No. 09-5568

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GARY LEBRON CLAY, Defendant-Appellant.	Appeal from the United States District Court, Eastern District of Tennessee at Chattanooga CR-1-07-00147 Judge Harry S. Mattice, Jr.

BRIEF OF APPELLANT
GARY LEBRON CLAY

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Mr. Clay requests oral argument because the issues raised here present, in the district court's words, a "close call." He respectfully asserts that oral argument will assist the Court in making its determination.

JURISDICTIONAL STATEMENT

Jurisdiction in the Eastern District of Tennessee was based on 18 U.S.C. § 3231, as Clay was charged with an offense against the laws of the United States committed within the Eastern District of Tennessee. A jury found Clay guilty of carjacking and brandishing a firearm during a crime of violence. The district court sentenced him to 360 months of imprisonment on April 27, 2009. The court entered his judgment of conviction on May 1, 2009.

On May 4, 2009, Clay filed a *pro se* notice of appeal, docketed as No. 09-5567. (R.102). On May 5, 2009, counsel for Clay filed a notice of appeal, docketed as No. 09-5568. (R. 104). Both notices were timely. The jurisdiction of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. § 1291, 18 U.S.C. § 3742(a), and Rule 4(b) of the Federal Rules of Appellate Procedure.

The Court entered an order on May 13, 2009 addressing the duplicative efforts. (Doc. 00615522207). The Court determined "both appeals are jurisdictionally sound." *Id*. Thus, the clerk was authorized to dismiss one appeal as duplicate. *See* Circuit Rule 45(a)(8). Appeal No. 09-5567 was dismissed. (Doc. 00615522207).

STATEMENT OF THE CASE

A grand jury charged Gary Lebron Clay with carjacking in violation of 18 U.S.C. § 2119 and brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii). Clay proceeded to a jury trial and the jury found him guilty. Clay's Motions for a New Trial and Acquittal were denied. The United States District Court for the Eastern District of Tennessee sentenced him to 360 months of imprisonment. Clay timely appeals, asserting the district court made multiple evidentiary errors, the verdict clashes with the evidence, and the sentence was unreasonable.

ISSUES PRESENTED FOR REVIEW

I. A year prior to the underlying events, Clay assaulted Karissa Marshall. The prosecution sought to highlight this other incident to show specific intent. Noting it was a "close call," the district court admitted it via Rule 404(b). Marshall told the jury that when she was 15, Clay pistol-whipped her. She also described the injuries Clay inflicted. Should the jury have been told about this prior act?

II. Three days before the carjacking, a man purported to be Clay was seen on a grainy surveillance camera prowling around a parking lot and rifling through cars. Clay was not charged for the burglary. The prosecution sought to admit the video, claiming it showed Clay securing the gun used in the carjacking. The court acquiesced, citing Rule 404(b). Should the jury have seen the video of this prior act?

III. The carjacking occurred on a dark morning. The culprit wore a hood. He was described as 5'8", clean shaven, medium complexion, and no tattoos. Clay is 6'2", has a mustache, dark complexion, and tattoos. No witness could identify the carjacker—the prosecution conceded as much. Was the evidence sufficient to sustain Clay's conviction for carjacking?

IV. Clay was placed in foster care and has been diagnosed with various mental health issues. Was his 30-year sentence reasonable given the factors enumerated in 18 U.S.C. § 3553(a)?

STATEMENT OF FACTS

To best grasp the issues on appeal, Clay first sets forth the prior acts the court admitted at trial. He then discusses the facts leading to the underlying charges.

A. The Events of September 10, 2006

Karissa Marshall was going to work on the afternoon of September 10, 2006. (Tr. 145). She left her home and walked to the bus stop. *Id*. While walking, a car pulled alongside her. (Tr. 145-46). A man asked if she needed a ride. (Tr. 20). Marshall refused. *Id*. As she resumed walking, the car continued to shadow her. (Tr. 145-46). Marshall's pace quickened. (Tr. 146). She reached for her purse but the man told her not to move. *Id*. Marshall then fled. *Id*.

The man exited the car and caught up with her. *Id*. He grabbed Marshall and began cursing. (Tr. 146-47). Seconds later, he hit her in the jaw with a gun. (Tr. 148-49). Knocked unconscious, Marshall fell to the ground. *Id*. She got up moments later and bystanders came to her aid. (Tr. 149-50). The man was gone. (Tr. 150). Marshall suffered injuries to her jaw which still persist. (Tr. 152). In the weeks following the incident, she did not leave her home. *Id*. Karissa Marshall was 15 at the time. (Tr. 144).

Over objections, Marshall recounted her experiences to the jury. (Tr. 150-51). She mused, "I thought I was going to die that day." (Tr. 148). Marshall identified Gary Lebron Clay as the man who attacked her. (Tr. 152).

B. The Events of October 29, 2007

Ron Archey and Steven Moser worked at Cricket Communications. (Tr. 86). Each parked their cars in the Cricket parking lot, which was monitored by a grainy surveillance camera. On October 29, 2007, the video showed a man lurking in the lot. (Tr. 73-74). The man entered Archey's white Chevrolet. (Tr. 74-75). He also entered Moser's green Ford. (Tr. 74-75). The video depicts the man exiting Moser's car with a black case. (Tr. 75). The case held Moser's silver pistol, which he kept under the driver's seat. (Tr. 77).

Upon leaving for lunch, Archey noticed personal property scattered outside his vehicle. (Tr. 79). His checkbooks, a DVD player, and DVDs were missing. (Tr. 87). Moser's black case was found on the side of the building, *sans* pistol. (Tr. 79). Realizing their cars had been burglarized, Archey and Moser consulted the surveillance video. *Id*.

The man on the video allegedly was Gary Lebron Clay. Clay was later found with Archey's possessions. Clay was not arrested or charged for the events of October 29, 2007. Over objections, Moser and Archey told the jury about the burglary. (Tr. 73-90). The jury also watched the surveillance video. (Tr. 73-75). *See also* Appendix at A-1).

C. The Events of November 1, 2007

The facts culminating in this case began around 7:15 a.m. on November 1, 2007. It was on the cusp of daylight savings time, making the morning unusually dark. (Tr. 114). Kathryn White drove her silver Grand Prix into the IRS parking lot in Chattanooga where she worked.[1] (Tr. 110). When co-worker Gail Evans arrived, she saw a hooded person walking across the parking lot. (Tr. 188-89). About 25 feet away, she was unable to determine the person's race, but could see he was clean shaven and about 5'8". (Tr. 189-91).

A few minutes later, Ramona Means arrived for work. (Tr. 109-10). She observed a black male standing at the driver's side of Kathryn White's vehicle. (Tr. 110). When she parked, the hood of her car was facing the driver's side of White's car. *Id*. The man then raised up, turned around, and pointed a gun at Means' windshield. *Id*. He threatened to "put a cap in her" if White did not start her car. (Tr. 110-11). The man glanced back and forth between White and Means. (Tr. 111). White started her car, got out, and the man drove off. (Tr. 120). Like Evans, Means described the carjacker as clean shaven. (Tr. 113). She further observed the carjacker and White standing adjacent, and that the carjacker, stooping a bit, was a little taller than White. (Tr. 121). Mrs. White was 5'6". (Tr. 117). Means could not positively identify the suspect. (Tr. 113).

