**NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 20-1286

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UNITED STATES

v.

RICHARD BOYLE,
Appellant

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Crim. No. 2-17-cr-00197-1
District Judge: Honorable Gene E. K. Pratter

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Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
on January 26, 2021

Before: JORDAN, MATEY, *Circuit Judges*, and HORAN,* *District Judge*

(Opinion filed: March 9, 2021)

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OPINION**

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* Honorable Marilyn J. Horan, District Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

** This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

MATEY, *Circuit Judge*.

Richard Boyle is a serial bank robber. From 2012 to 2016, he committed eleven bank robberies, stealing almost half a million dollars. He challenges his conviction after trial, alleging errors in the admission of evidence and the conduct of the prosecutors. Finding no merit to these claims, we will affirm.

## I. BACKGROUND

Needing funds to pay the bills, Boyle began moonlighting as a bank robber. Meticulous in his planning and routine in his execution, he preferred to stage the robberies at the end of the week, wearing an outer layer of clothing, hat, glasses, and a mask. Gloves concealed his fingerprints, and he sometimes used bleach to remove traces of DNA. As a result, no physical evidence linked Boyle to the robberies.

But plenty of circumstantial evidence did. Cell site data showed Boyle's phone idle during all but one of the robberies. Before one heist, a disposable phone was used to place a diversionary call to law enforcement about a bomb threat. Law enforcement traced that phone to a library, where video surveillance and witness testimony placed Boyle at the time of the call. Boyle's finances followed the robberies, recovering from less than $400 in the bank and over $20,000 in debt to spending large sums, as the robberies racked up. After many—sometimes even the same day—Boyle would make large deposits of cash into his personal and business accounts. He explained his fortune on timely gambling wins and a host of odd jobs, but he named only a handful of customers, who collectively paid him

around $1,200, and casino records show Boyd was a low-stakes gambler who lost more than he won.

A grand jury charged Boyle with 11 counts of bank robbery, in violation of 18 U.S.C. § 2133(a); 10 counts of using or carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c); and 10 counts of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i). Before trial, the Government moved to admit evidence, pursuant to Federal Rule of Evidence 404(b), about Boyle's 2008 conviction for multiple bank robberies, and financial information he provided to his state parole officer. The District Court granted the motion, allowing Boyle to renew his objection at trial. Boyle also filed a motion for a hearing under *Franks v. Delaware*, arguing that the affidavit in support of a search warrant executed at his home contained false statements or omissions. The District Court denied that motion, and a second raising the same argument. At trial, and again post-trial, the District Court denied Boyle's motions for a judgment of acquittal.

The jury returned guilty verdicts on all counts. The District Court sentenced Boyle to a term of imprisonment of 852 months, a three-year term of supervised release, and restitution of $495,686. Boyle timely appealed and we will affirm.[1]

## II. DISCUSSION

### A. Evidence about Boyle's Prior Robberies

Boyle first argues that the Government introduced prejudicial evidence about his prior criminal acts. Federal Rule of Evidence 404(b) provides that "[e]vidence of any other

[1] The District Court had subject matter jurisdiction under 18 U.S.C. § 3231 and we have jurisdiction under 28 U.S.C. § 1291.

crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." But such evidence may be admissible for other purposes, including "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). We review the District Court's decision to admit evidence under Rule 404(b) for an abuse of discretion, which "may be reversed only when . . . clearly contrary to reason and not justified by the evidence." *United States v. Balter*, 91 F.3d 427, 437 (3d Cir. 1996) (internal quotation marks and citation omitted). To admit such evidence, the Government needed to show a relevant purpose unrelated to propensity, with probative value not substantially outweighed by the potential for unfair prejudice to the defendant. *See Huddleston v. United States*, 485 U.S. 681, 691 (1988); Fed. R. Evid. 403. The district court enjoys "considerable leeway" to balance prejudice against probative value. *United States v. Sampson*, 980 F.2d 883, 886 (3d Cir. 1992).

Here, the Government used evidence of Boyle's earlier bank robberies for proper purposes, such as motive, preparation, and identity. And the District Court's multiple limiting instructions—whose language Boyle's counsel never objected to—cured any prejudicial effect. In his 2008 sentencing, Boyle admitted that he committed the robberies because he needed money to make car payments, pay tuition, and buy photography equipment. (App. at 63–64.) So too here. (*See* App. at 940, (telling his parole officer that he did not have a job), 832 (paying back rent with $9,000 in money orders), 1679 (buying a car with cash), 1550–51 (paying for tuition in cash), 1679–81 (buying thousands of dollars of camera equipment).) As the District Court correctly held, Rule 404(b)(2)

expressly permits admission of other-acts evidence for, among other things, "proving motive." Fed. R. Evid. 404(b)(2).

Boyle, as the Government explained, used many of the same techniques in both sets of robberies. He would often wear two sets of clothes, including a hat, jacket, and tie. He always covered his face and left his mobile phone at home. He always targeted banks within twenty miles of his home. "[P]reparation" and "identity" are both proper nonpropensity purposes under Rule 404(b)(2), and both properly identified by the District Court in its decision. Boyle complains that the evidence was more prejudicial than probative, but the District Court minimized that risk with repeated limiting instructions. And "we presume that . . . jur[ies] follow[] the limiting instruction that the district court gave and considered evidence . . . only for the limited purposes offered." *United States v. Cruz*, 326 F.3d 392, 397 (3d Cir. 2003); *see also Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Boyle's counsel declined to submit alternative instructions or supplement the ones given, and he raised no concerns. And, as the District Court noted, both parties correctly commented on the limited purpose of the evidence in their closing arguments. On balance, admitting this evidence was not error.

**B. The Motion to Dismiss the Indictment**

Boyle argues Police Detective Jeffrey McGee fabricated evidence and lied to the grand jury, violating his due process rights. But no such prosecutorial misconduct occurred, and even if it did, it was rendered harmless under *United States v. Mechanik* by his subsequent conviction by a petit jury.

"We review a district court's decision regarding a motion to dismiss an indictment because of prosecutorial misconduct for abuse of discretion." *United States v. Bryant*, 655 F.3d 232, 238 (3d Cir. 2011). "[A]s a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988). To make out a claim, the defendant must show that "the structural protections of the grand jury [were] so compromised as to render the proceedings fundamentally unfair." *Id.* at 257.

The bar is high. As we have explained, "the societal interest in avoiding the expense of a second trial far outweighs the appellants' interest in having a new trial based solely on prosecutorial misconduct before the grand jury." *United States v. Console*, 13 F.3d 641, 672 (3d Cir. 1993). In most cases, errors before a grand jury diminish in significance after trial, as "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." *Id.* at 672 (quoting *United States v. Mechanik*, 475 U.S. 66, 70 (1986)).

Boyle's claims do not clear that hurdle. He argues that the Government knowingly presented false testimony in the grand jury, pointing to Detective McGee's testimony that Boyle bought and activated the TracFone. That testimony mirrors the phone records introduced at trial. The library's video also showed Boyle entering the library at the relevant time and inspecting a computer terminal. A witness testified that Boyle asked him how to access the computers. And video evidence showed Boyle approach the information

desk, ask the clerk a question, and then walk in the direction of the computers. The TracFone was activated from the terminal soon after.

Boyle also contends that Detective McGee lied to the grand jury about statements made by one of the witnesses, Kyung Lee. (Opening Br. at 25–29.) Detective McGee did tell the grand jury that Lee reported that the bank robber was wearing an "old man" mask at the PNC robbery, when in fact she did not so testify. But it is unclear why Detective McGee's misstatement matters. The grand jury reviewed photos showing that the person who robbed PNC was wearing a mask. Lee never singled out Boyle as the robber. And McGee did not claim that she did.

Boyle next argues McGee lied to the grand jury when he testified that Boyle left his cell phone at home during the 2008 robberies. Not so. Rather, McGee testified that one of the police officers went to Boyle's home in 2008 following a robbery and, when his children called his phone, it could be heard ringing upstairs. Boyle's 2008 arrest report corroborated those events.

Finally, Boyle complains that references to his prior bank robbery convictions rendered the grand jury process unfair. But the Federal Rules of Evidence do not apply to grand juries. *See* Fed. R. Evid. 1101(d) (excluding grand jury proceedings from the scope of the rules, except for the rules on privilege); *Costello v. United States*, 350 U.S. 359, 363 (1956) (recognizing that grand juries may act solely on testimony that would be inadmissible at trial, such as hearsay evidence).

For those reasons, Boyle has not shown that there was misconduct before the grand jury, let alone error rising to the level needed to dismiss the case. *United States v. Soberon*,

929 F.2d 935, 940 (3d Cir. 1991) (allegedly perjured testimony to the grand jury does not fall into the narrow category of cases warranting dismissal).

**C. The District Court Properly Denied a *Franks* Hearing**

The right to a *Franks* hearing is not absolute. Instead, the defendant must (1) make a "substantial preliminary showing" that the affiant knowingly or recklessly included a false statement in or omitted facts from the affidavit, and (2) show that the false statement or omitted facts are "material to the finding of probable cause." *United States v. Yusuf*, 461 F.3d 374, 383–84 (3d Cir. 2006). Boyle contends that his second motion cited "newly discovered evidence," and the District Court erred by failing to conduct an evidentiary hearing on this basis. He is mistaken.

