When It Admitted Lopez's Identification Of Bright, Where Her Cross-Racial Identification Was Irreparably Tainted By A Suggestive Photo Array And Was Otherwise Unreliable.

The district court committed plain error when it admitted into evidence Lopez's identification of Bright procured by a suggestive FBI photo array. "Unduly suggestive identification procedures violate due process when they create a substantial likelihood of misidentification." *United States v. Hargrove*, 508 F.3d 445, 450 (7th Cir. 2007) (citing *Neil v. Biggers*, 409 U.S. 188, 198 (1972)). The danger of an incorrect identification increases when the defendant "is in some way emphasized." *Simmons v. United States*, 390 U.S. 377, 383 (1968). After viewing an unduly suggestive photo array, "the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen," thereby tainting subsequent identifications. *Id.* at 383-84. Unless the tainted identification is corroborated by independent indicia of reliability, due process requires the exclusion of such identifications. *See, e.g., United States v. Rogers*, 387 F.3d 925, 939 (7th Cir. 2004) (finding a single-person show-up unduly suggestive and identification unreliable); *Cossel v. Miller*, 229 F.3d 649, 656 (7th Cir. 2000) (holding that a single-photograph show-up "irreparably tainted" in-court identification).

Although defense counsel did not object to the admission of the evidence at trial, Bright never evinced an intention to formally relinquish his right to pursue a

suppression argument and, given the events that unfolded at trial, he had good cause for failing to move to suppress earlier.[4] *See* Fed. R. Crim. P. 12(e); *United States v. Johnson*, 415 F.3d 728, 730 (7th Cir. 2005) (finding that because Rule 12(e) "waiver" is more akin to a "forfeiture" than to an intentional relinquishment of a claim, the court would review the suppression argument if good cause was shown). Thus, this Court reviews the district court's admission of Lopez's identification for plain error. *See United States v. Alanis*, 109 F.3d 1239, 1242 (7th Cir. 1997). To find plain error, the court must determine "1) that an error was made; 2) that the error was clear or obvious; and 3) that the defendant's substantial rights were affected by that error." *United States v. White*, 222 F.3d 363, 369 (7th Cir. 2000). Once this Court finds plain error, it may then exercise its discretion to correct "those errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quoting *United States v. Young*, 470 U.S. 1, 15 (1985) (internal quotations omitted)).

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[4] Bright had good cause for his failure to raise the suppression claim before trial because the factual basis for the claim only became evident at trial. Specifically, the prosecution did not notify defense counsel that Thanh Staley had called an FBI agent a couple days after the live line-up to inform the agent that she had recognized someone at the lineup but had not identified him at that time because she had not been "100 percent sure." (Trial Tr. 280.) During a sidebar at trial, the prosecution represented to the court that it believed that Staley's conversation with Agent Robertson had not even been memorialized in a 302 report. (Trial Tr. 282.) Had Bright known about the surprise avalanche of undisclosed positive identifications, not only from Staley but also from security guard Larry Williams (who identified Bright in court despite failing to identify Bright when shown the FBI photo array), Bright likely would have moved to suppress the line-up evidence. *See, e.g., United States v. Salahuddin*, 509 F.3d 858, 861 (7th Cir. 2007) (finding that defendant showed good cause where "the failure to file [a suppression motion] was due in large part to a mutual misapprehension by both the Government and the defense as to the facts underlying [defendant's] juvenile conviction" and whether that conviction could count as a prior offense).

The introduction of Lopez's identification qualifies as plain error and merits discretionary reversal. Because the FBI photo array steered Lopez's attention towards Bright, her identification of Bright as the assailant was tainted by the suggestiveness of the array. The likelihood of an erroneous identification is reinforced by the totality of the circumstances surrounding the robbery, including Lopez's inattention and vague, pre-identification description of the assailant. Further, because Lopez was the only witness to positively place Bright at the bank, the district court's admission of her identification prejudiced Bright. As a result of the introduction of such unreliable evidence, the fairness and integrity of Bright's trial were seriously compromised. Thus, discretionary reversal is warranted.

A. Admitting the identification evidence was plain error.

This Court employs a two-step analysis to determine whether an identification is too tainted by a suggestive procedure to be admitted into trial. In the first step, the court must determine whether the identification procedure was unduly suggestive. *United States v. Fryer*, 974 F.2d 813, 821 (7th Cir. 1992). If so, the court then must determine if, under the totality of the circumstances, the identification is nevertheless reliable. *Id*. A sufficiently reliable identification, regardless of the suggestiveness of the identification procedure, need not be excluded. *See United States v. Newman*, 144 F.3d 531, 535-36 (7th Cir. 1998). But when the suggestiveness of the array is not outweighed by independent indicia of reliability, due process requires exclusion. *See, e.g., Cossel*, 229 F.3d at 656

(reversing conviction where identification was procured by a suggestive single-photo show-up and identification lacked independent reliability).

1. The photo array impermissibly suggested which suspect Lopez should pick.

An identification procedure that in some way emphasizes the government's suspect increases the likelihood of mistaken identification. *Simmons*, 390 U.S. at 383. The government may avoid violating due process by assuring that a photo array includes "'a reasonable number of persons similar to any person then suspected whose likeness is included in the array.'" *Manson v. Brathwaite*, 432 U.S. 98, 117 (1977) (quoting MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 160.2(2) (1975)). Although an array need not include "identical twins," *United States ex rel. Crist v. Lane*, 745 F.2d 476, 479 n.1 (7th Cir. 1984) (citation omitted), courts have looked for "descriptive features within a reasonable range of similarity to each other, especially in light of the [witness's] prior descriptions," e.g., *United States v. Funches*, 84 F.3d 249, 253 (7th Cir. 1996) (upholding line-up). Other factors considered in determining whether an array is impermissibly suggestive include the size of the array and the details of the photographs. *See United States v. Smith*, 156 F.3d 1046, 1050 (10th Cir. 1998); *United States v. Thai*, 29 F.3d 785, 808 (2d Cir. 1994). A difference between the suspect's complexion and that of the other men included is one way an array may impermissibly suggest a suspect. *See United States v. Fernandez*, 456 F.2d 638, 641 (2d Cir. 1972) (noting that it would be

"tolerably clear that the array was impermissibly suggestive" where only one person was shown with light skin). And suggestiveness is heightened when the distinguishing feature is one that the witness described to police in her pre-identification description. *See Hargrove*, 508 F.3d at 450 (rejecting defendant's claim that he was singled out by glasses and beard because none of the witnesses "had told investigators that any of the four men at the apartment were bearded or wore glasses"). Furthermore, concern about suggestiveness increases when a witness is making a cross-racial identification. *United States v. Rogers*, 126 F.3d 655, 658 (5th Cir. 1997).

Although a six-person array may be "sufficient," *United States v. Carter*, 410 F.3d 942, 948 (7th Cir. 2005), it is nevertheless "'sufficiently small to weigh heavily in the balance of factors to be considered'" when judging suggestiveness. *Smith*, 156 F.3d at 1050 (quoting *United States v. Sanchez*, 24 F.3d 1259, 1263 (10th Cir. 1994)). Where the witness's attention is directed to only two suspects, the suggestiveness of the array approaches that of a single-photo or show-up, a practice that is "inherently suggestive." *Newman*, 144 F.3d at 535*; see also Grubbs v. Hannigan*, 982 F.2d 1483, 1490 (10th Cir. 1993) (finding confrontation "unnecessarily suggestive" in part because array contained "four individuals who had facial characteristics noticeably dissimilar from those of the [defendant]" and a fifth individual had been in a prior lineup); *United States ex rel. Phipps v. Follette*, 428 F.2d 912, 913 (2d Cir. 1970) (holding that a confrontation that used a two-person show-up violated constitutional rights).

Here, the FBI photo array impermissibly emphasized Bright by including four fillers whose complexions are substantially darker than Bright, thereby converting the six-person photo array into a de facto two-person array. Only Bright, in the bottom middle, and the third filler, in the upper right, are medium-complexioned. (App. 12.) The difference in complexion between Bright and the fillers carries heightened importance because FBI investigators pressed Lopez to describe with specificity the complexion of the assailants. When Lopez initially described the first robber as "African American," the FBI investigators pressed for more detail:

> You know, there was an officer there that was asking if they were light, medium, like him. Can you tell us more? It was like a caramel, like a light color caramel
>
> * * *
>
> But they needed more detail. Was it a darker, you know, African American. A lighter African American? . . .And that's where I came in, and I told them it is like a medium, like a caramel, like a caramel candy, like a square caramel.

(Trial Tr. 214, 216.)

When shown the array at trial, Lopez confirmed that four suspects in the array were dark complexioned, whereas only two were medium-complexioned. (Trial Tr. 220.) Other descriptive estimates of the assailants that Lopez gave to the FBI—such as height—are impossible to judge in the photo array, which shows only the head and shoulders. Consequently, those features observable in the photo array—principally skin complexion, but also age—increased in importance. Thus, it is likely that the appreciable difference in complexion immediately led Lopez to

eliminate four of the fillers and focused her attention on only two, a consequence that could not have been unforeseen by Agent Robertson, the FBI agent who constructed the array. At trial, Agent Robertson admitted to having read Lopez's 302 before picking the photographs to include in the array. (Trial Tr. 234.) Although she claimed that all the photographs showed men of similar complexion (Trial Tr. 236), Agent Robertson nevertheless admitted that Bright's picture showed "a lighting affect [sic]" (Trial Tr. 235). Lopez, however, did not ascribe any differences to a lighting effect (Trial Tr. 176-223) and testified that only two of the men had a medium complexion (Trial Tr. 220).

Far from being picked out of a fair photo array, Bright had a 50/50 chance of being picked as the assailant. That Lopez admitted to having difficulty distinguishing between African Americans[5] (Trial Tr. 214) only increases the array's suggestiveness. Although the government may argue that the confrontation was not suggestive because the FBI agent told Lopez that the assailant may not be in the lineup (Trial Tr. 232), this Court has recognized that "with a lineup of six, a victim may conclude that the offender must be included," *United States v. Brown*, 471 F.3d 802, 804-05 (7th Cir. 2006) (discussing relative merits of sequential display versus lineup); see also Amy Klobuchar, Nancy K. Mehrkens Steblay, & Hilary Lindell Caliguiri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381, 388

[5] Specifically, Lopez admitted under cross-examination, "[S]ee, I'm not African American. You know, I only have two family members that are. So to me everyone is the same." (Trial Tr. 214.)

(2006) (noting that "[e]ven when the true perpetrator is absent from the lineup, it is likely that one of the fillers used in the lineup will provide a better relative match to the witness's memory than the others," a process that "can increase the risk of a misidentification."). By activating Lopez's relative judgment to pick which of the two medium-complexioned males most resembled the assailant, the FBI photo array impermissibly steered Lopez towards Bright and thus created a substantial likelihood of misidentification.

2. Lopez's identification was unreliable.

The district court committed error when it failed to recognize that the suggestiveness of the FBI photo array was enhanced by the totality of the circumstances in which Lopez viewed the assailant. An identification generated by an unduly suggestive confrontation is admissible only if indicia of its reliability outweigh "the corrupting effect of the suggestive identification itself." *Manson*, 432 U.S. at 114. In determining the reliability of Lopez's identification, this Court focuses on the five factors laid out in *Biggers*: "(1) the witness' opportunity to view the suspect at the scene of the crime; (2) the witness' degree of attention at the scene; (3) the accuracy of his pre-identification description of the suspect; (4) the witness' level of certainty in the identification; and (5) the time elapsed between the crime and the identification." *Rogers*, 387 F.3d at 938 (citing *Biggers*, 409 U.S. at 199-200). Because the totality of these factors does not outweigh the corrupting effect of the FBI photo array, admission of Lopez's identification was error.

Although Lopez claims she had a good opportunity to view the assailant's face (Trial Tr. 202), thus satisfying *Biggers*' first factor, this opportunity was completely undermined by the second *Biggers* factor: her inadequate attention throughout the entire robbery. In fact, under this factor, Lopez's degree of attention at the scene weighs most heavily against a finding of reliability. Courts have held that this factor bolsters reliability when the assailant's conduct "ensure[s] . . . rapt attention during the duration of the robbery," *Newman*, 144 F.3d at 536, or when the witness is otherwise especially attentive, see, e.g., *Walton v. Lane*, 852 F.2d 268, 274 (7th Cir. 1988) (noting that witness focused his attention solely on the robber); *McFowler v. Jaimet*, 349 F.3d 436, 449 (7th Cir. 2003) (concluding that witness likely viewed suspect "with a high degree of attention"). Courts have found that a witness is reliable when not distracted by fear of violence, see *United States v. Cord*, 654 F.2d 490, 493 (7th Cir. 1981), because the risk of misidentification "is increased when the observation was made at a time of stress or excitement," *United States v. Russell*, 532 F.2d 1063, 1066 (6th Cir. 1976).

