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

REPLY BRIEF OF DEFENDANT-APPELLANT McRAY BRIGHT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

ARGUMENT

I. The District Court Plainly Erred When It Admitted Lopez's Unreliable Identification Procured By An Unduly Suggestive Photo Array.

This Court should reverse Bright's conviction because the district court committed plain error when it admitted Lopez's identification, which was procured by a photo array that included only two men who matched the pre-identification description she gave the FBI. In defense of its array, the government cites inapposite case law where the lineup participants actually matched the pre-identification description given by the witness or where the defendant was so unusual looking that filling an array with similar-looking men would have been impracticable. Rather than attempt to rebut the clear prejudice flowing from the suggestive array, the government resorts to an incorrect interpretation of the plain-error standard, improperly limiting its application to cases where the evidence was otherwise insufficient to convict the defendant or where there is proof of the defendant's actual innocence. This Court should reject the government's efforts and reverse Bright's conviction.

A. This Court should review for plain error.

Bright had good cause for not raising his suppression motion pretrial because the practical necessity for the motion did not become apparent until trial. Specifically, Thanh Staley testified that, although she had been unable to identify Bright at the lineup four months earlier, she did contact the police to identify him a couple of days after the lineup, a fact the defense learned for the first time at trial.

(Trial Tr. 279-82.) Ignoring this Court's precedent, the government argues that Bright's good cause claim is "baseless" because Lopez's identification is "separate and independent" of Staley's. (Gov't Br. 16-17.) In *United States v. Salahuddin*, 509 F.3d 858 (2007), this Court found "good cause" for failing to move to suppress earlier even though the "[defendant] no doubt knew of the factual disputes that would require an evidentiary hearing well before the filing deadline for motions to suppress." *Id.* at 862. This Court vacated the district court's judgment and allowed Salahuddin to raise the suppression argument before the district court, in part because the failure to raise the issue sooner resulted from "mutual misapprehension" about the application of a career criminal statute to his guilty plea, which in turn affected his defense strategy including his decision to move to suppress. *Id*. at 862-63. Thus, this Court has recognized that confusion over the practical necessity of a suppression motion may excuse waiver in certain situations. *Id*.

Such a situation exists here. Unlike in *Salahuddin*, however, the causes of any misapprehension lie entirely at the government's feet. Its failure to disclose until trial Staley's identification of Bright *four months earlier* no doubt had a practical impact on his defense strategy. Therefore, Bright's failure to file a pretrial motion to suppress cannot be attributed solely to "negligence, oversight, or

laziness," *id.* at 861 (citation omitted), and this Court should review his suppression argument for plain error.[1]

B. The introduction of the identification was obvious error.

The district court plainly erred in admitting a suggestive and unreliable identification at trial. To reverse a conviction for plain error, this Court must find: (1) an error; (2) that was plain; (3) that affected the defendant's substantial rights; and (4) that affected the fairness, integrity, and reputation of the judicial proceedings. *United States v. Stott*, 245 F.3d 890, 900 (7th Cir. 2001). Regarding first and second prongs, "[a] defendant has a due process right not to be identified prior to trial in a manner that is unnecessarily suggestive and conducive to irreparable mistaken identification." *Cossel v. Miller*, 229 F.3d 649, 655 (7th Cir. 2000) (quotation and citation omitted). The district court violated that right and committed an obvious error when it admitted an unreliable identification procured by an unduly suggestive photo array.

1. The array was unduly suggestive.

Rather than explain how the inclusion of four dark-complexioned suspects would not have focused Lopez's attention on the remaining two, the government engages in the distracting exercise of pointing out similar physical characteristics among the participants that were irrelevant to Lopez's description. *Compare* (Gov't Br. 21) (stating, for example, that "[f]ive out of the six men have short black hair;

[1] Further, the record has been sufficiently developed at trial to allow the Court to rule on the matter. *C.f. United States v. Nunez*, 19 F.3d 719, 723 n.10 (1st Cir. 1994) (declining to review for plain error where record was inadequately developed in the district court).

only one (not the defendant) is bald.") *with* (Trial Tr. 201-02) (Lopez noting that the men's heads were covered by "hoodies"). Thus, although the government concludes that "[t]he photos of the men contain no unusual physical or facial characteristics that allow one picture to stand out" (Gov't Br. 21), it fails to note that the array would not have steered Lopez in the direction of *any* of the men on the basis of "unusual facial characteristics" for the simple fact that she did not notice any.

One characteristic Lopez did notice—and what FBI agents repeatedly questioned her about the day of the robbery—was complexion. (Trial Tr. 214, 216.) And after having pressed Lopez to be as specific as possible in describing that complexion,[2] the FBI constructed an array for her that contained four men whose complexions did not match that description.

