IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. **13-14541-DD**

United States of America,

Appellee,

- versus -

Bobby Madison,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

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United States v. Bobby Madison, Case No. 14-14541-DD

Certificate of Interested Persons

Undersigned counsel for the United States of America hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case who were not included in the Certificate of Interested Persons set forth in appellant's brief:

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Statement Regarding Oral Argument

The United States of America respectfully suggests that the facts and legal arguments are adequately presented in the briefs and record before this Court and that the decisional process would not be significantly aided by oral argument.

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Statement of Jurisdiction

This is an appeal from a final judgment of the United States District Court for the Southern District of Florida in a criminal case. The district court entered judgment against Bobby Madison on September 30, 2013 (DE941). The district court had jurisdiction to enter the judgment pursuant to 18 U.S.C. § 3231 because Madison was charged with offenses against the laws of the United States. Madison filed a timely notice of appeal on October 3, 2013 (DE943); *see* Fed. R. App. P. 4(b)(A)(i). The jurisdiction of this Court is invoked under 28 U.S.C. § 1291, which gives this Court jurisdiction of appeals from all final decisions of the district courts, and 18 U.S.C. § 3742(a), which authorizes review of a final sentence.

Statement of the Issues

1. Whether the district court erred in denying Madison's motion to suppress his cell phone records.

2. Whether the district court erred in refusing to give a requested jury instruction on the use of an unobjected-to statement of a coconspirator.

3. Whether Madison's sentence is procedurally or substantively unreasonable.

4. Whether the district court abused its discretion by denying Madison's motion for recusal prior to sentencing.

Statement of the Case

1. Course of Proceedings and Disposition in the Court Below

A federal grand jury in the Southern District of Florida returned a second superseding indictment charging appellant Bobby Madison and codefendants Terrance Brown, Toriano Johnson, Daryl Davis, Hasam Williams and Joseph K. Simmons with conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 1). Madison and certain codefendants were further charged with two counts of attempted Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2 (Counts 2, 4), and with two counts of using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2 (Counts 3, 5) (DE262).

Madison moved to suppress his cell phone records, obtained pursuant to a court order granting the government's application under 18 U.S.C. § 2703 (DE198). The government responded (DE203), Madison replied (DE210), and the district court denied the motion after holding an evidentiary hearing (DE339, 969).

Madison sought a severance from his codefendants who were eligible for the death penalty (DE195). The district court granted Madison's motion (DE208), and after a seven-day jury trial, he was found guilty of Counts 1, 2 and 3, and not guilty of Counts 4 and 5 (DE364).[1]

The district court sentenced Madison to concurrent terms of 140 months of imprisonment on Counts 1 and 2 and a consecutive 60-month term on Count 3, to be followed by concurrent terms of three years of supervised release on Counts 1 and 2 and five years on Count 3 (DE941). Madison was further ordered to pay a $300 special assessment (*id.*).

[1] The government ultimately did not seek the death penalty for Madison's codefendants (DE448). At a subsequent trial, Davis, Brown and Johnson and were convicted of Count 1 (DE886, 887, 888),Williams was convicted of Counts 1, 2, and 9 and acquitted of Counts 4 and 5 (DE890), and the jury did not reach a verdict as to the remaining counts with which these defendants were charged. Simmons was acquitted of all counts (DE885). Thereafter, pursuant to a plea agreement, Johnson pled guilty to Count 2 and Counts 3-8 were dismissed (DE938, 939). At a retrial, Brown was found guilty of Counts 2, 3, 4, 6, 7 and 8, and was acquitted of Count 5 (DE1136). The appeal of Johnson, Williams and Davis in Case No. 14676 is pending. Brown's appeal from the first and second trials is pending in Case No. 14-13149 (DE1153).

2. Statement of the Facts[2]

(i) October 1, 2010 robbery and murder of Brinks guard (Count 1)

Nathaniel Moss testified that on October 1, 2010, he and several other individuals robbed an armed Brinks guard who was delivering money to a branch of Bank of America in Miramar, Florida (DE392:7-8, 35-36). During the course of the robbery, Moss shot and killed the guard and also fired his gun at the driver of the Brinks truck (*id.* at 7-8, 38-41).

When Moss began cooperating with the government in June 2011, he provided details of the October 1, 2010, robbery that were corroborated by other evidence, and he subsequently told the government about other robberies not known to the investigators of the October 1 robbery (DE392:163-73; DE394:179-96; DE395:31-56, 82). Since at least as far back as 2005, Moss, along with Bobby Madison, Toriano Johnson, Terrance Brown, Daryl Davis, Hasam Williams, Jermaine Parish and another person Moss knew only as "Soldier," had been committing robberies together (DE392:8-10).[3]

[2] The Statement of Facts is derived from the evidence at Madison's trial. Facts relating to the motion to suppress and the sentencing are set forth in the arguments addressing those issues.

[3] Moss was also a lieutenant in a drug-trafficking organization headed up by Johnson (DE392:18-21).

Brown planned the October 1, 2010, robbery and also acted as a lookout (*id.* at 26). Moss, whose role was to hold up the Brinks guard and take his weapon, wore an orange traffic safety vest as a disguise, with a bulletproof vest underneath and a wig under a baseball cap (*id.* at 7, 26, 36, 56-57). Soldier wore a green sweatshirt and carried a gun; his job was to grab the guard's money bag after Moss disarmed him (*id.* at 28-29, 36). Also involved were Williams, Johnson and Davis, who acted as additional lookouts, and Parish, who drove the first getaway car and whose role was to drive Moss and Soldier to a second getaway car (*id.* at 27-30).The two getaway cars, a white 1999 Toyota Camry and a silver 1999 Honda Civic, had been stolen by Moss and Brown from Coconut Creek, Florida, using burglary tools (*id.* at 31, 54-60).[4] All of the participants used cell phones to communicate with each other during the robbery (*id.* at 34-35).

After shooting the guard, Moss and the others ran off in separate directions (*id.* at 41-45). The stolen Toyota Camry with the bag of money taken from the Brinks courier had crashed into a dumpster in the bank's parking lot and was abandoned (*id.* at 44, 54, 58-59, 63). Moss jumped a fence into a neighbor's yard,

[4] Other evidence showed that the Toyota Camry was stolen in Coconut Creek sometime between September 16 and 17, 2010, and it was recovered on October 1, 2010, at the back of the parking lot of the Bank of America in Miramar. The Honda Civic was stolen in Coconut Creek between September 26 and 28, 2010, and was recovered at another location in Miramar (DE392:57-60; DE395:87-88; GX 92 (stipulation No. 3)).

hid in some bushes, tossed his traffic safety vest and buried his gun (*id.* at 47, 55-57). He was apprehended there by police with the assistance of a police dog (*id.* at 48).[5]

Although Madison was not physically present at this robbery (for reasons later explained by Moss having to do with Madison's participation in prior robberies), he was still going to get a cut of the proceeds had the robbery been successful (*id.* at 30-31, 144, 160-61). FBI agents conducting surveillance several hours after the robbery, at about 5:30 p.m., observed Madison walk up to Brown's residence in Miami Gardens, where he sat in the front yard making phone calls (DE393:195-99, 208, 211-12). Madison then walked into Brown's residence, stayed for two or three minutes and left (*id.* at 206-07). Brown's ex-wife, Lisa McCarty, who arrived at the residence to pick up her son, drove Madison to the bus stop (DE394:13, 25).

Agents approached Madison at the bus stop and questioned him regarding his presence at Brown's residence (DE393:208-09). Madison said he had been there to watch a football game and that Brown was his best friend, but he had not seen Brown

[5] A videotape of the robbery, taken from a surveillance camera at the International House of Pancakes ("IHOP") near the bank, was played at trial (DE392:49-52; GX 8A, 8B). Various witnesses in the neighborhood who were present during or after the robbery corroborated Moss's description of the events (DE391:47-97), and a gun was recovered in the area where Moss was hiding after Moss later told police where he had hidden it (DE 392:55, 57; DE393:106-08; DE394:184-87). The other items, such as Moss's traffic safety vest, gloves and a pair of needle nose pliers used in stealing the cars, were found by police right after the robbery (DE392:55-57).

in a week and did not have his phone number (*id.* at 208-10). When Madison was interviewed by agents nine months later, in June 2011, he admitted that he had lied when he denied knowledge of Brown's phone number (DE394:164, 167-68, 171-72). He also said that while at Brown's house on October 1, 2010, he telephoned Brown's wife in an effort to locate Brown (*id.* at 168-69).

(ii) February 2005 robbery of Brinks guard[6]

In February 2005, Brown planned a robbery of a Brinks guard at a Wachovia Bank in West Palm Beach (DE392:84, 95; DE393:20-22). Also involved in the planning were Moss, Williams, Davis, Madison and another individual known as "Maurice" (*id.*). The plan, similar to that for the October 1, 2010 robbery, contemplated that Moss or Williams would disarm the guard and take his money; Brown, Davis and Maurice would act as lookouts; and Madison would drive the getaway car (*id.* at 84-86).[7] Madison drove a 1996 Jeep Grand Cherokee which had been stolen from a residence in Royal Palm Beach (*id.* at 88; DE393:29). He drove Moss and Williams to the bank and, after the robbery, drove them to a second getaway car (DE392:86-87, 90). Moss and Williams dressed up as construction

[6] Evidence of this robbery was admitted pursuant to Fed. R. Evid. 404(b) (DE392: 82-83, 177-80, 185-86).