[1] Mrs. White passed away in a car accident before trial. (Tr. 92).

Officer Hennessee of the Chattanooga Police Department was apprised of the carjacking around 7:30 that morning. (Tr. 28). He learned that White's ATM card had been swiped at the First Tennessee Bank. (Tr. 29). Hennessee went to the bank and reviewed its ATM video. (Tr. 31). A man was seen scanning White's card through the ATM at 8:43 a.m. (Tr. 33). White's Conoco gas card and a TVA debit card were also used. (Tr. 93).

Hennessee obtained a driver's license photo of Clay and compared it to the video. (Tr. 35). He surmised it was the same individual. (Tr. 35). The search for Clay began. (Tr. 36). Hennessee interviewed Clay's mother twice, first at her job, and again at her home. (Tr. 36). Hennessee obtained a search warrant for the home of Clay's mother, which was less than a mile from the IRS parking lot. (Tr. 55). However, Clay had not been living with his mother for weeks. (Tr. 60, 202). In an affidavit for the warrant, Hennessee described the suspect as a black male, clean shaven, carrying a gun in his left hand, and wearing a black coat hoodie. (Tr. 55-56). The affidavit said nothing about tattoos. (Tr. 57).

The day after the carjacking, Gail Evans reviewed a photographic lineup. (Tr. 192). One of the persons in the lineup was Clay. (Tr. 205-06). Evans identified an individual whom she was 50% sure was the person she saw during the carjacking. (Tr. 194). It was not Clay. (Tr. 205-06). Although the sole eyewitness able to make any identification did not select Clay, he remained the prime suspect. (Tr. 36).

On November 12, 2007, Hennessee spoke with an officer in the fugitive division about White's Grand Prix. (Tr. 38). The officer told Hennessee the car was at the East Lake Housing Courts. *Id*. Hennessee went to the location and saw the Grand Prix. *Id*. Officers set up surveillance on the vehicle. *Id*. The officers eventually learned which unit the car was associated with. (Tr. 39). They knocked on the door and were met by Valerie Hancock, the lessee of the apartment. (Tr. 39). Also in the residence were Miranda Abernathy, her child, and Valerie Hancock's mother. (Tr. 39-40). Abernathy would testify at trial that she had once seen Clay holding a gun in the residence. (Tr. 100). Learning that Clay was in the apartment, officers directed the women outside. (Tr. 40). They then called into the apartment to get Clay outside. *Id*.

Clay obliged. (Tr. 41). He exited a bedroom at the top of the stairs and walked down to the front door. *Id*. He was arrested without incident. *Id*. Valerie Hancock then consented to a search of her residence. *Id*. Hennessee focused on the room where Clay emerged. (Tr. 41-42). He found the keys to the Grand Prix and property belonging to Archey and Moser. (Tr. 42). Conspicuously absent was Moser's pistol. The search of Clay's mother's house also failed to uncover any firearms. (Tr. 67).

In White's car, officers found a CD containing photos of Clay and his friend, Adarius Smith. (Tr. 45). Those pictures were printed off the CD and

introduced at trial. (Tr. 45). One such picture showed Clay in a red and white shirt similar to the one he wore when shown on a surveillance video. (Tr. 50).

D. The Charges

The prosecution brought a two-count indictment against Clay. (R. 1, 13). Under Count I, the prosecution had to prove Clay took the vehicle "with intent to cause death and serious bodily injury," and took it "by force, violence, and intimidation." (R. 13). On Count II, the prosecution had to show Clay "did knowingly brandish a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, 'carjacking.'" (R. 13).

E. The Trial

1. Admitting the prior bad acts

Clay filed Motions in *Limine* to staunch the prejudice from Marshall's testimony and the Cricket Communications surveillance video. (R. 50, 74). The morning of trial, the court considered Clay's Motions. (Tr. 5-6). Clay contended the surveillance video was evidence of other crimes and did not satisfy Rule 404(b) of the Federal Rules of Evidence. (R. 50). He also argued the video's probative value was outweighed by its prejudice, violating Rule 403. (R. 50).

The prosecution countered that the video demonstrated Clay "brandished a real firearm as opposed to a toy or replica of some sort." (R. 67). It also contended that the firearm was used to commit the carjacking and, therefore, the theft constituted *res gestae*. (R. 67). But most tellingly, it admitted "[t]here is no

witness who can positively identify the defendant or anyone else as the perpetrator of the crimes charged in the instant indictment." (R. 67 at 6).

The prosecution played the video for the court. (Tr. 7-8). Clay argued, and the district court acknowledged, that the prosecution had other means available to prove its point, still photos. (Tr. 11). Nevertheless, the court allowed the prosecution to introduce the video because the burglary constituted preparation for the carjacking. (Tr. 8). The court also cited identification. The video portrayed Clay in a red and white shirt that the government contended was identical to the shirt he wore on November 1, 2007. (Tr. 50). Despite these determinations, the court was skeptical of the prosecution's theory. Its observation is noteworthy: "I haven't seen anything yet where this gun has been located which ties this specific gun to the crime that is alleged." (Tr. 12).

After admitting the video, the court considered Karissa Marshall's carjacking testimony. Clay objected to this evidence. (R. 74). He argued it was not relevant under Rule 402, and improper under Rules 403 and 404(b). (Tr. 11). The court disagreed. It cited the prosecution's high burden to prove that Clay intended to cause either death or serious bodily harm during the carjacking. (Tr. 15-17). The court heard a shortened version of Marshall's testimony to ascertain its worth. (Tr. 18). The court observed that admitting evidence under Rule 404(b) "is a fairly narrow line." (Tr. 18). "I will concede that in this area there is a fine

line between intent which is permissible under 404(b) and propensity which is obviously prohibited." (Tr. 18).

Marshall recounted her experience. (Tr. 20). Per her testimony, the court found Clay displayed an intent to cause serious bodily injury. (Tr. 25). "I will permit the government to introduce Ms. Marshall's testimony … for the limited purpose of demonstrating Mr. Clay's intent to cause death or serious bodily harm with respect to this carjacking incident." (Tr. 25-26). Clay reiterated his objections, and the court agreed to provide limiting instructions. (Tr. 26).

2. The prosecution's case

After the court's rulings, the trial proceeded predictably. The prosecution began with Officer Hennessee, who testified about the investigation. (Tr. 28). The prosecution then moved to Moser and Archey's testimony about the burglary. (Tr. 73).

Before playing the video depicting the two vehicles being burglarized, the court addressed the jury. (Tr. 47). "Mr. Clay is only on trial here for an alleged carjacking that occurred on November 1, 2007 and for brandishing a firearm in connection with that carjacking." *Id*. It noted that Clay was not on trial for "alleged theft of the handgun, a DVD, anything from Mr. Moser or Archey's truck." (Tr. 88). The court explained that the prosecution must prove Clay had a gun during the carjacking, "and one way of showing that is showing how he came to be in possession of a gun." (Tr. 48). "So, what I'm asking you to do is

perform a little bit of mental gymnastics, don't consider this evidence for purposes of trying to decide if Mr. Clay has a propensity to commit certain acts, consider it only for the purposes that I have described." (Tr. 48-49).