Detective McGee supported his application for a search warrant for Boyle's home with an affidavit. The affidavit included information about the TracFone used at the library and the identification of Boyle by a confidential informant who then positively identified photos of Boyle at the library on the day the phone was activated. Boyle points to unsworn summaries of interviews conducted by a defense investigator challenging phone activation records, and someone who Boyle claims is the Government's confidential source and whose husband denies she ever spoke with Detective McGee. (App. at 215–16.) He also claims that no evidence shows that Boyle used the computer at the library. The record refutes these claims. The Government received, and presented at trial, an email from TracFone with an IP address associated with the library. The unsworn testimony of the alleged informant's husband does not cause us to discount Detective McGee's sworn

testimony that he interviewed the informant. And two witnesses present at the library—one of whom testified at trial—stated that Boyle had asked them how to access a computer.

Boyle has not made a "substantial preliminary showing" that Detective McGee knowingly or recklessly lied in his search warrant affidavit. The District Court properly rejected his second motion for a *Franks* hearing.

**D. Substantial Evidence Supported Boyle's Conviction**

Finally, Boyle argues that the evidence at trial was insufficient for the jury to support his convictions. (Opening Br. at 56–61.) We do not agree. When reviewing the sufficiency of the evidence, we ask whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979) (emphasis in original and citation omitted). Our review is "highly deferential"; the jury's verdict "must be upheld as long as it does not fall below the threshold of bare rationality." *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430, 431 (3d Cir. 2013) (en banc) (internal quotation marks omitted).

Boyle offers three claims of insufficiency: (1) The Government never presented direct evidence that he was the actual bank robber; (2) the Government never showed that the banks were FDIC-insured; and (3) the Government never proved the knowledge element of the money laundering offenses. Each lacks merit.

First, while the Government never presented physical evidence or eyewitness testimony connecting him to the robberies, the circumstantial evidence was more than

adequate. A rational juror could have concluded as all twelve did, that this evidence was sufficient.

Second, an employee of each bank testified that the bank was FDIC-insured, and the Government introduced self-authenticating FDIC certificates of insurance. (App. at 2213; Supp. App. at 42–82.) That is more than sufficient. *See United States v. Barel*, 939 F.2d 26, 38 (3d Cir. 1991).

Finally, expert testimony presented at trial showed that Boyle knowingly laundered money through Square. Boyle, the expert explained, used his credit cards to process $17,000 through Square to his photography business, Sky Eye View. Boyle paid a fee on each transaction, and then received the money back from Square, less the fees, in the amount of $16,532.50. In other words, Boyle paid roughly $470 to put $17,000 in his business bank account, rather than simply transfer it there via wire for nothing. Boyle argued that this was merely evidence that he was "advanc[ing] his company funds at a lower rate than he would have incurred by using his credit cards for cash advances." (Opening Br. at 61.) That is one possible inference. Another is that he was laundering money made by robbing banks through a fake aerial photography business. And that is apparently the one the jury made.

## III. CONCLUSION

For these reasons, we will affirm the District Court's conviction.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 20-1286

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RICHARD BOYLE,
Appellant

v.

UNITED STATES OF AMERICA

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 2-17-cr-00197-1)

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PETITION FOR REHEARING

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BEFORE: SMITH, *Chief Judge*, and MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, *Circuit Judges*, HORAN,* *District Judge*

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The petition for rehearing filed by appellant Richard Boyle in the above-captioned matter has been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service. No judge who concurred in the decision asked for rehearing, and a majority of the circuit judges of the Court in regular active service who are not disqualified did not vote for rehearing by the Court. It is now hereby **ORDERED** that the petition for rehearing is **DENIED**.

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* Honorable Marilyn J. Horan, District Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

BY THE COURT,

s/ Paul B. Matey
Circuit Judge

Dated: June 1, 2021
SLC/cc: Richard Boyle
Robert J. Livermore, Esq.

AO 245B (Rev 09/19) Judgment in a Criminal Case
Sheet 1

# UNITED STATES DISTRICT COURT

Eastern District of Pennsylvania

UNITED STATES OF AMERICA
v.
RICHARD BOYLE

FILED
FEB 07 2020
KATE BARKMAN, Clerk

## JUDGMENT IN A CRIMINAL CASE

Case Number: DPAE2:17CR000197-001

USM Number: 75974-066

Catherine Henry, Esquire (Stand-by counsel)
Defendant's Attorney

## THE DEFENDANT:

X pleaded guilty to count(s) 1 through 31 of the Indictment

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

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18:2113(a) | Bank robbery | 10/14/2016 | 1,3,4,6,8,10,12,14, 16,18 and 20 |
| 18:924(c)(1)(A)(i) | Using and carrying a firearm during and in relation to a crime of Violence | 10/14/2016 | 2 |
| 18:924(c)(1)(A)(ii) | Brandishing, using and carrying a firearm during and in relation to a crime of violence | 10/14/2016 | 5,7,9,11,13,15,17, 19 and 21 |
| 18:1956 | Money laundering | 10/14/2016 | 22 through 31 |

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

February 5, 2020
Date of Imposition of Judgment

Signature of Judge

GENE E.K. PRATTER, USDJ
Name and Title of Judge

February 7, 2020
Date

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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**UNITED STATES OF AMERICA**

**v.** **CRIMINAL NO. 17-197**

**RICHARD BOYLE**



**ORDER**

AND NOW, this 1st day of May, 2017, it is hereby ORDERED that, for the reasons set forth in the government's motion, the following evidence of defendant RICHARD BOYLE's other crimes, wrongs or acts are admissible pursuant to Federal Rule of Evidence 404(b):

1. Evidence of defendant RICHARD BOYLE's prior convictions in Montgomery County for bank robbery.

2. Any information provided by defendant RICHARD BOYLE to the parole board or to his parole officer.

BY THE COURT:

HON. GENE E.K. PRATTER
Judge, United States District Court

**UNITED STATES OF AMERICA, v. RICHARD BOYLE,**
**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA**
**2019 U.S. Dist. LEXIS 154480**
**CRIMINAL ACTION No. 17-197**
**September 3, 2019, Decided**
**September 4, 2019, Filed**

**Editorial Information: Prior History**

United States v. Boyle, 2018 U.S. Dist. LEXIS 166096 (E.D. Pa., Sept. 26, 2018)

**Counsel** **{2019 U.S. Dist. LEXIS 1}**For RICHARD BOYLE, Defendant: CATHERINE C. HENRY, LEAD ATTORNEY, FEDERAL COMMUNITY DEFENDER OFFICE -EDPA, PHILADELPHIA, PA; NINO V. TINARI, LEAD ATTORNEY, PHILADELPHIA, PA; MARANNA J. MEEHAN, DEFENDER ASSOCIATION OF PHILADELPHIA, PHILADELPHIA, PA; MATTHEW F. SULLIVAN, NINO V. TINARI & ASSOCIATES, PHILADELPHIA, PA.

For USA, Plaintiff: ROBERT JAMES LIVERMORE, SEAN P. MCDONNELL, LEAD ATTORNEYS, U.S. ATTORNEY'S OFFICE, PHILADELPHIA, PA.

**Judges:** GENE E.K. PRATTER, UNITED STATES DISTRICT JUDGE.

**Opinion**

**Opinion by:** GENE E.K. PRATTER

**Opinion**

**MEMORANDUM**

Pratter, J.

After a two-week trial, a jury convicted Richard Boyle of eleven counts of bank robbery, ten counts of using a firearm in commission of those robberies, and ten counts of money laundering. Mr. Boyle filed two post-trial motions: (1) a motion to dismiss the indictment and (2) a motion for judgment of acquittal or a new trial pursuant to Federal Rules of Criminal Procedure 29 and 33. For the reasons outlined in this Memorandum, Mr. Boyle's motions are denied.

**Background**

Mr. Boyle was charged by indictment on April 12, 2017 with bank robbery in violation of 18 U.S.C. § 2113(a), using a firearm in commission of bank robbery in violation of 18 U.S.C. § 924(c)(1), and money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i). In total, 31 counts were brought against Mr. Boyle. The**{2019 U.S. Dist. LEXIS 2}** charges stemmed from a string of 11 bank robberies that were committed by the "Straw Hat Bandit" between 2012 and 2016. The trial lasted two weeks and the jury convicted Mr. Boyle of all 31 counts on March 15, 2019.

In very large part, the Government's case relied on circumstantial evidence. In total, the Government

presented 70 witnesses and offered hundreds of pages of documents into evidence over the course of the two-week trial. The Government presented several types of evidence, including: (1) the Straw Hat Bandit's pattern of conduct, (2) Mr. Boyle's pattern during a previous string of bank robberies, (3) Mr. Boyle's finances, (4) his communications with family members, (5) documentary evidence, and (6) evidence regarding Mr. Boyle's telephone cell site location information as compared with various locations relevant to this prosecution.