[7] Johnson was also in on the plan but could not participate because "he had to turn himself in to do some time" (*id.* at 85).

workers wearing traffic safety vests supplied by Davis, who worked for the Miami-Dade Transit Authority (*id.* at 68-70, 87; DE393:22).

The robbery took place as planned. Moss drew his gun and pointed it at the guard, Williams disarmed the guard and Moss grabbed the guard's money bag (DE392:91; DE393:21-22). Madison pulled up in the jeep and, after Moss and Williams got inside, Madison drove to a second getaway car, a Honda Accord, that had also been stolen from an address in Coconut Creek (DE392:92-93; DE 393:23). At least one of the two cars had been stolen by Madison (*id.* at 89-90, 106).

The participants split the proceeds of the robbery, which was over $500,000, and also gave Johnson a cut of $20,000 even though he was incarcerated and had not participated (*id.* at 98; DE393:22). Moss gave Johnson an additional $10,000 from his share, which was approximately $60,000 (DE392:98-99). When Johnson got out of jail, he used his share of the proceeds to start his drug-selling business in a complex known as "Back Blues" in Opa Locka (*id.* at 19, 100-01).

(iii) July 26, 2010 attempted robbery of Brinks guard (Counts 1, 2, 3)

Because Brown, the mastermind of the robberies, was either in jail or under house arrest from March 16, 2005 until March 18, 2010, the group did not commit robberies together during that period (DE392:102-03). Upon his release, Brown learned of the routes of the Brinks trucks and recommended that the next robbery

take place at a Bank of America in Lighthouse Point, in Broward County, with the same crew that had successfully staged the 2005 robbery – Brown, Moss, Madison, Williams, Davis and Johnson (*id.* at 103-05). Once again, a plan was made to steal two getaway cars and again Madison was assigned that task (*id.* at 105). However, on May 25, 2010, in attempting to steal a 1999 red Honda Civic from a residence in Coconut Creek, Madison was arrested after leading police on a high speed chase (DE393:30-76). He had gloves and burglary tools in his possession (DE393:76-82). He was released the same day after a bond was posted for him by Brown (DE392:106-07; DE393:189-90).

As a result of Madison's botched car theft, Moss and Brown stole the cars for the upcoming robbery -- a 1997 burgundy Infiniti SUV, stolen in Delray Beach on July 12, 2010, and a 2001 silver Toyota Camry, stolen in Royal Palm Beach, between July 9 and 10, 2010 (DE392:110-12). Also in preparation for the robbery, Moss, Brown and Madison went to a Walmart and purchased gloves, screwdrivers and a miniature flashlight (*id.* at 107-08; GX 34). On another day prior to the robbery, Moss, Madison, Johnson, Williams, Brown and Davis went to the bank "to stake it out" to determine the time the Brinks truck would arrive and to find the best escape route (DE392:125-26).

This plan involved Brown and Johnson acting as lookouts (*id.* at 109-10). Moss again wore a traffic safety vest, but this time Williams dressed up as a woman, wearing a dress, a wig and makeup applied by Davis (*id.* at 114-16). Under their "costumes," Moss and Williams also wore bulletproof vests, obtained from "Art," a corrupt Opa Locka police officer who aided Johnson's drug business (*id.* at 116-19).

On the day of the robbery, Madison, the driver, and Moss and Williams, the passengers, were seated in the stolen Toyota Camry, waiting for the Brinks truck to arrive at the bank (*id.* at 130-31). The plan was abandoned when the Brinks truck failed to appear (*id.* at 131). Moss left in the Infiniti, Madison and Williams took off in the Camry and the rest of the group left in other cars (*id.* at 131-32). A police car began following the Camry, which sped away and was later found abandoned at a residence in Pompano Beach, behind a car business, Riva Motorsports (DE392: 132-33; DE393:112-21).[8] Madison managed to get away, but local police officers found Williams nearby with a loaded semiautomatic pistol in his pants pocket (DE393:84-86, 118-21, 133-40). A wig and a dress were found near where Williams was apprehended (DE393:139, 147).

[8] Moss referred to the car driven by Madison and Williams as a Honda Civic but other evidence showed that he was mistaken and that they were driving the (stolen) Toyota Camry (DE392:130-32, 137-38; GX 35; DE393:112-16, 124-26).

A videotape made of Williams while in custody, admitted into evidence without objection, showed him trying to surreptitiously remove his makeup and recorded his statement to police that was evasive and riddled with inconsistencies in an effort to explain his presence in the area and his possession of the pistol (DE393:86-101; GX 59).[9] For example, he claimed that the gun belonged to the driver of the car who fled, but he also said that the driver left the gun behind and when he, Williams, ran out of the car, he took the gun with him (DE393:94-96; GX 59). He also claimed not to have seen the gun when he first got in the car, but then admitted that he had seen it (DE393:95; GX 59).

(iv) September 17, 2010 attempted robbery of Brinks guard (Counts 1, 4, 5)[10]

Brown began plans for another robbery, at a Bank of America in Miramar on September 17, 2010 (DE392:144, 148). The participants in this attempt were Moss, Madison, Soldier, Davis, Williams, Johnson and Brown (*id.* at 146). The plan was for Madison, driving the stolen burgundy Infiniti SUV, to take Moss and Soldier to the bank where they would hold up the armored guard and take his money bag, and

[9] Williams' statement to police is the subject of Issue 2 of Madison's Brief (Br. at 40).

[10] Madison was acquitted of Counts 4 and 5 but, as explained in his Presentence Investigation Report ("PSI"), based on his conviction on Count 1 for conspiracy, the evidence on Counts 4 and 5 was considered in determining his offense level, pursuant to USSG §1B1.2(d) (Revised PSI ¶¶31, 40-45).

then to drive away in another car, specifically a van owned by the Miami-Dade Transit Authority where Davis was employed (*id.* at 147, 150; DE393:8-14). The others were to act as lookouts (*id.* at 148-51).

On September 17, 2010, as the group waited for the Brinks guard, an unrelated traffic accident occurred across the street from the bank and when the police arrived, Madison "got paranoid," and telephoned Brown, telling him, "We fixing to leave" (*id.* at 151-52, 158). Brown told Madison to wait, but Madison refused and "just freaked out" and left when the police pulled into the plaza where the bank was located (*id.* at 152). As Madison pulled away, followed by police, everyone quickly left the Infiniti, climbed over a wall to where the van was parked and drove off (*id.* at 153-54). Brown, by telephone, told Moss and the others that the police were eating at the IHOP and were not following them so Moss and Soldier returned to the bank where they retrieved the Infiniti and drove off, eventually meeting with the rest of the crew at Davis's house (*id.* at 154-55, 159).

Madison disposed of the van because it had guns inside, but when he later joined the group, everyone "was kind of upset and heated [at Madison] for panicking and freaking out" (*id.* at 159-60). They decided to "give it another shot," but to not bring Madison to the next robbery on October 1, 2010 (*id.*). Although Madison was

not physically present on October 1, he would have been given a share of the proceeds had that robbery succeeded (*id.*). As Moss explained:

> Well, I mean, after the, you know, the stealing with the car and him getting caught inside the stolen vehicle and also with probation and also that he was originally supposed to be in a part of the robbery itself, then he was still entitled to a cut. Due to Terrance Brown's word, he still entitled to a cut.

(*id.* at 160).[11]

Johnson brought in Parish to take Madison's place as the driver for the next, October 1, 2010, robbery of the Brinks guard (*id.* at 161). Moss believed that if that robbery had succeeded, Madison would have been given $20,000 to $30,000 (*id.* at 211-12).

(v) Cell-site evidence

FBI Special Agent David Magnuson of the FBI's Cellular Analysis Survey Team ("CAST") testified as to information received from various cell phone companies regarding the cell phones of Moss, Brown, Madison, Davis, Williams and Johnson (DE393:183-93, 232-41; GX 66, 67, 68; DE394:19-22). He prepared reports showing the dates and times of calls made and received on those phones

[11] Moss was referring to Madison's arrest in May 2010 for stealing the Honda Civic in Coconut Creek. He was not on probation but was out on bond pending trial (DE392:106-07, 144).

during 2010 and, in some instances, the location of certain phones when the calls were made and received (DE393:251-53; GX 69A-91D).

For example on July 10, 2010, when Moss and Brown stole the 2001 silver Toyota Camry in Royal Palm Beach that was used in the July 26, 2010, attempted robbery of the Brinks guard in Lighthouse Point, Moss's phone was located near the site of that theft and it had 18 calls with Brown's phone from 12:40 a.m. through 8:13 a.m., and five calls with Madison's phone between 3:55 a.m. through 5:23 a.m., consistent with the time of the theft (DE392:110-12; GX 69C, 69D; DE393:253-63; DE394:28-32).[12] And, on July 12, 2010, when Moss and Brown stole the 1997 burgundy Infiniti SUV in Delray Beach for the same robbery, Moss's phone, located at 5:31 a.m. in the sector of the theft site, had two calls with Brown's phone at 5:31 a.m. and 6:17 a.m., and two calls with Madison's phone at 12:49 a.m. and 6:11 a.m., also consistent with the time of the theft (DE392:110-12; DE394:33-40; GX 70C, 70D, 70F).