Archey and Moser testified about the events of October 29, 2007. Kathryn White's husband spoke about Mrs. White's Grand Prix. (Tr. 91). Ramona Means then testified about her experiences during the carjacking. (Tr. 110).

The prosecution closed its case-in-chief with Karissa Marshall. (Tr. 142). Before she was called, the court noted her testimony presented a "close call." (Tr. 138). The court instructed the jury that Marshall's testimony would shed light "on whether Mr. Clay had the requisite intent to cause death or serious bodily harm in connection with the November 1, 2007 incident, not the incident that Ms. Marshall is going to testify about." (Tr. 143). The court's next words were telling. "Don't even consider, you know, the earlier incident. Mr. Clay is not on trial for that here. I'm sort of trying to read your faces. I know what I just gave you sounds like a very – this is how the rules of evidence work." (Tr. 143). The court concluded, "I'm going to ask you to perform some mental gymnastics as you listen to Ms. Marshall's testimony." *Id*.

Marshall then told the jury how Clay pistol-whipped her in the jaw on September 10, 2006. (Tr. 148-52).

3. Clay's case

After an unsuccessful Motion for Judgment of Acquittal, Clay put on his defense. (Tr. 160-62). Clay called IRS employee Gail Evans as a witness. (Tr. 187). She admitted to previously describing the carjacker as being 5'8", clean shaven, and of medium complexion. (Tr. at 196). She also admitted that a week before trial, she was shown a photograph of two men standing beside one another. (Tr. 195). The persons in the picture were Clay and his friend Adarius Smith. (Tr. 170-71). Evans stated that the person wearing the green shirt was the carjacker. (Tr. at 195). When shown this same photograph, Officers Hennessee and Jerry Poteet identified Adarius Smith as the person wearing the green shirt. (Tr. 66, 182-83). Hennessee also admitted that Smith was 5'8". (Tr. 221-22).

Clay also called Officer Poteet, a twenty-year veteran of the Chattanooga Police Department. (Tr. 180). He patrolled the area where the carjacking occurred. *Id*. He had encountered Adarius Smith on December 4, 2007. (Tr. at 181). He described Smith as being 5'8" and living four blocks from the IRS office. *Id*.

The evidence established that Clay was between 6'1" and 6'2". (Tr. 63, 201). Clay had worn a mustache for several years prior to trial. (Tr. 108, 169-70, 201). The ATM video on November 1 showed Clay was unshaven. (Tr. 108). He also has a dark complexion. Clay has a tattoo under his right eye and on his right hand. (Tr. 63). It was further established that Clay was right-handed. (Tr. 167,

201). Clay demonstrated that he was right-handed at trial by writing with his right hand. (Tr. 168-69, 176-77). Furthermore, Karissa Marshall admitted that she had previously said Clay had carried the gun with his right hand when he assaulted her on September 10, 2006. (Tr. 156).

F. The Verdict

On January 14, 2009, the jury returned a guilty verdict on both counts. (R. 79). Clay filed a Motion for Judgment of Acquittal and a Motion for New Trial. (R. 83, 84). Clay argued the court's admission of the surveillance video and Marshall's testimony was error and that the verdict was contrary to the weight of the evidence. (R. 84). The Court denied the Motion for Judgment of Acquittal. (R. 94). It also denied his Motion for New Trial. (R. 96). But in rejecting the Motion for New Trial, the court admitted the evidence against Clay "particularly with respect to the issue of identification—was circumstantial, and that at least some of the Government's evidence – particularly with respect to the testimony of eyewitnesses – was conflicting." (R. 96 at 4).

G. The Sentencing

The United States Probation Office prepared a Presentence Report ("PSR") which indicated Clay was a Career Offender. (PSR ¶ 23). The PSR further indicated that Clay's advisory guideline range was 360 months to life. (Sent. Tr. 6). This included a mandatory minimum sentence of 84 months on Count Two of the indictment. *Id*.

Clay did not object to any portion of the PSR which affected his guideline range. *Id*. He instead filed a Motion for a Downward Departure based on his history. (R. 88). Clay filed a sentencing memorandum explaining his time in foster care at an early age and being diagnosed with mental health issues at five. (R. 89 at 2-3). Those mental health issues still plague Clay, spawning five separate hospitalizations. *Id.* at 6. Clay also suffered sexual abuse as a child. *Id*. at 4. Based upon this history, Clay asked for a sentence below the applicable guidelines. (R. 88).

The prosecution sought a sentence at the top of Clay's advisory range. (R. 95). The district court sentenced Clay to 360 months, 5 years supervised release, and a $200.00 special assessment. (R. 100). Upon making its determination, the court lamented, "sometimes in other courts people don't get as much time as you're going to get here today for murder." (Sent. Tr. 18).

SUMMARY OF THE ARGUMENT

"Close call." "Fine line." "Narrow line." Rare is the criminal appeal that a district court repeatedly expresses its uncertainties about a piece of evidence. Yet that is how the district court described its decision to admit Karissa Marshall's testimony. The court was right to be concerned. It was wrong to do nothing about it.

Marshall's recounting of the events of September 10, 2006 was problematic for three reasons. First, the threat to shoot Ramona Means satisfied specific intent per Supreme Court and Sixth Court precedent—rendering Marshall's testimony unnecessary. Second, Marshall's testimony demonstrated Clay's propensity for criminal behavior. Third, a young girl describing her pistol whipping epitomizes prejudice. If Marshall's testimony was all, this case would be troubling enough. But the court compounded its error by admitting the burglary video. Like Marshall's testimony, the video skewed the jury's perception of Clay. Worse, no evidence was produced showing the burglary was committed in preparation for the carjacking or *res gestae*.

This case is not about breaking into cars or pistol whipping a young girl. But through the district court's rulings, that is what the case became. Standing alone, each prior act presents sufficient grounds to reverse. Considered cumulatively, reversal becomes unavoidable.

The court's evidentiary errors might have been dismissed as harmless if Clay's guilt was transparent. The record says otherwise. The errors committed by the district court were harmful because the evidence against Clay was not overwhelming. Clay did possess items belonging to Kathryn White. But a specific intent offense demands proof far in excess of that circumstantial evidence.

The bleak truth is that Clay was never positively identified as the carjacker. Even the prosecution conceded the absence of identification. Only one person could identify the carjacker, and she identified Clay's friend. Demonstrating an individual's specific intent is difficult; more so when the individual himself is unknown.

The prosecution had to prove Clay's guilt beyond a reasonable doubt, not merely that he could be guilty. The link between the guilty verdict and Clay's possession of stolen goods is conjecture. And that is why Clay's prior acts are so critical, they deflected attention from the prosecution's shortcomings. This was a close case, and telling the jury about a pistol whipping and burglary for which Clay was not on trial invariably tilted the verdict.

ARGUMENT

I. Allowing Karissa Marshall to Recount Her Pistol Whipping Gutted the Presumption of Innocence.

The right to a fair trial is sacrosanct. The chief virtue of a fair trial is that a defendant's guilt is not preordained. This is especially so when the defendant has a criminal record.