Because the scene inside the bank was submerged in chaos and fear, Lopez's attention does not bolster the reliability of her identification. Lopez had only seconds of calm observation before the robbery erupted. Lopez admitted that when the first assailant entered the bank and approached her teller window with a check, her interaction lasted only seconds and that she was looking at the check. (Trial Tr. 198.) Seconds later, after the robber moved on to another teller, Lopez heard the assailant demand money. She turned "and there was a gun on her head right here."

(Trial Tr. 179.) When asked if she said anything in response, Lopez answered "I just, oh, my God, that's all I said." (Trial Tr. 179.) Lopez and another teller "were praying" (Trial Tr. 184) before the first robber "put the gun to [her] head and told [her] to hold the bag" (Trial Tr. 186). As another teller gathered money for the robbers, the first assailant threatened to kill Lopez. (Trial Tr. 186) ("And he said, faster, do it faster, do you want her to die?"). Describing the scene inside the bank, Thanh Staley, the branch manager, testified that when she joined her tellers outside her office, they were "hysterical" and were "all crying and screaming and really hysterical." (Trial Tr. 248.) Unprepared for the robbery, Lopez was thrust into one of the most terrifying situations imaginable. Her fear is understandable. But "[t]hat such a response is entirely reasonable under the circumstances does not change the fact that it weighs against the reliability of her identification" because it "throw[s] some doubt on her ability to concentrate on and remember [the robber's] face." *Rogers*, 126 F.3d at 659.

Turning to the third *Biggers* factor, Lopez's pre-identification description of the first assailant does not bolster the reliability of her identification. Courts use this third factor to determine "if and when the witness developed and expressed a concrete and specific impression" of the assailant, an impression that is "firm enough to remain reliable despite the vagaries of time and the pressures of any undue suggestiveness." *Walton*, 852 F.2d at 274 (quotation omitted). Reliable eyewitnesses often provide detailed descriptions of an assailant's facial characteristics. *See, e.g., Manson*, 432 U.S. at 115 (noting that witness described

defendant's race and height, as well as "the color and style of his hair, and the high cheekbone facial feature"); *Fryer*, 974 F.2d at 821 (finding reliability where witnesses described defendant's "chemically treated" hair and high cheekbones). Such detail bolsters the inference that the witness had a sufficiently specific and reliable impression of the assailant before viewing a suggestive identification procedure.

Here, however, Lopez merely described an African-American male, who was somewhat taller than her (Trial Tr. 214) and whose age could range anywhere from early 20s to 30 (Trial Tr. 208, 212). Such a description—that overstates Bright's age by at least 2-12 years—describes innumerable men in the Chicago area and in no way suggests that Lopez had formed a "concrete and specific impression" of the assailant independent of the suggestive photo array. *See Marsden v. Moore*, 847 F.2d 1536, 1546 (11th Cir. 1988) (finding that description of assailant as "a white man in his thirties with a cast on his left hand" was "very general" and "suggest[ed] that [the witness's] identification did not have a reliable and sufficient independent basis"). Given Lopez's high stress-level and difficulties distinguishing between African-Americans, it is unsurprising that her pre-confrontation description of the assailant was general and vague. Nonetheless, this description does not bolster her reliability.

Lopez's subsequent certainty in her identifications—the fourth *Biggers* factor—is also suspect. Reliable witnesses often express unwavering confidence in their identifications. *See, e.g.*, *United States v. Wisniewski*, 741 F.2d 138, 144 (7th

Cir. 1984) (noting that witness recognized defendant "without hesitation"); *Newman*, 144 F.3d at 536 (explaining that "all witnesses expressed a high degree of certainty"). By contrast, upon seeing the photo array, Lopez "was hesitant." (Trial Tr. 193.) Furthermore, although her subsequent "very certain" identification was based on Bright's lips and eyes (Trial Tr. 221), she inconsistently testified that his eyes in the array looked different than those she remembered of the assailant (Trial Tr. 222) (describing assailant's eyes as "cold" but describing Bright's eyes in the photo array as "sad"). Thus, Lopez's belated certainty in her identification does not bolster the reliability of her identification.

Finally, the passage of five weeks between the robbery and Lopez's viewing of the photo array does not enhance the reliability of her identification. This final *Biggers* factor tends to bolster reliability when the identification occurs within hours after the crime or within days. *See, e.g., Newman*, 144 F.3d at 536 (noting that an identification sixty to ninety minutes after a robbery "enhances the reliability of these witness' identifications"); *McFowler*, 349 F.3d at 450 (finding that lineup within six hours of shooting "weighs rather strongly in favor of reliability"). The Supreme Court, however, has suggested that an identification after the passage of "weeks or months" may not bolster reliability. *See Manson*, 432 U.S. at 116 (noting that the passage of minutes bolstered reliability because "we do not have here the passage of weeks or months between the crime and the viewing of the photograph"). Although the five weeks between the robbery and Lopez's viewing of the suggestive photo array may not, by itself, be dispositive of reliability,

it certainly does not ameliorate Lopez's difficulty in making cross-racial identifications or in any way outweigh the corrupting effect of the FBI photo array.

3. The error in admitting the evidence was plain.

A plain error is one that is "obvious." *United States v. Olano*, 507 U.S. 725, 734 (1993). An error is not obvious where the law is unsettled at the time the error is committed. *United States v. Stott*, 245 F.3d 890, 900 (7th Cir. 2001).

By Bright's trial, in April 2007, the law was clearly settled as to what constituted an impermissibly suggestive confrontation. *See Manson*, 432 U.S. at 114-17; *Cord*, 654 F.2d at 492-93. Further, the suggestiveness of the FBI array was obvious on its face: only two of the photos matched the description given by Lopez. Also, Lopez's testimony revealed a lack of indicia of reliability; she had been extremely fearful and emotional during the robbery and had admitted that to her all African Americans "are the same." This testimony should have put the district court on immediate notice that Lopez's observational abilities were severely compromised and that her seemingly-confident identification of Bright as the first assailant was an effect of the suggestive photo array itself and not a product of her memory. Accordingly, the district court should have excluded the evidence, and failure to do so was obviously erroneous.

B. Bright was prejudiced by the admission of Lopez's identification because it is reasonably probable that the identification evidence affected the outcome of his trial.

To establish plain error, a defendant must also prove that the error affected "substantial rights." *Olano*, 507 U.S. at 734. Usually, this means that "the error must have been prejudicial" and "affected the outcome of the district court proceedings." *Id.* That is, the defendant must establish "'a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.'" *United States v. Dominquez Benitez*, 542 U.S. 74, 82 (2004) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

It was more than reasonably probable that admission of Lopez's tainted identification pushed the jury to conviction. In the absence of fingerprints, photographic evidence, or even the discovery of bait money, Lopez was the only witness untainted by self-interest to positively link Bright to the LaSalle bank. Other witnesses failed to make positive identifications of Bright. For example, Thanh Staley, the bank's branch manager, was not shown the photo array but instead attended a live lineup on June 15, 2006. (Trial Tr. 259.) At the line-up, Staley did not identify anyone as the first assailant. (Trial Tr. 261.) Instead, Staley waited a couple of days after the line-up before calling the FBI to tell them that she had recognized someone. (Trial Tr. 279-80.) Larry Williams, the bank's security guard, was unable to identify Bright as the assailant from the photo array. (Trial Tr. 316.) Despite his failure to positively identify anyone in the immediate aftermath of the incident and even after acknowledging his deteriorated eyesight

due to diabetes (Trial Tr. 315), Williams nonetheless confidently identified Bright for the first time at trial (Trial Tr. 293-94). Finally, as an alleged co-conspirator and government witness, Brandon Lee's testimony was tainted by self-interest.[6] Taken together, the incriminating impact of these other identifications is negligible.

Furthermore, the jury was deadlocked after one day of deliberations. (Trial Tr. 757.) On the next day, the jury asked the court for clarification as to how the charges interacted. (Trial Tr. 762.) Clearly, the jury had serious doubts that Bright was involved in the robbery and the conspiracy. Only Lopez, who had after a brief hesitation identified Bright in the photo array, provided direct, credible evidence of Bright's presence at the bank.

Undoubtedly, this evidence was critical to the government's conviction. As the Supreme Court has recognized, eye-witness testimony carries significant weight with juries. *Watkins v. Sowders*, 449 U.S. 341, 352 n.3 (1981) (Brennan, J., dissenting). Law and psychology scholars have also confirmed the "overwhelmingly influential" impact of eye-witness testimony. *See* ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 9 (1979). Given the confirmed importance of eye-witness identifications in jury decision-making, it is improbable that Lopez's tainted identification did not contribute to Bright's conviction.

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[6] As courts have recognized, testimony of co-conspirators is less valued than testimony by an unbiased party. *See, e.g., Almonacid v. United States*, 476 F.3d 518, 522 (7th Cir. 2007) (finding that an attorney did not fall below the standard of care when advising a client to decline a plea when the government's case rested mostly on co-conspirator testimony); *but see Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (noting that co-conspirator testimony has value that is "firmly rooted" and "steeped" in our jurisprudence).

C. Because admission of the photo array violated procedural due process, this Court should correct the error by vacating Bright's convictions.

Once this Court notices plain error, it has discretion to correct it. *Olano*, 507 U.S. at 735. "The Court of Appeals *should* correct a plain forfeited error affecting substantial rights if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (emphasis added) (internal quotation omitted); *United States v. Julian*, 427 F.3d 471, 482 (7th Cir. 2005) (explaining that an error would implicate the fairness and integrity of the judicial proceeding "[i]f a jury, properly instructed on this point, *might* have found that the conspiracy had come to an end" before the amended statute became effective) (emphasis added). Furthermore, an error may affect the fairness, integrity, or public reputation of judicial proceedings regardless of the defendant's guilt. *Olano*, 507 U.S. at 736-37.

Because the admission of Lopez's tainted identification implicated the fairness and integrity of Bright's prosecution, the plain error merits reversal. As described above, the jury's deadlocking suggests that there were grave doubts whether Bright participated in the robbery or the conspiracy, doubts that were entirely reasonable given the paucity of circumstantial evidence tying Bright to the bank, as well the scarcity of credible, direct eye-witness testimony. The exclusion of Lopez's identification may have tipped the balance the other way.

Finally, the error Bright complains of implicates his procedural due process rights, which are the foundation of a fair trial. As this Court has noted, "[m]isidentifcation is 'irreparable' when the source of the error is so elusive that it

cannot be demonstrated to a jury. . . ." *United States v. Williams*, 522 F.3d 809, 811 (7th Cir. 2008). For this reason, identifications procured by impermissibly suggestive confrontations are excluded altogether from trial, as opposed to requiring the defendant to attack their reliability once admitted into evidence. *See Foster v. California*, 394 U.S. 440, 443 n.2 (1969) (noting that credibility of identifications, like other evidence, is normally a matter for the jury, except where confrontation procedures are "so defective" as to render identification constitutionally inadmissible). By forcing Bright to defend against a tainted identification—evidence to which juries accord overwhelming weight—the district court denied Bright a fair trial. Thus, this Court should correct the plain error and vacate Bright's conviction.

II. The District Court Erred In Admitting Unduly Prejudicial Evidence In Violation Of Federal Rule Of Evidence 403.

The district court erred by admitting two pieces of improper guilt-by-association evidence in violation of Federal Rule of Evidence 403. First, Cheri Avery's testimony regarding Antonio Harris's prior robbery (Trial Tr. 404) proved little more than Bright's association with robbers and was, therefore, unduly prejudicial. Similarly, birth certificate evidence showing Bright's distant relation to Ruby Parker, a former LaSalle Bank employee (Trial Tr. 565-68), led the jury to infer Bright's guilt from her improprieties. Although this Court has never applied Rule 403 to exclude general associational evidence, other circuits have found such

evidence to raise an improper guilt-by-association inference and excluded it as unduly prejudicial; their reasoning is fully applicable here.

This Court reviews these evidentiary decisions for abuse-of-discretion. *United States v. LeShore*, 543 F.3d 935, 939 (7th Cir. 2008). First, defense counsel objected at trial to the admission of Avery's testimony regarding Harris's prior robbery, initially on hearsay grounds and then in a later sidebar on Rule 403 grounds. (Trial Tr. 400-01.) Specifically, during the sidebar the government argued that it was not hearsay because it was being offered "[t]o show the defendant's knowledge and to give context for the defendant's statement that he thinks it is a good idea." (Trial Tr. 401.) Defense counsel then made a second objection to its admission, arguing that the government was "suggesting that because of what [Harris] said this motivated or caused my client to commit the bank robbery." (Trial Tr. 401.) The district court recognized the Rule 403 (and possibly Rule 401) issues inherent in the evidence when it pointed out that "[t]he question is . . . really more the weight of the evidence." (Trial Tr. 402.) The district court ultimately concluded, however, that there was no evidentiary problem and admitted the evidence. (Trial Tr. 402.)