In the early morning of July 26, 2010, the date of the attempted robbery in Lighthouse Point, Madison's phone placed a call to Brown's phone, at 3:40 a.m. and again at 9:06 a.m. (DE 394:57-58). On the same day, Madison's phone was located in the area of the Bank of America in Lighthouse Point at 9:14 a.m. and 9:50 a.m.

[12] No location data was available for Madison's and Brown's phone during those hours (GX 69C; DE293:254-55).

(DE394:53; GX 75C). At 1:56 p.m. that day, Madison's phone was located near where the stolen Toyota Camry had been abandoned by him and Williams at a residence near Riva Motorsports in Pompano Beach (DE393:112-21; DE394:50, 53-54; GX 73C, 75D). His phone, while at that location, placed eight calls to Davis's phone between 1:56 p.m. and 2:01 p.m. (DE394:55, 59; GX 75D, 75E, 75F). Thereafter, Madison's phone traveled south to the sector covering the location of Davis's residence (DE394:50, 60-63; GX 73C, 75G, 75H, 75I, 75J). Although no location data was available for Williams' phone, the records showed two calls from Madison's phone to Williams' phone at 1:58 p.m. on July 26, 2010 (DE 394:51; GX 73C).[13]

(vi) Madison's testimony

Madison, who testified in his own defense, had five or six prior felony convictions for car theft, burglary, possessing marijuana and cocaine, and dealing in stolen property (DE395:135-37). He admitted that he stole a car in May 2010, but claimed that he and Brown had a "regular routine" of stealing cars for the purpose of selling them to a "chop shop" for the parts (*id.* at 137-41, 208-09). Madison had no idea that the car theft in May had anything to do with a robbery (*id.* at 147). He

[13] Except for one phone call on September 17, after midnight, no further location data was available for Madison's phone (DE393:76-78; GX 79C). Madison's phone service, activated on April 23, 2010, was terminated on September 23, 2010 (DE393: 240-45; DE394:85-86).

denied ever being involved in an armed robbery or acting as a getaway driver (*id.* at 198-99, 268).

Madison claimed that he was not with Williams on the day Williams got arrested and that he did not know Williams, he just knew "of him" from Brown (*id.* at 199).[14] Madison had known Brown for over 20 years and Brown helped Madison start a business for teaching children how to swim (*id.* at 148-55). Although the summer months were the busiest time for his swimming business, Madison claimed that Brown had his phone on July 26, 2010, and that he was home that day, waiting for Brown to return his phone even though the cell-site data showed that his phone made calls to his (Madison's) girlfriend's phone and her place of business on that day (*id.* at 161, 169-74, 214-16, 233-43). Madison changed his testimony and said that Brown must have returned his phone to him that day (*id.* at 235-41, 243-44).

Madison claimed to know nothing about the October 1, 2010, robbery and murder until he showed up at Brown's house later that afternoon and learned that someone had been killed (*id.* at 178-85, 190-91). He said that "it had nothing to do with Terrance . . . Terrance is not a violent person . . . I never knew him to do anything violent" (*id.* at 191). He claimed that he did not speak to Brown on October 1, 2010, and that he never told anyone that he had spoken to Brown that day;

[14] As shown above, Williams was arrested after the unsuccessful robbery attempt at Lighthouse Point on July 26, 2010 (DE392:130-33; DE393:85-86).

nor did he lie to police that day and tell them that he did not have Brown's number or later admit to police that he had lied (*id.* at 223-26).[15]

Madison also said that he had nothing to do with Moss because Moss's girlfriend, Irih Small, was the mother of Madison's child and there was "too much friction" between them, which was the reason that Moss was testifying against him, although he acknowledged that Moss did not implicate him in the October 1, 2010, robbery (*id.* at 175-78, 200, 252-53).

3. Standards of Review

In reviewing a decision on a motion to suppress evidence, this Court reviews the district court's findings of fact for clear error and its application of the law to those facts *de novo*. *See United States v. Simmons*, 172 F.3d 775, 778 (11th Cir. 1999).

A claim of error in the refusal to give a requested jury instruction is reviewed for abuse of discretion. *United States v. Yeager,* 331 F.3d 1216, 1222 (11th Cir. 2003). However, this Court will not review an error that is invited or induced by a party. *United States v. Jernigan,* 341 F.3d 1273, 1289 (11th Cir. 2003). Plain error

[15] On rebuttal, FBI Task Force Officer Gerard Starkey testified that in June 2011, Madison admitted lying to police on October 1, 2010, when he said he did not have Brown's phone number, and he also admitted to having a telephone conversation that day with Brown's ex-wife, who told him that he should leave the area of Brown's house (DE394:149-50; DE395:269-70).

review applies to a claim of evidentiary error that was not objected to at trial. *Id.* at 1280.

The district court's application and interpretation of the sentencing guidelines is reviewed *de novo* and its factual findings are reviewed for clear error. *United States v. Smith*, 480 F.3d 1277, 1278-79 (11th Cir. 2007). The reasonableness of a sentence is reviewed under a deferential abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 597 (2007).

This Court reviews a judge's denial of a motion for recusal for an abuse of discretion. *United States v. Amedeo*, 487 F.3d 823, 828 (11th Cir. 2007).

Summary of the Argument

The district court's denial of Madison's motion to suppress his cell phone records and the cell-site information derived therefrom should be upheld in light of this Court's recent decision in *United States v. Davis*, 754 F.3d 1205, 1210 (11th Cir. 2014). Although the Court in *Davis* held that such records may only be obtained pursuant to a warrant based on probable cause, it upheld the denial of a motion to suppress based on the government's good-faith reliance on 18 U.S.C. § 2703(d), the provision of the Stored Communications Act authorizing such records to be obtained upon a showing of reasonable grounds to believe that the information sought is relevant and material to an ongoing criminal investigation. Not having the benefit of

Davis's Fourth Amendment analysis, the district court in this case properly relied on § 2703(d) in authorizing the government to obtain Madison's cell phone records and its decision should be upheld on the same ground as that relied on in *Davis*, *i.e.*, the good-faith exception to the exclusionary rule.

This Court should not review Madison's claim that Williams' statement to police following his and Madison's flight from the failed robbery attempt on July 26, 2010, was improperly admitted because he agreed to its admission at trial. His claim that the district court erred in not giving his requested instruction as to the use of that statement should be reviewed for plain error because Madison has changed his argument on appeal. No error, plain or otherwise, has been shown because the district court properly determined that Williams' statement was made during and in furtherance of the conspiracy. That Williams was in custody for state offenses does not mean that he was not part of the ongoing conspiracy to commit Hobbs Act robberies with Madison and other members of the conspiracy.

In calculating Madison's guideline range, the district court did not hold him accountable for uncharged or acquitted conduct, but rather for his participation in a conspiracy, the object of which was to rob Brinks security guards at banks.

Madison has not met his burden of showing that his sentence is substantively unreasonable. He was a member of an ongoing conspiracy that committed violent

crimes, one of which resulted in the cold-blooded murder of an armed security guard. The district court properly considered the factors under 18 U.S.C. § 3553(a), including Madison's criminal history and the need for deterrence, and arrived at a reasonable sentence, above Madison's guideline range but well below the statutory maximum for his offenses.

The district court did not abuse its discretion in denying Madison motion's for recusal. The record of Madison's sentencing proceeding is clear that, consistent with its ruling in denying his motion, the court did not consider any statements made by Madison during a debriefing that were inadvertently revealed by the government in a sentencing memorandum.

Argument

I. The District Court Properly Denied Madison's Motion to Suppress His Cell Phone Records.

Madison contends that the district court should have granted his motion to suppress because the government obtained his cell phone records without a warrant, in violation of his Fourth Amendment rights (Br. at 29-34). He also claims that the government failed to meet the lesser standard for obtaining a court order under § 2703(d) of the Stored Communications Act ("SCA"), because its application did not establish reasonable grounds to believe that the information sought was relevant and material to an ongoing investigation (*id.* at 34-39). Madison's claims are without

merit. The government's application, as the district court found, met the statutory standard and, in light of this Court's recent decision in *United States v. Davis*, 754 F.3d 1205, 1210 (11th Cir. 2014), the district court's denial of his motion to suppress should be upheld under the good-faith exception to the exclusionary rule.

A. Facts Relating to Motion to Suppress

(i) Hearing on motion to suppress

During the course of the investigation, the government submitted an application for a court order, pursuant to § 2703(d) of the SCA, requiring MetroPCS, an "electric communication service" within the meaning of U.S.C. § 2510(15), to disclose records related to the use of Madison's cell phone, including the location of cellular towers, from May 1, 2010 to February 1, 2011 (DE198:9-13) ("Application").[16] On February 2, 2011, a magistrate judge issued the Order, finding that the government had "offered specific and articulable facts showing that there are reasonable grounds to believe that the records and other information sought are relevant and material to an ongoing criminal investigation" (DE198:15-16).