A. Standard of Review.

The Court typically applies the abuse of discretion standard to determine whether the district court improperly admitted evidence. *United States v. Ganier*, 468 F.3d 920, 925 (6th Cir. 2006). But Federal Rule of Evidence 404(b) is different. Evidence admitted pursuant to that rule is considered under a three-part test. *United States v. Bell*, 516 F.3d 432, 440 (6th Cir. 2008). The Court reviews (1) for clear error the district court's determination that the "other act" occurred; (2) *de novo* the district court's legal determination that the evidence was admissible for a proper purpose; and (3) for abuse of discretion the determination that the evidence's probative value was not outweighed by its prejudice. *Id*.

B. Acknowledging it was a "Close Call," the District Court Admits Marshall's Testimony.

Over Clay's objections, the court permitted the prosecution to introduce evidence of the September 2006 assault of fifteen-year-old Karissa Marshall. The court reasoned that it showed Clay's intent to cause death or serious bodily injury. This element is necessary to prove a violation of 18 U.S.C. § 2119.

Marshall's testimony was not delivered clinically. The prosecution elicited the terror she felt when assaulted. (Tr. 147-48). She described the size and menacing nature of her attacker. (Tr. 146-48). When she was confronted, she "felt like [she] was going to die that day." (Tr. 148). Finally, Marshall told the jury that two years later, her jaw still hurts. (Tr. 152). This is likely why the district court stated, "while I am confident in the correctness of my ruling, I do believe that it is a relatively close call for the reasons that we've discussed." (Tr. 138).

C. Marshall's Testimony was Superfluous Because Ramona Means' Testimony Demonstrated Conditional Intent.

Before explaining why Marshall's testimony demonstrates criminal propensity and epitomizes prejudice, a more debilitating flaw is set forth. Marshall's testimony was unnecessary because the prosecution had evidence to show "the intent to cause death or serious bodily injury." In *Holloway v. United States*, the Supreme Court considered the evidence required to satisfy the "intent to cause death or serious bodily injury" element of 18 U.S.C. § 2119. *Holloway,* 526 U.S. 1 (1999). The Court held the specific intent element can be met via the defendant's conditional intent to cause death or serious bodily injury. *Id*. at 8, 12.

Holloway and its progeny establish Marshall's testimony was superfluous. The Sixth and Seventh Circuits have reviewed carjacking convictions where the defendant took a car by displaying a firearm but not causing physical harm. In *United States v. Glover*, the defendant carjacked the victim and repeatedly threatened to kill her. *Glover*, 265 F.3d 337, 342 (6th Cir. 2001). In *United States v.*

Jones, the defendant threatened to kill one victim if the other called the police. *Jones*, 188 F.3d 773, 777 (7th Cir. 1999). Both courts found sufficient facts to establish the defendant had the "intent to cause death or serious bodily injury" under § 2119. As this Court acknowledged in *Glover*, "the victim need not suffer actual serious bodily injury in order to establish the specific intent element of § 2119." 265 F.3d at 342. Thus, showing the defendant acted violently in the past is not needed if conditional intent was shown in the present.

Another decision blighting the admission of Marshall's testimony is *United States v. Fekete*, 535 F.3d 471 (6th Cir. 2008). The Court considered whether the prosecution could satisfy the "specific intent" element of § 2119 without establishing that the defendant's firearm was loaded. The Court acknowledged that specific intent was not satisfied by showing the defendant brandished a firearm during the carjacking. *Id.* at 480. Additional evidence was needed such as "other evidence to the defendant's acts or statements (e.g., a threat to kill or harm) that suggests that he or she had the requisite specific intent." *Id*. at 480-81. The *Fekete* defendant's actions of pointing a gun at two victims while shouting orders carried the "clear implication … that if [the victims] did not comply, they would be shot or otherwise injured." *Id*. at 482. That is the precise scenario here.

Fekete and *Glover* are the blueprint for reversal. To establish specific intent under § 2119, a verbal threat to kill while pointing a firearm at a victim is enough. The prosecution had such testimony here. Ramona Means stated the

carjacker pointed a gun at her and threatened to "put a cap in her" unless Mrs. White complied with his demands. (Tr. at 110-11). Thus, the prosecution could meet its burden provided it could establish that Clay was the carjacker. As the prosecution had other evidence available to satisfy specific intent, Marshall's testimony should have been excluded due to the danger of confusing the jury. *See United States v. Myers*, 123 F.3d 350, 364 (6th Cir. 1997). Under *Holloway*, *Fekete*, and *Glover*, the testimony of Means negated any need to introduce the pistol whipping. That Marshall's testimony was superfluous is further aggravated by its incompatibility with Rules 404(b) and 403.

D. Rule 404(b) Precludes Evidence Showing A Propensity For Crime.

Apprising the jury of a defendant's prior criminal acts undermines the presumption of innocence. Thus, evidence of prior crimes to show the defendant committed the underlying offense is *verboten*.

The admission of prior bad acts is governed by Rule 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> Fed. R. Evid. 404(b).

1. The pistol whipping testimony was not admissible for a legitimate purpose.

The motivation behind Rule 404(b) is twofold. First, that the jury may convict a person "not because he is guilty of the crime charged but because of his

prior misdeeds." *United States v. Phillips*, 599 F.2d 134, 136 (6th Cir. 1979). Second, that the jury will infer that "because the accused committed other crimes, he probably committed the crime charged." *Id.* The Rule thus ensures that a defendant is "tried for what he did, not for who he is." *United States v. Vance*, 871 F.2d 572, 575 (6th Cir. 1989).

Whether evidence was properly admitted under Rule 404(b) consists of three steps. The first considers whether sufficient evidence existed showing the other act occurred. Clay did not dispute this element at trial. (Tr. 16). The second step, conducted *de novo*, is whether the other act evidence is admissible for a legitimate purpose. *Bell*, 516 F.3d at 440. The Court evaluates whether the evidence is probative of a material issue other than character. *United States v. Carney,* 387 F.3d 436, 451 (6th Cir. 2004). Evidence of other acts is probative of a material issue if the evidence is offered for an admissible and material purpose and is probative of the purpose for which it is offered. *United States v. Rayborn,* 495 F.3d 328, 342 (6th Cir. 2007).

Evidence of other crimes is admissible only in limited circumstances. Those circumstances did not exist here. To be admissible under Rule 404(b), a prior bad act must be "substantially similar and reasonably near in time to the offenses for which the defendant is being tried." *United States v. Carney*, 387 F.3d 436, 451 (6th Cir. 2004). The September 10, 2006 pistol whipping is not probative of Clay's intent to commit the November 1, 2007 carjacking. First, the two sets of

conduct are unrelated. Second, they are temporally disconnected. Third, they are fundamentally different. The pistol whipping was not about theft. It was not about taking a car. Marshall's testimony did not establish Clay was trying to steal anything from her, let alone a car. The underlying incident was about such things.