**I. The Straw Hat Bandit's Pattern**

The Government presented evidence at trial that demonstrated that many of the 2012 to 2016 robberies followed a signature pattern. The Government presented testimony of bank employees and accompanying video of the bank robber at various locations. This evidence demonstrated that the robber: (1) took precautions**{2019 U.S. Dist. LEXIS 3}** to cover himself to hide his physical features fully and protect against any potential forensic evidence;1 (2) placed diversionary calls shortly before the robberies to distract police;2 (3) conducted "takeover robberies" and forced bank employees to open vaults and ATM machines;3 (4) robbed banks on holidays or at the end of the business week when the bank had additional cash on hand;4 (5) layered his clothing so that he could quickly discard the outer layer after the robbery;5 (6) parked a distance away so a getaway car would not be visible on security cameras,6 and; (7) was familiar with bank protocols and procedures.7

**II. Mr. Boyle's 2008 Conviction for Bank Robbery**

In 2008, Mr. Boyle pleaded guilty in Bucks County to eight counts of bank robbery and related charges. March 4, 2019 Tr. 187:8-10. He was sentenced to 3.5 to 10 years in prison. Mr. Boyle stole approximately $100,000 from the banks during those previous robberies. Mr. Boyle admitted that he committed the robberies because he was unemployed, needed money, and was about to be evicted. *Id.* at 191:4-192:8. Mr. Boyle further admitted that he used the proceeds from those bank robberies**{2019 U.S. Dist. LEXIS 4}** to pay medical bills, make car payments, pay tuition, and buy photography equipment. *Id.* During those robberies, Mr. Boyle often wore a hat, jacket, and tie and he always covered his face. *Id.* at 189:15-190:9. Mr. Boyle wore multiple layers of clothing so he could remove the outer layer after the robbery. *Id.* at 186:1-7. He also left his phone at home. *Id.* at 180:24-181:20. In 2008, Mr. Boyle was caught because he parked too close to the bank and witnesses saw him running from the bank and getting into his car. *Id.* at 180:9-15.

The Straw Hat Bandit used a very similar pattern during the course of his robberies, as discussed *supra*. However, the Straw Hat Bandit had a practice of parking his vehicle outside the view of security cameras.

**III. Mr. Boyle's Finances**

In large part, the Government focused on Mr. Boyle's finances and demonstrated that Mr. Boyle spent large sums of money shortly after each robbery. The Government went through Mr. Boyle's known sources of income and demonstrated that he spent $300,000 more than what was available from those known sources. March 12, 2019 Tr. 157:15-176:13. The Government's summary financial witness, Eric Hiser, testified that there was a "spike"**{2019 U.S. Dist. LEXIS 5}** in Mr. Boyle's spending after each robbery. *Id.* at 161:13-176:13. For example, Mr. Hiser testified that $44,000 was stolen from First Priority Bank on January 2, 2014. *Id.* at 168:23-25. Following the robbery, Mr. Boyle paid for his daughter's tuition, made purchases at a Guitar Center, made cash deposits, bought drone photography equipment, paid rent, and bought fine jewelry. *Id.* at 169:1-170:23. In total, Mr. Boyle spent over $80,000 in the months after the robbery. *Id.* at 171:2-3. The Government also demonstrated that Mr. Boyle did not have any other sources of income during that time period that could explain the sudden influx of cash.

### IV. Mr. Boyle's Communications with Family Members

The Government also presented evidence of communications between Mr. Boyle and his family members. For example, Mr. Boyle texted with his daughter Abigail regarding the financial hold on her account at Temple University. *Id.* at 34:18-22. The First Priority Bank was robbed on January 2, 2014. That morning, Mr. Boyle asked to borrow his daughter's car. *Id.* at 35:12-19. After the time of the robbery, Mr. Boyle texted his wife that he had the money for their daughter's tuition. *Id.* at 33:5-34:5. The following**{2019 U.S. Dist. LEXIS 6}** Monday, Mr. Boyle paid his daughter's tuition with $5,000 in cash, March 7, 2019 Tr. 150:16-151:20, and then texted his daughter to tell her that her tuition was paid in full. March 12, 2019 Tr. 35:20-36:2.

Mr. Boyle also texted family members on a number of occasions claiming to have won large sums of money at area casinos. *Id.* at 24:8-35:6; 47:5-48:5. The Government presented witnesses from those casinos who testified that it would be virtually impossible for a person to win large sums of money without the casino's knowledge. March 6, 2019 Tr. 173:8-21. Mr. Boyle, who testified on his own behalf, testified that he won between $7,000 to $10,000 in total at the casinos he frequented, March 13, 2019 Tr. 63:9-21, which is far less than the casino records show. March 6, 2019 Tr. 11:4-16:9. Mr. Boyle also admitted that he sometimes lied to his family members about where he was getting large sums of money. March 13, 2019 Tr. 86:10-23.

The Government also introduced a text message that Mr. Boyle sent to his daughter Haley. The text message included an image and the caption "The Straw Hat Bandit." *Id.* at 45:5-8.

### V. Documentary Evidence

The Government presented additional documentary evidence**{2019 U.S. Dist. LEXIS 7}** tying Mr. Boyle to the robberies. This evidence included purchases on Amazon internet accounts of an earpiece with a clip-on attachment and green latex gloves, both of which types of items were later seen on the bank robber. March 11, 2019 Tr. 110:23-112:22; 114:4-115:5; 117:14-19. The Government demonstrated that Mr. Boyle ran his own credit card through his business' Square credit card processing account. March 12, 2019 Tr. 156:17-157:14. The Government posited that Mr. Boyle wanted to launder the proceeds of the bank robberies through his legitimate business and conceal the actual source of the money.

### VI. Cell Site Location Information8

Lastly, the Government presented testimony from Detective Anthony Vega, who is an expert in cell site analysis. March 8, 2019 Tr. 156:1-17; 159:25-160:6. The records indicated that Mr. Boyle's phone was off or not in use during most of the robberies. *Id.* at 168:15-169:24. However, Mr. Boyle's phone was used a short distance away from the Colonial American Bank approximately 15 minutes after the robbery. *Id.* at 170:2-172:3. Mr. Boyle's phone was also used in the vicinity of the Target where a TracFone9 was purchased. *Id.* at 182:24-185:2. That TracFone**{2019 U.S. Dist. LEXIS 8}** was later used to place diversionary calls before the PNC Bank robbery in Upper Dublin. *Id.* at 183:5-10; 190:25-191:20. This same TracFone was activated at the Warminster Branch of the Bucks County Free Library during the time when Mr. Boyle was at the library. *Id.* at 185:5-14. A witness testified that at the library Mr. Boyle asked whether there was a way to use library computers without using a library card. *Id.* at 85:2-12. A "guest" user was logged into the public computer at the time the TracFone was activated, and that computer was off camera. *Id.* at Tr. 106:4-108:13; 185:5-14. Nothing about Mr. Boyle's cell site location information was exculpatory because the records indicate that the phone was either off, not in use, or, on one occasion, was actually located near the bank that was robbed.

## Discussion

Mr. Boyle filed two post-trial motions. The Court will first consider Mr. Boyle's motion to dismiss the indictment, which the Court denies because it fails as a matter of law. The Court will then turn to the motion for judgment of acquittal or a new trial, which the Court denies because the Court concludes that the Rule 404(b) evidence was admissible, and, additionally, there was sufficient**{2019 U.S. Dist. LEXIS 9}** evidence to sustain the jury's verdict.

### I. Motion to Dismiss the Indictment

After the jury found him guilty on all counts, Mr. Boyle filed a motion to dismiss the indictment. He alleges that the prosecutor knowingly elicited false testimony before the grand jury and improperly offered evidence of Mr. Boyle's prior convictions. Mr. Boyle contends that this resulted in an indictment and ultimate conviction that violated his Fifth Amendment right to due process. According to Mr. Boyle, the evidence that proves this prosecutorial misconduct was only discovered during the trial, thus making it impossible to raise these allegations earlier. Mr. Boyle's motion fails as a matter of law.

In *United States v. Mechanik*, 475 U.S. 66, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986), the Supreme Court of the United States considered a motion to dismiss the grand jury indictment after the defendants had been convicted at trial. The Court concluded that any error was harmless considering the subsequent finding of guilt by the petit jury. *Id.* at 70 (holding "that the supervening jury verdict made reversal of the conviction and dismissal of the indictment inappropriate"). Indeed, "the petit jury's subsequent guilty verdict [meant] not only that there was probable cause to believe that the defendants were guilty**{2019 U.S. Dist. LEXIS 10}** as charged, but also that they [were] in fact guilty as charged beyond a reasonable doubt." *Id.* The guilty verdict further meant that "any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." *Id.*

In this case, Mr. Boyle contends that Detective Jeffrey McGee testified falsely that (1) Mr. Boyle activated the TracFone at the Bucks County library, (2) Mr. Boyle purchased the TracFone, (3) no witness could identify Mr. Boyle as the robber, (4) there was no eyewitness who saw the robber, and (5) banks do not typically have outside cameras. Mr. Boyle also argues that the Government erred when it presented evidence of Mr. Boyle's past convictions for bank robbery to the grand jury, which the Court also admitted during the trial. First, there is no evidence that Detective McGee lied to the grand jury. The discrepancies Mr. Boyle highlights are merely differences in how to interpret the evidence. Second, all of this testimony and evidence was admissible and was presented during trial. Mr. Boyle cross-examined Detective McGee on each of these points thoroughly. The jury carefully considered both Detective McGee's testimony and the counterarguments**{2019 U.S. Dist. LEXIS 11}** posed by Mr. Boyle and concluded that Mr. Boyle was guilty.

Even if Mr. Boyle is correct as to any alleged error during the grand jury proceedings, that error was rendered harmless by Mr. Boyle's subsequent conviction. *See United States v. Console*, 13 F.3d 641, 672 (3d Cir. 1993) (citing *Mechanik*, 475 U.S. at 70-72) ("Even assuming [prosecutorial misconduct] occurred, however, the petit jury's guilty verdict rendered any prosecutorial misconduct before the indicting grand jury harmless."). For these reasons, Mr. Boyle's motion to dismiss the indictment is denied.

### II. Motion for Judgment of Acquittal or for New Trial

Mr. Boyle also seeks relief in the form of a judgment of acquittal or a new trial. Mr. Boyle argues that he is entitled to a new trial because the Court allowed the Government to admit evidence of Mr.