In his motion to suppress, Madison alleged that the government had made false statements in the Application and that without such statements the remaining

[16] The Application for the court order and the order ("Order") are each appended to Madison's motion to suppress, as Exhibits 1(a) and 1(b), respectively, and are included in his Appendix.

allegations were insufficient to support the Order (DE198). At the hearing, Madison further claimed that he had an expectation of privacy in his cell phone records which, the district court opined, raised an additional claim that the higher standard of probable cause under the Fourth Amendment was required to support the Order (DE198; DE339:6 n.3; DE 969:3-4, 50).[17]

At the hearing, Agent Magnuson testified, as he did at trial, as to the call-detail information and cell tower records received from MetroPCS regarding Madison's cell phone (*id.* at 83-88, 91-92). FBI Task Force Officer Gerard Starkey testified as to the statements in the Application that Madison claimed were false (*id.* at 9-11). Two of the statements, cited in Madison's motion to suppress, were: (1) "Sources have identified Bobby Ricky Madison as a person possibly involved in the armored car robbery that occurred on October 1, 2010" (DE198:2, 13, ¶m); and (2) "Madison is a known associate of [Nathaniel] Moss and Moss's other associates" (DE198:2, 13, ¶m). At the hearing, Madison further claimed that the statement,

[17] The magistrate judge, Hon. Robin S. Rosenbaum, was appointed to the district court after issuing the Order and the case was transferred to her prior to the hearing on the motion to suppress (DE302). In her order denying the motion, Judge Rosenbaum cited authority upholding a district court's authority to review a motion under these circumstances (*see* DE339:5, n.2). Acknowledging that authority, Madison nevertheless claims, without any record support, that Judge Rosenbaum had a "personal interest" in upholding the Order that she had issued (Br. at 30).

"Madison lives in the Opa Locka area near where Moss resides," was also false (DE198:13, ¶n; DE969:56).

Officer Starkey testified that at the time the Application was submitted in February 2011, Moss, who was apprehended at the scene of the October 1, 2010, robbery, was in custody (DE969:11; DE198:10-11, ¶b). Following the robbery, law enforcement authorities discovered that the IHOP near the Bank of America where the robbery occurred had captured part of the robbery on its surveillance video, leading the authorities to conclude that at least two other individuals were involved (DE969:11-12). The IHOP video showed a person in a green-hooded sweatshirt throwing the money bag from the robbery into a vehicle (*id.* at 11, 14). The video was broadcast by the media and two sources that law enforcement authorities deemed credible said that they believed that the robbery participant wearing a green-hooded sweatshirt in the video was Madison (*id.* at 12, 13-15, 24, 27). According to Officer Starkey, both of these tipsters had had "extensive contact" with Madison through their profession and neither was a paid informant (*id.* at 27-28). As Officer Starkey described them, the individuals providing the information were involved in a "reliable profession," more specifically, "the court system" (*id.* at 29). He acknowledged that he and other agents subsequently determined that Madison was not the individual wearing the green-hooded sweatshirt (*id.* at 25, 42).

In addition, during the course of the investigation, Officer Starkey consulted with FBI Special Agent Jose Perez, who was investigating drug-trafficking organizations, including one involving Moss, identified by multiple eyewitnesses as the shooter of the Brinks messenger, and codefendant Terrance Brown, who was also under investigation for the robbery (*id.* at 12-13, 18, 21-22; DE 198:10-11). The drug-trafficking investigation, which involved a court-ordered wiretap, had established that Madison was a known associate of Moss and Brown, although Officer Starkey conceded that he did not believe that Madison had been identified as speaking on a single recorded telephone call while the wiretap was in place (*id.* at 13, 18, 22-24). Officer Starkey further testified that besides Agent Perez, three other law enforcement officers, whom Officer Starkey named, had each independently informed him, based on their investigative work in matters other than the October 1, 2010, robbery, that Madison was a known associate of Moss and Brown (*id.* at 18, 41-42). Also, during the early evening of October 1, 2010, the date of the robbery, law enforcement agents encountered Madison at Brown's residence (*id.* at 12-13).

While at Brown's residence on October 1, 2010, Madison told agents that earlier that day he had appeared at an 8:30 a.m. court hearing in Broward County and then took two buses to arrive at Brown's residence (*id.* at 15). Officer Starkey confirmed that Madison had been scheduled for an 8:30 a.m. hearing, but when he

contacted the court clerk's office to ask whether Madison had shown up for the hearing, he was told that the office would not provide such information over the telephone and he would have to consult the court's website (*id.* at 15-16, 30). Officer Starkey did so, but the website did not have the information he was seeking (*id.* at 16). Officer Starkey conceded that, prior to the time the Application was submitted, he did not investigate any further to see whether Madison had shown up for the hearing; nor did the Application state that Madison had a possible alibi for the robbery (*id.* at 31-34). Officer Starkey believed that even had he ascertained that Madison had shown up for the 8:30 a.m. hearing, that did not mean that he could not have been physically present for the robbery, which occurred approximately three to three-and-one-half hours later in Miramar (also in Broward County) (*id.* at 15, 33, 43). And, even if Madison had not been present at the robbery, that did not mean that he was not involved in planning it, particularly since additional evidence pointed to that possibility (*id.* at 43).

For example, in January 2011, Officer Starkey became aware that on May 25, 2010, Madison had been arrested after a high-speed chase, driving a car stolen from the City of Coconut Creek, in Broward County, the same city where the two vehicles used in the October 1, 2010, robbery had been stolen (*id.* at 16, 19-20, 35, 44-49, 98). Police reports stated that at the time of his arrest, Madison was in possession of two

screw drivers, a small flashlight and a glove (*id.* at 19). This made the May 25, 2010, car theft even more significant in light of the fact that burglary tools were found at the October 1, 2010, crime scene and that the two stolen cars used in that robbery had had their steering columns accessed by prying away the plastic (*id.*). Also, Moss's and Brown's phone records, which Officer Starkey examined in mid-October and November, 2010, showed that at the time the cars used in the October 1, 2010, robbery were stolen (on September 17 and 28, 2010), Moss and Brown were both together in Coconut Creek (*id.* at 16-17; DE198:12, ¶¶j, k).

Officer Starkey opined that, based on all of these facts, law enforcement authorities had a good-faith belief that Madison was "a person possibly involved in the armored car robbery that occurred on 10/1/2010," that he was "a known associate of Moss and Moss' other associates," and that he lived "in the Opa Locka area near where Moss resides" (DE969: 43-44).

(ii) The court's decision

The district court issued a written order denying Madison's motion to suppress (DE339). The court found that Officer Starkey and other agents had a good-faith basis for identifying Madison as a person possibly involved in the October 1, 2010, robbery, although it further found that the government should have noted Madison's alleged alibi in the Application (*id.* at 10). The court concluded,

based on the information provided by other law-enforcement agents and the encounter with Madison at Brown's residence on the day of the robbery, that the government had a good-faith basis for asserting that Madison was a known associate of Moss and Moss's other associates (*id.*).

The court also took judicial notice of the address Madison gave when he was arrested on May 25, 2010, and the fact that he lived approximately eight miles or about 20 minutes without traffic from Opa Locka (*id.* at 11; DE969:98). Viewing the government's allegation that Madison lived "in the Opa Locka area near where Moss resides," as suggesting that he and Moss lived in the same neighborhood, the court found that statement "not accurate" (*id.*).

The court rejected Madison's claim that obtaining cell-site evidence constituted a search under the Fourth Amendment for which a finding of probable cause was required (*id.* at 12-17). Further, the Court recognized that the SCA authorizes a procedure for obtaining historical cell-site information without establishing probable cause and concluded that the allegations in the Application satisfied the standard in § 2703(d), finding as follows:

> First, the Application includes numerous specific and articulable facts surrounding the armed robbery that occurred on October 1, 2010; the preparations made for that robbery; Defendant's alleged ties to the one known participant in the robbery (at the time of the cell-site Application); and Defendant's alleged skill set and modus operandi for stealing cars like the ones involved in the robbery.

Second, the facts that the Government set forth in its Application provide a reasonable basis for the Government to have believed at the time of the Application that Defendant was a suspect in the robbery. Among other allegations, the Application asserts that its investigation had revealed at least four people to have been involved in the robbery, based on eyewitness accounts and surveillance. Only Moss was identified at that time, however. Therefore, the investigation was attempting to determine who the other three or more conspirators were when the Government submitted its Application.

In reviewing Moss's cell site records, the Government discovered evidence that heavily suggested that Moss had been involved in the theft of the two cars stolen from Coconut Creek in the early morning hours of September 17 and September 28, 2010, which were later used to perpetrate the crime. During his apparent trips to Coconut Creek to obtain the stolen cars, Moss spoke on his phone to people at two different cell phone numbers. Even assuming that the Government had identified the subscribers to those telephone numbers as people other than Defendant, that still left at least one more coconspirator.