The prosecution's stated purpose for introducing the pistol whipping was to establish the requisite *mens rea*—"with the intent to cause death or serious bodily harm." *See* 18 U.S.C. § 2119. The pistol whipping had no tendency to prove the intent element of the carjacking because the two events were different. The prosecution never explained how the event of September 10, 2006 had ties to the carjacking on November 1, 2007. Instead, the pistol whipping evinced Clay's character in violation of Rule 404(b). The prosecution sought to show how Clay acts when someone refuses to acquiesce. Indeed, the prosecution proclaimed at closing, "you have direct evidence of what he does. You have him pistol whipping a 15-year-old girl across the left side of her face sending her to the hospital." (Tr. 236). This treads too closely to criminal propensity.

Instructive is *United States v. Blankenship,* where the Court reversed because of Rule 404(b) evidence. *Blankenship*, 775 F.2d 735, 739 (6th Cir. 1985). The defendant's prior proposals to burglarize houses was unrelated to his transactions in illegal firearms, and thus "merely demonstrated the general criminal character of [the defendant]." *Id*. The September 10, 2006 incident

portrayed Clay as dangerous. This, in turn, suggested propensity. After absorbing Marshall's disturbing testimony, the jury was more inclined to find Clay guilty because of his prior misdeed.

Letting Karissa Marshall describe the fear and injuries caused by Clay mislead the jury such that it convicted him despite no identification. Thus, because Clay possessed Mrs. White's items and pistol whipped a young girl, he likely committed the crime. Planting these inferences compensated for the inability to identify Clay as the carjacker. Indeed, the prosecution implied this very tactic. Arguing why the video of the vehicle burglary was imperative, it stated "[t]here is no witness who can positively identify the defendant or anyone else as the perpetrator of the crimes charged in the instant indictment." (R. 67 at 6). Lacking the ability to place Clay at the scene, the prosecution melded the pistol whipping and carjacking.

2. The pistol whipping testimony was not probative of intent.

The district court described its analysis as walking a "fine" and "narrow" line. (Tr. 18). But even when a court finds prior conduct is similar to the charged conduct, the past acts may not be probative of present intent. For example, prior drug distribution convictions may not be used to demonstrate the intent to distribute drugs in unrelated cases. *Bell*, 516 F.3d at 444. *Bell* cautioned against establishing the intent to distribute based on unrelated prior distribution convictions because it "employ[s] the very reasoning--i.e., once a drug dealer,

always a drug dealer--which 404(b) excludes." *Id*. Although *Bell* involved drug distribution, it is not the superficial distinctions that matter but the underlying similarities. That Clay committed an assault earlier does not mean he had the intent to do so again.

In admitting Marshall's testimony, the district court emphasized the heavy burden the prosecution faced on the carjacking charge. (Tr. 15-17). This reasoning is flawed for two reasons. First, as noted above, the record contained testimony regarding conditional intent. Second, it was the prosecution's decision to allege this offense. To admit evidence of criminal propensity simply because the prosecution seeks more serious charges is circular logic. Demonstrating specific intent is an arduous task. But it is not an excuse to suspend evidentiary rules. In preparing the carjacking charges, the prosecution should have marshaled admissible, non-prejudicial evidence.

By prohibiting proof of criminal propensity, Rule 404(b) cocoons the presumption of innocence. This Rule was violated as Clay was branded violent here because he was violent before.

F. Testimony From a Pistol-Whipped Girl Epitomizes Prejudice.

If the evidence is probative of a material issue, the Court considers step three, whether the probative value is outweighed by its prejudice. Fed. R. Evid. 403. Propensity evidence is prejudicial because it may "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."

United States v. Coleman, 179 F.3d 1056, 1062 (7th Cir. 1999). Such is the case here. Marshall was 15 when pistol-whipped. The attack was unprovoked. (Tr. 148). Marshall was left homebound for two weeks. (Tr. 151-52). Her pain persists two years later. (Tr. 152). This is the precise testimony Rule 403 forbids.

Rule 403 ensures the constitutional guarantees of a fair trial. It requires the Court to consider "the delicate balance between the probative value and its capacity to engender vindictive passions within the jury or to confuse the issues." *United States v. Green,* 548 F.2d 1261, 1268 (6th Cir. 1976). The imprint of a young girl describing her pistol whipping was deep, misleading the jury.

Juxtapose the prejudicial impact of a pistol whipping with cocaine use. The difference is not a gap but a chasm. Yet, the Court has struggled with admitting prior cocaine use. "By branding [defendant] as a criminal possessing crack cocaine, this evidence had the natural tendency to elicit the jury's opprobrium for [defendant]." *United States v. Haywood*, 280 F.3d 715, 724 (6th Cir. 2002). "The information unquestionably has a powerful and prejudicial impact." *Johnson,* 27 F.3d at 1193 (internal quotes omitted). "The evidence further invited the jury to conclude that [defendant] is a bad person …." *United States v. Jenkins*, 345 F.3d 928, 939 (6th Cir. 2003) (internal quotes omitted). If simple cocaine use elicits such concerns, the prejudice from a pistol whipping should be exponentially troubling.

The prosecution will seek refuge in the district court's limiting instruction. This is insufficient shelter—the instruction did nothing to alleviate the impact of the pistol whipping testimony. Telling the jury to use the evidence for intent could not stifle the "reverberating clang" that Clay pistol-whipped Karissa Marshall. *See Shepard v. United States,* 290 U.S. 96, 104 (1933). While a limiting instruction minimizes some prejudice of the prior act "it is not, however, a sure-fire panacea for the prejudice resulting from the needless admission of such evidence." *Haywood*, 280 F.3d 715, 724 (6th Cir. 2002). Any trace of the instruction was drowned by the disdain for an unprovoked pistol whipping.

Sixth Circuit precedent supports reversal. In *United States v. Stout*, the defendant was charged with possessing child pornography. 509 F.3d 796 (6th Cir. 2007). The prosecution sought to introduce a prior offense in which the defendant surreptitiously videotaped a 14-year-old girl in the shower. *Id*. at 798. The prosecution claimed it showed the defendant's intent to possess child pornography. *Id*. The district court found the prior offense "inflammatory and distracting." *Id*. at 801. The Sixth Circuit agreed. The Court adopted the district court's reasoning, "[a]ny jury will be more alarmed and disgusted by the prior acts than the actual charged conduct." *Id*. The Court was further motivated by the limited evidence of the underlying charges. This made the "potential for distraction and unfair prejudice … greater than normal." *Id*.

The concerns expressed in *Stout* are replicated here. An unprovoked pistol whipping of a 15-year-old girl is more lurid than stealing a car. While not diminishing the seriousness of carjacking, the pistol whipping was more disturbing. The prior act involved a violent attack, whose victim still feels the lingering effects two years on. Per *Stout*, when the prior act overshadows the underlying act, Rule 403 precludes admission. The more sensational pistol whipping guaranteed the jury would be distracted and unable to make the "mental gymnastics" the district court's instructions required.

G. Summation.

A verbal threat to kill while pointing a firearm establishes specific intent. This rendered Karissa Marshall's testimony unnecessary. Admitted anyway, the presumption of innocence was eviscerated. The testimony of Karissa Marshall painted Clay as a predator. For confirmation, the Court need only look to the district court's own reluctance in admitting the case-altering testimony.