Thus, neither the facts of the case nor the government's authority supports its proposed rule that differences in skin color among line-up participants is not unduly suggestive, especially in the absence of other distinguishing physical characteristics. As an initial matter, the government's proposed rule cannot stand where, as here, the identification procedures suggested the culprit on the basis of a characteristic noted by the witnesses. *See Grubbs v. Hannigan*, 982 F.2d 1483, 1490 (10th Cir. 1993) (finding suggestiveness where some of the differences in facial

[2] "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? . . . And that's where I came in, and I told them it is like a medium, like a caramel candy, like a square caramel." (Trial Tr. 214, 216.)

characteristics "related to an important component of [the witness's] description of her assailant").

To that end, the government's cases are inapposite because the defendants in those cases were either not emphasized on the basis of a characteristic described by witnesses or were identified by witnesses who had not described the distinguishing characteristic. *See United States v. Lawson*, 410 F.3d 735, 738-39 (D.C. Cir. 2005) (upholding photo array where defendant was one of two "light-skinned" African Americans yet not noting whether skin tone was a component of witness's description); *United States v. Moore*, 115 F.3d 1348, 1359-60 (7th Cir. 1997) (finding array not suggestive where defendant was only one with a "notched" eyebrow but where multiple positive identifications came from witnesses who had not described the eyebrow to police); *United States v. Funches*, 84 F.3d 249, 251-53 (7th Cir. 1996) (upholding lineup as non-suggestive where nearly all the fillers matched the witnesses's pre-identification descriptions of the robber, especially where the defendant did *not* match the descriptions offered by either witness).

Further, the government's reliance on *United States v. Traeger*, 289 F.3d 461 (7th Cir. 2002), is misplaced. *Traeger* upheld a lineup not only because the "size differential was not so great as to make the lineup unduly suggestive," but also because of the difficulty of finding fillers who would closely match the defendant. *Id.* at 465-66, 474 (noting that the defendant was "bigger than the average offensive tackle in the National Football League" and that filling a lineup with men who "outside of the NFL . . . are fairly rare" was not required). Unlike *Traeger*, the

government's inclusion of only two medium-complexioned African Americans that matched Lopez's description is rooted in sloppiness and haste, not impracticability.

Further, although the government asserts that skin color is simply "a matter of degree" and that here the differences "are minimal" (Gov't Br. 22-23), it attaches to its brief a color array that shows two suspects significantly lighter than the others (Gov't App. 1). And the government cannot credibly claim that such "minimal" differences would not suggest to Lopez which suspects to focus on, as the government's own actions after the robbery belie such a claim. Specifically, the FBI pressed Lopez to be as specific as possible when describing the assailant's complexion (Trial Tr. 214), no doubt because such "minimal" differences in skin color would give the FBI some basis on which to identify the suspect. That is, *when the government was looking for someone to arrest*, skin color was not "a matter of degree" but an important identifying characteristic. It should have been entirely foreseeable that Lopez would look for medium-complexioned African American males in the array and disregard the other four fillers who were darker. Thus, the government's own authority and actions conclusively establish the undue suggestiveness of the photo array.

2. Lopez's identification was unreliable.

Given that the photo array was unduly suggestive, Lopez's identification should have been excluded because it satisfied only one of the factors used to assess reliability. *See United States v. Rogers*, 387 F.3d 925, 938-39 (7th Cir. 2004) (reversing where four factors were either neutral or weighed against reliability).

What little authority the government cites is inapplicable and serves only to highlight the obviousness of the error in admitting the identification.

First, although Lopez had a good look at the assailant's face (Trial Tr. 202), satisfying the first factor, the surrounding circumstances indicated that she could not have taken advantage of this opportunity to focus on his face, which is the second factor. The record disproves the government's argument that Lopez's mere physical proximity to the assailant "likely sharpened" her attention. (Gov't Br. 26.) Far from being attentive, Lopez was "crying and screaming and really hysterical" during the robbery (Trial Tr. 248), which is not the demeanor of one likely to remember an assailant's face, *see United States v. Rogers*, 126 F.3d 655, 659 (5th Cir. 1997).

Further, her vague pre-identification description of the assailant demonstrates her agitated state of mind, a fact that weighs *against* reliability. This third factor "helps the court determine if and when the witness developed and expressed a *concrete* and *specific* impression of the individual's characteristics . . . ." *Walton v. Lane*, 852 F.2d 268, 274 (7th Cir. 1988) (quotation omitted) (emphasis added). The government's argument that this factor is waived because Bright "failed to introduce evidence about his own height or weight at trial" (Gov't Br. 27) is beside the point, as the lack of specificity and detail should have been apparent based on Lopez's description alone.

