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.

REPLY BRIEF OF GARY LEBRON CLAY

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INTRODUCTION

Invoking district court and juror discretion can get an appellee only so far. The prosecution had to do more than parrot deference, and emphasizing inapt case law and peripheral points will not suffice. Clay's contentions remain.

Punctuating the prosecution's brief is a reluctance to engage the real concerns of this case. How a juror is impacted by a 15-year-old girl reliving her pistol whipping. Why that testimony was never needed in the first place. How conflicting eyewitness testimony and improperly admitted evidence erode circumstantial evidence. When explanation is most needed, the prosecution is most terse.

The inadmissible and insufficient evidence are distinct issues each supporting reversal. But the interplay is important, for the inadmissible highlights the insufficient. A strong case need not be infected with questionable evidence. But the prosecution felt compelled to compensate for the eyewitness testimony of this case with that from another. The quandary it now faces is one of its own making, and its response does not reassure. The prosecution dodges controlling cases and critical questions; and with a 30 year sentence at stake, such inadequacies cannot be excused.

ARGUMENT

I. The Second Inquiry of the Rule 404(b) Test is Reviewed *De Novo.*

The prosecution claims that the Court disregards Supreme Court precedent because it uses *de novo* review on Rule 404(b) issues. Thus, it demands a decade's worth of Sixth Circuit precedent be discarded.

Clay's opening brief cited *United States v. Bell*, which used a *de novo* standard for the second part of the 404(b) test. 516 F.3d 432, 440 (6th Cir. 2008). *Bell* reviewed "*de novo* the district court's legal determination that the evidence was admissible for a proper purpose." *Id*. The prosecution declares *Bell* dead. But *Bell* is good law and the prosecution makes no showing to the contrary. Nor is *Bell* an anomaly. Abandoning the *de novo* standard runs much deeper than *Bell*. *See United States v. Khadiri*, 364 Fed. Appx. 951, 953 (6th Cir. 2010); *United States v. Magoti*, 352 Fed. Appx. 981, 984 (6th Cir. 2009); *United States v. Ayoub*, 498 F.3d 532, 547 (6th Cir. 2007); *United States v. Rayborn*, 495 F.3d 328, 342 (6th Cir. 2007); *United States v. Murphy*, 241 F.3d 447, 450 (6th Cir. 2001); *United States v. Merriweather*, 78 F.3d 1070, 1074 (6th Cir. 1996).

Bell does note deviations from the *de novo* standard. It cited *United States v. Haywood*, 280 F.3d 715, 720 (6th Cir. 2002), as "applying [an] abuse of discretion standard instead." *Bell*, 516 F.3d at 440. But "[t]hese standards are not in fact inconsistent, because it is abuse of discretion to make errors of law or clear errors of factual determination." *Id*. *quoting United States v. Ganier*, 468 F.3d 920,

925 (6th Cir. 2006). Moreover, the cases the prosecution cites for pure abuse of discretion predate *Bell*. *See United States v. Carney*, 387 F.3d 436 (6th Cir. 2004); *United States v. Mack*, 258 F.3d 548 (6th Cir. 2001). As such, *Bell* controls.

The Supreme Court case the Sixth Circuit supposedly runs afoul of is *General Electric v. Joiner*, 522 U.S. 136 (1997). *Joiner* does state abuse of discretion is used for evidentiary rulings. But *Joiner* considered appellate review of an expert's testimony. Thus, *Joiner's* analysis was focused on *Daubert v. Merrell Dow*, 509 U.S. 579 (1993) and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Expert witness testimony is far removed from Rule 404(b) issues. Moreover, it is the district court's "legal determination" that is reviewed *de novo*. *Bell*, 516 F.3d at 440. The prosecution does not say why a legal determination should not be reviewed *de novo*.

Asking to overrule a substantial line of precedent is significant. The prosecution falls far short in justifying this step. The *de novo* standard applies.

II. The Pistol Whipping Testimony Was Unnecessary, Prejudicial, and Proof of Propensity.

A. Testimony concerning conditional intent already existed.

The prosecution had to prove Clay possessed the specific intent to cause "death or serious bodily injury." 18 U.S.C. § 2119. That much is undisputed. How that element is proven is where the parties diverge.