II. Admitting a Video of Clay Breaking into Cars Served Little Purpose Other Than to Inflame.

A. Standard of Review.

The Court's framework for evaluating the district court's admission of the burglary video is the same as the carjacking testimony. The Court reviews (1) for clear error the district court's determination that the "other act" occurred; (2) *de novo* the district court's legal determination that the evidence was admissible for a proper purpose; and (3) for abuse of discretion the determination that the

evidence's probative value was not outweighed by its prejudice. *United States v. Bell*, 516 F.3d 432, 440 (6th Cir. 2008).

B. Setting its Skepticism Aside, the District Court Erroneously Admits the Video.

The prosecution possessed a security video capturing a burglary of two vehicles in the Crickett Communications parking lot three days before the carjacking. (Tr. 8, 11). The prosecution sought to admit the video based on *res gestae*, preparation, and identification. Learning the prosecution wanted to introduce the video, Clay filed a Motion in *Limine*. (R. 50, 74). After reading the motions and entertaining argument, the court was skeptical of the prosecution's position. "I haven't seen anything yet where this gun has been located which ties this specific gun to the crime that is alleged." (Tr. 12). These concerns would not be assuaged. Admitting the video was wrong for four reasons.

1. No evidence ties Moser's handgun to the carjacking.

Whether Moser's firearm was used in the carjacking is unknown because his gun was never found. (Tr. 66, 78, 85). Thus, concluding the gun was one in the same is steeped in speculation. The only connection is that Moser's gun was silver and the gun in the carjacking was silver.

Despite the tenuous connection between the burglary and the carjacking, the prosecution was undeterred. Like Marshall's testimony, the prosecution emphasized the difficult burden it faced as a reason to admit the video. But need is distinct from probative. The Court articulated this point in *United States v.*

Stout, 509 F.3d 796 (6th Cir. 2007). The prosecution in *Stout* argued the child pornography evidence was negligible, necessitating prior act evidence. The district court was unswayed, noting that simply because the prior bad act evidence "is subjectively critical to this case under the 404(b) analysis, those circumstances do not make the evidence objectively more probative." *Id*. at 800. The Sixth Circuit concurred. "The need for the evidence does not make the evidence more likely to prove that which it is offered to prove." *Id*.

The logic condemned in *Stout* was what the prosecution employed here. The prosecution invoked its heavy burden on the carjacking charge and the lack of identification as reasons to admit the burglary video. (R. 67, Tr. 6-7). The district court agreed. (Tr. 11, 15). This reasoning disavows *Stout*.

Also instructive is *United States v. Huddleston*, 802 F.2d 874 (6th Cir. 1987). The defendant was convicted of possessing stolen videotapes. Evidence was admitted that the defendant had previously sold televisions of dubious origin. The prosecution implied the defendant lied about the sale's legitimacy. The Sixth Circuit held the evidence was prejudicial because it was unclear whether the defendant knew the televisions were stolen. *Id*. at 876-77. Thus, the jury should not have received evidence that it "could infer the televisions were stolen." *Id*.

Like *Huddleston*, the prosecution has never proved the gun taken from Moser's vehicle was used in the carjacking. While the prosecution contended they were the same, conjecture was its crutch. That a silver colored gun was

present in both situations is insufficient. Thus, telling the jury that Moser's gun was used in the carjacking was wrong. *Huddleston* held the improper admission of prior act evidence affected a defendant's "substantial rights." *Id.* at 877. Per *Huddleston,* the Court should reverse.

2. The video was not evidence "in preparation" of the carjacking.

Rule 404(b) allows the admission of other acts to prove a "plan" if the act is a step toward completing a larger criminal plan. *United States v. Fountain*, 2 F.3d 656, 667 (6th Cir. 1993). Nothing established Mrs. White was singled out or that the carjacking required three days preparation. Again the district court's observation is instructive: "I haven't seen anything yet where this gun has been located which ties this specific gun to the crime that is alleged." (Tr. 12).

Any claim the burglary was in preparation of the carjacking is diluted by the following realities. The quality of the video was poor. The person who broke into the vehicles wandered aimlessly around the parking lot. There was no evidence he attempted to access a particular vehicle. There was no evidence that it was a specific attempt to possess a firearm. Finally, there was no evidence the firearm stolen from Moser's truck was taken for the carjacking. Any conclusion to the contrary is embedded in conjecture, especially since Moser's firearm was never recovered. (Tr. 12, 66).

The theft of Ronald Archey's checkbooks, portable DVD player, and phone should never have been admitted as 404(b) evidence. The preparation that

the prosecution introduced this evidence was the theft of Moser's firearm. Yet, the connection between Archey's theft and the carjacking was never explained. Thus, Archey's testimony was introduced to prove bad character, forbidden under Rule 404(b).

For similar reasons, the *res gestae* basis falls short. *Res gestae* is evidence of other crimes closely related in both time and nature to the charged crime. *United States v. Vincent*, 681 F.2d 462, 465 (6th Cir. 1982). The burglary of the two vehicles occurred three days prior to the carjacking. Moser's gun was never located. (Tr. 12, 66). Without proof that the gun stolen during the burglary was that used during the carjacking, the prosecution was not able to establish that the burglary was part of the *res gestae*.

3. The video was not evidence of identification.

Rule 404(b) allows the introduction of other bad acts to identify the defendant as the party who committed the crime. The prosecution claimed here that the video identified Clay for purposes of the carjacking. This position is flawed for numerous reasons.

The prosecution did not contend that the burglary of the vehicles involved the same *modus operandi* as the carjacking. The identification of the burglar had no effect on the carjacking because the video was indecipherable. Thus, no one could identify Clay as the man in the video. In fact, the police did not identify Clay as the burglar until after his arrest on the carjacking charge when Archey's

possessions were recovered. The evidence of the burglary simply did not aid law enforcement in identifying the carjacker.

4. The video's prejudicial impact outweighed any probative value.

Even if the burglary is deemed relevant, the probative value of watching the actual video could not outweigh its prejudice. The video was unduly prejudicial because it reflected incriminating behavior. Playing the video to prove identification and preparation was the most prejudicial way of demonstrating those points. The prosecution had alternative means of establishing the burglary. (Tr. 9). The prosecution admitted it had still photographs it could introduce. (Tr. 9). The district court acknowledged these other means. (Tr. 11). Such photos would have been less prejudicial.

Additionally, the prosecution had a witness who saw Clay with a firearm. (Tr. 10). Miranda Abernathy observed Clay with a handgun the night before the carjacking. (Tr. 100). The prosecution could prove its point without the necessity of the Crickett Communications video. Thus, the jury did not have to watch a man wandering through the parking lot and rifling through cars.

The prosecution will downplay the video's admission by emphasizing the limiting instructions. The district court did instruct the jury that Clay was not on trial for the burglary. (Tr. 47). However, "as with all admitted evidence of prior bad acts, this Court may assume that some prejudice potentially inhered," and the instructions did not mitigate this prejudice. *Lattner,* 385 F.3d at 958. That

presumption holds here. The cost of admitting prejudicial evidence is unacceptable if equally probative and less prejudicial evidence is available. The jury could have viewed still photos and the ATM surveillance video, not the burglary video.