Further, in arguing that Lopez's certainty in her identification—the fourth factor—bolsters her identification, the government conveniently ignores the

encouragement the FBI agent gave Lopez at a critical moment in the identification. Specifically, when Lopez looked at the array, she told the agent that Bright's eyes looked "sad," which was different than she had remembered. (Trial Tr. 221.) The agent wasted little time dispelling any doubt: "And that's when [the agent] stated that they might look different. You know, they might be clean cut, you know, a different appearance or anything like that." (Trial Tr. 221.) Such improper bolstering undercuts Lopez's "very certain" identification. Finally, turning to the fifth factor, the government concedes that the five weeks between the robbery and the identification diminished its reliability. (Gov't Br. 29.)

Thus, it was obvious error to admit Lopez's unreliable identification based solely on Bright's lips and "sad" eyes (Trial Tr. 221-22) where the identification was procured by an unduly suggestive photo array.

C. Lopez's identification prejudiced Bright by bolstering the government's weak and improbable case.

Given the government's weak case, the plainly erroneous admission of Lopez's identification affected Bright's "substantial rights," thus satisfying the plain error test. *See United States v. Olano*, 507 U.S. 725, 734 (1993). An error affects "substantial rights" when it causes "prejudice"; that is, when there exists "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) (citation and brackets omitted). In response, the government inexplicably offers a sufficiency argument (Gov't Br. 31) (stating that security guard Williams's testimony or co-conspirator Brandon Lee's was sufficient to convict), and its cases

wholly fail to address prejudice, *see Hayes v. Battaglia*, 403 F.3d 935 (7th Cir. 2005) (procedurally-defaulted collateral attack); *United States v. Payton*, 328 F.3d 910 (7th Cir. 2003) (challenge to sufficiency of the evidence).

The government undoubtedly shoe-horns Bright's plain error argument into a sufficiency framework in order to take advantage of the latter's "exceedingly deferential standard of review[.]" *United States v. Blanchard*, 542 F.3d 1133, 1154 (7th Cir. 2008). But evidence sufficient to uphold a verdict may be insufficient when a defendant claims prejudice. *See United States v. Simpson*, 479 F.3d 492, 505 (7th Cir. 2007). In fact, "[a] defendant is more likely to be prejudiced by error . . . when the government has a weak case." *United States v. Berry*, 627 F.2d 193, 201 (9th Cir. 1980). And courts have described as "not overwhelming evidence" prosecutions centered on co-conspirator testimony and circumstantial evidence. *See United States v. Wihbey*, 75 F.3d 761, 771 (1st Cir. 1996) (parenthesis omitted).

Citing no authority, the government claims that the incredible identifications of two eye-witnesses (Williams and Staley), the testimony of a felon co-conspirator, and a demand note not even traced to Bright constitutes "overwhelming evidence."[3] (Gov't Br. 30.) However, the government fails to acknowledge that Lopez's identification likely bolstered the credibility of the other witnesses, such as

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[3] Improbabilities abound upon closer inspection of Bright's alleged "spending spree" (Gov't Br. 9, 31), which serves only to widen the government's evidentiary gaps. The jewelry receipt contained not Bright's name, but someone named "James Goodman." (Trial Tr. 443.) Additionally, although the defendant's friend Antonio Harris was bonded out of jail for $1,500 on the day of the robbery, the bond was signed by his mother, Serena Harris. (Trial Tr. 555.) Finally, the government neither found the bait money at Bright's residence (Trial Tr. 582) nor introduced evidence over a year later at trial that the bait money had been spent, despite alleging a "spending spree" totaling over ten percent of the heist proceeds.

convicted felon and cooperating witness Brandon Lee (Trial Tr. 330-31), or security guard Williams, who failed to identify Bright as a robber until he saw Bright in court over a year later (Trial Tr. 293). Lopez's identification also likely filled the gaps created by the lack of physical evidence, such as fingerprints from the demand note carried by the barehanded robber. (Trial Tr. 201.)

Moreover, the jury's deadlocking after a day of deliberations highlights the tenuous nature of the government's case, despite the government's claim that such deadlocking is hard to interpret and "inscrutable." (Gov't Br. 32.) To the contrary, having been specifically instructed by the district court to consider the evidence (Trial Tr. 741-55), the jury no doubt spent its first day of deliberations doing just that. Notwithstanding the government's so-called "overwhelming evidence at trial" (Gov't Br. 30), the jury sent the court a note announcing "We are at a deadlock. What now?" (Trial Tr. 757). Thus, Lopez's identification served as the nucleus of an otherwise weak and improbable case.