The prosecution contends Karissa Marshall's testimony was needed to show Clay's "intent to cause serious bodily harm to another innocent stranger if

she resisted his demands." (Brief at 40). But the prosecution already had testimony that the carjacker threatened to shoot Ramona Means. 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, if the prosecution could establish Clay was the carjacker, it had evidence of specific intent.

Clay devoted three pages to why Marshall's testimony was unnecessary. (Brief at 20-22). He cited four cases for support: *Holloway v. United States*, 526 U.S. 1 (1999), *United States v. Glover*, 265 F.3d 337 (6th Cir. 2001), *United States v. Jones*, 188 F.3d 773 (7th Cir. 1999), and *United States v. Fekete*, 535 F.3d 471 (6th Cir. 2008). Each held that physical harm was not needed to show specific intent under 18 U.S.C. § 2119 if there was evidence of conditional intent. Ramona Means' testimony demonstrated conditional intent. This negated the need for the pistol whipping testimony.

The prosecution refuses to touch *Holloway*, *Glover*, *Jones*, and *Fekete*. It skirts this abyss by invoking an unpublished case, *United States v. Love*, 254 Fed. Appx. 511 (6th Cir. 2007). In *Love*, the admission of a prior conviction despite other evidence of specific intent was not error because of cumulativeness. *Id*. at 518-19. *Love* is ineffective in light of *Holloway*, *Glover*, *Jones*, and *Fekete*. It is also distinguishable. *Love* made its determination on Rule 403 grounds. 254 Fed. Appx. at 518-19. Clay objected to Marshall's testimony under Rules 402, 403, and 404(b). (Tr. 11). Moreover, *Love* involved a prior drug distribution conviction, not

the pistol whipping of a 15-year-old girl. Finally, the evidence of conditional intent, as found in *Holloway*, *Glover*, *Jones*, and *Fekete*, was not present in *Love*.

In any event, the prosecution misapplies *Love*. Alternative sources of intent should be considered when weighing the probative value of other acts evidence. *Haywood*, 280 F.3d at 723. "One factor in balancing unfair prejudice against probative value under Rule 403 is the availability of other means of proof." *Merriweather*, 78 F.3d at 1078. The prosecution had no need for the pistol whipping testimony to establish Clay's intent. Thus, per *Bell*, this testimony is *verboten*: "[t]he government had a number of means available to it to prove [defendant's] specific intent to distribute and possess cocaine, without showing that he was involved in previous drug crimes." 516 F.3d at 446, *quoting Merriweather*, 78 F.3d at 1078. Similarly, the conditional intent established by Ramona Means' testimony made Karissa Marshall's testimony unnecessary. This is the basis for reversal.

One final point bears mention. The prosecution highlights *United States v. Johnson*, and its observation that "[w]here there is thrust upon the government … the affirmative duty to prove that the underlying prohibited act was done with a specific criminal intent, other acts evidence may be introduced under Rule 404(b)." *United States v. Johnson*, 27 F.3d 1186, 1192 (6th Cir. 1994). But then come the omitted caveats. In the same breath, *Johnson* states, "[t]hat is not to say that the other acts evidence is automatically admissible in such cases." *Id*. And

most damaging: "[t]he rule we have reaffirmed is narrowly stated, purposely so, to address only specific intent crimes of the type with which the defendant was charged here and not the whole range of crime involving criminal states of mind." *Id*. at 1193. *Johnson* involved intent to distribute cocaine. Thus, the language trumpeted by the prosecution is of no value here.

B. The pistol whipping testimony showed a propensity for crime.

Admitting prior criminal acts undermines the presumption of innocence. This gravity is evaded as the prosecution points out that the Court has admitted "prior bad acts to show specific intent in other types of cases." (Brief at 37). The prosecution cites three cases for support, *United States v. Stevens*, 303 F.3d 711 (6th Cir. 2002), *United States v. Bilderbeck*, 163 F.3d 971 (6th Cir. 1999), and *United States v. Grimes*, 620 F.2d 587 (6th Cir. 1980). Each is distinguishable. *Stevens* involved arson, *Bilderbeck* drug selling, and *Grimes* forgery. None involved crimes of violence. Setting aside the notion of "victimless crime," a violent crime victim's impact on a jury is strong. Karissa Marshall was no exception.