Boyle's prior bank robbery convictions. Mr. Boyle also argues that the Court should grant a judgment of acquittal on the grounds that there was insufficient evidence to sustain the jury's verdict. The Court denies both arguments.

***A. Motion for New Trial***

Under Federal Rule of Criminal Procedure 33, " the court may vacate any judgment and grant a new trial if the interest of justice so requires." On May 1, 2018, this Court granted the Government's motion *in limine* to introduce evidence of other acts**{2019 U.S. Dist. LEXIS 12}** pursuant to Federal Rule of Evidence 404(b). *See* May 1, 2018 Order (Doc. No. 39).10 Mr. Boyle argues that the Court erred when it allowed the Government to introduce evidence of his prior bank robberies pursuant to Rule 404(b). The Court concludes that the 404(b) evidence was admissible and the motion for a new trial is denied.

Federal Rule of Evidence 404(b) states that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). However, this "evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* at 404(b)(2). In order to be admissible under Rule 404(b), the evidence must satisfy four requirements: "(1) the other-acts evidence must be proffered for a non-propensity purpose; (2) that evidence must be relevant to the identified non-propensity purpose; (3) its probative value must not be substantially outweighed by its potential for causing unfair prejudice to the defendant; and (4) if requested, the other-acts evidence must be accompanied by a limiting instruction." *United States v. Repak*, 852 F.3d 230, 241 (3d Cir. 2017) (citing *Huddleston v. United States*, 485 U.S. 681, 691, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988); *United States v. Caldwell*, 760 F.3d 267, 277-78 (3d Cir. 2014)). The party seeking to admit the evidence bears**{2019 U.S. Dist. LEXIS 13}** the burden of demonstrating its admissibility. *Repak*, 852 F.3d at 241.

The Court of Appeals for the Third Circuit has stated that Rule 404(b) is both inclusionary, *see United States v. Green*, 617 F.3d 233, 244 (3d Cir. 2010), and exclusionary. *See Caldwell*, 760 F.3d at 276. The court has recently clarified that "Rule 404(b) is a rule of exclusion, meaning that it excludes evidence unless the proponent can demonstrate its admissibility, but it is also 'inclusive' in that it does not limit the non-propensity purposes for which evidence can be admitted." *Repak*, 852 F.3d at 241. "Regardless of whether Rule 404(b) is one of 'inclusion' or 'exclusion,' it is clear . . . that it is a rule of *precision*, requiring a proponent to articulate a specific, non-prohibited purpose for the evidence, which in practical terms, means a purpose other than propensity." *United States v. York*, 165 F. Supp. 3d 267, 269 (E.D. Pa. 2015) (emphasis in original).

*1. Non-Propensity Purpose for Evidence*

At the first step of the analysis, the Government and the district court must identify a "non-propensity purpose for introducing" Mr. Boyle's prior convictions. *Repak*, 852 F.3d at 242. The Court of Appeals for the Third Circuit has "repeatedly emphasized that Rule 404(b) must be applied with careful precision, and that evidence of a defendant's prior bad acts is not to be admitted unless both the proponent and the District Court plainly identify a proper, non-propensity**{2019 U.S. Dist. LEXIS 14}** purpose for its admission." *Caldwell*, 760 F.3d at 274. "When evaluating whether a non-propensity purpose is at issue, we 'consider the material issues and facts the government must prove to obtain a conviction.'" *United States v. Brown*, 765 F.3d 278, 291 (3d Cir. 2014) (quoting *Caldwell*, 760 F.3d at 276) (other quotations omitted). There were distinct, non-propensity purposes to admit Mr. Boyle's prior convictions for bank robbery in this case because the 404(b) evidence demonstrated motive, preparation, and identity.11

*2. Relevance*

The Court must next consider whether the evidence was relevant. "To be relevant, proffered evidence must fit into 'a chain of inferences-a chain that connects the evidence to a proper purpose, no link of which is a forbidden propensity inference.'" *Repak*, 852 F.3d at 243 (quoting *United States v. Davis*, 726 F.3d 434, 442 (3d Cir. 2013)). The Court of Appeals for the Third Circuit requires "that this chain be articulated with careful precision because, even when a non-propensity purpose is 'at issue' in a case, the evidence offered may be completely irrelevant to that purpose, or relevant only in an impermissible way." *Caldwell*, 760 F.3d at 281. The 404(b) evidence was relevant for its proper purpose in this case.

First, the prior convictions demonstrate a motive to avoid eviction from the Boyle family home. At the sentencing hearing for the 2008 bank robberies, Mr.**{2019 U.S. Dist. LEXIS 15}** Boyle stated that he committed those robberies because he was at risk of being evicted from his home. March 4, 2019 Tr. 191:4-192:8. In this case, Mr. Boyle was again threatened with eviction shortly before the first robbery. Stanislas Falkowski, Mr. Boyle's landlord, began eviction proceedings because Mr. Boyle fell behind on the rent. *Id.* at 137:15-139:7. As of April 13, 2012, Mr. Boyle owed $8,413.52 in unpaid back rent. *Id.* at 139:8-10. On June 1 of that year, Mr. Boyle was served with a notice that he and his family had ten days to vacate the property. *Id.* at 142:16-22. On June 8, the robbery occurred at the Colonial American Bank in Horsham, Pennsylvania. The next day, Mr. Boyle paid his landlord $9,000 in back rent. *Id.* 143:15-25. The Government argued at length that Mr. Boyle had the same motive (i.e., was under the exact same set of back rent/eviction pressures) as he was when he robbed banks in 2007 and 2008.

Second, the prior acts demonstrate Mr. Boyle's preparation. Mr. Boyle learned a significant lesson from his earlier robberies-he was identified as the bank robber in 2008 because he had parked his car too close to the bank. This evidence was relevant, argued the Government,**{2019 U.S. Dist. LEXIS 16}** because Mr. Boyle took precautions this time around not to repeat the same mistake. During this series of robberies, Mr. Boyle parked well outside the view of security cameras. On the security videos, the bank robber can be seen making his way quickly through the parking lots, hedges, and off camera before the police could arrive.

Third, the Rule 404(b) evidence was relevant to reveal Mr. Boyle's identity. Mr. Boyle used a similar set of tactics to disguise himself in the latest string of robberies as the tactics he used in 2007 and 2008. Indeed, determining the identity of the robber was no small issue in this case because Mr. Boyle kept his face covered, avoided leaving any physical evidence, and generally disguised himself thoroughly and well. As he did during the previous robberies, Mr. Boyle left his phone at home or turned off to avoid being placed via electronic means at the banks. Furthermore, Mr. Boyle wore multiple layers of clothing during both sets of robberies. This was a unique way to both make himself look larger and also quickly change his appearance after the robbery by shedding clothes.

*3. Unfair Prejudice*

The "third step requires that other-acts evidence must not give rise to**{2019 U.S. Dist. LEXIS 17}** a danger of unfair prejudice that substantially outweighs the probative value of the evidence under Rule 403 of the Federal Rules of Evidence." *Repak*, 852 F.3d at 246. Under Rule 403, the Court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of" unfair prejudice. Fed. R. Evid. 403. "However, the prejudice against which the law guards is *unfair* prejudice-prejudice of the sort which clouds impartial scrutiny and reasoned evaluation of the facts, which inhibits neutral application of principles of law to the facts as found." *Goodman v. Pennsylvania Turnpink Comm'n*, 293 F.3d 655, 670 (3d Cir. 2002) (cleaned up) (emphasis in

original). A district court must do more than merely restate a "bare conclusion," it must "provide 'meaningful balancing' when applying Rule 403 to determine the admissibility of Rule 404(b) evidence." *Repak*, 852 F.3d at 246-47 (citing *Caldwell*, 760 F.3d at 283).

Undoubtedly, the evidence of Mr. Boyle's prior convictions for bank robbery was prejudicial, that is, it was not helpful to Mr. Boyle; however, it was not unfairly so. As noted above, the testimony was highly relevant when considering the identical motive to the previous robberies and some of the unusual tactics the robber took to conceal his identity. Indeed, the robber excelled at covering his identity and covering his tracks. This forced the Government to make its case based entirely from**{2019 U.S. Dist. LEXIS 18}** circumstantial evidence. And the Government used a wide array of circumstantial evidence, including the 404(b) evidence, to demonstrate that Mr. Boyle was the Straw Hat Bandit.

The Court took care to limit the prejudicial effect of this testimony. The Court kept the presentation of this evidence to a minimum and forbade duplicative testimony on this point. *See e.g.*, March 4, 2019 Tr. 184:1-185:14; March 5, 2019 Tr. 14:1-6 and 60:3-61:6. Furthermore, the Court did not allow the evidence to go in to the jury room during deliberations. March 5, 2019 Tr. 59:5-17. And, for whatever value it had, during the Government's closing argument, the prosecutor was also careful to explain the very limited purpose for which this evidence could be used, March 13, 2019 Tr. 120:24-122:19, as did Mr. Boyle's counsel. *Id.* at 144:18-145:15.

*4. Limiting Instructions*

The last step of the 404(b) analysis is to provide a limiting instruction to the jury, if the defendant requests it. The instruction should advise "the jury that the evidence is admissible for a limited purpose and may not be considered in another manner." *Caldwell*, 760 F.3d at 277. The Court gave such a limiting instruction at multiple points during the trial. March 4,**{2019 U.S. Dist. LEXIS 19}** 2019 Tr. 176:24-178:4 and 195:9-20; March 5, 2019 Tr. 5:1-20.