D. The introduction of Lopez's identification denied Bright a fair trial.

Finally, the admission of Lopez's identification merits discretionary reversal because it affected the "fairness, integrity, or public reputation of judicial proceedings." *See Olano*, 507 U.S. at 735. The government misleads this Court by arguing that plain error can be corrected only where "the error causes a 'miscarriage of justice,' *i.e.*, the conviction of an innocent person." (Gov't Br. 19)

(quotation omitted).[4] In fact, the Supreme Court "was not willing to define this last element strictly in terms of actual innocence." *Stott*, 245 F.3d at 900; *see also Olano*, 507 U.S. at 736. Indeed, "[a]n error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Olano*, 507 U.S. at 736-37.

Here, reversal is merited because the introduction of Lopez's identification denied Bright a fair trial by allowing the jury to convict on unfair and improperly gathered evidence. Thus, discretionary reversal is warranted.

II. The District Court Erroneously Admitted The Testimony Of Cheri Avery And Evidence Concerning Ruby Parker.

A. The district court erred in admitting Avery's testimony regarding Harris's prior bank robbery.

At trial, Avery testified to two statements made in her presence: (1) Harris's statements about his prior bank robbery; and (2) Bright's statement that just such a robbery "[s]ound[s] like something I want to do." (Trial Tr. 406.) Even if Bright's statement were admissible, the district court erred in admitting Harris's. As an initial matter, the government argues Bright failed to object on prejudice grounds at trial (Gov't Br. 36-37), but the record shows Bright adequately preserved his objection when counsel argued at sidebar that Avery's testimony unfairly linked

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[4] The government's reliance on the erroneous "miscarriage of justice" standard in *United States v. Wheeler*, 540 F.3d 683, 690 (7th Cir. 2008), can only be an oversight, as the *Olano* Court squarely rejected the "miscarriage of justice" standard from *United States v. Young*, 470 U.S. 1 (1985), in favor of the "affects the fairness, integrity or judicial integrity" standard from *United States v. Atkinson*, 297 U.S. 157 (1936). *See* Jeffrey L. Lowry, *Plain Error Rule —Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Criminal Procedure*, 84 J. Crim. L. & Criminology 1065, 1080-81 (1994).

Bright to Harris (Trial Tr. 401). Specifically, at sidebar defense counsel introduced the concept of unfair prejudice by objecting that the "other part" of Avery's testimony led to a "*suggestion* that because of what he said this . . . *caused* my client to commit the bank robbery." (Trial Tr. 401) (emphasis added). Counsel's objection fairly implies that Harris's statement was prejudicial because it unfairly linked Bright to a bank robber, which in not related to the relevant question of whether Bright committed the robbery. Because this objection was apparent from the context and served to alert the court to the prejudicial nature of this evidence, he preserved his Rule 403 objection. *C.f. United States v. Carroll*, 871 F.2d 689, 691-92 (7th Cir. 1989) (holding defendant did not preserve objection because he did not specify the grounds, and it was not apparent from context). Therefore, this Court should review for an abuse of discretion.

Even if this Court applies plain-error review, however, the district court's admission was erroneous. As noted above, *see* section I.B., *supra*, plain error is (1) an error, (2) that is plain or obvious, and (3) that affects substantial rights. *Olano*, 507 U.S. at 732. This Court corrects plain errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (citation omitted). The error was plain because under Rule 403, this Court excludes evidence when its probative value is outweighed by the danger of unfair prejudice. Fed. R. Evid. 403; *United States v. Samuels*, 521 F.3d 804, 813 (7th Cir. 2008). Here, the probative value of the Harris statement was virtually non-existent. Harris's statement that he committed a prior robbery and his advice that "you have to be in and out quick"

(Trial Tr. 404) were details that were not relevant to whether Bright robbed the bank. And, contrary to the government's suggestion, Harris's statement was not necessary to provide context. Avery herself could have provided, in general terms, the context of the conversation and Bright's subsequent statement without also inserting Bright's association with other bank robbers. Thus, the probative value, if any, of the Harris statement was low.

The prejudicial impact of this testimony, however, was high; therefore, its admission constitutes plain error. This Court has long recognized the danger of admitting unduly prejudicial guilt-by-association evidence. The fundamental rationale for excluding evidence of a defendant's interaction with unsavory characters is the danger that this evidence will lead the jury to convict the defendant not on the basis of the evidence in the case, but rather based on its aversion to the defendant or the people with whom he interacts. *United States v. Irvin*, 87 F.3d. 860, 864-66 (7th Cir. 1996) (noting in the gang context that such evidence "is likely to be damaging to a defendant in the eyes of the jury" because they "arouse negative connotations and often invoke images of criminal activity" and concluding there is "always the possibility that a jury will attach a propensity for committing crimes to defendants who are so affiliated or that a jury's negative feelings toward gangs will influence its verdict") (citation omitted); *United States v. Romo*, 669 F.2d 285, 288 (5th Cir. 1982) (stating "[t]hat one 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"). As these cases

demonstrate, the touchstone of this inquiry is whether the evidence would cause the jury to convict the defendant based on an improper ground rather than on the evidence.