The Crickett Communications video constituted evidence of other crimes, in violation of Rule 404(b). As the Supreme Court noted in *Old Chief v. United States*, prior act evidence runs the risk of "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the latter bad act now charged." 519 U.S. 172, 180 (1997). Allowing the jury to watch Clay burglarize cars painted him as a thief, and thus more likely to be a carjacker.

D. The Video and Marshall's Testimony Were the Antithesis of Harmless.

Even if the improperly admitted evidence is harmless when viewed piecemeal, that result changes when considered collectively. "The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990). To satisfy this requirement, such errors must "so fatally infect the trial that they violated the trial's fundamental fairness." *United States v. Bell*, 367 F.3d 452, 471 (5th Cir. 2004).

The admission of Clay's prior acts was erroneous. It was also harmful. Any probative value gained from admitting the surveillance video and Marshall's testimony was slight, whereas the likelihood it would be used

improperly great. Erroneously admitting evidence requires a new trial when it affects substantial rights. *United States v. DeSantis*, 134 F.3d 760, 769 (6th Cir. 1998). In making the harmless calculation, the Court does not consider whether there was sufficient evidence to convict. *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963). "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *O'Guinn v. Dutton*, 88 F.3d 1409, 1461 (6th Cir. 1996). This inquiry is inhospitable to the prosecution. Indeed, reversible error is presumed unless the Court concludes that the jury was not substantially swayed by the error. *Haywood*, 280 F.3d at 724. The pistol whipping testimony, coupled with the burglary video, was too strong not to sway.

In *United States v. Merriweather*, 78 F.3d 1070 (6th Cir. 1996), the error was not harmless because the Court was unable to say "with fair assurance" that the jury was not impacted by the improperly admitted evidence. *Id.* at 1079. The record here warrants the same assessment. Clay will not belabor the prejudice sustained by the pistol whipping testimony and burglary video. He will simply point out that those admissions were harmful because they had anything but "a very slight effect." *United States v. Price*, 134 F.3d 340, 349 (6th Cir. 1998).

E. Summation.

The district court described the evidence here as "conflicting." (R. 96 at 4). This assessment puts the evidentiary issues under a brighter light. "What may be

harmless in a case where the evidence strongly favors one party may be fatally prejudicial in a close case." *Sanders-El v. Wencewicz*, 987 F.2d 483, 485 (8th Cir. 1993).

III. The Evidence at Trial was Insufficient to Sustain a Conviction.

A. Standard of Review.

Viewing the evidence in the light most favorable to the prosecution, the Court considers whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *United States v. Humphrey*, 279 F.3d 372, 378 (6th Cir. 2002). The Court considers circumstantial and direct evidence in favor of the prosecution. *United States v. Wade*, 318 F.3d 698, 701 (6th Cir. 2003).

B. A Finding of Guilt Beyond a Reasonable Doubt Cannot be Made.

The Due Process Clause of the Fifth Amendment protects an accused against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970). The prosecution must show the evidence adduced at trial could support a rational determination of guilt beyond a reasonable doubt. *United States v. Powell,* 469 U.S. 57, 67 (1984). The conviction should be affirmed only if there is a "substantial basis of fact from which the fact in issue can be reasonably inferred." *United States v. Green,* 548 F.2d 1261, 1266 (6th Cir. 1977).

Suspicion cannot support a guilty verdict. "Evidence that at most establishes no more than a choice of reasonable probabilities cannot be said to be sufficiently substantial to sustain a criminal conviction." *United States v. Hayter*

Oil Co., 51 F.3d 1265, 1271 n. 5 (6th Cir. 1995). Thus, in a "toss up" situation, a conviction may not be sustained where "the circumstantial evidence supports no more than a choice between reasonable inferences of fact. . . ." *United States v. Leal,* 75 F.3d 219, 223 (6th Cir. 1996). Such is the case here.

The prosecution concocted a case using circumstantial and improper evidence. Clay was convicted via the pistol whipping testimony of Karissa Marshall and the burglary video. Without this evidence, all that remains is Clay's possession of Mrs. White's car and credit cards. This is not enough to prove the specific intent offense of carjacking. While illegal, possession of stolen goods is a far cry from the charges that netted him thirty years. The prosecution emphasized that Clay had Mrs. White's car an hour after the carjacking. In the criminal world, an hour is a lifetime. Clay certainly could have gotten the car from a cohort shortly after the carjacking. Thus, there was an absence of direct evidence that Clay was at the carjacking.

The best the prosecution could do, and will do again here, is trumpet the circumstantial evidence. "[A] line must be drawn between valid circumstantial evidence, and evidence which requires a leap of faith in order to support a conviction." *United States v. White,* 932 F.2d 588, 590 (6th Cir. 1991). Clay was charged with carjacking and brandishing a firearm. He was not on trial for possessing Mrs. White's car and credit cards. While incriminating, these possessions could not secure a conviction. The prosecution bore the burden of

proving beyond a reasonable doubt that Clay committed the carjacking and did so by brandishing a firearm. Yet, the prosecution was unable to place Clay at the scene. Worse, a different individual was identified as the culprit.

The district court's concerns again come to the fore. Denying the Motion for a New Trial, the court conceded the evidence against Clay "particularly with respect to the issue of identification—was circumstantial, and that at least some of the Government's evidence—particularly with respect to the testimony of eyewitnesses—was conflicting." (R. 96 at 4). A finding of guilt for a specific intent crime cannot be made on circumstantial and conflicting evidence.

C. Identification Issues Plagued the Prosecution.

The eyewitnesses' description did not match Clay. The suspect was described by Ramona Means as being a little taller than the victim, who was between 5'6" and 5'7". Gail Evans concurred, describing his height as about 5'8". (Tr. 196). While the witnesses claimed the culprit was stooping, it is unlikely he maintained this shortened posture the entire time. Most importantly, Means said the man "raised up" when she parked her car. (Tr. 110).

Both witnesses said the carjacker was clean shaven. No one mentioned tattoos. He had a medium complexion. (Tr. 196). When shown a police photo lineup, Gail Evans identified a clean shaven black male whom she was 50% certain was the culprit. (Tr. 194). The person Evans selected was not Clay, whose photograph was located immediately to the left of the photograph Evans

selected. (Tr. 205-06). Finally, Agent Hennessee's information described the suspect as carrying a gun in his left hand, clean shaven, and wearing a black hoodie, black pants, black shoes, and a black do-rag. (Tr. 55-56).

The contrast between this evidence and Clay is sharp. Clay was nearly 6'2", about six inches taller than the description of the carjacker. (Tr. 169-70). Clay has worn a mustache for several years. (Tr. 169-70). He has a tattoo under his eye and on his hand. (Tr. 63). Clay is right-handed. (Tr. 167, 201). He was wearing a white coat with hood, light pants, and a red and white shirt shortly after the carjacking. Most importantly, he was unshaven in the ATM surveillance video. (Tr. 108). These gaps are too deep to be papered over.

The prosecution will fixate on the hour differential between the carjacking and ATM video showing Clay with Mrs. White's car. But on closer examination, this apparent strength turns out to be double-edged. The ATM video showed Clay was unshaven. (Tr. 108). This video thus undermines the prosecution as the eyewitnesses insisted the carjacker was clean shaven. (Tr. 113, 189-91).