Two witnesses testified as to the 404(b) evidence. Before the first witness testified the Court stated:

> Ladies and gentlemen, my understanding is that this witness may be addressing and be asked about an incident or incidents that happened that are not strictly speaking on part of the trial here. So you're going to hear some testimony that the defendant committed some other event, other bank robbery in the past.
>
> Those are not robberies that this case concerns. The evidence of such other acts is permissible for only limited purposes, and you'll remember I told you when we talked about what's evidence and what's not evidence. Sometimes things are admitted for a limited purpose, and you have to follow my instructions.
>
> Well, you can consider the evidence that you're about to hear reference to only for the purpose of deciding whether the defendant, Mr. Boyle, had a state of mind or knowledge or intent necessary to commit the crimes, or a crime charged in the Indictment or acted with a method of operating that demonstrates some sort of unique pattern, or did he commit these events on trial here by accident.
>
> You may not use this testimony,**{2019 U.S. Dist. LEXIS 20}** the reference to these other prior so-called bad acts, for purposes of deciding whether the acts in question in this Indictment were actually committed, nor can you use this evidence to show that somebody has a propensity or a character trait to commit crime.
>
> So it's the limited purpose to see if there is some permissible purposes at all. So he's not on trial for committing these other acts that you may hear this witness talk about. And you'll hear me

give this instruction again perhaps at the end of the trial as well.March 4, 2019 Tr. 176:24-178:4.

The Court reiterated these limiting instructions again during the final jury instructions. The Court stated:

> You've heard testimony that Mr. Boyle was previously convicted for the commission of other prior bank robberies. This evidence of other prior acts was admitted only for a very specific and very limited purpose.
>
> You may consider that evidence only for the purpose of deciding whether Richard Boyle had a state of mind, knowledge, or intent necessary to commit the crime or crimes alleged here in this Indictment in this case. You may consider the evidence of the prior acts for purposes of deciding whether Mr. Boyle acted with a method of**{2019 U.S. Dist. LEXIS 21}** operation as evidencing a unique pattern and did not commit the acts for which he's on trial here by accident or mistake. Do not consider that evidence of prior acts for any other purpose.
>
> Of course, it's for you to determine whether you believe the evidence, and if you do believe it, whether you accept it for that limited purpose. You may give it whatever weight you feel it deserves within the context of that limited purpose.
>
> Mr. Boyle is not on trial for committing these other prior acts. You certainly may not consider the evidence of those prior acts as a substitute for proof that he committed the crimes charged here in this case.
>
> So you may not consider that evidence as proof that Mr. Boyle had a bad character or had some propensity or personal character inclination as part of his nature to commit a crime. Specifically, you may not use that evidence to conclude that because Mr. Boyle may have committed the other acts in the past that he must have committed these charged in this Indictment.
>
> Remember, he's on trial in this case only for the offenses charged in the Indictment, not for those prior acts. Do not return a guilty verdict here unless the Government proved the crimes charged**{2019 U.S. Dist. LEXIS 22}** in this Indictment and proved them beyond a reasonable doubt.March 14, 2019 Tr. 18:7-19:16.

Courts presume that the jury followed the instructions they were given. *See United States v. Newby*, 11 F.3d 1143, 1147 (3d Cir. 1993). There is nothing to lead this Court to believe that the jury in this case failed to follow the Court's directive.

For these reasons, Mr. Boyle's motion for a new trial is denied.

***B. Motion for Judgment of Acquittal***

Mr. Boyle also filed a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29. Pursuant to Federal Rule of Criminal Procedure 29(c), a "defendant may move for a judgment of acquittal" within 14 days after the jury enters a guilty verdict or after the court discharges the jury, whichever is later. "A judgment of acquittal is appropriate under [Rule 29] if, after reviewing the record in a light most favorable to the prosecution, we determine that no rational jury could have found proof of guilt beyond a reasonable doubt." *United States v. Willis*, 844 F.3d 155, 164 n.21, 65 V.I. 489 (3d Cir. 2016). "Thus, a finding of insufficiency should 'be confined to cases where the prosecution's failure is clear.'" *United States v. Smith*, 294 F.3d 473, 477 (3d Cir. 2002) (quoting *United States v. Leon*, 739 F.2d 885, 891 (3d Cir. 1984)).

A district court considering the motion must be "ever vigilant" that it does not "usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury." *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005). Therefore,**{2019 U.S.**

**Dist. LEXIS 23}** the court can only order the entry of a judgment of acquittal if no evidence in the record, regardless of how it is weighed, supports a finding of guilt beyond a reasonable doubt. *United States v. McNeill*, 887 F.2d 448, 450 (3d Cir. 1989) (quoting *Brandom v. United States*, 431 F.2d 1391, 1400 (7th Cir. 1970)).

Mr. Boyle contends that there was insufficient evidence to sustain the jury's verdict against him. In particular, Mr. Boyle argues that the Government failed to introduce any direct evidence that he was the bank robber, that the eyewitnesses gave varied descriptions of the bank robber, that the two witnesses who saw the bank robber without a mask failed to identify him, and that the Government lacked sufficient evidence for the money laundering charges. Mr. Boyle is incorrect on all accounts.

*1. Circumstantial Evidence*

To be sure, the Government's case was based entirely on circumstantial evidence. However, there was an overwhelming amount of circumstantial evidence that pointed to Mr. Boyle being the Straw Hat Bandit.

Mr. Boyle regularly came into large sums of money shortly after the robberies and was unable to explain-or, more importantly, to convince the jury-where or how he obtained the money. He spent lavishly on photography equipment, dental work, and fine jewelry, in addition to paying off**{2019 U.S. Dist. LEXIS 24}** overdue rent and other expenses. Mr. Boyle used large amounts of cash and money orders to pay for college tuition and home rent. He contended that he won the money gambling, but casino records demonstrated that, like many people at casinos, Mr. Boyle often lost. To the extent he had any winnings, the records showed them to be, at best, quite modest. He also argued that the money came from his drone photography business, but the evidence only demonstrated that he had a couple of clients, neither of which were particularly active.

The Government also presented evidence beyond Mr. Boyle's finances. Mr. Boyle's Amazon purchases matched somewhat unique items seen on the bank robber, such as green latex gloves and an earpiece. Furthermore, Mr. Boyle's cell phone put him in the vicinity of the Target store where someone purchased a TracFone that was later used to make a diversionary call. Mr. Boyle was in that area at around the time when the TracFone was purchased. He was also at the library when that TracFone was activated on a public computer.

The Court recognizes that all of this evidence is circumstantial but certainly cannot conclude that "no rational jury could have found proof of guilt**{2019 U.S. Dist. LEXIS 25}** beyond a reasonable doubt." *Willis*, 844 F.3d at 164 n.21.

*2. Eyewitness Testimony*

Mr. Boyle next argues that there were issues with the eyewitness testimony in this case. Namely, he contends that certain of the eyewitnesses provided significantly different physical descriptions of the person who committed the robberies and no witness from the robberies was able to identify Mr. Boyle as the robber.

Mr. Boyle is correct that, of the numerous witnesses the Government called to testify, those witnesses provided a range of descriptions of the bank robber. One witness recalled that she had described the robber as "about 5'8" and about 215 pounds[.]" March 4, 2019 Tr. 75:2-11. Another said he was around 6'2". March 5, 2019 Tr. 166:9-16. Although one witness said the robber had brown eyes, *Id.* at 104:3-8, another said the robber appeared to have blue or green eyes. March 6, 2019 Tr. 111:7-13. Witnesses also provided varied descriptions of the way the perpetrator walked. March 4, 2019 Tr. 62:3-6 ("I want to say it was a distinctive walk, sort of from side to side."); March 5, 2019 Tr. 148:4-7 ("I just saw him running toward Bethlehem Pike[.]"); March 7, 2019 Tr. 11:6-8 ("I

saw him limp a little bit."); *Id.* at 179:1-14 ("He**{2019 U.S. Dist. LEXIS 26}** was on foot, but he was - I would say he was skipping, but he wasn't speed - I would say he was speed walking. He wasn't running.").

Mr. Boyle further points out that the only two witnesses to see the robber without a mask failed to identify him. Eric Wharton identified a person other than Mr. Boyle when he was shown a photo array. March 7, 2019 Tr. 14:2-15:3. He said he was about 70% sure of his identification at the time. *Id.* At trial, which took place five and a half years after the robbery at the bank where Mr. Wharton worked, Mr. Wharton believed that Mr. Boyle and the robber shared similar features but could not say for sure that Mr. Boyle was the robber. *Id.* at 17:23-18:11. The second witness to see the bank robber without a mask, Kyeung Lee, did not testify at trial. Instead, Detective Jeffrey McGee testified that Ms. Lee did not get a good look at the robber and he was not confident in a sketch developed from her description. March 11, 2019 Tr. 72:17-21.

Defense counsel pointed out these discrepancies throughout the trial. The jury heard and carefully considered this evidence and counsel's arguments, and after all that the jury rendered a guilty verdict. The Court will not overstep**{2019 U.S. Dist. LEXIS 27}** its authority at this juncture and "usurp the role of the jury" by disturbing the jury's verdict on these grounds. *Brodie*, 403 F.3d at 133.

*3. Money Laundering*

Lastly, Mr. Boyle challenges his convictions for ten counts of money laundering under 18 U.S.C. § 1956(a)(1)(B)(i). The statute states in relevant part:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity-
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or . . .
>
> (B) knowing that the transaction is designed in whole or in part-
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity[.]18 U.S.C. § 1956(a)(1)(B)(i).