The prosecution argues, "[i]t is difficult to see how evidence that a defendant previously set fires … and evidence that a defendant previously sold drugs could be admitted … yet Defendant's prior act of causing serious bodily harm with a handgun could not…." (Brief 39-40). But arson, drug dealing, and

forgery are often habitual and part of a pecuniary pattern. Battery and threats of assault are typically not.

Stevens, *Bilderbeck*, and *Grimes* involved prior offenses that mirrored those charged. The same cannot be said here. While the intent to cause bodily harm is present in both carjacking and pistol whipping, the offenses were unique. They were not part of the same scheme and involved different motives. One involved theft, the other did not. One involved physical violence, the other did not. The Court's distinction between drug using and drug selling is instructive. The two crimes are "wholly different" because one "involves the personal abuse of narcotics, the other the implementation of a commercial activity for profit." *Haywood*, 280 F.3d at 721, *quoting United States v. Ono*, 918 F.2d 1462, 1465 (9th Cir. 1990). That profit-nonprofit dichotomy, present here, eviscerates the prosecution's reliance.

Finally, the prosecution claims that prior bad acts are permissible to show specific intent for carjacking based on three out-of-circuit cases: *United States v. Basham*, 561 F.3d 302 (4th Cir. 2009), *United States v. Rodriguez-Berrios*, 573 F.3d 55 (1st Cir. 2009), and *United States v. Lecroy*, 441 F.3d 914 (11th Cir. 2006). Distinctions abound. In *Basham*, the prior bad acts occurred a couple days before the events that led to the underlying charges. 561 F.3d at 308. In *Rodriguez*, the prior bad acts were physical abuse and stalking by the defendant of his ex-wife, who was the victim of the underlying murder. 573 F.3d at 63-64. In *Lecroy*,

details of a prior crime in which the defendant had a hit list were admitted to refute his defense that he had not intended to kill. 441 F.3d at 929. *Basham*, *Rodriguez*, and *Lecroy* are distinguishable on their face. Each involved direct ties between the prior bad act and the underlying charge. That dynamic is absent here.

Nor does the prosecution touch the holdings of *United States v. Bell*, 516 F.3d 432, 444 (6th Cir. 2008) and *United States v. Blankenship*, 775 F.2d 735, 739 (6th Cir. 1985). Those cases warned against evidence demonstrating the general criminal character of the defendant. (Brief at 24-25). It is unfathomable that the concerns of *Bell* and *Blankenship* are not implicated here. The pistol whipping of Karissa Marshall portrayed Clay as dangerous. And after listening to Karissa Marshall, the jury was more inclined to find Clay guilty. Showing Clay intended to be violent in this case because he was violent in another case is propensity.

C. The pistol whipping testimony was prejudicial.

Even if the prosecution prevails on propensity, an assertion it made for that issue should be considered for prejudice. The prosecution claims Marshall's testimony "was offered here to show Defendant's intent to cause serious bodily harm to another innocent stranger…." (Brief at 40). These words embody why Marshall's testimony "had the natural tendency to elicit the jury's opprobrium" for Clay. *Haywood*, 280 F.3d at 724.

A young girl describing her pistol whipping is the height of prejudice. The prosecution offers little in response. The content of Marshall's testimony is never

broached. That Marshall stated "I felt like I was going to die that day" elicits no comment. The extent of Marshall's injuries is ignored. The prosecution is also reticent on Clay's case law. The danger of "engendering vindictive passions" is not addressed. *United States v. Green*, 548 F.2d 1261, 1268 (6th Cir. 1976). Sixth Circuit precedent discussing the prejudice of prior cocaine use is ignored. *United States v. Johnson*, 27 F.3d 1186, 1193 (6th Cir. 1994). Also disregarded is Clay's contention about why a jury instruction is ineffectual. (Brief at 28).