Moreover, if Moss drove a car to Coconut Creek where the cars were stolen – which seems highly likely, given the time of day and the lack of available public transportation at that time – at least one other person would have had to have ridden with him in order to steal each car and bring both the stolen vehicle and Moss's car back. On September 17, 2010, Moss was at his home in Opa Locka at 2:37 a.m. and at Coconut Creek at 4:24 a.m., leaving a window of approximately one hour and forty-five minutes. But the Court takes judicial notice that, traveling at the designated speed limits, the trip between the two cities requires only about forty minutes when no traffic exists. So the extra hour, or so, could have been used to pick up someone to help steal the car in Coconut Creek.

The allegations concerning Defendant's alleged theft of the car on May 25, 2010, reflect significant similarities between the May 25 crime and the thefts of the cars used in the October 1, 2010, armed

> robbery. Specifically, the Application asserts that all three cars were stolen from the same city – Coconut Creek – at about the same time of day – the very early morning hours. Considered against the allegations that Moss and Defendant were known associates and that sources had identified Defendant as a person possibly involved in the October 1, 2010, armed robbery, these averments provided a reasonable basis for the Government to have believed at the time of the Application that Defendant was a suspect in the robbery.
>
> Finally, the Government submitted sufficient allegations to show a reasonable basis to believe that the cell-site information sought would be relevant and material to the ongoing investigation. Moss's cell-site records firmly placed Moss at the scene of the thefts of both cars used in the October 1, 2010, robbery. Once the Government rationally identified Defendant as a suspect in the robbery, it was reasonable for it to entertain the notion that Defendant's cell-site information would be similarly relevant and material to the ongoing investigation. Because the Application satisfies the Section 2703(d) standard, the Order is upheld.

(*id.* at 18-20) (footnote omitted).

B. The District Court Properly Denied Madison's Motion to Suppress.

In *United States v. Davis*, 754 F.3d at 1210, this Court was confronted with the same issue as that presented here, which it described as one "of first impression in this circuit, and not definitively decided elsewhere in the country." *Id.* As in this case, the evidence challenged in *Davis* on Fourth Amendment grounds consisted of records obtained from cell phone service providers pursuant to the SCA. Under that law, the government can obtain from "a provider of electronic communication service," "a record or other information pertaining to a subscriber to or customer of

such service" when the government has obtained either a warrant, pursuant to 18 U.S.C. § 2703(c)(1)(A) or, as occurred in *Davis* and in this case, a court order under § 2703(d). *See* 18 U.S.C. § 2703(c)(B). Subsection (d) does not require a showing of probable cause, but rather "specific and articulable facts showing that there are reasonable grounds to believe that the . . . records or other information sought are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). The defendant in *Davis* did not claim that reasonable grounds had not been shown in his case. His contention was that a warrant based on probable cause was constitutionally required to obtain the cell site location information obtained from his provider and introduced at trial. *Id.* at 1210-11.

This Court agreed, finding that "cell site location information is within a subscriber's reasonable expectation of privacy," and that "the obtaining of that data without a warrant is a Fourth Amendment violation." *Id.* at 1217. Nevertheless, the Court, agreeing with the government, upheld the district court's denial of the defendant's motion to suppress under the "good faith" exception to the exclusionary rule recognized in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405 (1984). *Davis*, 754 F.3d at 1217. Under that doctrine, the purpose behind the exclusionary rule, to deter unlawful police conduct, is not served by suppressing evidence where the police acted in "reasonable reliance on a search warrant issued by a neutral and

detached magistrate but ultimately found to be unsupported by probable cause." *Leon*, 468 U.S. at 900, 104 S. Ct. at 3409 (quoted in *Davis*, 754 F.3d at 1217).

As this Court noted, it was of no significance, for Fourth Amendment purposes, that the officers in *Davis* relied on a court order issued pursuant to a statute, *i.e.*, the SCA, rather than on a warrant based on a magistrate's finding of probable cause because, as in *Leon*, "there was a 'judicial mandate' to the officers to conduct such search and seizure as was contemplated by the court order." *Davis*, 754 F.3d at 1218 (quoting *Leon*, 468 U.S. at 920 n.21, 104 S. Ct. at 3419 n.21). The Court's reasoning is fully applicable here:

> Here, the law enforcement officers, the prosecution, and the judicial officer issuing the order, all acted in scrupulous obedience to a federal statute, the Stored Communications Act, 18 U.S.C. § 2703. At that time there was no governing authority affecting the constitutionality of this application of the Act. There is not even allegation that any actor in the process evidenced anything other than good faith. We therefore conclude that under the *Leon* exception, the trial court's denial of the motions to suppress did not constitute reversible error.

Davis, 754 F.3d at 1218.

In the instant case, the magistrate judge issued the Order pursuant to the SCA on February 2, 2011, well before June 11, 2014, when this Court issued its opinion in *Davis* (DE198:15-16, Exh. 1(b)). Accordingly, this Court should affirm the district court's denial of Madison's motion to suppress on the same ground as it affirmed the denial of the motion to suppress in *Davis*. *See United States v. Caraballo*, 595 F.3d

1214, 1222 (11th Cir. 2010) (holding that Court may affirm denial of motion to suppress on any ground supported by the record). After an evidentiary hearing, at which the government presented the basis for its allegations in the Application, the district court made detailed findings in support of its conclusion that Officer Starkey and other agents had a good-faith basis for identifying Madison as a person possibly involved in the October 1, 2010, robbery (DE339:10, 18-20). The court's ultimate conclusion, after hearing all the evidence, was that the allegations in the Application satisfied the standard of § 2703(d) by stating "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation" (*id.* at 18) (quoting § 2703(d)).

Madison claims, as he did in the district court, that the government made false statements in support of the Order and that, without such statements, the standard for issuing an order under § 2703(d) was not met (Br. at 36-39). However, he relies on facts that the court took into account in evaluating the totality of the evidence, namely that the government should have included in the Application that Madison had a possible alibi for the October 1, 2010, robbery based on his court appearance in Broward County that day, and that he did not live in Opa Locka. These facts, as

the district court implicitly found, did not undermine its finding that "[t]he Application at issue in this matter crosses the Section 2703(d) bar" (DE339:18).

Indeed, as Officer Starkey testified, it was still possible, even taking Madison's court appearance into consideration, that he was present at the robbery but, more important, that he could have been a member of the conspiracy without being physically present when the robbery took place (which turned out to be the case) (DE969:15, 33, 43). And the location of Madison's residence was of little or no significance, compared to the other evidence presented in the Application by the government, such as: the characteristics of Madison's May 25, 2010, theft of a car which "reflect[ed] significant similarities" to the thefts of the cars used in the October 1, 2010, robbery, including that the car was stolen in Coconut Creek; Moss's cell-site records that placed him at the scene of the thefts of the cars used in the October 1, 2010, robbery; Madison's association with Moss, who was apprehended at the scene of the robbery, and with Moss's other associates, as shown by Madison's presence at Brown's house on the day of the robbery; and the fact that sources had identified Madison as one of the participants in the robbery (DE339:18-20). That it later turned out that Madison was not physically present at the robbery does not establish that the government acted in bad faith or that it made knowingly false statements in the Application or that Madison was not a member of

the conspiracy. *Cf. Franks v. Delaware*, 438 U.S. 154, 165, 98 S.Ct. 2674, 2681 (1978) (recognizing that not every fact recited in a warrant affidavit is necessarily correct, "for probable cause may be found upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily").

Officer Starkey's testimony established the basis for the allegations in the Application and the district court found his testimony credible. In reviewing a ruling on a motion to suppress, this Court "afford[s] substantial deference to the factfinder's credibility determinations, both explicit and implicit." *United States v. Lewis*, 674 F.3d 1298, 1303 (11th Cir. 2012). Madison has not shown that the district court's factual findings were clearly erroneous or that it erred in concluding that the government's application for an order under the SCA established "reasonable grounds to believe" that his phone records were "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Accordingly, the district court's denial of Madison's motion to suppress should be affirmed.

II. The District Court Properly Refused to Give a Jury Instruction On the Use of Williams' Unobjected-To Statement Made During and in Furtherance of the Conspiracy.

As previously shown, on July 26, 2010, the day of the failed Lighthouse Point robbery, Madison abandoned the Toyota Camry and fled, but Williams was taken

into custody (DE392:110-16, 130-32; DE393:84-86, 112, 118-21, 133-40, 147). A videotape of an interview of Williams by a Broward County deputy sheriff was admitted into evidence without objection (GX 59; DE393:85-89). The tape shows Williams trying to surreptitiously remove his makeup, and making evasive and inconsistent statements in an attempt to explain his presence in the area and his possession of the gun (GX 59; DE393:89-101).

Madison claims that the district court erred in refusing to give his requested instruction which was, in relevant part: "[I]f . . . an alleged participant made a statement or admission to someone after being arrested or detained, you must consider that evidence with caution and great care. [A]ny such statement of an alleged participant is not evidence about this defendant" (DE395:7).[18] Defense counsel claimed that without the requested instruction, Williams' statement would violate the rule of *Bruton v. United States*, 391 U.S. 123, 126, 88 S. Ct. 1620, 1622 (1968) (holding that admission at joint trial of non-testifying co-defendant's confession implicating defendant violates defendant's rights under Confrontation Clause) (*id.* at 7-9). The government pointed out that Williams' statement did not implicate *Bruton*, that it was admissible as a statement of a coconspirator and that "there was an agreement by the parties to have that video introduced" (*id.*at 8-9).