Similarly, Bright adequately preserved his objection to the admissibility of the birth certificate evidence on Rule 403 grounds by objecting to its admission twice–once in a pre-trial motion (Trial Tr. 11) and again when the evidence was presented at trial (Trial Tr. 565). Under an abuse-of-discretion standard, this Court should reverse when "no reasonable person could take the view adopted by the trial

court." *LeShore*, 543 F.3d at 939 (internal quotation omitted). Evidence is inadmissible if its prejudicial effect substantially outweighs its probative value. Fed. R. Evid. 403. Evidence is "unfairly prejudicial if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case." *United States v. Peters*, 791 F.2d 1270, 1294 (7th Cir. 1986), *superseded by statute,* 18 U.S.C. § 3742(b) (2006), *as recognized in United States v. Guerrero,* 894 F.2d 261, 267 (7th Cir. 1990) (internal citation and quotations omitted) (statute superseded *Peters* on other grounds). The evidence of the defendant's associates' improper acts should have been excluded because it invited the jury to decide the case not on the defendant's acts, but rather on the jury's "instinct to punish" the defendant for his associates' actions.

Although this Court has not squarely applied Rule 403 to more general associational evidence, but see *Peters*, 791 F.2d at 1308 (rejecting defendant's associational argument in passing because the record did not support the claim), it has excluded guilt-by-association evidence in the gang context, *United States v. Irvin***,** 87 F.3d 860, 864 (7th Cir. 1996) (finding evidence of the defendant's gang membership damaging, dangerous and erroneous under Rule 403).[7] Not only will

[7] Similarly, other circuits have found that a defendant's gang membership has "the potential to elicit an unfavorable reaction from the jury increasing the danger of 'guilt by association.'" *United States v. Brown*, No. 06-5167, 2008 WL 2967708, at *5-6 (10th Cir. 2008); *see also United States v. McKay*, 431 F.3d 1085, 1093 (8th Cir. 2005) (noting "gang affiliation evidence is not admissible where it is meant merely to prejudice the defendant or prove his guilt by association with unsavory characters," and is not relevant to a disputed

jurors sometimes equate gang membership with criminality, but they may also permit their negative feelings about gangs in general to infect their verdict. *Id.* at 865. Thus, "[g]uilt by association is a genuine concern whenever gang evidence is admitted." *Id.*

Moreover, other circuits have found general associational evidence that invites the jury to infer guilt by association violates Rule 403.[8] The Fifth Circuit has repeatedly excluded evidence of the criminal acts of the defendant's associates as a "*highly prejudicial* attempt to taint defendant's character through 'guilt by association.'" *United States v. Romo*, 669 F.2d 285, 288 (5th Cir. 1982) (finding defendant's associates' prior drug convictions both irrelevant to the charged conspiracy and unduly prejudicial under Rule 403 because they implied that the defendant was a drug dealer simply because he associated with them) (emphasis added) (citation omitted); *see also United States v. Lopez-Medina*, 461 F.3d 724, 748-

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issue); *Kennedy v. Lockyer*, 379 F.3d 1041, 1056 (9th Cir. 2004) ("[T]he use of gang membership evidence to imply 'guilt by association' is impermissible and prejudicial.").

[8] Such evidence also qualifies as improper propensity evidence, which is inadmissible under Federal Rule of Evidence 404(b). The Tenth Circuit has analyzed the prior bad acts of the defendant's associates under Rule 404(b) and reached a similar result by excluding the evidence. *United States v. Massey*, 48 F.3d 1560, 1571 n.11 (10th Cir. 1995) (stating that although the "evidence at issue in this case is about the prior bad acts of individuals other than [the defendant, i]t does not necessarily reflect on the character of [the defendant]. Thus, this evidence may not really be Rule 404(b) evidence at all. Nonetheless, because the possibility of guilt by association raises some specter of prejudice, we will assume *arguendo* that the evidence is 404(b) evidence."). As noted above, see supra p. 6 n.2, Bright moved *in limine* to exclude under Rules 403 and 404(b) evidence of prior bad acts that were not charged in the indictment (R. 92, Def.'s Consolidated Mot. in Limine, at 1-3). Although the district court did not rule on the motion on this basis (R. 96, Minute Entry; Trial Tr. 9), the defense objection pursuant to Rule 404(b) serves as an alternate basis on which to exclude this evidence.

49 (6th Cir. 2006) (finding the introduction of the mug shots and prior convictions of the defendant's associates were irrelevant to his guilt); *United States v. Espinoza*, 244 F.3d 1234, 1239-41 (10th Cir. 2001) (holding that the defendant's sons' drug trafficking convictions were irrelevant and unduly prejudicial under Rule 403 because the evidence "created the impression that most if not all members of [the defendant's] immediate family were involved in drug trafficking. . . ."); *United States v. St. Michael's Credit Union*, 880 F.2d 579, 602 (1st Cir. 1989) (finding that admission of evidence of the defendant's father's criminal activities violated Rule 403, because "the jury may have convicted [the defendant] on a theory of guilt by association"); *United States v. Hernandez*, 780 F.2d 113, 118-19 (D.C. Cir. 1986) (finding that evidence of a fight by one co-defendant could not be admitted against the non-participating co-defendant because it violated Rule 403). The rationale underlying these decisions is the same as the rationale underlying this Court's analysis of gang membership: namely, that evidence of the defendant's associates' bad acts is unduly prejudicial and should be excluded. Therefore, this Court should extend its Rule 403 analysis of gang evidence to general associational evidence.

The admission of two pieces of evidence at issue in this case—(1) Avery's testimony regarding Harris's prior bank robbery and (2) birth certificate evidence linking Bright to Parker—violated Rule 403 because both invited the jury to infer Bright's guilt based on the actions of his associates.

First, the district court abused its discretion in admitting Avery's testimony regarding Harris's prior bank robbery under Rule 403 because, like *Romo*, Avery's

testimony was a prejudicial attempt to taint Bright's character through his association with Harris, an admitted robber. *Romo*, 669 F.2d at 288. Avery testified that Harris was at a party with Bright and "bragging about a bank robbery he had done." (Trial Tr. 404.) Not only is this evidence nearly irrelevant to proving Bright's guilt for the LaSalle Bank robbery, see Fed. R. Evid. 401, it was also damaging prejudicial guilt-by-association evidence that should have been excluded, see Fed. R. Evid. 403. There is no evidence Bright relied on Harris's bank robbing experience and, although the government claimed at trial that the testimony was necessary to explain the circumstances surrounding Bright's subsequent statement that robbing a bank sounded like a good idea (Trial Tr. 401-02), Bright's statement easily spoke for itself without the additional prejudice resulting from testimony about Bright's association with other robbers. In short, Harris's prior bank robbery simply was not necessary to prove Bright's intent or state of mind that night; therefore, the marginal probative value of the "context" to Bright's statement provided by Harris's prior bank robbery was minimal.

Although the probative value of this evidence was low, the prejudicial value was substantial. Like *Romo*, where the Fifth Circuit found evidence that the defendant's associates were drug dealers to be prejudicial, evidence of Bright's association with Harris was unduly prejudicial because it invited the jury to infer that Bright was more likely to commit a bank robbery simply because he associated with bank robbers. *Romo*, 669 F.2d at 288; *see also Espinoza*, 244 F.3d at 1240.

Such prejudicial inferences, like those in *Romo* and *Espinoza*, clearly and substantially outweighed the probative value of the evidence.

The district court also abused its discretion by admitting unduly prejudicial birth certificate evidence that linked Bright to Ruby Parker, an aunt by marriage who formerly worked at the LaSalle Bank. Like the improper Avery testimony, the birth certificates violated Rule 403 because their prejudicial guilt-by-association effect substantially outweighed their probative value. Therefore, this evidence should have been excluded.

First, Bright's relationship to Parker is irrelevant to his guilt. Five birth certificates were necessary to establish Bright's relation to Parker. (Trial Tr. 11, 566.) A distant familial relationship, especially when it is by marriage and not by blood, simply does not make it more likely that Bright committed this robbery. *See, e.g., United States v. Williams*, 561 F.2d 859, 862 (D.C. Cir. 1977) (finding that "sibling relationship was the only nexus connecting" the defendant with relevant evidence, and that it "was an exceedingly thin strand to support the threshold requirement of relevance.").

Although the government claimed this evidence explained the robbers' rationale for selecting *this* bank (Trial Tr. 10), an inference that Bright possessed any relevant knowledge from this simple relationship is not warranted. There was no evidence Bright ever met Parker or spoke with her. Similarly, there was no evidence Bright knew Parker worked at this bank or that he ever visited the bank. *See, e.g., St. Michael's*, 880 F.2d at 601-02 (finding that since there was no evidence

to support the inference that the defendant knew of her father's gambling activities, any testimony regarding such activities was irrelevant to the defendant's guilt). Bright's relationship to Parker, without more, is insufficient to explain why the robbers chose this bank. Therefore, the probative value of this evidence is low.

The prejudicial impact of this evidence, however, is great because the jury could infer Bright's guilt based on his association with Parker, a relative who had once been employed at the bank, knew the Brinks truck delivery schedule, and was later terminated from her employment with the bank. (Trial Tr. at 507.) The government all but made explicit the inference that Ruby Parker breached her employer's trust by disclosing this information to others outside the workplace.[9] The government also introduced evidence the bank was robbed the same day as a Brinks truck was scheduled to arrive. (Trial Tr. 506.)

The government, in its closing argument, encouraged the jury to find Bright guilty based on his association with Parker, stating that "[i]t is no coincidence of the 140 LaSalle banks in the Chicago area . . . that his aunt . . . was an ex-employee of the very branch that got robbed that was on the other side of town, that the Brinks schedule hadn't changed since she was employed there." (Trial Tr. 738-39.) This is one of the last things the jury heard prior to deliberating: that Bright's relation to a former employee, who knew the Brinks schedule, meant he committed the charged

[9] Indeed, this kind of sensitive information is not the stuff of casual conversation, especially when dealing with detailed delivery dates and times. A rational juror could draw no other inference from the government's insinuation that Ruby Parker had disclosed the Brinks delivery schedule to others except that she intentionally or negligently assisted in the planning of this crime.

robbery. Bright's potential association with Parker, however, does not prove he shared Parker's knowledge of the Brinks schedule or that he would avail himself of her indiscreet and improper disclosure of the information. *See e.g., Romo,* 669 F.2d at 288 (noting that just because someone is "married to, associated with, or in the company of a criminal does not support the inference that the person is a criminal or shares in the criminal's guilty knowledge") (quotation omitted). Therefore, as with the Cheri Avery testimony, the district court abused its discretion in admitting the birth certificate evidence.

Finally, the erroneous admission of both pieces of evidence was not harmless error. "The test for harmless error is whether, in the mind of the average juror, the prosecution's case would have been significantly less persuasive had the improper evidence been excluded." *United States v. Emerson,* 501 F.3d 804, 813 (7th Cir. 2007) (quotations omitted). Because it is impossible to conclude "with fair assurance, after pondering all that happened without stripping the erroneous action[s] from the whole, that the [the factfinder] was not substantially swayed by the error," *United States v. Kotteakos,* 328 U.S. 750, 765 (1946), the district court's error was not harmless.

First, the admission of this evidence cannot be deemed harmless because of the general weakness of the government's overall case with respect to Bright. There was no direct physical evidence found at the bank—no fingerprints or DNA—that linked Bright to the robbery. The photographs and surveillance video culled from the bank cameras failed to disclose the robbers' identities. Only one witness of the

more than fourteen who were present during the robbery positively identified Bright in a lineup, see supra Section I. In lieu of adequate direct evidence, the government was forced to rely on a bevy of circumstantial proof relating to Bright's expenditures in April 2006 and the testimony of witnesses like Lee, who the jury could have found less than credible.

In fact, the weakness of the government's case was laid bare when, after nearly two days of deliberations, the jury finally returned to court deadlocked and confused. Without the erroneous admission of Avery's testimony or the birth certificate evidence, the government's case would have been significantly less persuasive because these were the only two pieces of independently corroborative and untainted evidence linking Bright to the bank. *See, e.g., Irvin*, 87 F.3d at 866-67 (finding the admission of gang evidence harmful because given the government's otherwise-circumstantial case, the court could not conclude "that the jury's verdict [did] not reflect any improper inferences drawn from the inflammatory" guilt–by-association evidence); *United States v. Hudson*, 843 F.2d 1062, 1069-70 (7th Cir. 1988) (finding that the admission of prior bad acts of the defendant's "play[ed] a substantial role in persuading a jury of the defendant's guilt," and was not harmless error, where the direct evidence of guilt—including an out-of-court identification and fingerprint—was less than overwhelming).