The prosecution's single line of attack is Clay's reliance on *United States v. Stout*, 509 F.3d 796 (6th Cir. 2007). *Stout* did affirm the district court's exclusion of evidence and cited district court discretion in doing so. But that is not the point. *Stout* is relevant because the prior bad act was deemed inadmissible as "inflammatory and distracting." *Id.* at 801. The prosecution claims *Stout* is inapt because it involved a sex offense, which "presents a greater risk of unfair prejudice …." (Brief at 43). But it is difficult to imagine how pistol whipping a 15-year-old girl into unconsciousness is not unfairly prejudicial.

Finally, the prosecution claims *Stout* is inapplicable because the pistol whipping was not "significantly worse" than the carjacking. (Brief at 44). This is wrong for two reasons. First, the prosecution phrases the issue in false terms. One need not diminish the seriousness of carjacking to accept the distracting nature of the pistol whipping. The prior act's context is key, and the inflammatory details of Marshall's attack are undeniable. Second, the pistol whipping might have been on

par with the carjacking if it had not been introduced via the victim herself. But it was, and Marshall told the jury she thought she might die, was homebound for two weeks, and feels pain in her jaw two years later. Listening to Marshall relive her attack enabled the jury to be "more alarmed and disgusted by the prior acts than the actual charged conduct." *Stout*, 509 F.3d at 801. This is especially true given Mrs. White's unavailability to testify at trial.

Because the pistol whipping testimony was unnecessary, prejudicial, and proof of propensity, a new trial is warranted.

III. The Parking Lot Surveillance Video Was Unnecessary, Prejudicial, and Proof of Propensity.

A surveillance video capturing a burglary of two vehicles three days before the carjacking was admitted based on *res gestae*, preparation, and identification. This is reversible error.

A. The video was not proof of *res gestae*.

The prosecution claims the video demonstrating the theft of the firearm was proper under *res gestae*. It asserts the Court "has consistently recognized district courts do not err" by admitting *res gestae* evidence. (Brief at 23). The prosecution overstates its case.

Prominent in the prosecution's analysis is *United States v. Hardy*, 228 F.3d 745 (6th Cir. 2008). But the *Hardy* Court held the district court erred in admitting *res gestae* evidence. *Hardy* disavows the prosecution. It stated that the *res gestae* exception "is not an open ended basis to admit any and all other act evidence the

proponent wishes to introduce." *Id*. at 748. The Court has imposed "severe limitations in terms of the temporal proximity, causal relationship, or spatial connections that must exist between the other acts and the charged offense." *Id*. at 749. These principles formed the basis of *Hardy's* determination that the evidence "was not necessary to explain the charged offense, complete the story of [defendant's] testimony, nor did it tend to establish the charged conspiracy itself." *Id*. at 750. The Court should adhere to *Hardy*.

The prosecution asserts "eyewitness testimony established Ms. White's carjacker brandished" a gun. (Brief at 24). And, "Ms. Abernathy testified she saw Defendant with a semi-automatic handgun…." *Id*. Thus, the theft of Mr. Moser's handgun is "*res gestae* because it completed the story." *Id*. This claim necessitates dissection. First, the identity of the carjacker was never established. In fact, the only person identified was Adarius Smith. While a semi-automatic handgun may have been used, someone other than Clay was identified as holding it. Second, Ms. Abernathy never "saw Defendant with a semi-automatic handgun," as the prosecution asserts. (Brief at 24). Rather, she testified, "I don't remember what it looked like." (Tr. at 100). Finally, the theft of Moser's gun cannot complete a story that is riddled with inconsistencies, unknown characters, and misinformation.

Similarly, the prosecution's claim that the theft was "a prelude to the charged offense" is hindered by the prosecution's inability to place Clay at the crime scene. Whether Moser's firearm was used in the carjacking is unknown

because his gun was never found. (Tr. 66, 78, 85). This distinguishes this case from the unpublished Fourth Circuit case cited by the prosecution. *United States v. Brown*, 22 Fed. Appx. 102 (4th Cir. 2001).

Without proof that the firearm stolen during the burglary of the two vehicles was the same firearm used during the carjacking three days later, the prosecution could not establish that these burglaries were part of the *res gestae* of the carjacking.