In its attempt to limit the applicability of the common-sense rationale underlying the *Irvin* decision, the government makes two equally unavailing arguments. First, it argues that this Court has never applied its guilt-by-association reasoning outside of the gang context. Second, the government advocates for an unwarranted narrowing of this Court's existing guilt-by-association precedent to require active gang membership or extensive proof of the associate's criminal history or activities before such evidence can be excluded. (Gov't Br. 38-39.) This Court should reject both efforts to distract from the fact that the reasoning underlying *Irvin* is fully applicable to this case.

First, the government seizes on the fact that this Court has not yet had the opportunity to extend its guilt-by-association jurisprudence under Rule 403 to associations outside the gang context. (Gov't Br. 38.) But in no case has this Court been invited to apply its Rule 403 guilt-by-association standard to other, non-gang associational evidence and expressly declined to do so. Thus, this Court has not limited its guilt-by-association jurisprudence only to gang evidence. Moreover, neither of the two cases on which the government relies stands for any limitation of guilt-by-association principles to gang evidence. (Gov't Br. 38, citing *United States v. Irvin*, 87 F.3d 860 (7th Cir. 1996); *United States v. Thomas*, 86 F.3d 647 (7th Cir. 1996)). In fact, *Irvin* shows precisely why guilt-by-association evidence is so

harmful and how its reasoning is in line with all of the other circuits that have applied the guilt-by-association prohibition to other types of associational evidence. *Irvin*, 87 F.3d at 863-68; *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, 599-603 (1st Cir. 1989) (holding the admission of the father's illicit gambling ring against daughter defendant, who had no knowledge of ring, was highly prejudicial guilt-by-association evidence). Thus, the fact that this Court has applied guilt-by-association with respect to gang evidence (Gov't Br. 38) neither undercuts this Court's existing guilt-by-association case-law nor counsels against its extension to contexts outside of gangs.

The government then attempts to improperly narrow this Court's guilt-by-association jurisprudence to cases that only involve gang membership and or where the associates' criminal conduct is extensive. (Gov't Br. 38-39.) Neither argument is supportable. Gang membership is an artificial distinction on which to base the question whether a guilt-by-association argument may be raised in the first instance. The prejudicial inference of gang evidence stems from the criminality the jury associates with gangs, not the defendant's membership. *See Irvin*, 87 F.3d at 863 (noting that the lower court sustained an objection to the term "gang," leading the government to use the less prejudicial term "club").

Finally, the government hints repeatedly that guilt-by-association evidence is only improper when the jury is given a lot of details about the shady affiliate. (Gov't Br. 38) ("There was no testimony about Antonio Harris' background, his criminal history, or details about any prior bank robbery . . . ."); (Gov't Br. 40-41) ("There was no evidence presented that Parker had a criminal history or was an accomplice to the crime."). Although this might increase the evidence's prejudicial nature, neither proof of criminal convictions nor extensive detail about criminal activity is required in order for a jury to make a prejudicial inference.[5]

Here, the Harris evidence prejudicially connected Bright with a bank robber. Because the probative value of this evidence was so low, it was not outweighed by the substantial prejudice stemming from Bright's association with and his receiving advice from an acknowledged bank robber. The reasoning underlying this Court's existing guilt-by-association precedent applies fully here and this Court should find plain error.

Turning to the third prong of the test, the admission of Harris's prior bank robbery affected Bright's "substantial rights" and denied him a fair trial because it showed that Bright was likely to associate with bank robbers and unfairly bolstered other weak evidence in the case. Thus, the admission of this evidence likely affected the jury's decision to convict. Finally, the government once again

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[5] Thus, the government's attempts to distinguish *Romo* based on the extensiveness of the evidence presented is unavailing. The prejudice in *Romo* originated from the mere association, not the details underlying that association, and this fundamental association is the basis of this Court's decision in *Irvin*. Like *Romo*, the government improperly introduced evidence linking Bright, an accused bank robber, with an associate who had previously committed bank robbery.

incorrectly contends that this Court must engage in a sufficiency inquiry or find actual innocence to correct a plain error. (Gov't Br. 32.) As noted above, this mischaracterizes the law. *See Stott*, 245 F.3d at 900; *Olano*, 507 U.S. at 736; section I.D, *supra*. Therefore, the district court plainly erred in admitting this evidence. Bright's conviction should be overturned and his case remanded for a new trial.

B. The district court abused its discretion in admitting evidence related to Ruby Parker, which the government improperly used to connect Bright to the bank.