Second, both pieces of evidence were used by the government during closing arguments to corroborate the testimony of other less-than-credible witnesses, which increased its prejudicial value. (Trial Tr. 690, 695, 735-39); *see, e.g., Romo*, 669 F.2d

at 290 (noting that the erroneous admission of guilt-by-association evidence was not harmless error when the only remaining evidence was uncorroborated co-conspirator testimony). For example, the government heavily relied on testimony of Brandon Lee, a co-conspirator. Although juries have a right to be skeptical of co-conspirator testimony, especially when it derives from a government proffer for sentencing leniency, both pieces of the improper Rule 403 evidence bolstered Lee's testimony and, thus, his credibility with the jury.

Third, the government heavily relied on both pieces of evidence in closing arguments, which demonstrates that they played a significant role in the government's case. With respect to the Cheri Avery testimony about Antonio Harris, the government argued:

> [a]nd you heard about how in February, about a month before, the defendant was at the home of Antonio Harris, they were playing dice. Antonio Harris was talking about doing a bank robbery. Described it perhaps as a lick. And Mack said, that's something I would like to do.
>
> * * *
>
> And it is not a coincidence that he was at a dice game in February, a month before the robbery, in which they were talking about doing a bank robbery. And Mack said, that sounds like something I'm going to do. And when he says it sounds like something I'm going to do, that lick was described in the same way to Brandon Lee when Brandon Lee was first invited into the conspiracy. It was described to him as Mack's job, as a sweet lick.

(Trial Tr. 735-36, 739.) The government similarly relied on the birth certificate evidence to bolster its case in closing argument:

> And also this is not just some random bank . . . remember the testimony of the bank official from LaSalle Bank, George Quiroga, and

> also Special Agent Nikkole Robertson. Ruby Parker had worked at that LaSalle Bank until 2005. And Ruby Parker was McRay Bright's cousin's mother. They had used the word functional aunt. The fact was that McRay Bright's uncle was not married to Ruby Parker, but that they lived together or at the very least had children together. So it was a relation to him. And she had worked at that bank until 2005.

(Trial Tr. 690.)

The government's attempt to exploit the prejudicial quality of this guilt-by-association evidence almost certainly heightened any impact the improper evidence had on the jury. *See United States v. Polasek*, 162 F.3d 878, 887 (5th Cir. 1998) (noting that the government's emphasis on prejudicial guilt-by-association evidence in the closing argument increased its prejudicial effect on the verdict).

In light of the weakness of the government's case and its heavy reliance on the impermissible evidence, one cannot conclude with any certainty that the jury "was not substantially swayed" by its erroneous admission, *Kotteakos,* 328 U.S. at 765, or that the jury did not draw improper guilt-by-association inferences, *Irvin*, 87 F.3d at 866. Because the district court erred in admitting these two pieces of evidence and because these errors likely improperly influenced the jury's verdict, Bright's conviction should be overturned and his case remanded for a new trial.

III. The District Court Erroneously Interpreted And Applied The Enhancement For Obstruction Of Justice Pursuant To Sentencing Guideline 3C1.1.

The district court erred when it decided that a conviction under 18 U.S.C.

§ 751(a), attempted escape, was sufficient to automatically require a two-level enhancement under the Sentencing Guidelines for obstruction of justice, U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2007). Because of this misinterpretation of the Guideline, the district court also failed to make the appropriate mens rea finding when it assessed the enhancement. Therefore, this Court should reverse Bright's sentence and remand for resentencing. *See, e.g., United States v. Seward*, 272 F.3d 831, 838-39, 841 (7th Cir. 2001) (remanding for resentencing where district court did not make explicit findings required for obstruction-of-justice enhancement for perjury). This Court reviews a district court's interpretation of the Sentencing Guidelines and its consideration of the appropriate sentencing factors *de novo*. *United States v. Draves*, 103 F.3d 1328, 1337 (7th Cir. 1997) (discussing standard of review for interpretation of Guidelines); *United States v. Bass*, 325 F.3d 847, 850 (7th Cir. 2003) (discussing standard of review for determining sentencing factors).

Under § 3C1.1, a defendant who attempts to or actively impedes or willfully obstructs the administration of justice is subject to a two-level offense increase. Under Application Note 4(e), "escaping or attempting to escape from custody" justifies an enhancement. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. n.4(e). By contrast, Application Note 5(d) provides that "avoiding or fleeing from arrest" ordinarily does not justify the enhancement. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. n.5(d). As this Court has stated, "[i]t is not at all clear . . . that these two categories of conduct are mutually exclusive," and whether a

defendant is in formal custody is not dispositive. *Draves*, 103 F.3d at 1337. Rather, the "ultimate question" for purposes of a § 3C1.1 enhancement is "whether defendant's conduct evidences a willful intent to obstruct justice." *Id.* at 1338; *United States v. Haddad*, 10 F.3d 1252, 1260-61 (7th Cir. 1993) (stating that in order to impose an obstruction-of-justice enhancement, a district court must find that the defendant's actions were done willfully and "with the specific intent to avoid responsibility for the offense").[10] Because the district court erroneously assumed that a conviction under § 751(a) automatically satisfied this mens rea, this Court should remand for resentencing.

During sentencing, the district court relied solely on Bright's conviction for attempted escape as grounds for the two-level enhancement for obstruction of justice under § 3C1.1. (Sentencing H'rg Tr. 27-31.)[11] Bright had been convicted of attempted escape under 18 U.S.C. § 751(a) for his dash out of a police station and into an adjacent parking lot on May 16, 2006, the morning after his arrest and when he was being transferred to federal custody. (Trial Tr. 510, 514-18.) At

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[10] This Court's decision in *United States v. Connor*, 950 F.2d 1267, 1276 (7th Cir. 1991) does not merit a contrary result. *Connor* was decided before *Draves* and did not read all of the Application Notes in conjunction, as *Draves* did. *See Draves*, 103 F.3d at 1338 (preferring "a less myopic analysis of defendant's conduct that considers all of the relevant Application Notes together with the language and purpose of the Guideline"). Thus, *Connor* has little utility in answering the "ultimate question" under § 3C1.1 after *Draves*: whether Bright's flight evidenced a willful intent to obstruct justice.

[11] The government also attempted to justify the enhancement based on certain allegedly-false statements made by Bright after his arrest. (Sentencing Hr'g Tr. 27-28.) The district court, however, did not impose the obstruction-of-justice enhancement based on these statements; in fact, the court stated that it would not need to even consider the alleged false statements. (Sentencing H'rg Tr. 31) ("It's not necessary to get into a discussion of the various incidents of making false statements in light of the conviction for escape. . . .").

sentencing, Bright's counsel objected to the enhancement on the grounds that Bright's state of mind was like that of an "egg-head-shell plaintiff," and that he had fled after an officer yelled and used profanity at him. (Sentencing H'rg Tr. 29.) Bright's state of mind, counsel argued, was an "extenuating circumstance[]" that should defeat the imposition of the enhancement. (Sentencing H'rg Tr. 29.) In response, the government argued that the conviction for attempted escape warranted the enhancement, at which point the district court cut off all discussion. (Sentencing H'rg Tr. 31.) Finding that, "in light of the conviction for the escape, which . . . is a clear enhancement under . . . 3(c)1.1, obstruction of justice," the court imposed the two-level enhancement and then moved on to other issues. (Sentencing H'rg Tr. 31.)

The district court's interpretation of the Sentencing Guidelines, however, was erroneous. As in *Draves*, Bright's unauthorized flight from custody is insufficient to establish a willful mens rea. In fact, the jury had not found that Bright had willfully attempted to obstruct justice when he dashed into an adjacent parking lot. Rather, according to the jury instructions for the crime of attempted escape, the jury merely found that Bright "*knowingly* attempted to leave . . . custody without authorization to do so." (R. 105, Jury Instructions, at 26) (emphasis added). This Court in *Draves* refused to presume willful intent when the handcuffed defendant escaped from the back of the officer's car and ran three houses away before being apprehended. *Draves*, 103 F.3d at 1336-37. Similarly, the district court could not presume a willful intent from Bright's unauthorized flight into the police station

parking lot while handcuffed. This evidence may have been sufficient to establish guilt for attempted escape, but it is insufficient to establish the necessary mens rea of willfulness under § 3C1.1. The district court's assumption to the contrary is thus an erroneous interpretation of law. Thus, this Court should remand for resentencing.

Because of its flawed interpretation of the Sentencing Guidelines, the district court consequently erred by not making the appropriate mens rea finding when it assessed a two-level enhancement to Bright's base offense level. The government also offered no proof beyond Bright's conviction for attempted escape to establish this intent (Sentencing H'rg Tr. 27-28, 30-31); instead, the government simply opined that the conviction for attempted escape made "this a very easy decision from the Court's standpoint. . . ." (Sentencing H'rg Tr. 28.)

In contrast to the government's lack of adequate proof, however, defense counsel repeatedly put Bright's state of mind before the court during sentencing. For example, the court-appointed mitigation specialist testified that she found Bright to be "more teen-like than anything" (Sentencing H'rg Tr. 7), and emotionally equivalent to a 13- or 14-year old (Sentencing H'rg Tr. 10). She also testified that Bright seemed to be suffering from high-anxiety when meeting her (Sentencing H'rg Tr. 7) and that, based on his discussions with psychologists, Bright thought that he had experienced an extreme panic attack before the robbery (Sentencing H'rg Tr. 14). By linking Bright's "delicate" state of mind to his being cussed at by the FBI officer (Sentencing H'rg Tr. 29), defense counsel clearly offered

evidence that Bright's flight was instinctive and spontaneous, and thus without the deliberate and willful mens rea that this Court requires. Therefore, just as the district court's flawed legal interpretation of the Guidelines merits a remand for resentencing, so too does the district court's failure to make the concomitant finding as to Bright's mens rea. Therefore, this Court should reverse Bright's sentence and remand for resentencing.

CONCLUSION

For the foregoing reasons, the appellant, McRay Bright, respectfully requests that this Court vacate his convictions and remand for a new trial or, at a minimum, for resentencing.

Respectfully Submitted,

McRAY BRIGHT
Defendant-Appellant

By: _____

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No. 08-1770

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. McRAY BRIGHT, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division Case No. 06 CR 342 Hon. Joan H. Lefkow Presiding Judge

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, McRay Bright, hereby certify that I served two copies of this brief and attached short appendix and one digital copy of the brief by placing them in an envelope with sufficient postage affixed and directed to the person named below at the address indicated, and depositing that envelope in the United States mail box located at 357 East Chicago Ave., Chicago, Illinois on November 19, 2008.

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

McRAY BRIGHT,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Case No. 06 CR 342

Hon. Joan H. Lefkow
Presiding Judge

CIRCUIT RULE 31(e) CERTIFICATION

I, the undersigned, counsel for the Defendant-Appellant, McRay Bright, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief and all of the Appendix items that are available in non-scanned PDF format.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I, the undersigned, counsel for the Defendant-Appellant, McRay Bright, hereby certify that this brief conforms to the rules contained in Fed. R. App. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 12,739.

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Presiding Judge

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

I, the undersigned, counsel for the Defendant-Appellant, McRay Bright, hereby state that all of the materials required by Circuit Rules 30(a), 30(b), and 30(d) are included in the Appendix to this brief.

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Hon. Joan H. Lefkow,
Presiding Judge

ATTACHED REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT McRAY BRIGHT

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SHORT APPENDIX

TABLE OF CONTENTS

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SHORT APPENDIX

TABLE OF CONTENTS

TG

JUDGE LEFKOW

MAGISTRATE JUDGE MA[illegible]

FILED

MAR 15 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

06 cr 342

MAGISTRATE JUDGE JEFFREY COLE
UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA	No. 06 CR 342
v.	Violations: Title 18, United States Code, Sections 371, 2113(a), 924(c)(1)(A)(ii), 751(a), and 2.
MCRAY BRIGHT (a/k/a "Mack" and "McRay Briscoe")	SECOND SUPERSEDING INDICTMENT

FILED

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MAR 15 2007

MAR 15 2007
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

COUNT ONE

The SPECIAL DECEMBER 2005 GRAND JURY further charges:

1. From on or about March 21, 2006, to on or about March 28, 2006, at Chicago, in the Northern District of Illinois, Eastern Division,

MCRAY BRIGHT (a/k/a "Mack" and "McRay Briscoe"),

defendant herein, and co-conspirators Brandon C. Lee and Yvon M. Kingcade (a/k/a "Mitch" and "Uncle Mitch"), did conspire and agree with each other to commit an offense against the United States, namely, knowingly and intentionally taking by force, violence and intimidation, from the person and presence of employees of LaSalle Bank, 7516 North Clark Street, Chicago, Illinois, approximately $83,584 in United States currency belonging to and in the care, custody, control, management, and possession of LaSalle Bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, in violation of Title 18, United States Code, Sections 2113(a) and 2.