B. The video was not proof of preparation or identity.

Nothing established Mrs. White was singled out or that the carjacking required three days preparation. Moreover, the gun used in the carjacking was not recovered. The prosecution disregards these realities. If Clay was never identified, and the gun was never recovered, the gun cannot evince identification of Clay.

The prosecution cites *United States v. Hembree*, 312 Fed. Appx. 720 (6th Cir. 2008). *Hembree* examined whether it was error to admit into evidence that the defendant was driving a stolen car when he committed a robbery. *Id.* at 724. *Hembree* is distinguishable because the stolen car was recovered. *Id.* The prosecution also proved the car used in the robbery was stolen. *Id*. Such facts are lacking here. The gun supposedly taken by Clay was never recovered. It is thus unknown whether Moser's gun was used in the carjacking. (Tr. 66, 78, 85). *Hembree* is of no help.

For the same reasons, the prosecution cannot rely on a forty-year-old case from the Third Circuit or an unpublished case from the Tenth Circuit. *United States v. Leftwich*, 461 F.2d 586 (3rd Cir. 1972); *United States v. Bain*, 1996 WL 740849 (10th Cir. 1996). In both cases, the items in question, a car (*Leftwich*) and a license plate (*Bain*) were recovered. *Leftwich* at 589; *Bain* at *8-*9. They were also proven to be used in the underlying crime. These realities foreclose the prosecution's reliance. Finally, *United States v. Day* is inapt because the prior theft of firearms were directly related to what the defendants were charged with—possessing firearms. 591 F.2d 861, 871 (D.C. Cir. 1978). *Day*, like the rest of the prosecution's reliance, succumbs to the unique facts of this case: another individual was identified as the perpetrator, a prior act never truly proven, and the weapon used never found.

C. The video's prejudice did not outweigh its probative value.

The prosecution's argument on this point is predictable—discretion and jury instructions. Clay does not wrestle with either notion in the abstract. But simply offering retreads does not quell the concerns of the opening brief.

Clay's position on this point is simple, the prosecution did not have to show the video. It had alternative means of establishing the theft. (Tr. at 9). Still photos, as the district court acknowledged, were much less prejudicial. (Tr. at 9, 11). Miranda Abernathy also claims she saw Clay with a gun the night before the carjacking. (Tr. at 100). These avenues were less prejudicial than a video of a man

rifling through cars. Yet, the prosecution bypasses this point. Instead, it asserts the surveillance video was prejudice but not "unfair prejudice." (Brief at 34). The prosecution is mistaken. The video's prejudice is unfair because it painted Clay in a bad light and was not needed. Again, still photos and Miranda Abernathy's testimony could accomplish what the video was introduced for.

If the prosecution had other evidence available to satisfy its burden, evidence of other acts should be excluded due to the danger of confusing the jury. *United States v. Myers*, 123 F.3d 350, 364 (6th Cir. 1997). The surveillance video highlighted Clay's criminal propensity. Because it was not needed, the probative value of the video was outweighed by its prejudice.

IV. The Inadmissible Evidence Was Anything But Harmless.

The pistol whipping testimony and surveillance video were not harmless. The dispositive question is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *United States v. DeSantis*, 134 F.3d 760, 769 (6th Cir. 1998). Through this prism, reversal is proper.

There is a strong probability that the surveillance video and pistol whipping testimony contributed to the guilty verdict. This evidence was prejudicial. It painted Clay as a thief and a predator, making it more likely he committed the carjacking. If identification was not in issue, Clay's concerns might be brushed aside. But no witness identified Clay. As such, the pistol whipping testimony and

surveillance video became all the more critical. Clay could not be placed at the carjacking, necessitating his pistol whipping and burglary as the bridge.

The prosecution's harmless error analysis is singular in focus: rehash the circumstantial evidence. (Brief at 46-47). But in lieu of this laundry list, the prosecution leaves four points unanswered. First, the cumulative effect of individually harmless errors. *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990). Second, in the district court's words, the "conflicting" evidence, which can render an error "fatally prejudicial in a close case." *Sanders-El v. Wencewicz*, 987 F.2d 483, 485 (8th Cir. 1993). Third, the difficulty of saying "with fair assurance" that the jury was not impacted by a burglary video or pistol whipping. Fourth, the heavy reliance on circumstantial evidence; if the circumstantial evidence was so convincing, why was the questionable evidence needed in the first place?