The guilty verdict should be scuttled for another reason. A CD discovered in Mrs. White's car contained photographs of Clay with a friend, Adarius Smith. A week before trial, Gail Evans viewed the pictures and again failed to recognize Clay. (Tr. 195). But she did identify Adarius Smith. (Tr. 170, 195). Smith fit the physical description offered by both eyewitnesses to perfection. Smith is a black male, 5'8", and clean shaven. While Clay's mother lived near the crime scene,

Clay was not living with her, and more importantly, Smith lived even closer. His residence was a mere four blocks away. (Tr. 181). Finally, Smith was identified by Varnetta Clay as the man she saw with Gary Clay a few days after the carjacking. (Tr. 204). Smith was wearing a black hoodie. *Id*.

D. Summation.

Clay did not fit the description of the carjacker. Adarius Smith did. There is a significant likelihood Clay was not the carjacker. Where a nearly equal theory of guilt and innocence is supported by the evidence, a reasonable jury must necessarily entertain a reasonable doubt. *United States v. Sanchez*, 961 F.2d 1169, 1173 (5th Cir. 1992). That doubt should have been present here because of, in the district court's words, the "conflicting" evidence. (R. 96 at 4).

IV. The 360 Month Sentence Imposed Upon Clay Was Unreasonable.

Clay will spend the next thirty years of his life in federal penitentiary for conduct resulting in no physical harm. This prompted the district to note, "sometimes in other courts people don't get as much time as you're going to get here today for murder." (Sent. Tr. 18). The Court should vacate this sentence.

A. Standard of Review.

The Court reviews sentencing issues for abuse of discretion. *United States v. Paull*, 551 F.3d 516, 526 (6th Cir. 2009).

B. The Factors of 18 U.S.C. § 3553 Warrant Remand.

Section 3553(a) directs sentencing courts to consider certain factors when determining the sentence. Included is the "history and characteristics of the

defendant." 18 U.S.C. § 3553(a). While a sentencing court must consult the sentencing guidelines, it may disregard them after considering the factors enumerated in § 3553(a). Appellate courts review the same factors enumerated in § 3553(a) to determine the reasonableness of the sentence. *United States v. Booker*, 543 U.S. 220, 261-62 (2005).

A defendant may seek appellate review to determine whether his sentence is excessive based upon the district court's unreasonable analysis of the § 3553(a) factors. *United States v. McBride*, 434 F.3d 470, 476-77 (6th Cir. 2006). The review of a sentence's reasonableness includes but is not limited to the length of the sentence. *United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005). It also considers the factors evaluated and the procedures employed in determining the sentence. *Id*. A sentence within the properly calculated guideline range is entitled to a presumption of reasonableness. *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006). That presumption has been rebutted here.

The factors enumerated in 18 U.S.C. § 3553(a) support a sentence below the applicable guideline range. Instructive is the recent decision of *United States v. Janosko*, 2009 WL 4609826 (6th Cir. Dec. 8, 2009). The defendant was convicted of possessing and distributing thousands of images of child pornography. The guidelines recommended a sentence of 210-262 months. The district court imposed a sentence of 180 months. Its explanation for this divergence is telling:

> it is a recognition that you brought to this situation, something that happened to you as a child . . . and

> which marked you for a period of time in which you still have to work to recover from.

Id. at *1.

The defendant in *Janosko* was sexually assaulted as a young boy. *Id*. The district court, via § 3553(a), reduced the sentence for that reason, and the Sixth Circuit affirmed. *Id*. at *1-2. Clay's sentence should be reduced accordingly.

C. Clay's Sexual and Psychological Abuse Merit a Downward Departure.

The district court should have deviated from the guidelines after considering the factors enumerated in 18 U.S.C. § 3553(a). Clay was diagnosed with behavioral problems at the age of five. (R. 89 at 2). Clay submitted numerous records documenting his tribulations. (R. 89 at Exhibits 1-11). He was removed from his biological mother at a young age and then recycled through foster homes. (R. 89 at Exhibits 2-4). This milieu left Clay prone to sexual and physical abuse. (R. 89 at 4). Those psychological scars remain. Clay suffered mental health problems spawning five mental health hospitalizations before he was 18. (*Id*. at 6 and Exhibits 1-11). This is not an excuse for Clay's actions, it is an explanation. Even the prosecution conceded Clay "had a troubled childhood to which no young child should be subjected." (R. 95 at 4).

A sentence is substantively unreasonable if the district court fails to consider relevant sentencing factors or gives unreasonable weight to a factor. *United States v. Conatser*, 514 F.3d 508, 520 (6th Cir. 2008). In assessing substantive unreasonableness, the Court looks to "the totality of the circumstances." *Gall v.*

United States, 552 U.S. 38, 51 (2007). The district court should have made a downward departure based on Clay's abusive formative years. Given Clay's history, the presumptive reasonableness of a guideline sentence was rebutted. The thirty year sentence imposed by the district court was unreasonable given the factors enumerated in 18 U.S.C. § 3553(a).

CONCLUSION

This appeal is not a referendum on Gary Lebron Clay's record. It is whether his trial was conducted in accordance with evidentiary principles and fairness. With due respect to the district court, it was not. If the next thirty years of Clay's life are to be whittled away in a federal penitentiary, it should be done without improper evidence infecting the trial.

Respectfully submitted this 5th day of April, 2010.

Gary Lebron Clay

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)(C)

The undersigned, counsel of record for the Appellant, Christopher P. Keleher, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7)(C):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7)(C) for a brief produced with a monospaced font. The length of this brief is 10,170 words according to the Microsoft word count function.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two copies of Appellant's brief into envelopes addressed to the following counsel of record at their addresses stated below with first class postage pre-paid and by placing the envelopes into the U.S. Mail at the 175 West Jackson Boulevard, S. 1600, Chicago, Illinois 60604 before 5:00 p.m. this 5th day of April, 2010.

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ADDENDUM

Record Entry No.	**Description of Entry**
1	Indictment
5	Order appointing counsel
29	Order allowing withdrawal of counsel
50	Defendant's First Motion *In Limine*
67	Government's Response to Defendant's Motion *In Limine*
70	Notice of Intent to Use Evidence of Other Crimes
71	Defendant's Reply to Government's Response to Motion
74	Defendant's Objection to use of 404(b) evidence
76	Minute Entry for day 1 of jury trial
77	Minute entry for day 2 of jury trial
79	Jury Verdict
83	Motion for Acquittal
84	Motion for New Trial
88	Defendant's Motion for Downward Departure
89	Sentencing Memorandum
91	Order setting date of sentencing
93	Order allowing filing of exhibits under seal
94	Order denying motion for acquittal
96	Memorandum & Order denying motion for new trial
99	Minute Entry for Sentencing Hearing
100	Judgment
101	Notice of Appeal
109	Trial Transcript (day 1 of jury trial)
110	Trial Transcript (day 2 of jury trial)
***	Pre-Sentence Investigation Report

Trial Exhibit	
Gov. Exhibit 19	surveillance video of Cricket parking lot, submitted on 1/13/09 (Record Entry No. 109, and mailed to the Court on 4/20/10