The Government's case for money laundering against Mr. Boyle primarily rested on the testimony of Megan Brady and Eric Hiser. Ms. Brady is a fraud investigator for Square, Inc. March 6, 2019 Tr. 92:25-93:4. She reviewed Mr. Boyle's Square account for his drone photography business and generally explained how companies can use Square to process credit card payments. *Id.* at 92:25-104:2.**{2019 U.S. Dist. LEXIS 28}** Ms. Brady did not testify as to any fraudulent activity on Mr. Boyle's Square account. However, Mr. Hiser, a forensic accountant for the FBI, testified that Mr. Boyle ran his own credit card through his business' Square credit card processing account. March 12, 2019 Tr. 156:17-157:14. Mr. Hiser showed each transaction on a summary exhibit. He testified that Mr. Boyle charged $17,000 to Square on his credit cards, which he then received back from Square, less Square's fees, in the amount of $16,532.50. *Id.* at 157:9-11. Mr. Boyle argues that "Mr. Hiser did not expound upon the raw data, which he presented with respect to the Square transactions." Def.'s Supp. Br. at 8 (Doc. No. 128).

The Court does not conclude that Mr. Hiser needed to "expound" on the raw data. Indeed, a reasonable jury could have concluded that Mr. Boyle robbed the banks and, in an attempt to conceal the source of that money, ran ten credit card transactions on his Square account.

**Conclusion**

For the reasons set out in this memorandum, the Court denies Mr. Boyle's post-trial motions.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

**ORDER**

**AND NOW**, this 3rd day of September, 2019, upon consideration**{2019 U.S. Dist. LEXIS 29}** of Defendant's Motion for Judgment of Acquittal and for a New Trial (Doc. No. 100), the responses and replies thereto (Doc. Nos. 102, 123, 124, & 128), Defendant's Motion to Dismiss the Indictment (Doc. No. 108), the Government's Response (Doc. No. 121), and following oral argument on July 15, 2019, **IT IS ORDERED** that Defendant's Motions (Doc. Nos. 100 & 108) are **DENIED**.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

**Footnotes**

1

*See e.g.*, March 6, 2019 Tr. 37:23-38:5; 115:25-116:6; March 7, 2019 Tr. 119:7-120:6; March 12, 2019 Tr. 37:4-38:4.

2

*See e.g.*, March 6, 2019 Tr. 221:2-225:3; March 8, 2019 Tr. 119:3-122:15; March 12, 2019 Tr. 16:21-17:16.

3

March 11, 2019 Tr. 52:10-22.

4

*See e.g.*, March 6, 2019 Tr. 80:2-24; March 12, 2019 Tr. 16:21-25; 36:9-14.

5

*See e.g.*, March 5, 2019 Tr. 172:17-173:10; March 7, 2019 Tr. 194:13-195:2; March 11, 2019 Tr. 116:14-117:9;

6

*See e.g.*, March 5, 2019 Tr. 147:25-148:13; March 7, 2019 Tr. 9:22-11:8.

7

*See e.g.*, March 4, 2019 Tr. 54:18-55:1; March 5, 2019 Tr. 80:14-81:6; March 6, 2019 Tr. 110:1-111:6.

8

In September 2018, the Court ruled that Mr. Boyle's cell site location information was admissible even though it was gathered without a warrant. *See United States v. Boyle*, No. 17-197, 2018 U.S. Dist. LEXIS 166096, 2018 WL 4635783 (E.D. Pa. Sept. 27, 2018). The Supreme Court of the United

States ruled in *Carpenter v. U.S.*, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), that law enforcement must obtain a warrant before compelling a wireless carrier to turn over a subscriber's cell site location information. *Id.* at 2221. Although a warrant was not obtained in this case, the Court concluded that the agents' actions were in good faith and the exclusionary rule should not apply. *Boyle*, 2018 U.S. Dist. LEXIS 166096, 2018 WL 4635783, at *3.

9

A TracFone is a prepaid phone where the purchaser buys the phone and the minutes separately. March 8, 2019 Tr. 66:14-23. Assuming the purchaser pays in cash, the TracFone cannot be tied back to the purchaser.

10

The Court amended this Order on March 4, 2019, but the substance of the Order and the ruling remained the same. *See* March 4, 2019 Order (Doc. No. 83).

11

The Government also argues that the 404(b) evidence is admissible because it demonstrates Mr. Boyle's intent and plan to use the proceeds from the bank robberies to pay bills, make car payments, pay tuition, and buy photography equipment. The Court does not believe that these stated purposes are so unique in the context of this case to have warranted admission of Mr. Boyle's prior crimes on these bases alone.

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA** | : | |
| | : | |
| **v.** | : | **CRIMINAL NO. 17-197** |
| | : | |
| **RICHARD BOYLE** | : | |

**ORDER**

AND NOW, this day of , 2017, it is hereby ORDERED that, for the reasons set forth in the government's motion, the following evidence of defendant RICHARD BOYLE's other crimes, wrongs or acts are admissible pursuant to Federal Rule of Evidence 404(b):

1. Evidence of defendant RICHARD BOYLE's prior convictions in Montgomery County for bank robbery.

2. Any information provided by defendant RICHARD BOYLE to the parole board or to his parole officer.

BY THE COURT:

HON. GENE E.K. PRATTER
Judge, United States District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| | : | |
| v. | : | CRIMINAL NO. 17-197 |
| | : | |
| RICHARD BOYLE | : | |

**GOVERNMENT'S MOTION IN LIMINE TO INTRODUCE EVIDENCE OF OTHER ACTS PURSUANT TO FED. R. EVID. 404(B)**

## I. INTRODUCTION

The United States of America, by its undersigned attorneys, LOUIS D. LAPPEN, Acting United States Attorney for the Eastern District of Pennsylvania, and ROBERT J. LIVERMORE and SEAN P. MCDONNELL, Assistant United States Attorneys for the district, hereby notifies defendant RICHARD BOYLE, of its intent to introduce evidence under FRE 404(b), as described below, and moves this Court in limine to permit introduction of "other acts" evidence against BOYLE.

## II. FACTUAL BACKGROUND

### A. Charged Offense Conduct

RICHARD BOYLE was a serial bank robber, sometimes called the "Straw Hat Bandit" by the FBI and the media. The indictment charges him with 11 bank robberies and 10 counts of using a firearm in the commission of those robberies. BOYLE stole a total of $495,686 in these robberies. BOYLE was able to steal that stunning total by using more advanced methods of bank robbery, including taking over the bank and forcing bank employees at gunpoint to open the vaults and cash-rich ATM machines. These methods, while profitable, left behind a *modus*

*operandi* that helps to link the robberies together to the same offender. In addition, BOYLE laundered the proceeds of his robberies by routing the funds through his photography business, Sky Eye View, in an attempt to conceal the source of this income.

There is no question that the "Straw Hat Bandit" committed the 11 bank robberies at issue. The main issue for the jury to decide is the identity of the "Straw Hat Bandit." As an experienced bank robber, BOYLE made careful plans to avoid apprehension and learned from his previous mistakes. During these robberies, BOYLE wore a hat, glasses, and mask to conceal his face. He wore gloves to conceal his fingerprints. He even occasionally spread bleach on the floor to conceal his DNA. However, BOYLE's unusual pattern of behavior left behind a signature identity, forged from his prior bank robbery experience, which helps to tie him to all of the robberies. Moreover, BOYLE provided highly incriminating information to his parole officer before and after the robberies which further prove his identity as the "Straw Hat Bandit." In this manner, evidence of BOYLE's prior bank robberies and the information BOYLE provided to his parole officer constitute compelling evidence of BOYLE's motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. When this evidence is weaved together with the government's other evidence, the combination of the two prove beyond any doubt that BOYLE is the "Straw Hat Bandit" and committed the crimes charged in the indictment.

**B. 2008 Bank Robbery Convictions**

In 2008, BOYLE pleaded guilty in Bucks County to 8 counts of bank robbery and related charges and was sentenced to 3.5 to 10 years in prison. BOYLE stole approximately $100,000 from the banks. At his prior sentencing hearing, BOYLE admitted that he committed the prior

robberies because he was unemployed, needed money, and was about to be evicted from his home. BOYLE admitted that he used the proceeds from the bank robberies to pay medical bills, make car payments, pay tuition, and buy photography equipment. BOYLE further admitted that he used the proceeds from the bank robberies to purchase photography equipment with the plan to operate a successful photography business.

BOYLE used some of the same techniques in both series of robberies which became his signature. BOYLE often wore a hat, jacket, and tie. He always covered his face. He often provided the tellers with bags in which to place the money. He always left his mobile phone at home. BOYLE also learned several significant lessons from his prior bank robberies. BOYLE was caught in 2008 because he parked too close to a bank and his vehicle was observed on camera. As described below, BOYLE learned his lesson from this mistake and took pains not to repeat it. In so doing, however, BOYLE revealed his own identity by overcompensating for his prior mistakes to such an extreme degree.

**C. Evidence**

**1. Colonial American Bank, 300 Welsh Road, Horsham**

On Friday, June 8, 2012, at approximately 5:45 p.m., RICHARD BOYLE robbed the Colonial American Bank, 300 Welsh Road, Horsham, Montgomery County, Pennsylvania, at gunpoint. Prior to the robbery, BOYLE made a diversionary call from a TracFone. BOYLE wore a large-brimmed straw hat (hence the nickname, the "Straw Hat Bandit"), a sack or pillowcase with the eyes cut out, sunglasses, dark pants, a dark blue suit coat, tie and black tight-fitting gloves. He also carried a handgun in a shoulder holster on his right side. After indicating that he wanted money and wanted to talk to the manager, BOYLE ordered the manager to open the vault.