The possibility that the pistol whipping testimony and surveillance video contributed to the conviction is not merely reasonable, it is real. Circumstantial evidence, dispatched in the next section, exists. But remove the pistol whipping testimony and surveillance video, and the prosecution's case is emaciated. A finding of harmless error is hard to sustain when the district court itself noted the rulings walked a "fine" and "narrow" line. (Tr. 18).

V. Clay's Guilt Was Not Overwhelming.

The prosecution established that Clay was guilty of possessing stolen property and fraudulent use of a credit card. The one thing it could not prove was that Clay committed the carjacking. The evidence against Clay was insufficient, indeed, the district court hinted as much. (R. 96 at 4). In response, the prosecution points to Clay's burden and the elements of carjacking. (Brief at 48-49). The tough questions are evaded.

Clay spent three pages articulating the inconsistencies of the prosecution's case. (Brief at 39-41). The prosecution responds with a perfunctory paragraph stating the eyewitness selection of someone other than Clay is inconsequential because Clay was found guilty. (Brief at 50). This logic is disconcerting.

The prosecution's response is derelict because the other problems emphasized by Clay elicit no response. The carjacker was 5'6"-5'8", clean shaven, no tattoos, medium complexion, and wore a black sweatshirt and black pants. (Tr. 55-56; 194-96). Clay is 6'2", unshaven, tattooed on his face and hand, and wore a white hooded jacket with a red and white shirt after the carjacking. (Tr. 63, 169-70). These discrepancies are treated like the third rail. The prosecution instead argues that Clay was caught on camera using Mrs. White's credit card and wearing a "distinctive red and white patterned shirt." (Brief at 46-47). Fervent focus on circumstantial evidence is the prosecution's downfall.

First, Clay was on the video, but the underlying charge was carjacking, not using Mrs. White's credit cards. Second, while the prosecution focuses on ephemeral items like clothing, it ignores more enduring things such as facial hair. Clay pointed out he was unshaven in the video an hour after witnesses said the carjacker was clean shaven. (Brief at 40). The prosecution's silence on this point is deafening. Third, no witness to the carjacking ever described the red and white shirt. While Clay wore it in the ATM video, the contrast with the black attire worn by the carjacker is sharp. Fourth, it is possible Adarius Smith committed the carjacking while Clay secured the gun and used the credit cards. Fifth, Clay's mother did live near the carjacking, but Clay had not been living with her for three weeks. (Tr. at 208). Smith, on the other hand, lived four blocks from the scene. (Tr. at 181).

Unwilling to address the evidence during the carjacking, the prosecution embraces the evidence recovered after. But the prosecution's tunnel vision precludes it from seeing what was plain to the district court: that the evidence is "conflicting." (R. 96 at 4). Instead, the inconsistent evidence is drowned in the din of post-carjacking events. The circumstantial evidence does show Clay possessed items belonging to Mrs. White. But a finding of guilt for a specific intent crime cannot be made on circumstantial and conflicting evidence. The prosecution should have addressed the evidence undermining its case.

In addition to the inconsistent evidence, the specter of the inadmissible evidence again rears its head. If the circumstantial evidence of Clay's guilt was overwhelming, why the testimony of Karissa Marshall? Adarius Smith was identified as the carjacker, not Clay. Thus, Clay's conviction was premised on the events after the carjacking. The link between the circumstantial evidence and conviction was the testimony of Karissa Marshall and the surveillance video. Clay's guilt cannot be overwhelming when questionable evidence was integral to the conviction.

Because Clay was not identified as the carjacker, did not fit the description of the carjacker, and was tethered to the testimony of Karissa Marshall, the evidence was insufficient.

CONCLUSION

District court discretion is not appellate court obsequiousness. There are too many concerns to affirm. Gary Lebron Clay should be tried for the events of this case, not another.

Respectfully submitted this 22nd day of July, 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 4,293 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 22nd day of July, 2010.

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