OVERT ACTS

2. In furtherance of the conspiracy and to accomplish the objectives of the conspiracy, the conspirators committed one or more overt acts, which overt acts included but were not limited

to the following acts committed on or about March 28, 2006 at the LaSalle Bank, 7516 North Clark Street, Chicago, Illinois:

(a) Defendant MCRAY BRIGHT carried a handgun into the bank.

(b) Yvon M. Kingcade carried a handgun into the bank.

(c) Defendant MCRAY BRIGHT approached a bank teller and demanded money from the bank's vault.

(d) Defendant MCRAY BRIGHT struck a bank manager in the head with a handgun he was carrying.

(e) Defendant MCRAY BRIGHT struck a security guard in the head with a handgun he was carrying.

(f) Yvon M. Kingcade jumped over the teller counter, brandished his handgun, and used it to subdue and to control bank employees during the robbery.

(g) Brandon C. Lee locked the bank's doors to prevent customers and employees from escaping and notifying authorities.

(h) Defendant MCRAY BRIGHT, Yvon M. Kingcade, and Brandon C. Lee, forced bank employees and a bank customer into the bank's vault and attempted to lock them into the vault to facilitate defendants' escape.

(i) Defendant MCRAY BRIGHT, along with Yvon M. Kingcade and Brandon C. Lee, stole approximately $83,584 from the bank;

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

The SPECIAL DECEMBER 2005 GRAND JURY further charges:

On or about March 28, 2006, at Chicago, in the Northern District of Illinois, Eastern Division,

MCRAY BRIGHT (a/k/a "Mack" and "McRay Briscoe"),

defendant herein, and Brandon C. Lee and Yvon M. Kingcade (a/k/a "Mitch" and "Uncle Mitch"), by force, violence, and intimidation, did knowingly take from the person and presence of employees of LaSalle Bank, 7516 North Clark Street, Chicago, Illinois, approximately $83,584 in United States currency belonging to and in the care, custody, control, management, and possession of LaSalle Bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation;

In violation of Title 18, United States Code, Sections 2113(a) and 2.

COUNT THREE

The SPECIAL DECEMBER 2005 GRAND JURY further charges:

On or about March 28, 2006, at Chicago, in the Northern District of Illinois, Eastern Division,

MCRAY BRIGHT (a/k/a "Mack" and "McRay Briscoe"),

defendant herein, knowingly possessed a firearm in furtherance of, and used and carried that firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, namely, bank robbery in violation of Title 18, United States Code, Section 2113(a), as charged in Count Two of this Indictment;

In violation of Title 18, United States Code, Section 924(c)(1)(A)(ii) and 2.

COUNT FOUR

The SPECIAL DECEMBER 2005 GRAND JURY further charges:

On or about May 16, 2006, at Chicago, in the Northern District of Illinois, Eastern Division,

MCRAY BRIGHT (a/k/a "Mack" and "McRay Briscoe")

defendant herein, did knowingly attempt to escape from the custody of an officer of the United States, namely, Special Agents of the Federal Bureau of Investigation, pursuant to a lawful arrest for the bank robbery charged in Count Two of this Indictment;

In violation of Title 18, United States Code, Section 751(a).

A TRUE BILL:

_____

FOREPERSON

_____

UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
	)	Judge Joan H. Lefkow
v.	)	
	)	No. 06 CR 342
MCRAY BRIGHT, Defendant.	)	

DEFENDANT BRIGHT'S COMBINED MOTIONS IN LIMINE

NOW COMES Defendant, MCRAY BRIGHT, by and through his attorney, Standish E. Willis, and presents the following combined motions in limine:

I. Bar the Government From Introducing Any Mention of Drug Dealing or Gang Affiliation

Defendant Bright is charged with four counts stemming from his alleged participation in a bank robbery. Defendant Bright was indicted, along with co-conspirators Brandon Lee and Yvon Kingcade. The government does not allege in their indictment any language concerning drug dealers or gangs. As such, any mention of drug dealers or gang affiliations will only be introduced to inflame the jury against defendant Cage.

Evidence of uncharged criminal activity is admissible if it is "'intricately related to the facts of the case' before the court." *United States v. Ramirez*, 45 F.3d 1096, 1102 (7th Cir. 1995) (*quoting United States v. Hargrove*, 929 F.2d 316, 320 (7th Cir. 1991)). The admissibility of such evidence is limited only by Rule 403 and is not subject to the limiting requirements of Rule 404(b). *Id.* at 1102-03.

In this case, Defendant Bright is charged with bank robbery. The facts in this case do not appear to indicate that the co-conspirators were in a gang together, as thus trusted each other; or that the co-conspirators sold drugs together, and thus had a relationship in which they would trust each other. As any mention of drug dealing or gangs in reference to Bright would not only prejudice Bright, but is also irrelevant to the charged case. As such, the government should be precluded from introducing any drug dealing information.

II. Bar the use of tape recordings attributable to Bright from the MCC

The government seeks to introduce certain tape recordings of Bright speaking on the phone from his incarceration at the MCC. The conversations are allegedly of Bright attempting to have a witness change his testimony to the F.B.I. about Bright. These conversations are not relevant and should be excluded.

Federal rule of evidence 401 provides that only relevant evidence can be introduced at trial, while rule 403 provides that even relevant evidence can be excluded if its probative value is outweighed by its prejudicial effect. See Fed. R. Evid. 401 and 403.

In this case, the tapes are not relevant as there is no proof that anyone spoke to the witness in question, Tierre Dean, on Bright's behalf. The government has filed their witness list and have included Tierre Dean as one of their witnesses. Since Tierre Dean is one of their witnesses, they will have him present to ask if anyone talked to him on Bright's behalf to get him to change his

testimony. Any conversations recorded while Bright was in custody are not only not relevant, but highly prejudicial. The jury will assume that since Bright was held in jail, than he is guilty of the crime charged. The introduction of the tapes will negate having the defendant dress in street clothes and not brought in by the Marshals in the presence of the jury. The jury will already know that he is in custody and will assume that he is a bad person. As such, this court should bar any use of MCC recordings as they are not relevant, and unfairly prejudicial.

III. No Mention of Other Bad Acts Not Charged in the Indictment

In this case, Defendant Bright is charged with various crimes stemming from the robbing of a bank. Through the course of discovery, there are certain acts that others have accused Bright of committing, namely, that of hitting his girlfriend Lorreil Brown.

Federal rule of evidence 401 provides that only relevant evidence can be introduced at trial, while rule 403 provides that even relevant evidence can be excluded if its probative value is outweighed by its prejudicial effect. See Fed. R. Evid. 401 and 403.

As any mention of these alleged bad acts are not relevant to the charged crime and would only be introduced to prejudice the jury against Bright, Bright respectfully asks that any government witness be instructed that there is to be no mention of the alleged bad acts.

WHEREFORE the defendant respectfully requests that this court grant his motions in limine.

8

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

MCRAY BRIGHT,
Defendant.

Judge Joan H. Lefkow

No. 06 CR 342

DEFENDANT BRIGHT'S MOTION TO EXCLUDE BIRTH CERTIFICATES

NOW COMES Defendant, MCRAY BRIGHT, by and through his attorney, Standish E. Willis, and presents the following motion to exclude birth certificate evidence, and in support of said motion states as follows:

The government has stated their intention to introduce certain birth certificate records in order to prove that defendant McRay Bright had a relative that once worked at the bank that was robbed. However, the birth certificates are not relevant and should be excluded from use at the trial.

Federal rule of evidence 401 provides that only relevant evidence can be introduced at trial, while rule 403 provides that even relevant evidence can be excluded if its probative value is outweighed by its prejudicial effect. See Fed. R. Evid. 401 and 403.

In this case, there are some vague references to the bank robbery being an "inside job" by Yvon Kingcade. Kingcade is not being called as a witness by the government. There is absolutely no evidence that Ms. Parker, Bright's alledged

aunt, had any involvement what-so-ever in the bank robbery. Ms. Parker has not been charged with a crime. The only thing the birth certificate records will do is to confuse the jury and unfairly prejudice Bright.

WHEREFORE the defendant respectfully requests that this court grant his motion in limine.

Respectfully submitted,

S.E.W.

Standish E. Willis

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Joan H. Lefkow	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	06 CR 342 - 1	DATE	4/16/2007
CASE TITLE	USA vs. McRay Bright		

DOCKET ENTRY TEXT

Arraignment held on second superceding indictment. Defendant acknowledges receipt, waives formal reading and enters a plea of not guilty. Government's consolidated motions in limine [86] granted and denied without prejudice as stated on the record. Government's motion to exclude alibi defense [90] denied as moot. Defendant's combined motions in limine [92] granted in part as stated on the record and denied as moot as stated on the record, except where ruling is deferred. Defendant's motion to exclude birth certificates denied. Jury trial begins. Voir dire held. Trial held and continued to 4/17/2007 at 10:00 a.m.

05:30

Courtroom Deputy Initials:	MD

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
	)	Judge Joan H. Lefkow
v.	)	
	)	No. 06 CR 342
MCRAY BRIGHT, Defendant.	)	

DEFENDANT BRIGHT'S MOTION FOR A NEW TRIAL

NOW COMES Defendant McRay Briscoe-Bright, by his attorney, Standish E. Willis, and moves this court pursuant to Rule 33 of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments to the Constitution of the United States, and moves this court to enter an order granting him a new trial, based on any one or more of the following grounds:

1. It was error for the court to dismiss a juror after that juror had been accepted on the juror panel. It was clear that the particular juror had learned from watching the entire jury voir dire process how to get off the jury. The prosecution brought to the court's attention something which was allegedly whispered underneath this juror's breath, which then led to the juror being re-voir dired after she had already been sworn in as a juror in the trial. The juror in question was African-American, as was the defendant. The jury which ultimately decided Bright's guilt was composed of only two African-Americans.

The Constitution requires that the exclusion of jurors must be based on neutral reasons not related to race. *See Batson v. Kentucky*, 476 U.S. 79, 98 (1986). In this case, the prosecution's challenge of a black juror after she had been sworn in by relating to the judge comments the juror allegedly said under her breath was done to exclude an African-American off the jury.

2. It was error for the court to allow in evidence of birth certificate records over defense objections. The birth certificate records were introduced even though they were not relevant to the charged crime. According to the government, Bright's 'functional' aunt worked at the bank which was robbed in a time period previous to the bank robbery. This aunt was not called to testify, was not in any way linked to the robbery and was not accused as being a coconspirator of the charged crime. Further, there was not one person who testified on behalf of the government who linked this 'functional' aunt to Bright.

Even if the evidence was relevant, it was still unfairly prejudicial to the defendant in that he was unfairly associated with a crime simply because a 'functional aunt' at some point use to work at the bank. To allow in evidence that this woman once worked at the bank, without any evidence that Bright knew this information and without any information that the woman spoke to Bright at any time during the time frame leading up to the robbery was unfairly prejudicial.

3. It was error for the court to send additional jury instructions to the jury during the course of their deliberations which basically signaled that the jury should convict the defendant. A jury instruction conference was held prior to the jury deliberating and all the relevant jury instructions were provided to the jury. To then redefine the jury instructions after several hours of deliberation in a way which, although a correct statement of law, implied to the jury that they were required to find Bright guilty was in error.

4. It was error to allow the prosecution in their closing arguments to shift the burden of proof to the defendant. During closing arguments, the defense pointed out to the jury that the prosecution did not present any evidence of photo analysis or fingerprint analysis connected to the defendant. Over the defense's objections, the court allowed the prosecution to comment during their rebuttal argument as to the defendant's ability to use his subpoena powers to introduce relevant evidence. The defense does not have any burden to produce any evidence and to allow the prosecution to suggest otherwise to the jury was improper.

5. It was error to deny Bright's motion for acquittal at the close of the government's case.

For all the above reasons, Bright ask that this Honorable court grant his motion for a new trial.

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Joan H. Lefkow	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	06 CR 342	DATE	3/19/2008
CASE TITLE	USA vs. McRay Bright		

DOCKET ENTRY TEXT

Defendant's motion for a new trial [#115] is denied.

■[For further details see text below.] Notices mailed by Judicial staff.