He then took the vault keys, ordered employees to the ground and fled with approximately $49,464. After BOYLE left, bank employees noticed that he had sprayed or dumped bleach on the inside of the bank door.

The proffered 404(b) evidence assists the government prove that BOYLE committed this robbery. First, BOYLE admitted during the prior sentencing hearing that he committed the 2008 robberies because he was about to be evicted from his home and he needed the money to pay rent. BOYLE's motivation to commit this Colonial American Bank robbery was exactly the same. On May 8, 2012, just a few weeks before the robbery, BOYLE's landlord filed suit to evict BOYLE from his home, the exact same home he was renting in 2008, for failure to pay rent. At the time, BOYLE owed $8,771.62 in back rent. On June 11, 2012 (three days after the robbery), BOYLE gave his landlord nine money orders totaling $9,000 to pay the bank rent. BOYLE purchased all of those money orders on June 9, 2012 (the day after the robbery) at a Walmart store located at 1515 Bethlehem Pike, Hatfield, PA, using U.S. currency. Not coincidentally, the TracFone used to place the diversionary call was purchased at the same Walmart store on a different date prior to the robbery.

During the time period leading up to this robbery, BOYLE's provided a significant amount of incriminating information to his parole officer. This information proves: (a) BOYLE's motivation for committing the bank robberies and (b) that he had no other source of funds to pay $9,000 in back rent. Around the time of his 2011 release from prison on parole, BOYLE stated to the Parole Board that he has not had a full-time job since 2002 when his contract with Johnson & Johnson was not renewed. In a March 16, 2011 statement to the Parole Board regarding his prior eight bank robbery convictions, BOYLE stated, "In April 2007 after a period of unemployment, I

was about to be evicted from our house. From the period of May of 2007 to February 2008, I robbed numerous banks. . . . The first bank I robbed was out of panic of losing my house, but I believe the other robberies occurred because of greed and laziness." BOYLE explained that he used the money to buy a car, pay bills, pay rent, pay for medicine for his family, and buy camera equipment to start a new business. BOYLE further admitted to the Parole Board that all of the banks he robbed were located within 20 miles of his home in Doylestown.

BOYLE began meeting with his parole officer in August 2011. On almost every meeting, the primary subject of the conversation was BOYLE's efforts to find a job and his desperate financial situation. On May 16, 2012, BOYLE met with his parole officer and told her that he was under a "lot of stress." BOYLE reported that he had an eviction hearing with the local magistrate. BOYLE later lied to his parole officer by telling her that he had "cleared up everything" and "paid back rent" – which he did not do until after the robbery. BOYLE claimed that he found a job working as a painter.[1] On June 11, 2012 (three days after the robbery), BOYLE changed his story and told his parole officer that his daughter got a job to help them pay the rent.[2] However, BOYLE reported to his parole officer that he told the family that they could not afford to live in the house and they would have to move out. On July 3, 2012, BOYLE deposited $500 into his wife's account using one hundred $5 bills.[3] In August 2012, Boyle told

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1 The government's evidence will prove that BOYLE did not have any legitimate source of income during the time period charged in the indictment. Furthermore, simple math will refute any claim that he earned the $9000 painting. Even if he made $20 in cash an hour painting, that would take him 450 hours, or approximately 10 weeks of work to earn that much money. BOYLE's statements to his parole officer eviscerate any such theory.

2 Both of his daughters denied under oath giving BOYLE the money to pay the rent.

3 Even if he had been working a legitimate job, it would be highly unusual for anyone to be paid with one hundred $5 bills.

his parole officer that he had not been working regularly at his "painting job" and he was looking for new employment. In this manner, BOYLE's statements to the Parole Board and his parole officer confirm his identity as the "Straw Hat Bandit" and establish the inescapable fact that he paid his landlord the $9,000 in back rent using the proceeds of the Colonial American Bank robbery.

**2. First Federal Bank, 803 Park Avenue, Wrightstown**

On Friday, September 28, 2012, at approximately 6:50 p.m., BOYLE robbed the First Federal Bank, 803 Park Avenue, Wrightstown, Bucks County, Pennsylvania. BOYLE wore a navy blue suit coat, dress pants, dress shirt and tie, a ski mask, safety goggles and an electronic earpiece. BOYLE entered the bank, announced the robbery, and demanded access to the vault. After being denied access to the vault by the employees, one teller provided BOYLE with $7,246.00. After ordering the employees to an office in the rear of the building, BOYLE fled on foot. He implied a handgun but did not actually display one. [This is the one bank robbery without an accompanying 924(c) offense. However, the robbery took place at 6:50 p.m., on a Saturday. There were no customers in the bank. There were only two female employees observed on the video. BOYLE apparently believed he did not need a gun to intimidate them.]

On September 5, 2012, a few weeks before the robbery, BOYLE bought an earpiece from Amazon, similar to the one used during the robbery. In September 2012, BOYLE reported to his Parole Officer that he was still having financial problems and they were looking for a new apartment to rent because he could not afford to live in the house he had been renting. BOYLE did not report any new employment or source of income. Despite those statements, BOYLE continued to pay the rent on time and continued to pay other expenses using the proceeds of the

bank robberies. For example, a few days after the robbery, on October 1, 2012, BOYLE deposited $800 into his wife's account. Later in October 2012, BOYLE told his parole officer that he could not find work and was thinking of moving to Florida. In November 2012, BOYLE stated to his parole officer that he still did not have a job and was looking for a new home to rent.

**3. Wells Fargo Bank, 706 Stony Hill Road, Yardley**

On, Friday, January 18, 2013, at approximately 9:15 a.m., BOYLE robbed the Wells Fargo Bank, 706 Stony Hill Road, Yardley, Bucks County, Pennsylvania, at gunpoint. BOYLE wore a gray sweat suit with the hood pulled up, a black ski mask, white sneakers and green rubber gloves. After approaching the teller counter and displaying a black semi-automatic handgun, he provided the teller with a bag and instructed her to empty the drawers. He also provided a bag to another employee and followed him to the vault. BOYLE then took both bags, containing approximately $34,910 and left, returning shortly thereafter to splash a bleach-like substance on the door. BOYLE then fled on foot.

The financial evidence after this robbery is also very compelling. After the robbery, BOYLE began spending large amounts of cash for which there is no source other than bank robbery. On January 22, 2013, BOYLE deposited $1500 in cash into his wife's account. On January 24, 2013, just a few days after the robbery, BOYLE paid $2000 in cash to his dentist. On February 1, 2013, BOYLE deposited another $600 in cash into his wife's account. On March 18, 2013, BOYLE paid his dentist another $8000, including $4000 in cash. On March 13, 2013, BOYLE deposited $4010 in cash into his Citibank account.

On January 30, 2013, twelve days after the robbery, BOYLE met with his parole officer and told her that he felt like he was getting "his life together" and did not have any "problems to

report." The government evidence will show that BOYLE was not working and had no source of income, other than the bank robberies, for these large cash expenditures. BOYLE's life was getting "his life together" and solving his financial problems through the proceeds of the bank robberies.

**4. PNC Bank, 1015 Bethlehem Pike, Ambler**

On Saturday, March 30, 2013, at approximately 8:30 a.m., BOYLE robbed the PNC Bank, 1015 Bethlehem Pike, Ambler, Montgomery County, Pennsylvania at gunpoint. Prior to the robbery, BOYLE placed a diversionary call to distract the police while he robbed this bank. BOYLE wore a brown suit jacket, light blue button-down shirt, dark pants, a tie, light green rubber gloves, and a pillowcase over his head with the eyeholes cut out. Armed with a black semi-automatic pistol, he ordered everyone in the bank to the floor and instructed three bank tellers to empty both of their drawers. BOYLE placed $29,777.00 into a black Nike drawstring backpack. BOYLE was last seen heading on foot north on Bethlehem Pike, towards Ambler Borough. The bank surveillance video showed him walking a considerable distance away from the bank, beyond the range of the cameras, in an effort to avoid repeating the same mistake which he made in 2008.

After this robbery, BOYLE began spending large sums of cash – the only possible source of which is the bank robbery. On March 30, 2013, BOYLE deposited $1,800 cash into his landlord's bank account. On April 2, 2013, BOYLE paid another $6,533.25 to his dentist. On the same day, April 2, 2013, he deposited $7,075 in cash into his bank account. On April 15, 2013, he deposited $3,000 cash into his wife's bank account. On May 6, 2013, BOYLE met with his parole officer and told her "all continuing to go well."

**5. Harleysville Savings Bank, 1889 East Ridge Pike, Royersford**

On Friday, May 24, 2013 at approximately 4:40 p.m., BOYLE robbed the Harleysville Savings Bank, 1889 East Ridge Pike, Royersford, Montgomery County, Pennsylvania at gunpoint. BOYLE wore a black baseball hat, black hooded face mask, tan zip-up jacket, and blue rubber gloves. BOYLE entered the bank, brandished a gun, ordered a customer to the floor, and instructed the teller to give him all of the money in the top and bottom drawers. He demanded $20's, $50's and $100 bills, and no dye packs. He then approached a second teller and made the same demands. He then walked out of the bank, across the parking lot, and through a hedge row. Witnesses reported that they saw the dye pack explode as he was walking across the parking lot. While no money was recovered, the stained bills would have been difficult to use, thus, necessitating a second bank robbery on the same day (see Univest Bank below). A bank audit determined the loss to be $13,854.