The district court also abused its discretion in admitting evidence related to Ruby Parker. The government claims Bright's distant relation to Parker—a former bank employee who supposedly knew the armored truck delivery schedule—explains why the robbers chose this bank out of the hundreds others in Chicago. (Gov't Br. 40.) First, the district court erred in finding this evidence to be probative of "why the defendant chose this bank" (Trial Tr. 12) because its finding relied on a series of unsupportable inferences. The five birth certificates introduced at trial showed only Bright's distant relation to Parker. What these certificates did not show, however, is that: (1) Bright had ever met Parker; (2) he knew she worked at this bank; or (3) Parker had ever disclosed the Brinks delivery schedule to him or anyone else. Nor did the government introduce any evidence at trial to close these evidentiary gaps. Accordingly, because the birth certificates, standing alone, do not establish the inference that the district court articulated in admitting them, the probative value is virtually non-existent.

Moreover, the very same erroneous inference on which the district court relied in deeming the evidence probative likewise exposes its prejudicial nature. The only way the jury could have concluded that Bright's relationship to Parker influenced the decision to rob this particular bank is if the jury: (1) filled the evidentiary gaps to show Bright knew and interacted with Parker; and then (2) improperly assumed that Parker was the type of employee who would breach her employer's trust by disclosing confidential bank security information that is otherwise not the stuff of casual conversation. Like *Irvin*, where this Court excluded prejudicial associational evidence because the government neither tied the defendant to the gang nor the criminal activity at hand, 87 F.3d at 864, the government here asked the jury to make both this unwarranted evidentiary leap and this unreasonable inference: "[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.) *See, e.g.*, *St. Michael's Credit Union*, 880 F.2d at 599-603 (holding that the admission of the father's illicit gambling ring against defendant daughter was highly prejudicial because the government did not present any evidence from which a jury could reasonably infer the defendant had knowledge of her father's activities).

Although the government again quibbles that there was no evidence that Parker had a criminal history or that she was an accomplice to this crime (Gov't Br. 40-41), as noted above, *see* section II.A, *supra*, the exclusion of improper guilt-by-

association evidence under Rule 403 does not require this kind of detail. The salient question is whether the defendant's mere association with an unsavory person, however that association is established, could cause the jury to jump to unreasonable inferences unrelated to properly admitted evidence. For Bright's distant relation to Parker to explain Bright's choice of bank, multiple unreasonable inferences were necessary; therefore, this evidence was highly prejudicial.

Finally, this error was not harmless. The government's contention that Bright must prove that the jury "convicted him . . . merely because he associated with a person who breached her employer's trust" (Gov't Br. 41) overstates the defendant's burden in a harmless-error inquiry. Errors should not be deemed harmless if the government'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 and citation omitted); the question is not whether the jury "convicted" based on his mere association. The government introduced Bright's association for only one reason: to explain why this particular bank was robbed. Without this evidence, the government could not independently connect Bright to the bank, let alone the neighborhood, on the day and time it was robbed. The government's case would have been significantly weaker without the Parker evidence because there was no physical evidence placing Bright at the bank, and the case would have then rested on tenuous circumstantial evidence and the less-than-convincing identifications made at trial, *see* section I, *supra.* Because the district court abused its discretion in admitting this evidence and this error was not

harmless, Bright's conviction should be overturned and his case remanded for a new trial.

III. The District Court Erred In Its Interpretation And Application Of Sentencing Guideline § 3C1.1.

The district court erroneously assumed that Bright's conviction for attempted escape under 18 U.S.C. § 751(a) automatically justified a two-level sentence enhancement for obstruction of justice under United States Sentencing Guidelines Manual § 3C1.1 (2007). This assumption was incorrect because, although § 751(a) requires only that a defendant knowingly leave custody, 18 U.S.C. § 751(a) (2006), this Court's precedent makes clear that the Guideline requires a finding of a "willful" intent to obstruct justice. *See, e.g.*, *United States v. Hagan*, 913 F.2d 1278, 1285 (7th Cir. 1990) (stating that § 3C1.1 "contains a clear *mens rea* requirement that limits its scope to those who 'willfully' obstruct . . . the administration of justice), superseded by statute on other grounds, U.S. Sentencing Guidelines § 3C1.2.; *United States v. Stroud*, 893 F.2d 504, 507 (2d Cir. 1990) (noting that although "willful is a word 'of many meanings, with its construction often . . . influenced by its context,'" the guidelines require a conscious act with the purpose of obstructing justice), superseded by statute on other grounds, United States Sentencing Guidelines. Because the district court also explicitly declined to make