STATEMENT

Under Rule 33, Fed. R. Crim. P., a court may grant a new trial "if the interest of justice so requires." The court may grant a new trial "in a variety of situations in which the substantial rights of the defendant have been jeopardized by errors or omissions during trial." *United States* v. *Eberhart,* 388 F.3d 1043, 1048 (7th Cir. 2004). Such motions are disfavored and are granted only in extreme cases. *E.g.*, *United States* v. *Linwood*, 142 F.3d 418, 422 (7th Cir. 1998). However, in deciding whether a new trial should be granted under Rule 33, the court "may properly consider the credibility of witnesses, and may grant a new trial if the verdict is so contrary to the weight of the evidence that a new trial is required in the interest of justice." *United States* v. *Washington*, 184 F.3d 653, 657 (7th Cir. 1999).

1. Defendant argues that the court erred in dismissing a juror once she had been sworn to serve because the government's motivation in seeking reconsideration of the juror's qualifications was to exclude an African-American from the jury. The Government in response identifies the juror as Ethel Richardson and reports that after being sworn and in connection with voir dire of other jury panel members, Ms. Richardson indicated that she had reservations about sitting in judgment of another person. The court called her to the side bar to question her and she confirmed that she did have such reservations. At that, the court dismissed the juror for cause and without objection from the defense.

There is no evidence in this record that the Assistant United States Attorney was motivated by race in raising the issue. *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the only authority on which defendant relies, concerned the use of peremptory challenges. Because here the court determined that juror Richardson could not be fair and impartial based on a factor other than race, defense counsel heard the colloquy and did not object, and two other African- American jurors were seated, this argument fails to persuade that the interest of justice requires a new trial.

STATEMENT

2. Defendant argues that birth certificate records demonstrating that defendant was a relative of Ruby Parker, who had been employed at the bank defendant robbed, were irrelevant and the admission of this evidence was prejudicial because there was no evidence that defendant knew that Ms. Parker had worked at the bank or that she had spoken to Bright at or near the time of the robbery. The Government responds that the evidence was relevant to show that it was defendant at the far North Side bank, even though he lived on the far South Side.

To justify a new trial, an evidentiary ruling must be not only error but harmful error. *United States* v. *Owens*, 424 F.3d 649, 653 (7th Cir. 2005), *citing United States* v. *Hernandez*, 330 F.3d 964, 969 (7th Cir. 2003) ("[W]hen reviewing evidentiary errors, we will only reverse and order a new trial provided that the improper admission was not harmless, which is to say 'only if the error had a substantial influence over the jury, and the result reached was inconsistent with substantial justice.'"). Evidence that the defendant was related to a former employee of the bank tended to make more probable the fact that the defendant was present at the victim bank which was far outside defendant's normal ambit. The lack of additional evidence that the defendant knew of Ms. Parker's place of employment or that she had recently spoken with him diminishes the weight of the evidence but does not erase its probative value. Even if the evidence was not properly admitted, defendant does not explain how this evidence had a substantial influence over the jury. Where other witnesses, including co-conspirator Brandon Lee, placed defendant at the bank, there is little basis to argue that admission of the evidence was inconsistent with substantial justice.

3. Defendant argues that the court erred in sending a "*Pinkerton* instruction" to the jury several hours after it had begun its deliberations because that signaled to the jury it should convict defendant. Defendant again does not provide context giving rise to the ruling. The Government responds that the instruction was given in response to a jury question and points out that the defendant concedes that the instruction correctly stated the law.

The court of appeals has admonished, "When it is clear that the jury is having difficulty with the original instructions, a supplemental instruction is appropriate. Furthermore, the district court should strive to clear away any difficulties with concrete accuracy." *United States* v. *Young*, 316 F.3d 649, 661 (7th Cir. 2002) (internal citations omitted). Where the defendant makes no argument that the court gratuitously added an unneeded instruction, and lacking specific demonstration that the instruction may have encouraged the jury to convict for a reason not based on the evidence, the court must infer that its determination to add the instruction was within its properly considered range of judgment. *Id.* at 661-62.

4. Defendant contends that the burden of proof was shifted to the defendant when the prosecutor commented during its rebuttal that the defendant has the right to subpoena relevant evidence. According to defendant, his counsel had pointed out in closing "that the prosecution did not present any evidence of photo analysis or fingerprint analysis connected to the defendant." According to the Government's response, defense counsel had "intimated" in closing "that the government had enhanced photographic evidence that allegedly depicted another person committing the robbery." The government responds that it was obliged to respond because defense counsel's statement implied that the Government had withheld exculpatory evidence. The Government represents that it noted in rebuttal before the jury that it retains the burden of proof and the defense is not required to present any evidence; however, the defense has the same power to issue subpoenas, a power that extended to FBI's forensic examiners. Defense counsel has

STATEMENT

not challenged the government's version of the facts.

To evaluate allegations of prosecutorial misconduct during closing, the court of appeals has stated,

> We begin by looking at the disputed remarks in isolation to determine if they were proper. If we find the comments were proper, our analysis ends. If, however, we find the comments were improper, we must then look at the remarks in light of the entire record to determine if the defendant was deprived of a fair trial. In determining the effect on the fairness of the trial we consider: 1) the nature and seriousness of the prosecutorial misconduct; 2) whether the prosecutor's statements were invited by conduct of defense counsel; 3) whether the trial court instructions to the jury were adequate; 4) whether the defense was able to counter the improper arguments through rebuttal; and 5) the weight of the evidence against the defendant.

United States v. *Butler*, 71 F.3d 243, 254 (7th Cir. 1995). In this instance, defense counsel's comment at least suggested that the prosecutor had evidence that he did not present. A juror could reasonably have inferred that such evidence was unfavorable to the government, thus tending to exonerate the defendant. *See United States* v. *Sblendorio*, 830 F.2d 1382, 1390 (7th Cir. 1987) ("If the un-called witness is under the control of the party who elects not to call him, it may be appropriate to infer that the testimony would have been favorable to the other side."). Under these circumstances, the prosecutor's statement, couched in the reminder that the burden of proof is on the government, was not improper. *See United States* v. *Miller*, 276 F.3d 370, 374 (7th Cir. 2002) (where defendant testified that an individual had instructed her to act contrary to Medicaid manual and prosecutor asked defendant whether that witness had testified in the case, defense counsel objected, and the court admonished the jury that the burden of proof is on the government, prosecutor's statement that the defendant has subpoena power was not error.); *Sblendorio*, 830 F.2d at 1393 (A prosecutor is not forbidden to observe that the defense could produce a witness if it wishes.).

5. Defendant argues that the court erred in denying defendant's motion for acquittal at the close of the government's case. A motion for judgment of acquittal at the close of the government's evidence must be granted where the evidence is insufficient to sustain a conviction. Fed. R. Crim. P. 29(a).

Defendant makes no argument in support of his position. The government responds that the evidence was more than sufficient to sustain a conviction, pointing to the testimony of co-conspirator Brandon Lee, a photo line-up identification of the defendant by the bank manager, the defendant's friend Cheri Avery's testimony that defendant had said robbing a bank sounded like something he wanted to do, the defendant's post-robbery spending spree, his post-arrest statement which was inconsistent with his sister's trial testimony, claiming to have bought one of two cars after the robbery with personal savings, and his attempt to escape from arresting agents. The evidence was sufficient to sustain a conviction.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED

MAR 24 2008

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

MAR 24 2008

UNITED STATES OF AMERICA, Plaintiff(s), vs. MCRAY BRIGHT Defendant(s).	)	No. 06 CR 342 Judge Lefkow

NOTICE OF APPEAL

NOTICE is hereby given that McRay Bright, Defendant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on the 20th day of March, 2008.

Respectfully submitted,

s/Standish E. Willis
Attorney for Defendant

THE LAW OFFICES OF STANDISH E. WILLIS, LTD.
407 South Dearborn 1395
Chicago, Illinois 60605
(312) 554-0005

Received a copy of the above Notice this__ _____ day of _____, 2006.

_____
United States Attorney

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA
V.
MCRAY BRIGHT

JUDGMENT IN A CRIMINAL CASE

Case Number: 06 CR 342-1

USM Number: 18683-424

Standish E. Willis
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

x was found guilty on count(s) one, two, three, and four of the second superceding indictment in this case
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §371	Conspiracy to Commit Bank Robbery	3/28/06	one
18 U.S.C. §2113(a)	Bank Robbery	3/28/06	two
18 U.S.C §924(c)(1)(A)(ii)	Brandishing a Firearm in Furtherance of a Crime of Violence	3/28/06	three
18 U.S.C. §751(a)	Attempting to Escape	3/28/06	four

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

X Count(s) all remaining ☐ is x are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

3/20/2008
Date of Imposition of Judgment

Signature of Judge

Joan H. Lefkow - U.S. District Judge
Name and Title of Judge

3/27/2008
Date

AO 245B (Rev. 06/05) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: MCRAY BRIGHT
CASE NUMBER: 06 CR 342-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

181 MONTHS.

(60 months on Counts I and IV, 97 months on Count II, and 84 months on Count III. Counts I, II, and IV shall run concurrently, while Count III shall run consecutive to Counts I, II, and IV, for a total imprisonment term of 181 months).

x The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that defendant be assigned to the Bureau of Prisons facility at Oxford, Wisconsin.
The Court recommends that mental health counseling, drug counseling, and vocational programs be made available to defendant while incarcerated.

x The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: MCRAY BRIGHT
CASE NUMBER: 06 CR 342-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

5 YEARS

(3 years supervised release on Counts I, II, and IV, and 5 years supervised release on Count III. Counts I, II, and IV and Count III are to run concurrent for a total of 5 years supervised release).

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3B — Supervised Release

DEFENDANT: MCRAY BRIGHT
CASE NUMBER: 06 CR 342-1

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

Costs of imprisonment and supervision are waived.

The defendant shall submit to one drug test within 15 days of release from imprisonment and random drug tests thereafter, conducted by the U.S. Probation Office, not to exceed 104 tests per year.

The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release.

DEFENDANT: MCRAY BRIGHT
CASE NUMBER: 06 CR 342-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 400.00	$	$ 83,584.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
LaSalle Bank Attn: Corporate Investigations 5250 North Harlem Avenue Chicago, Illinois 60656	$83,584	$83,584	

TOTALS	$ 83584	$ 83584

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

x The court determined that the defendant does not have the ability to pay interest and it is ordered that:

x the interest requirement is waived for the ☐ fine x restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MCRAY BRIGHT
CASE NUMBER: 06 CR 342-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 400.00 due immediately, balance due

☐ not later than _____ , or
x in accordance ☐ C, ☐ D, ☐ E, or x F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F x Special instructions regarding the payment of criminal monetary penalties:

Payment of the total criminal monetary penalties shall be as follows: in monthly installments of 10% of net monthly income to commence fifteen days after the entry of this judgment.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

x Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

06 CR 342-2 Yvon Kingcade Total amt: $83,584 Joint & several amt: $83,584
06 CR 342-3 Lee Brandon Total amt: $83,584 Joint & several amt: $83,584

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

So I wrote down how they looked, what they were wearing, what skin color they were. I remember one had glasses, one had an earring. You know, one didn't have an earring, but he had the hole for it. Just little things. Because then I'm thinking they have the video, they can put it together or something. But, you know, I'm just writing what I could remember.

Q. Did the police eventually come?

A. Yes, they did.

Q. Were you interviewed?

A. Yes, I was.

Q. And did you give the description of everything that you had written down and remembered to law enforcement?

A. Yes, ma'am.

Q. And at a later time, were you also interviewed by the FBI?

A. Yes, ma'am.

Q. And did they show you a photographic line-up?

A. Yes.

Q. And what did they tell you about the line-up?

A. They -- it was an FBI Agent Nikkole. She came -- she called me at home, and she said she would meet me at work. And she came and -- with another lady. They met me at the bank, and they showed me six pictures. And they told me to take my time and look through it and pick a picture that I feel that is the right person.

And they just sat there while I looked. And I kept

looking, and I was hesitant. And I told her, you know -- and she is like, what's wrong? I go this person looks like the person. The only thing is I can't tell if they have earrings or not because of the picture. You know, so you can't see the ears, and you couldn't --

Q. When you say, you know, ears, do you actually mean earrings or --

A. Like ear piercing. It was -- you know, it is a small picture so you can't see this detail. You can't see like their actual ears if they have a hole in it.

But you could see their eyes, their face, fine. And I told her, it is this one. Look at the eyes. I just know it is this one. And she had me, I think, initial it or circle it, initial it, and date it. And she told me that was it, thank you, and she left. And I was working -- scheduled for working that day.

Q. Did Nikkole Robertson of the FBI tell you were under no obligation to identify anyone?

A. No, she said, don't worry about it, if you can't pick anyone, that's fine. We would rather you not pick anyone if you are not sure. So you don't, you know, have the wrong person.