[18] The proposed instruction was apparently provided to the court but does not appear on the docket sheet (DE395:7).

The district court declined to give the requested instruction, finding that Williams' statement was that of a coconspirator made "in furtherance of protecting the conspiracy so that the conspiracy to commit further armed robberies in the future could proceed" (*id.* at 10-11).

Now on appeal, Madison makes a different claim, which is that Williams' videotaped statement was improperly admitted because Williams' participation in the conspiracy ended with his arrest and, therefore, his statement was not made during or in furtherance of the conspiracy (Br. at 40-43). Madison claims that the court should "at a minimum" have given the jury a limiting instruction although he does not explain how an instruction would have cured the evidentiary error of which he now complains (Br. at 43). If Williams' statement was not admissible against Madison, it was not admissible for any purpose because Williams was not on trial.

This Court should invoke the invited error doctrine and not review Madison's claim that Williams' statement was improperly admitted because he agreed to its admission. As the prosecutor explained (and Madison did not disagree), the government filed a motion in limine in support of admitting the videotaped statement under Federal Rule of Evidence 801(d)(2)(E) as a coconspirator statement, but the motion was never argued or ruled upon because the parties agreed that the statement was admissible (DE395:9; *see* DE214). *See United States v.*

Jernigan, 341 F.3d 1273, 1289-90 (11th Cir. 2003) (holding that review, even for plain error, is unavailable where defendant affirmatively agreed to admission of evidence).

Even if the Court were to review Madison's claim for plain error, on the theory that he preserved an objection to the court's refusal to give his requested instruction, albeit on a different ground than that argued at trial, he could not prevail because, as the district court found, Williams' statement was properly admitted against Madison as one "made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). Moss's testimony, substantially corroborated by other evidence, established that the July 26th attempted robbery was part of an ongoing conspiracy to commit robberies of Brinks armed guards, and that the scheme involved another such attempt on September 17, 2010, and a completed robbery on October 1, 2010, when a Brinks guard was killed. In *Grunewald v. United States*, 353 U.S. 391, 77 S. Ct. 963 (1957), the Supreme Court noted that "a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." 353 U.S. at 405, 77 S. Ct. at 974 (quoted in *United States v. Magluta*, 418 F.3d 1166, 1178 (11th Cir. 2005)).

The district court did not clearly err in finding that Williams' false and evasive statements to police after his arrest following the failed robbery attempt at Lighthouse Point were made during the course of and in furtherance of the conspiracy to rob Brinks armed guards by lying about his reasons for being in the vicinity and for having a gun on his person. Accordingly, even if the Court were to address Madison's claim, he has not shown plain error or any error in the admission of Williams' statement, or in the court's refusal to give his requested instruction.

III. Madison has not shown that his sentence is procedurally or substantively unreasonable.

Madison claims that the district court improperly considered uncharged and acquitted offense conduct at sentencing (Issue 3, Br. at 43), and that it imposed a substantively unreasonable sentence (Issue 4, Br. at 47). His claims are without merit.

A. Sentencing Facts

(i) PSI and objections[19]

Madison's PSI applied the 2011 *Guidelines Manual* to determine his advisory guideline range for his three counts of conviction, Counts 1, 2 and 3 (PSI, p.1).

[19] There are three versions of the PSI -- the initial PSI, disclosed on September 28, 2012, the Revised PSI, prepared on April 13, 2013 with an Addendum, and a final PSI, prepared on October 1, 2013 to incorporate the revisions ordered by the court at Madison's sentencing on September 30, 2013. Unless otherwise indicated, all references to "PSI" are to the Revised PSI.

Pursuant to USSG § 3D1.2(b), the PSI combined Count 1, charging a Hobbs Act conspiracy from May 2010 through October 1, 2010, with Count 2, charging an attempted Hobbs Act robbery on July 26, 2010, because the offenses "involve[d] the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan" (PSI ¶30). Count 3, charging a violation of 18 U.S.C. § 924(c), was excluded from grouping pursuant to USSG § 2K2.4, comment.(n.4), and was subject to a mandatory minimum of five years and a maximum of life imprisonment, to run consecutively to any other term of imprisonment (PSI ¶¶33, 110).

Pursuant to USSG § 1B1.2(d), "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on separate counts of conspiracy for each offense that the defendant conspired to commit." This guideline obligates the sentencing court to step into the role of a trier of fact and determine which offenses the defendant conspired to commit. *See* USSG § 1B1.2, comment.(n.4). Accordingly, the PSI calculated Madison's offense level by creating the following three groups for each object of the conspiracy charged in Count 1: Group 1, the July 26, 2010 Lighthouse Point attempted robbery; Group 2, the September 17, 2010 Miramar attempted robbery; and Group 3, the October 1, 2010, Miramar robbery (PSI ¶31). The offense level for

each group was determined under the robbery guideline, USSG § 2B3.1, which has a base offense level of 20 (*id.*, ¶¶34, 40). Group 1 had a base offense level of 20, which was enhanced by two levels for obstruction of justice pursuant to USSG § 3C1.1, based on Madison's false testimony at trial regarding his whereabouts and the location of his phone on July 26, 2010, the date of the Lighthouse Point attempted robbery (*id.*, ¶¶27, 28, 34-39). Group 2 had a base offense level of 20, which was enhanced by three levels because a firearm was possessed during the September 17, 2010, attempted robbery, pursuant to USSG §2B3.1(b)(2)(C) (*id.*,¶¶40-45).[20] Group 3 had a base offense level of 43 because the PSI applied the cross-reference in USSG § 2B3.1(c)(1), which requires the court to apply the murder guideline, § 2A1.1, with a base offense level of 43, when a victim of the robbery was killed under circumstances constituting murder (*id.*, ¶¶46-51). Applying the multiple count rules to determine a combined adjusted offense level, the PSI determined that Madison's offense level was 43 (*id.*,¶¶32, 52-58).

[20] The firearm enhancement was only applied in connection with the September 17, 2010, attempted robbery because, in light of Madison's acquittal of the § 924(c) count in connection with that robbery (Count 5), it did not constitute double-counting to apply the firearm enhancement based on a finding that a firearm was possessed during that robbery. *See* USSG § 2K2.4, comment.(n.4). The probation officer incorrectly applied a three-level enhancement, applicable when a dangerous weapon is possessed, instead of a five-level enhancement for a firearm. The court corrected that error at the sentencing hearing and applied the five-level enhancement pursuant to § 2B3.1(b)(2)(C) (DE 980:33-42).

Madison's criminal history score was based on five felony convictions from 2003, when he was 25 years old, until 2008 for: (1) grand theft of a vehicle; (2) burglary and grand theft involving two vehicles; (3) dealing in stolen property; and (4) possession of cannabis (2 convictions) (PSI ¶¶66-70). In the first grand theft vehicle case, Madison violated his probation three times which resulted in two modifications and one revocation of probation for which he served a total of 51 days in jail (*id.*, ¶66). In the burglary and grand theft vehicle case, he failed to appear for arraignment and ultimately pled guilty and served 21 days in jail (*id.*,¶67). He served 98 days in jail for the stolen property case and adjudication was withheld in the marijuana cases (*id.*, ¶¶68-70). Madison also had uncounted convictions from the age of 18, for burglary of a vehicle, possession with intent to sell cannabis, possession of cocaine and two violations of probation, one for committing burglary and robbery while on probation (*id.*, ¶¶63-65). From age 16, he had nine arrests not resulting in convictions for grand theft, burglary of an occupied dwelling, trespassing, strong arm robbery and other more minor offenses (*id.*, ¶¶72-80). He also had a pending case for aggravated fleeing or eluding, grand theft vehicle, possession of cannabis and driving while his license was suspended, all arising out of his theft of the car on May 2010, for use in the upcoming July 26, 2010, Lighthouse Point robbery (*id.*, ¶81).

Madison's convictions that were counted pursuant to USSG §§ 4A1.1 and 4A1.2 resulted in six criminal history points and a category III criminal history score which, when combined with his offense level of 43, resulted in a guideline range of life imprisonment, which was reduced to 480 months based on a statutory maximum of 20 years for each of Counts 1 and 2 (PSI ¶¶71, 110-11); *see* 18 U.S.C. §1951(a). A consecutive sentence of at least 60 months was required for Count 3 (PSI ¶110); *see* 18 U.S.C. § 924(c)(1)(A)(i).