any factual findings whatsoever,[6] it committed reversible error in imposing the enhancement. *United States v. Seward*, 272 F.3d 831, 838 (7th Cir. 2001) (remanding for resentencing where district court failed to make necessary findings of all factual predicates for an obstruction-of-justice enhancement). The district court's error was predicated upon a misinterpretation of § 3C1.1 and the findings required to justify an enhancement under that section, a legal question that this Court reviews *de novo*. *United States v. Jones*, 983 F.2d 1425, 1429 (7th Cir. 1993). Further, even if this Court were to construe the district court's application of the § 751(a) conviction as a mens rea finding, that application would be clear error because, as discussed above, the mens rea under § 751(a) does not pass the required "willfulness" threshold of § 3C1.1.[7] *See United States v. Haddad*, 10 F.3d 1252, 1260-61 (7th Cir. 1993) (requiring that act be done "'willfully' and with the specific intent to 'avoid responsibility' for the [charged] offense") (quotation omitted).

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[6] Although the government and defense counsel spent over four transcript pages presenting facts and arguments to the court that they believed militated for and against the assessment of the enhancement, (Sentencing H'rg Tr. 27-31), the court simply responded:

> It's not necessary to get into a discussion of [the facts disputed by the parties] in light of the conviction for the escape, which, as you [the government] say, is a clear enhancement under . . . 3C1.1, obstruction of justice. So we'll move on with that.

(Sentencing H'rg Tr. 31.)

[7] In any event, given the extensive factual record that developed between trial and sentencing via the court-appointed mitigation specialist, the district court should not have automatically equated the jury's finding with respect to § 751(a) with its obligations under § 3C1.1. The record developed at sentencing could not support a finding that Bright's instinctual and fear-driven flight was done with the specific intent to obstruct justice. *See United States v. Haddad*, 10 F.3d 1252, 1260-61 (7th Cir. 1993). Thus, a remand is required under either standard of review.

The plain language of § 3C1.1 states that it applies only when "the defendant *willfully* obstructed or impeded, or attempted to obstruct or impede, the administration of justice." U.S. Sentencing Guidelines Manual § 3C1.1 (emphasis added). This Court has acknowledged this willfulness requirement and has repeatedly and explicitly distinguished between instinctive and calculated conduct. *See*, *e.g.*, *United States v. Arceo*, 535 F.3d 679, 683 (7th Cir. 2008); *United States v. Porter*, 145 F.3d 897, 903-04 (7th Cir. 1998); *United States v. Draves*, 103 F.3d 1328, 1338 (7th Cir. 1997); *Haddad*, 10 F.3d at 1260; *Hagan*, 913 F.2d at 1285.

The government attempts to undermine this tradition by misconstruing both this Court's holding in *Draves* and § 3C1.1's Application Notes.[8] Under the government's theory, the willfulness requirement would be limited to cases in which a defendant flees from the scene of arrest but would not apply once the defendant is firmly in custody. (Gov't Br. 43-46.) This attempted misdirection utterly fails by turning a blind eye to two points this Court has covered time and again. First, this Court has repeatedly held that the Application Notes are not dispositive "for three reasons: (1) Application Notes 3 and 4 potentially overlap;[9] (2) the examples they provide are 'non-exhaustive';[10] and (3) those examples are merely intended to 'assist

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[8] Note 4(e) lists "escaping . . . from custody" as conduct typically reached by the Guideline, whereas Note 5(d) lists "fleeing from arrest" under conduct *not* subject to enhancement.

[9] At the time of the *Porter* decision, the contents of Notes 4 and 5 were denoted Notes 3 and 4, respectively. The relevant text, however, remains identical.

[10] This Court refers to the opening caveats of both Notes 4 and 5, which state: "The following is a *non-exhaustive* list of examples of the types of conduct to which this . . . applies:" U.S. Sentencing Guidelines Manual § 3C1.1 cmt. (n.4, 5) (emphasis added).

the court in determining whether application of this enhancement is warranted in a particular case.'" *Porter*, 145 F.3d at 903 (quoting *Draves*, 103 F.3d at 1338). *See United States v. Monem*, 104 F.3d 905, 909 (7th Cir. 1997) (noting Notes are not dispositive); *Hagan*, 913 F.2d at 1284 (same); *see also United States v. White*, 903 F.2d 457, 461 (7th Cir. 1990) (same but using then-current text of U.S.S.G. § 3C1.1 cmt. (n. 1)), superseded by statute on other grounds, United States Sentencing Guidelines § 3C1.2.

Second, and more importantly, this Court has regularly refused to rule on obstruction-of-justice enhancements based on the government's proposed criterion of whether a defendant fled pre-arrest or post-custody, clearly stating that an obstruction enhancement may be warranted "despite the fact that [a defendant] was *not* yet under arrest or in custody at the time of his flight." *Porter*, 145 F.3d at 904 (emphasis added); c*ompare White*, 903 F.2d at 462 (applying enhancement to defendant who fled prior to arrest); *Arceo*, 535 F.3d at 687 (same); *with Hagan*, 913 F.2d at 1285 (opposite). In short, this Court has already rejected the government's "overly formalistic" arrest/custody approach in favor of "a less myopic analysis . . . that considers all of the relevant Application Notes together with the language and purpose of the Guideline." *Draves*, 103 F.3d at 1337-38.