So she's like if you don't -- if you can't identify someone, don't worry about it, it is okay.

MS. HICKEY: Your Honor, permission to approach the

Q. So you have again to process the night drops?
A. Correct.
Q. Okay. So when this individual came over, you were actually working on the night drops?
A. Correct.
Q. Okay. Now as he approached, I think Ms. Brownlee called him over because she knew you were working on the night drops, correct?
A. Correct.
Q. And he went over to her teller station?
A. He came up to my window. He had said, I'd like to cash this check. At that time I looked at the check, and it was a Charter One check.
Q. Okay.
A. And she called him over. She is like, I could take care of you over here. Because I was going to put that deposit away and take care of the customer.
Q. Sure.
A. And she had called him over, so I continued to do the deposit.
Q. Okay. So he walks over. He hands you the check. And you are looking at the check. And he was -- it was a matter of seconds before she called him over.
A. Correct.
Q. And then he goes over to her teller station.

ski cap, a baseball cap, and their hoodie. So the most you could see out of these gentlemen were their face features --

Q. Okay.

A. -- you know if they had little bit of hair here, a goatee or anything like that, you could see that stuff.

Q. You could or could not see?

A. You could see their face clearly.

Q. Okay. You could. And they had all their heads covered.

A. They had all had their heads covered, hoodies.

There was one gentleman who had a baseball cap, you know, everything, the hoodie up. They all had hoodies.

The one had the baseball cap, but under the cap he had one of those like.

Q. Okay. Let's focus on the second person.

A. Okay.

Q. He had the hoodie on, correct?

A. Correct.

Q. How tall about was he?

A. Do you mind if I stand up?

Q. Sure.

A. Okay. Let's say this is the teller line. About that tall. They are all taller than me. But I have heels on. I am five, six.

Q. So with your heels on, you would be, what, five, eight or five, nine?

the agents after you talked to your internal investigators, right?
A. Correct.
Q. And you told the agent -- the FBI agents that the person who approached you, describing as Offender 1, was between the age of 25 and 35, is that correct?
A. No. I told them that they were -- had to be a little older than me or a little younger. They looked very young.
Q. Okay. So you didn't say 25 or 35?
A. No, I did not give a specific age.
Q. Okay. So if they have that in their report, they have it wrong?
A. I'm not saying they have it wrong. My age at the time was 23. So if I told them it could have been older than me. I told them they couldn't be older than, you know, probably, I told them probably their early 20s or mid 20s --
Q. Okay.
A. -- close to 30, that's all I told them. I didn't say 25 to 30. I said probably younger or to 30.
Q. Now what's in the report is 25 to 30.
MR. SCHNEIDER: Objection.
BY MR. WILLIS:
Q. Did you tell them 25 to 30?
THE COURT: Pending objection.
MR. WILLIS: I'm sorry?

THE COURT: Rephrase your question.

MR. WILLIS: Sure.

BY MR. WILLIS:

Q. Did you tell the agents 25 to 35?

A. No, I told them they were either younger -- to me to -- 30, they could not be over. I was 23 at the time that this happened, turning 24.

So they probably estimated 25 to 30. I told them they could not be over 30 years old. So the 30 is correct.

Q. So you told them that they were at least 30 possibly?

A. I told them that they were --

MR. SCHNEIDER: Objection, misstates her testimony, your Honor.

THE COURT: Sustained.

BY MR. WILLIS:

Q. Again what did you say about 30?

A. I said they all looked young. They either could have been younger than me.

Q. Okay.

A. You know, they looked like young men, you know, or older than me. And at that time the FBI agents asked me, well, how old you are? I told him how old and when my birthday is. And I told them they could not be over 30.

Q. They could not be over 30? Okay.

A. They just looked very young.

Q. And the first person, did you tell the agent that the first person was five, seven to five, eight?
A. I told him they had to be taller than me. They asked me at that time how tall was I? I told them five, six. So they had a few more inches taller than me.
Q. Okay.
A. Except the third one.
Q. And my question is did you tell them five, seven to five, eight?
A. I told them around five, seven to five, eight, maybe five, nine.
Q. Okay. And did you tell the agents that the complexion of the first person was a medium complexion?
A. Correct. It was not dark, it was not light.
Q. Light --
A. It was medium. Medium for -- see, I'm not African American. You know, I only have two family members that are. So to me everyone is the same.

So when they -- when I told them medium, they told me to describe -- to describe it, either caramel -- you know, there was an officer there that was asking if they were light, medium, like him. Can you tell us more? It was like a caramel, like a light color caramel.

Q. Did you say when I asked you about the second person that the second person was light complexion?

A. Correct.
Q. Okay. And I understood you say that the first person was also light.
A. Correct. There was two light and one your complexion.
Q. Okay. Is medium and light the same or is light lighter than medium?
A. Like what are you -- I don't know what you guys mean by like for an African American.
Q. Well, what do you mean?
A. Like caramel.
Q. Okay.
A. You know, that's like a caramel medium. And light to me for an African American is like a caramel color, I would think.
Q. Okay. So light is lighter than caramel --
A. No.
Q. -- or is light the same as caramel?
A. About the same. Not too dark, not too light. You know, they could be of mixed race. You know, light complexion.
Q. But light is lighter than medium, is that correct. It is a little lighter than medium.
A. I am not sure what I mean by --
Q. Well, let's put it like this. If you are describing color and you were using three categories --
A. Okay.

Q. Light, medium, and dark.
A. Okay.
Q. Is that how you were doing it?
A. That's how I was doing it at first.
Q. Okay.
A. But they needed more detail. Was it a darker, you know, African American? A lighter African American? Very Caucasian or something looking? And that's where I came in, and I told them it is like a medium, like a caramel, like a caramel candy, like a square caramel.
Q. Did you tell the agents when they first asked you that the second person was light complexioned?
A. I told them they were light complexioned. And then -- when I said light, they said what do you mean, Caucasian, you know, and everything? And I was like, no, they were African American, just a lighter complexion.
Q. Okay. Lighter complexion African American.
That was first person and the second person?
A. Correct.
Q. They are were about the same complexion?
A. A little bit about the same.
About the same I would say.
Q. Okay. What -- let me back up a moment.
At some point these robbers were demanding money, correct?

BY MR. WILLIS:

Q. Showing you Government Exhibit Photo Line-up.

Take a look at that. Just look at it, and I'll take it back from you before you answer my question.

A. There is two light complexion -- oh.

Q. So of the six photos, two of them are light complexioned?

A. Correct, sir.

Q. And how would you characterize the other four?

A. As a dark complexion.

Q. Dark complexion.

Okay. Now did anyone, any of the agents of the law enforcement, invite you down to the police station to look at an actual line-up --

A. No, sir.

Q. -- where there were actual people?

A. No.

Q. That never happened?

A. No.

Q. So when you looked at these photos, you couldn't tell how tall these people were, could you?

A. Correct. It was just from their -- from here up. So you can't really tell.

Q. In fact when you looked at the photo, I believe you said that this person looked like the person but you couldn't see their ears.

A. Correct.
Q. Is that right?
A. I was -- I was told by the agent that take -- to take my time, that they might look different than the day of the robbery. That they might be clean cut. They might be a little rougher than the date of the robbery.
Q. Uh-huh.
A. I took my time. And the lips and eyes was what made me very certain that that was the one.
Q. Well, looked -- you said the look in the eyes were different. Correct?
A. I told the agent that it looked sad, and those people that were here that day didn't look sad.
Q. Okay.
A. You know, he looked sad in that picture. And that's what I told the agent. And that's when she stated that they might look different. You know, they might be clean cut, you know, a different appearance or anything like that.
Q. But you weren't absolutely sure when you looked at them because you hadn't --
A. I was sure. The eyes and the lips and the --
Q. Okay. Go ahead. I'm sorry.
A. The eyes and the lips is -- you could -- if you have something that bad happen to you, it is like you never forget it. You can never forget that person's eyes, you know?

And I told the agents I'm sure that's the one, you know. I just can't see the ears to see if he has a piercing. That's the only thing. You know, but I go, I'm sure. The eyes and the lips.

Q. After you viewed the photographs, did you ask the agent to let you see them again so you could be sure?

A. Correct. I said, let me, you know, take one more look and just make sure and have that gut feeling. And I had that same gut feeling when I first seen it.

MR. WILLIS: Judge, may I have a moment?

THE COURT: Yes.

(Brief interruption.)

MR. WILLIS: No further questions.

THE COURT: All right. Any redirect?

MS. HICKEY: Brief redirect, your Honor.

REDIRECT EXAMINATION

BY MS. HICKEY:

Q. You said that when you looked at the photo line-up, the eyes of the person looked sad. And on the day of the robbery they looked different.

How did they look on the day of the robbery?

A. They looked cold, like they don't care what was going to happen to us, they just wanted the money. You know, we were crying and praying, and they are telling us to shut up. And we were just praying. I kept saying, I have a daughter, please.

was that back then I was not 100 percent sure.
Q. Okay.
A. It doesn't mean that I didn't recognize anybody back then.
Q. So if you --
A. I told you it was my understanding then that, you know, my understanding was I had to be 100 percent sure.
Q. Okay.
A. So it is the same thing now. You asked me if I recognize somebody, and my testimony is, yes, I recognize somebody.
Q. Okay. You recognize.

Did you tell the U.S. Attorney or the defense lawyer or anybody on June 15th, I think it was, when you were down there, that you recognized somebody at that time?
A. Not -- because the proceeding was -- I mean, the way the line-up happened, everything was very structured.
Q. Uh-huh.
A. I didn't get a chance to talk to anybody whatsoever. They took me in and they took me out to not compromise, I guess other people that they had bringing in on a line-up, so I didn't talk to anybody at that --
Q. Okay?
A. -- at the --
Q. Well, you told them that you didn't recognize anybody, right?
A. I told them -- once again I told them I was not 100 percent

sure.
Q. Okay.
A. I never did say, no, I do not recognize anybody.
Q. Okay. So you did talk to someone and you say that I'm not 100 percent sure.
A. Yes, that was in the room. The defense attorney was there, so was Mark, and so was that FBI agent.
Q. So -- but it is your testimony now that you do recognize somebody and the person that you identified you are 100 percent sure of that?
A. I didn't say I was 100 percent sure.
Q. Okay. What is your testimony today?
A. I do recognize this person, yes.
Q. Let me ask you this, after you left the line-up -- well, strike that.

Did you recognize that person on the June 15th but you weren't 100 percent sure?
A. Yes.
Q. Okay. After you left did you call the U.S. Attorney and say, look, I recognize one of the guys, but I'm not 100 percent sure but did I recognize him?
A. I didn't speak to the U.S. Attorney. I did speak to Nikkole, the FBI agent.
Q. The FBI agent.
A. Correct.

Q. On the same day or after that?
A. It was probably, you know, a day or so after. But, yes, I did speak to Nikkole, yes.
Q. Now you're talking about the U.S. Attorney here?
A. No.
Q. This agent --
A. Yes.
Q. -- Ms. Robertson?
A. Yes.
Q. And you told her that you recognize one of the persons, but you weren't 100 percent sure?
A. Yes.
Q. So this is a couple of days later?
A. It must have been a couple days, I don't remember exactly.
Q. What did she say to you about that?
A. She told me that, how come I didn't say something at the time of the line-up? And, I says -- and then I explained to her where my confusion was when the agent -- I said I thought that I had to be 100 percent sure, and my answer was I wasn't 100 percent sure during the line-up.
Q. Okay. And what did she say?
A. And she said that, you know, unfortunately, she wasn't there to clarify it for me because another agent -- you know, they wanted the investigation very clean, so they wanted to take her out of the equation, whatever, and had another agent

read it to me so that it wasn't tainted at all. And so --
Q. Did you tell anybody else, besides Special Agent Robertson, that you believe you recognized someone but you weren't 100 percent sure?
A. When I -- I mean, then I didn't talk to anybody else, no.
Q. Nobody else but Agent Robertson?
A. Correct.
Q. So that was some time about maybe June 17th or 18th?
A. It had to be some time in June.
Q. Okay. What day was this on, do you recall, June 15th?
A. I don't recall. I know I was at work. You have to remember I had just gotten married and just came back from my honeymoon when all of this happened, so it must have been either Tuesday or Wednesday or something because they tried to do a line-up at the day I was getting married and that wasn't going to work, so --
Q. Okay. So did you -- you didn't come to talk to her on the weekend, did you?
A. No.
Q. Did you come to see her or did you talk to her on the phone?
A. No, it was on the phone.
MR. WILLIS: Judge, may I have a sidebar?
THE COURT: Yes.
(Sidebar proceedings had in open court outside of the

hearing of the jury:)

MR. WILLIS: This comes as a complete surprise to me. I have not received the 302. But I didn't want to raise discovery issues about his responsibility of the U.S. Attorney to give me any up dates on any of these witnesses, and I have not received this.