Madison filed objections to the PSI (DE413). Other than to contest his participation in the conspiracy to commit the October 1, 2010, robbery, he did not contest any other facts regarding his offense conduct (*id.* at 2). He claimed it would be unconstitutional for him to be held accountable for the conduct in Group 2 because he was acquitted of the September 17, 2010, attempted robbery (*id.* at 3). He also argued that, even if it were not unconstitutional to sentence him based on acquitted conduct, the firearm enhancement in that group was improper because if he had been convicted of the § 924(c) offense related to that robbery, the firearm enhancement would not apply based on USSG § 2K2.4, comment.(n.4) (*id.*). Madison further claimed that he should not be held accountable for the conduct covered in Group 3 because he was not present and did not plan or participate in the October 1, 2010, robbery (*id.*). Accordingly, Madison contended that his base

offense level should be lowered to a level 22 based solely on the July 26, 2010, robbery in Group 1 (*id.*). The government responded, contending that the court could constitutionally consider acquitted conduct in sentencing Madison (DE 468, 469).[21]

(ii) Sentencing hearing

At Madison's sentencing hearing, the district court ordered certain changes to be made to the Revised PSI (which were incorporated into the final PSI), based on certain factual objections (DE980:3-23). The only factual dispute germane to the calculation of Madison's offense level was his claim that he was not part of the conspiracy at the time of the October 1, 2010, robbery and murder (*id.* at 3-7). The prosecutor acknowledged that "Mr. Madison, after September 17, 2010, did not participate in any meetings in furtherance of the October 1, 2010 robbery, nor did he help plan the robbery on October 1, 2010," and the court ordered the PSI to reflect that fact (*id.* at 9). Moreover, in light of the fact that Madison was not physically present at the scene when the Brinks guard was killed, the prosecutor recommended that the court not apply the cross-reference to the murder guideline in determining

[21] The government's responses also included information it had obtained during a post-conviction debriefing of Madison, which led to the district court granting Madison's motion to strike those pleadings (DE470, 475). The court's denial of Madison's motion to recuse based on the government's disclosure is discussed in Argument IV, *infra*.

Madison's base offense level for Group 3, which lowered his offense level from a level 42 to a level 23 (*id.* at 23-24).

Nevertheless, the prosecutor pointed out that Madison knew that more robberies would be committed and that he was excluded from participating as a getaway driver solely because Brown was unhappy with his performance at the September 17th robbery, and that Brown had ordered that Madison be given a cut from the proceeds of the October 1st robbery, all of which established that Madison, who never affirmatively withdrew, was still involved in an ongoing conspiracy to rob Brinks guards (*id.* at 9, 11, 27-29). The court similarly recalled that "Mr. Moss testified that Mr. Brown had agreed to provide Mr. Madison with a certain amount of money, even though they were taking him off for punishment because he had allegedly messed up the prior attempted robbery on September 17th" (*id.* at 7). Overruling Madison's objection to holding him accountable for the October 1st robbery, the court concluded:

> I find that it is fair and appropriate to hold Mr. Madison responsible. I do find that at least by a preponderance of the evidence that Mr. Madison was, although minimally, still involved in the conspiracy for the October 1st robbery. Whether or not he knew precisely when it would occur, he did know it was going to occur. He knew that they were going to go back and do it another day when the September 17th one got scurried.
>
> In addition, there was testimony that Mr. Madison was to be paid a certain amount – I can't remember whether it was $8,000 or what,

> something like that – as a result of his involvement in the scheme up until September 17th; and he also did not take any actions to stop the conspiracy from proceeding. So, for all of those reasons, I think it's appropriate to hold him responsible.

(*id.* at 30).

In light of these findings, defense counsel requested, and the court granted (without objection from the government), a further two-level reduction in Madison's offense level for his minor role with respect to the October 1st robbery (*id.*at 30-31). The court further determined, over defense counsel's objection, that the firearm enhancement was solely applicable to Group 2, the September 17th robbery, and that a five-level (rather than a three-level) enhancement was appropriate pursuant to USSG § 2B3.1(b)(2)(C) (*id.* at 33-42). The court's rulings resulted in a total offense level of 28 and a guideline range of 97-121 months of imprisonment (*id.* at 42-43).[22]

Defense counsel argued for a sentence at the low end of Madison's guideline range, pointing out that he was certified as a lifeguard and had his GED degree and that he had completed a drug program in prison (*id.* at 44). Counsel further contended that Madison "was a car thief" and "not a hard-core violent criminal," that

[22] The range was arrived at as follows: Group 1, offense level 22 (base offense level of 20, plus 2 for obstruction); Group 2, offense level 25 (20, plus 5 for firearm); and Group 3, offense level 18 (20, minus 2 for minor role) (DE 980:42). Application of the multiple count rules resulted in a combined offense level of 28 (*id.* at 43); *see* USSG § 3D1.4.

the reason he had been "kicked out" of further participation in the robberies was because he was "skittish" and "got cold feet," and that a long period of incarceration was not appropriate because Madison was a "minor criminal" (*id.* at 45). Counsel also stated that Madison had tried to cooperate with the government, but that his efforts had been rejected (*id.* at 53-54).

The prosecutor recommended a sentence above the guideline range, of 240 months' imprisonment, plus the 60-month mandatory minimum for the § 924(c) charge (*id.* at 51). The prosecutor disagreed with defense counsel's characterization of Madison, arguing that he had left the scene of the September 17th, 2010, robbery because he saw the police and did not want to get caught, but that he was fully involved in the conspiracy, he had been involved since 2005, and he was willing and able to commit these robberies, playing the critical role of getaway driver (*id.* at 47-50). The prosecutor further pointed out that Madison had not accepted responsibility and he had taken the witness stand and lied, and that any efforts at cooperation were futile because he would not be a credible witness at any future trial (*id.* at 48, 57-59).

Madison spoke on his own behalf, stating that he was not a violent person, he was a family man, and that he saved lives by being a water safety instructor and lifeguard (*id.* at 62-66).

Prior to imposing sentence, the court stated that it had considered the PSI, the advisory guideline range and all of the statutory factors, but would not address all of those factors on the record (*id.* at 67). The court noted the seriousness of Madison's crimes and observed that although he was not present at the robbery that resulted in the death of the Brinks guard, "he was involved in the prior attempts also which involved guns, and obviously, Mr. Madison had to know that guns were involved based on the fact that he was present at the meetings, the fact that the gunman in the July 26th case was carrying a gun, and the car was stopped and both Mr. Madison and Mr. Williams fled the vehicle" (*id.*). The court continued:

> So, it may not have been Mr. Madison's intention that that firearm ever be used. But the problem is when there is a firearm involved, particularly in a violent crime of this nature, that's always a very real possibility that it's going to be used. You can't control what the other people who are involved in the crime will do, and so you have to assume that somebody might use the firearm and somebody might get hurt or killed. So, obviously, this was [a] very serious offense conduct and it went on for several months.

(*id.* at 67-68).

The court also took into consideration Madison's criminal history but stated that his prior crimes, although serious, did not reflect his "entire life," and that it was commendable that Madison had worked as a lifeguard and swimming instructor for children (*id.* at 68-69). In considering the "strong need for general deterrence," the court stated: "Obviously, we can't have people going around with guns holding up

other people, particularly other armed people. The Brinks messengers or other armored car drivers, they also have guns. Somebody in the public also could have been hurt or killed. We're lucky that didn't happen. It's bad enough that the messenger was killed in the October 1st incident" (*id.* at 69). The court also mentioned the "specific need for deterrence" based on Madison's "lengthy criminal history" (*id.*).

The court sentenced Madison to concurrent terms of 140 months of imprisonment on Counts 1 and 2, and a 60-month consecutive term on Count 3, for a total of 200 months of imprisonment, to be followed by concurrent terms of supervised release of three years on Counts 1 and 2 and five years on Count 3 (*id.* at 69, 71-72).

B. Madison Has Not Shown That His Sentence is Procedurally or Substantively Unreasonable.

This Court reviews "all sentences -- whether inside, just outside, or significantly outside the Guidelines range – under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41, 128 S. Ct. 586, 597 (2007). First, the Court determines whether the district court committed any significant procedural error, such as miscalculating the advisory guideline range, treating the guidelines as mandatory, failing to consider the factors in 18 U.S.C. § 3553(a), selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen

sentence. *United States v. Pugh*, 515 F.3d 1179, 1190 (11th Cir. 2008).[23] The Court then examines whether the sentence is substantively unreasonable under the totality of the circumstances and in light of the § 3553(a) factors. *Id.* at 1190-91.

(i)The district court properly applied the guidelines.

Madison claims that the court misapplied the guidelines by holding him accountable for uncharged conduct, *i.e.*, the October 1, 2010, robbery, and for acquitted conduct, *i.e.*, the September 17, 2010, attempted robbery (Br. at 43-45). Madison is correct that he was not charged with the *substantive* October 1 robbery; nor was he convicted of the September 17th attempted robbery. However, he was charged with and convicted of the *conspiracy* to commit Hobbs Act robbery from May 2010 to October 1, 2010, as charged in Count 1 of the indictment (DE262). Accordingly, pursuant to USSG § 1B1.2(d), the court made a finding that the objects of the conspiracy were the July 26, September 17, and October 1, 2010, robberies and it adopted the PSI's application of the grouping rules, which resulted in three separate groups for each object of the conspiracy. After considering the evidence at

[23] The § 3553(a) factors are: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need to reflect the seriousness of the offense, promote respect for the law, provide just punishment, deter criminal conduct and protect the public; (3) the kinds of sentences available; (4) the applicable guideline range; (5) the pertinent policy statements of the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution.

trial, the court concluded that Madison was a member of the conspiracy to commit the October 1st robbery but, in recognition of the fact that he was not present when the robbery was committed, it did not hold him accountable for the murder of the Brinks guard and it granted him a minor role reduction, which resulted in his having an offense level of 18 for that object offense.