In its final attempt to circumvent the willfulness requirement of § 3C1.1's plain language, the government cites cases from other circuits which, it implies, based *their* imposition of § 3C1.1 enhancements upon the government's preferred

distinction between pre-arrest and post-custody. (Gov't Br. 44-46.) As an initial matter, even if these cases stood for this proposition, they are irrelevant because, as demonstrated above, this Court has repeatedly stated that § 3C1.1 requires willfulness. All the same, the government in fact makes Bright's case by pointing to two instances where, despite finding that defendants were firmly in custody, courts remained careful to additionally characterize defendants' actions as "willful." *See United States v. Abdunafi*, No. 07-3635, 2008 WL 5007393, at *4 (3d. Cir. Nov. 26, 2008) (noting that defendant's action was a "willful attempt to escape from . . . custody"); *United States v. McDonald*, 165 F.3d 1032, 1035-36 (6th Cir. 1999) (noting that defendant "willfully and deliberately escaped from custody" and his actions "[did] not reflect the conduct of one who is in a state of panic").

Two of the government's remaining cases are factually inapposite because they do not treat situations of flight or arrest/custody at all and, further, only upheld obstruction enhancements after noting that defendants' conduct was calculated. *See United States v. Jackson-Randolph*, 282 F.3d 369, 390 (6th Cir. 2002); *United States v. Maccado*, 225 F.3d 766, 769-70 (D.C. Cir. 2000) ("[defendant] does [not] claim that . . . his actions were not willful."). And the final two government cases are, at best, inconclusive. *See United States v. Huerta*, 182 F.3d 361, 366 (5th Cir. 1999) (admitting that "the question whether [the defendant escaped] from custody may not be a *precise* substitute for the question whether a defendant willfully obstructed . . . justice") (emphasis added); *United States v. Williams*, 152 F.3d 294, 303 (4th Cir. 1998) (not questioning § 3C1.1's willfulness

requirement and limiting its dissatisfaction with *Draves* only "[*t*]*o the extent that* [it] counsels against applying the enhancement where the escape occurs contemporaneously with the arrest") (emphasis added). Thus the cases cited by the government, non-binding to begin with, do not bolster the district court's decision or the government's proposed arrest/custody bright-line rule.

In fact, the basis for the government's proposed rule—the theory that the activities listed in § 3C1.1's Application Note 4 automatically justify an enhancement without a separate finding of willfulness—is untenable. Such an exemption would lead to potentially absurd results, such as a defendant who *negligently* "destroyed . . . evidence . . . material to an official investigation," but then received a sentence enhancement for "*willfully* obstruct[ing] . . . the administration of justice." U.S. Sentencing Guidelines Manual § 3C1.1 cmt. n. 4(d) (emphasis added). Further, an "arrest vs. custody" regime would lead to the unfairly over-and-under-inclusive result of enhancing the sentence of a fleeing newly-handcuffed offender, whose action certainly does not obstruct justice, while sparing someone who, though never in custody, leads police on a wild goose chase for weeks or years preceding his actual arrest and thus certainly does obstruct justice. Instead, the decisions of this Court and many others properly condition a § 3C1.1 enhancement on the distinction between calculated evasion and instinctive flight. *See Arceo*, 535 F.3d at 687; *Porter*, 145 F.3d at 904. *See also United States v. Greer*, 158 F.3d 228, 235 (5th Cir. 1998); *United States v. Walcott*, 61 F.3d 635, 639

(6th Cir. 1995); *United States v. Mondello*, 927 F.2d 1463, 1466-67 (9th Cir. 1991); *Stroud*, 893 F.2d at 507-08.

Thus, the plain-language willfulness requirement of § 3C1.1 is firmly established in this Court and is not contravened by either *Draves* or other circuits. In addition, this requirement allows for a workable reading of § 3C1.1's Application Notes and comports with principles of fairness, where the government's proposed arrest/custody rule does not. The district court erred when it enhanced Bright's sentence without finding that his flight was willful, and his case must be remanded for resentencing.

CONCLUSION

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

Respectfully Submitted,
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No. 08-1770

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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 COMPLIANCE WITH CIRCUIT RULE 31(e)

I, the undersigned, counsel for the Defendant-Appellant, McRay Bright, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), a version of this reply brief 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 6975 words.

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, McRay Bright, hereby certify that I served two copies of this reply brief 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 March 5, 2009.

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