MR. SCHNEIDER: Judge, it is certainly not exculpatory. There was no report prepared.

MR. WILLIS: Don't have to be exculpatory to give a 302.

THE COURT: The 302 is the report?

MR. WILLIS: Yes. I should have gotten a report that this witness talked to this agent and basically says what she says is no.

THE COURT: You didn't give those over?

MR. SCHNEIDER: There wasn't a report prepared, Judge, is my understanding. We turned over all the prior recorded statements that we had of the defendant.

THE COURT: Well, well, you confirm that at a break or something.

MR. SCHNEIDER: Sure.

THE COURT: All right.

(The following proceedings were had in open court in the presence and hearing of the jury:)

MR. WILLIS: May I have a moment, Judge?

Q. Near that time?
A. I'm not sure. Probably.
Q. Ms. Avery, was there ever an occasion -- do you know someone named Antonio Harris?
A. Yes.
Q. And how do you know Antonio Harris?
A. Friend of mine.
Q. Does Antonio Harris have a nickname?
A. Little Tony.
Q. Does he have any other nicknames?
A. Tony Bone.
Q. And do you know whether Mack knows Antonio Harris?
A. Yes.
Q. What's their relationship?
A. Friends.
Q. Good friends?
A. You could say that.
Q. Do you know who the mother of Tony Bone is? Antonio Harris?
A. Yes.
Q. Who is that?
A. Serena.
Q. Now in 2006 were you present for a dice game that took place at the residence of Antonio Harris?
A. Yes.

MR. WILLIS: I need more foundation. Objection.
BY MR. SCHNEIDER:
Q. What is the residence -- where does Antonio Harris live?
A. 56 and Artesian.
Q. And do you remember when that dice game took place, approximately?
A. It was cold outside. February, January, I'm not sure. Somewhere around there.
Q. And who was present at the dice game?
A. It was a lot of people present. I was present, Little Mack was present, Brandon was present, Ronnie was present. A lot of people was present.
Q. Was Antonio Harris present?
A. Yes.
Q. And do you recall whether there was any discussion about robbing a bank at the dice game?
A. It was discussion -- I'm not sure if it was talking about robbing a bank. It was a discussion of --
MR. WILLIS: Objection. I'm going to object to the extent that these are non-conspiratorial discussions. These are not co-conspirator statements that she's discussed so far.
MR. SCHNEIDER: They are not being offered for the truth, your Honor. If your Honor would like --
THE COURT: Let's have a sidebar.
(Sidebar proceedings had in open court outside of the

hearing of the jury:)

MR. SCHNEIDER: Your Honor, Ms. Avery testified in the grand jury that she was at this dice game, that Antonio Harris was bragging about a bank robbery he had done and giving advice to others, including Mack, about how to do a successful robbery. Harris said you have to be in and out quick. And in reply Mack said something like, that sounds like something I'll do.

THE COURT: So it is an admission by the defendant that --

MR. SCHNEIDER: It is an admission by the defendant --

MR. WILLIS: But the other part is it is not an admission.

MR. SCHNEIDER: But giving advice about a bank robbery isn't offered for the truth.

MR. WILLIS: What is it offered for?

MR. SCHNEIDER: To show the defendant's knowledge and to give context for the defendant's statement that he thinks it is a good idea.

MR. WILLIS: I strongly object to that. It is not -- it is offered -- you are suggesting that because of what he said this motivated or caused my client to commit the bank robbery.

MR. SCHNEIDER: It is not hearsay, Judge.

THE COURT: What was the date of this in relation to

the bank robbery?

MR. SCHNEIDER: She said it was in the winter of 2006. She said it was cold.

MR. WILLIS: She said January or February.

MR. SCHNEIDER: So before the bank robbery he had a conversation with someone saying, why don't we rob a bank. And Mack says in reply that sounds like a good idea.

MR. WILLIS: That would be fine if the person who said that was a co-conspirator, but he is not. It is hearsay.

MR. SCHNEIDER: It is a party admission.

THE COURT: I think it is admissible. The question is, you know, really more the weight of the evidence. But I'll let it in.

(The following proceedings were had in open court in the presence and hearing of the jury:)

BY MR. SCHNEIDER:

Q. Ms. Avery, at that dice game that you have described in around February of 2006, did Antonio Harris make statements about a bank robbery?

A. He made statements about hitting a lick. I don't know if it was a bank robbery or what.

Q. Well, Ms. Avery, you testified in the grand jury.

A. Yes, I know.

Q. Do you remember that?

A. Yes.

including one witness who testified before your Honor at trial.

But the one that I think makes this a very easy decision from the Court's standpoint is the attempt to escape, which is clearly obstruction of justice within the Guidelines. That's something the jury's found beyond a reasonable doubt. And for that reason, we think it applies.

MR. WILLIS: Judge, we responded as well, but we would just briefly go through our response. One, McRay told the agents that he purchased the car with money that he got for working at the daycare center. That's still the position. He did work at the daycare center. I don't think there's anything that was parol evidence to refute that.

What was happening, he was working. He was kind of living in these different places because he had no place to live. They were kind of taking care of him. He worked in the daycare center. Now, obviously, the owner of the center couldn't say he was an employee, because, you know, when you have a daycare center, you have all kind of investigation. In fact, he was working, he was cleaning, but he was sometimes taking care of some of the children there; but obviously, she couldn't own up to that because she would lose her license for him to be working at the daycare center with the children.

And I think that explains partially one of the other points that the government makes that my client, while he's at the MCC, did something to change the testimony of Tierre Dean,

who's the son of the lady at the daycare center. He apparently told the agents one thing, and then he changed his mind. I don't know why he changed his mind. I suspect it has something to do with that family trying to stay clear of this investigation because of the daycare center.

The escape, I'm not sure that -- well, we don't think under the circumstance -- there are two answers. One is in here. I have another answer that's not in there.

Under the circumstances that we know of now, given this young man's state of mind, given his whole history, it's kind of like when we were in law school, the egg-head-shell theory that's used. For officers to confront him the way he did, you know, cussing at him, for other people, they might shrug it off; but this is a very delicate, abused, homeless half the time, 18-year-old kid. For him to be shouted and cussed at being law enforcement -- now, if it had been a gang-banger on the street, one would have said, "Well, that's what they do." But law enforcement don't do that, or they shouldn't do that. So for him to try to get out of there, I think, makes some sense. And it's escape under the law, but I think there were some very extenuating circumstances for him.

The other issue, I'm not sure that this would count as a level enhancement, where he was convicted of it and now the government is trying to use it again to penalize him more. So, I think that's -- I don't have the case law. That just

occurred to me. But I know there's case law in these double enhancements where you're using -- penalizing a person twice. He's getting penalized because he got convicted. He's going to get sentenced on that. Now the government is trying to enhance him again on another theory. I don't think that's proper.

So, for all of those things that we've indicated, we don't think it -- especially the statement. The statement was true. And I have no question about that Ashley, who's here, gave her brother money to buy that car. And he may have had bank money, too, so we don't know what he used for the car. But he didn't want his family to know about it. So, I don't think she got on the stand -- I just don't believe that at all. There's no evidence of that.

MR. SCHNEIDER: And, Judge, I guess what I would add as well are the defendant's statements to the mitigation officer, knowing those statements would be relayed to your Honor, in which the defendant has, displaying a complete lack of credibility, claimed that he attempted to withdraw from the offense en route to the bank; that he was forced under threat to commit the bank robbery, of which there's no evidence other than the defendant's words; that he doesn't remember anything that happened in the bank robbery because he was under the influence of spiked marijuana. That just -- I think that's offensive to the Court. It's offensive to the victims. And I think that's something that weighs in.

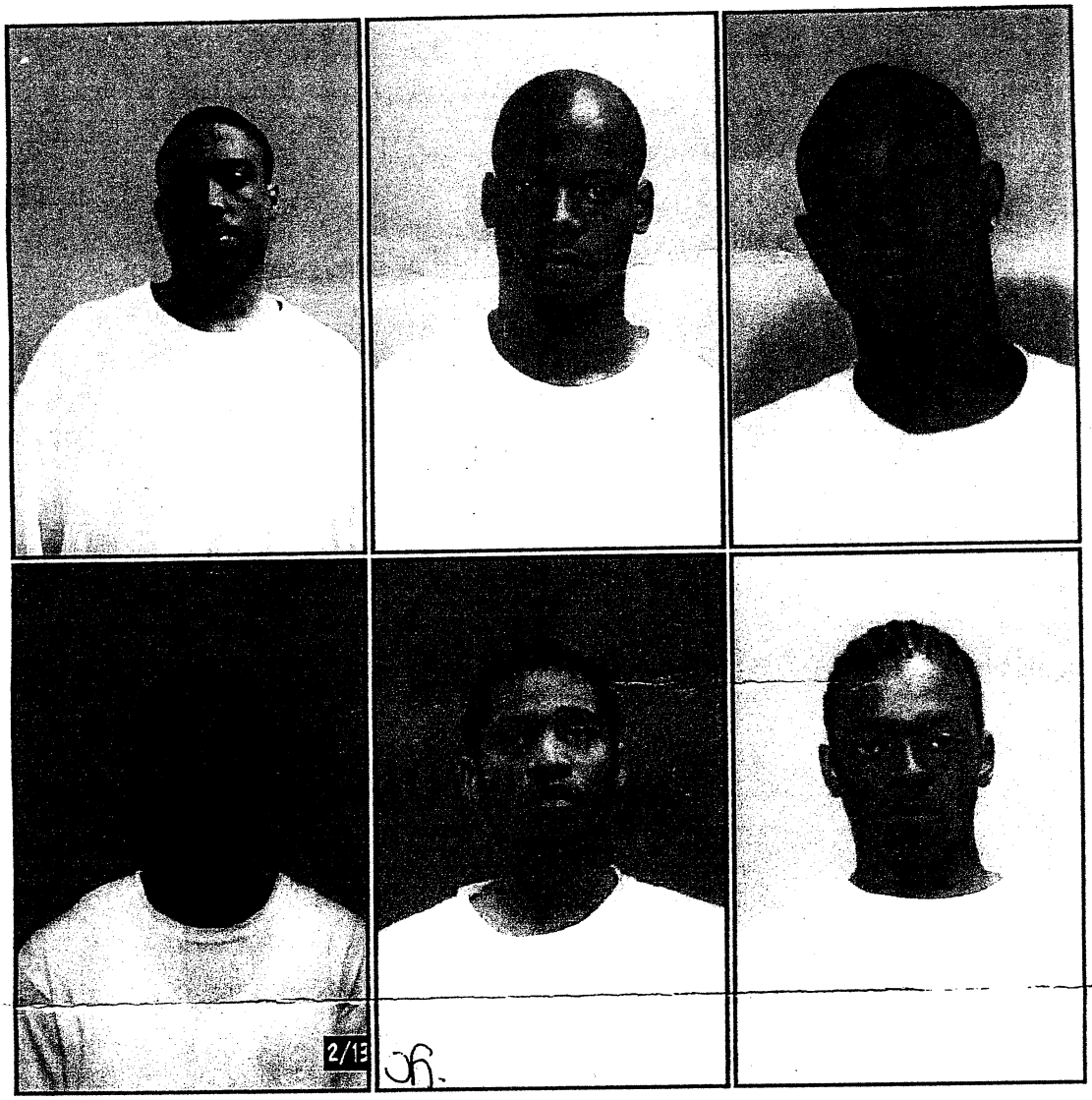
But again, I think the clearest thing here is the jury's beyond a reasonable doubt conviction that the defendant attempted to escape from the FBI. And with respect to the sentencing consequences of that, given the difference in offense levels for those two offenses, there's no sentencing consequence except insofar as it factors into the obstruction of justice, unless the Court were going to run the sentences consecutively, which I would assume it won't do.

THE COURT: It's not necessary to get into a discussion of the various incidents of making false statements in light of the conviction for the escape, which, as you say, is a clear enhancement under 3(b)1.2 -- or 3(b)1.1(C), I guess -- no, no, no. Where is it? 3(c)1.1, obstruction of justice. So, we'll move on with that.

Then criminal history departure.

MR. WILLIS: Judge, our position -- I don't know what else I can say -- is that we think it should be a departure because a level 2 overstates his criminal history. He has a very, very minor offense, which is reflected by the sentence, which is supervision, which is not a conviction. And then on top of that, with this minor offense and supervision, he gets additional points.

We think that's an overstatement of his criminal -- he doesn't have a criminal history except for a marijuana conviction, and now all of a sudden, he's in a criminal



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