Madison is therefore incorrect when he states that the court misapplied the multiple count rules in Chapter 3 of the *Guidelines Manual* and that he was sentenced based on uncharged conduct. Section § 1B1.2(d) requires that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated *as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit*." (emphasis added). Therefore, after calculating a base offense level for each group that represented an object of the conspiracy, the court correctly applied the multiple count rules and arrived at an overall offense level of 28 and a guideline range of 97-121 months for Counts 1 and 2.[24]

[24] The October 1, 2010, robbery in Group 3 added a half-unit, resulting in one additional level to Madison's total offense level. *See supra* note 22 and USSG § 3D1.4(b).We note that in finding that Madison was a member of the conspiracy to commit the October 1, 2010, robbery, the court did not explicitly apply the reasonable doubt standard called for in § 1B1.2(d), comment.(n.4). *See United States v. McKinley*, 995 F.2d 1020, 1026 (11th Cir. 1993) (holding that record must reflect that court found, explicitly or implicitly, that defendant conspired to commit

For the same reason, Madison's claim that he was sentenced based on acquitted conduct is without merit because, although he was acquitted of the September 17, 2010, attempted robbery, the court found that he conspired to commit that robbery and, pursuant to § 1B1.2(d), it held him accountable for that object offense. Madison does not claim that he did not conspire to commit that robbery. His argument, which he acknowledges has been rejected by this Court, is that holding him accountable for that offense at sentencing violates his Sixth Amendment right to have a jury determine his guilt (Br. at 47). *See United States v. Faust*, 456 F.3d 1342, 1347 (11th Cir. 2006) (holding that consideration of acquitted conduct at sentencing does not violate Sixth Amendment). Accordingly, Madison's constitutional and other challenges to the court's application of the guidelines in determining his offense level are without merit.

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object of conspiracy beyond a reasonable doubt). The court here stated that "*at least* by a preponderance of the evidence" it found that Madison remained a member of the conspiracy up to and including the October 1st robbery, which does not mean that, had the issue been raised, the court would not have made the same finding employing the higher standard (DE980:30) (emphasis added). In any event, Madison did not object and he does not now claim that the court plainly erred, or erred at all, in applying an incorrect standard under § 1B1.2(d). *See Sepulveda v. U.S. Attorney Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005) ("When an appellant fails to offer argument on an issue, that issue is abandoned").

(ii) Madison has not shown that his sentence is substantively unreasonable.

The district court imposed a 140-month sentence on Counts 1 and 2, which constituted an upward variance of 19 months from the high end of Madison's advisory guideline range of 97 to 121 months of imprisonment. The court further imposed a mandatory consecutive five-year sentence for Madison's § 924(c) violation, charged in Count 3. Madison claims that his sentence is substantively unreasonable but his argument consists primarily of a rehash of his claim that he was improperly sentenced based on uncharged and acquitted conduct (Br. at 47-48), and of a further claim that the factors relied on by the court, such as the seriousness of the offense and the need for deterrence, were already taken into account in the determination of his guideline range (*id.* at 52). Madison also contends that his conduct was not "inherently violent," that his criminal history was not that serious, that the court failed to consider § 3553(a)(2)(D) "concerning educational, vocational, and other correctional treatment" (*id.* at 52-54), and that it "chose the most onerous sentence" (*id.* at 52-54). The record refutes these arguments.

If the district court determines that a sentence outside the guideline range is appropriate, "it must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *United States v. Overstreet*, 713 F.3d 627, 636 (11th Cir.), *cert. denied*, 134 S. Ct. 229

(2013) (citation and internal quotation marks omitted). This Court will not reverse a sentence due to a variance unless it is "left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *Id.*

Contrary to Madison's argument, the court explicitly stated that it had considered *all* of the § 3553(a) factors but that it would not refer to each of them when imposing sentence (DE980:67). As this Court has held, although sentencing courts must be guided by the § 3553(a) factors, they need not discuss, nor state on the record that they have explicitly considered, each factor. *United States v. Amedeo,* 487 F.3d 823, 832 (11th Cir. 2007) "Rather, an acknowledgment by the district judge that he or she has considered the § 3553(a) factors will suffice." *United States v. Turner*, 474 F.3d 1265, 1281 (11th Cir. 2007). Moreover, in deciding to vary upward, a court may rely on the same facts that it considered in calculating the guideline range. *Amedeo,* 487 F.3d at 833. *See* 18 U.S.C. § 3661 (providing that no limitation may be placed on information concerning defendant that court may consider in selecting a sentence).

In varying upward, the court properly relied on the seriousness of Madison's offense, which involved the use of violence and in one instance resulted in the

murder of a security guard, as well as Madison's lengthy and extensive criminal history, the need to protect the public and the need to deter Madison and others. In deciding the extent of the variance, the court took into account that Madison had given swimming lessons to children and had worked as a lifeguard. The sentence it imposed, 140 months, is well below the statutory maximum of 20 years of imprisonment for each of Counts 1 and 2. *See United States v. Gonzalez*, 550 F.3d 1319, 1324 (11th Cir. 2008) (holding that sentence below statutory maximum is indicative of its reasonableness).

In light of the district court's proper consideration of the § 3553(a) factors, Madison has not met his burden of showing that his sentence is outside the range of reasonable sentences or that the district court committed a clear error of judgment in imposing it. *Overstreet*, 713 F.3d at 636. His sentence should be affirmed.

IV. The District Court Properly Denied Madison's Motion for Recusal.

Madison contends that the district court should have recused itself when the government improperly revealed, in response to a motion to continue sentencing and and in a sentencing memorandum, that in a post-conviction debriefing, he admitted that he was guilty and that he had lied on the witness stand (DE468, 469). Madison moved to strike these pleadings, stating that they violated the government's letter agreement with him, in which it stated that any use of his statements during the

debriefing would be limited by USSG § 1B1.8 (providing, with certain exceptions, that self-incriminating information provided by a defendant pursuant to a cooperation agreement "shall not be used in determining the applicable guideline range") (DE470). Madison urged the court "[a]t a minimum," to strike the government's pleadings and assign the case to another judge (*id.* at 3).

The prosecutor filed a response, stating that he had inadvertently overlooked the agreement and that, upon receipt of Madison's motion to strike, he called defense counsel to explain "the government's oversight in this regard," and to assure counsel that "it was not intentional (which the defense graciously acknowledged)" (DE473:1 n.1). The government withdrew from the court's consideration its reference to Madison's immunized statements as not relevant to the court's determination of the appropriate sentence (*id.* at 2).

The district court issued an order striking the government's pleadings but denying Madison's recusal motion, stating that it was "fully capable of disregarding the immunized statements in their entirety. The Court sat through Madison's trial and heard all the evidence, including Madison's testimony. Therefore, the Court is in the best position to evaluate the facts of this case and impose an appropriate sentence" (DE475).

The district court did not abuse its discretion in denying Madison's motion for recusal. Madison's reliance on *United States v. Foster*, 889 F.2d 1049 (11th Cir. 1989), as "directly on point" to this case is misplaced (Br. at 56). There, in violation of the government's explicit agreement not to use any information disclosed by Foster during a debriefing, the prosecutor *deliberately* disclosed to the probation officer who was preparing the PSI certain information derived from the debriefing that indicated that the defendant had a greater involvement in drug trafficking than was elicited at trial. *Id.* at 1051. The district judge granted Foster's motion to strike the information from the PSI, but "frankly admitted that he could not 'unlearn' this material," although he also said that he "did not or would not, to the best of his knowledge, allow the information to influence him." *Id.* at 1055. Analogizing to cases in which the government breached a plea agreement by disclosing facts or taking a position at sentencing inconsistent with the agreement, this Court held that the only remedy for the government's conduct was resentencing before a different judge. *Id.*

By contrast, the district judge in this case stated in no uncertain terms that Madison's admission of guilt would not influence her in any way and Madison puts forth no basis for not taking the court's statement at face value. Unlike the information deliberately disclosed in *Foster*, the information disclosed here,

inadvertently, did not reveal anything in addition to what the court already knew from having presided at trial, which was that a jury found Madison guilty beyond a reasonable doubt and that he had lied on the witness stand. Indeed, Madison did not object to the PSI's enhancement to his sentence for obstruction of justice (*see* PSI, ¶38). Accordingly, no violation of USSG § 1B1.8 occurred because Madison's statements during the debriefing were not considered by the court in determining the applicable guideline range or in varying upward. The court's decision not to recuse itself was not an abuse of discretion and should be upheld.

Conclusion

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements for Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-based typeface using Microsoft Word 2010, 14-point Times New Roman.

Certificate of Service

I hereby certify that seven copies of the foregoing Brief for the United States were mailed to the Court of Appeals via Federal Express this 28th day of August and that, on the same day, the foregoing brief was filed and served on Randee J. Golder, P.A., using CM/ECF.

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