**6. Univest Bank, 4285 Township Line Road, Schwenksville**

On the same day as the Harleysville Savings Bank robbery and only minutes later, Friday, May 24, 2013, at approximately 5:12 p.m., BOYLE robbed the Univest Bank, 4285 Township Line Road, Schwenksville, Montgomery County, Pennsylvania at gunpoint. The tellers stated that the robber was an older white male, "6'1 to 6'3, 200-210 pounds" (BOYLE was about 6'1, 210 pounds). BOYLE wore a black baseball hat, black hooded mask, tan zippered jacket, dark pants and green rubber gloves. BOYLE entered the bank, approached a teller, handed her a plastic bag and stated "put your money in the bag, no dye backs, and both drawers." After the teller complied, BOYLE approached a second teller and made a similar demand. After that teller complied, BOYLE took the bag, and walked out of the bank and across a field in attempt to avoid

making the same mistake as he did in the 2008 robberies. A bank audit determined the loss to be $13,365.

Based upon the video evidence, there is no question that the same person committed the Harleysville Saving Bank and the Univest Bank robberies. The robber did not even bother to change his clothes. Moreover, if BOYLE was traveling from the Harleysville Saving Bank to his home after the robbery, he would likely pass the Univest Bank.

On August 1, 2013, BOYLE reported to his parole officer that he had been "painting" and that he was still looking to "downsize" because he could not afford his current home. Nonetheless, BOYLE continued to pay his rent and other household expenses. The government's evidence will show that BOYLE did not earn this money as a painter but rather from the proceeds of the charged bank robberies.

**7. Wells Fargo Bank, 25 West Skippack Pike, Ambler**

On August 29, 2013, the day before the robbery, BOYLE purchased a 2006 Nissan Sentra for $7,624.80 for his daughter. BOYLE initially presented a check from his wife to purchase the car. A few minutes later, BOYLE then took back the check and gave the dealer $7624.80 in currency. BOYLE told his wife in a text message the he got the money gambling at a Parx casino – which casino records refute. BOYLE further told his wife that he needed to "win" more money the following day (August 30 – the day of the robbery) to pay for "rent, phone, cable, and extras." Cryptically, his wife asked, "??? Is it ok to go 2 days in a row"? BOYLE replied that he would be going to a different casino, Valley Forge Casino, the following day (August 30). His wife

replied, "Pls be careful".[4]

On Friday, August 30, 2013 at approximately 12:56 p.m., BOYLE robbed the Wells Fargo Bank, 25 West Skippack Pike, Ambler, Montgomery County, Pennsylvania at gunpoint. Prior to the bank robbery, BOYLE placed two diversionary phone calls: one was a bomb threat to the Meadowlands Country Club and the other call reported a man with a gun at Temple University, Ambler Campus. The purpose of the calls was to slow the police response time to the bank robbery alarm.

During the robbery, BOYLE wore a loose black mask with thinner material over the eyes and face, light colored gloves, light colored blazer, and tan khaki pants. After entering the bank, BOYLE paused briefly behind a placard to pull a mask over his head. He held a handgun, which he wrapped in plastic as he moved toward a Personal Banker's office, and demanded that the banker open the vault. When the banker advised he could not open the vault himself, BOYLE took him to the teller area, where he distributed black nylon bags and demanded the tellers place money from their top and bottom drawers into the bags.

BOYLE then took the banker to the ATM room, and again the banker advised he could not open it alone. BOYLE demanded that he find someone who could help him, so the banker departed the teller area and quickly ducked into his office, retrieved his cell phone, and continued out of the bank with several customers who had entered. Once outside, the banker called 911. BOYLE, still inside the bank, then demanded two other employees to accompany him to the ATM, where he placed the contents into one of his black bags. He then departed the area. Once

[4] The investigators have subpoenaed records from various casinos. The records show that BOYLE occasionally visited the casinos, but they do not reflect any sort of gambling, let alone winnings, which could possibly account for the funds coming into the bank accounts.

outside, BOYLE saw the banker across the street and demanded, "Hey you, come here." BOYLE then heard the approaching sirens and ran towards what appeared to be a blue, four-door, BMW, got inside and fled the scene heading north on Ivy Road. A bank audit determined the loss to be $74,337.00.

On August 31, 2013, BOYLE deposited $1000 cash from the robbery into his wife's bank account and $1500 cash into his landlord's account to pay his rent. On September 6, 2013, BOYLE paid $2565 in cash to his dentist. Furthermore, after the robbery, BOYLE's son, Liam, sold a blue, four-door, BMW which BOYLE had previously given to him.

On October 1, 2013, BOYLE deposited $500 cash into his wife's bank account. In November 2013, BOYLE reported to his parole officer that he was still looking for a smaller apartment to rent, however, he had no other problems to report.

**8. First Priority Bank, 10 Sentry Parkway, Blue Bell**

On January 2, 2014, the day of the robbery, BOYLE texted his daughter, Abby, to ask her if he could borrow her car that afternoon to go to "Parx" Casino. BOYLE did not go to Parx Casino, rather, BOYLE used the car to rob the First Priority Bank in Blue Bell.

On Thursday, January 2, 2014, at approximately 2:28 p.m., BOYLE robbed the First Priority Bank, 10 Sentry Parkway, Blue Bell, Montgomery County, Pennsylvania at gunpoint. BOYLE wore a shiny black mask with no nose or mouth cutouts, large black sunglasses, blue or black knit gloves, black or dark blue pants, a sweatshirt, and blue shoes. BOYLE displayed a gun and slid a reusable green and orange grocery bag marked with a "peace" symbol to the teller, demanding the teller to give him all the $50 and $100 bills, no bait bills or dye packs. He then demanded the money from the second drawer of the same teller. BOYLE then commanded the

teller and another employee to go into the vault. The two employees gave BOYLE the fifty and one hundred dollar bills he requested, and he then asked for the twenty dollar bills. After cleaning out the vault, he asked for the cash from the ATM, however, the ATM was not accessible at that time. BOYLE told the employees to wait for three minutes before exiting the vault. An audit determined that approximately $60,000.00 in U.S. Currency was taken during the robbery.

BOYLE's motivation to commit this particular robbery was to pay his daughter's (Abby) tuition at Temple University. On January 2, 2014, the day of the robbery, BOYLE sent a text message to his wife indicating that he got his daughter's tuition money. On January 6, 2014, BOYLE paid $5,015 to Temple to pay for his daughter's tuition from the proceeds of the bank robbery. Later that day, BOYLE texted Abby and stated, "Your tuition has been paid in full." Abby replied, "You're awesome. So I don't have a financial hold anymore??" BOYLE responded, "Nope."

On January 8, 2014, BOYLE met with his parole officer and asked for permission to go to Florida for job training in aerial photography. On January 29, 2014, BOYLE told his parole officer that he had completed the aerial photography training but was still looking for work and a smaller place to live. In February 2014, BOYLE admitted that his painting business had been "slow." He reported that he wanted to move to a smaller apartment but could not afford the security deposit. In May 2014, BOYLE told his parole officer that he started his own aerial photography business called "Sky Eye View," however, he admitted that he had not made any money on this venture. He admitted that his rent was $1600 per month and he wanted to find a smaller place to live. In August 2014, BOYLE reported that his drone camera crashed and that he was "out of business" until it was fixed. In December 2014, BOYLE reported to his parole

officer that his work was "slow" due to poor weather.

BOYLE's spending habits during this time period were not consistent with someone having financial problems and not earning legitimate income. In January and February of 2014, BOYLE purchased several thousand dollars' worth of camera equipment from B&H Photo in New York, in the same manner that he purchased camera equipment from the proceeds of the 2008 robberies. On May 2, 2014, BOYLE purchased $4,381.57 worth of camera equipment from B&H. On May 7, 2014, BOYLE purchased a $4,395 Rolex watch from First Pennsylvania Previous Metals in Warrington, PA using U.S. currency. On May 13, 2014, BOYLE bought more than $10,000 worth of goods from B&H Photo. On June 8, 2014, BOYLE bought $2,535.24 worth of goods from B&H Photo. On July 15, 2014, BOYLE purchased a 2005 Acura sedan at Fred Beans Subaru for $13,712 – all in U.S. currency. Between July 16 and November 19, 2014, BOYLE deposited more than $17,000 in cash into his Sky Eye View business account. On November 19, 2014, he paid another $1000 to his dentist. All of these funds were proceeds from the bank robberies as BOYLE admittedly had no other source of income during this time period.

**9. Wells Fargo Bank, 481 West Germantown Pike, Plymouth Meeting**

On Tuesday, January 6, 2015 at approximately 9:27 a.m., BOYLE robbed the Wells Fargo Bank, 481 West Germantown Pike, Plymouth Meeting, Montgomery County, Pennsylvania at gunpoint. BOYLE wore a blue and black jacket with a blue hood and a "GE" logo, a black mask covering his face with a black sheer material covering the eyes, and dark blue or black pants. BOYLE approached a teller window, brandished a handgun and demanded cash from the teller's drawer. BOYLE provided the teller with a black nylon bag with drawstrings. The teller complied with the demands, and BOYLE then demanded the contents of the other tellers' drawers. He

ordered an employee and a customer to lie on the floor. He then demanded someone open the ATM. An employee complied with this demand, and BOYLE fled the bank on foot towards the parking lot of an adjacent store. An audit determined that $90,618 in U.S. Currency was taken during the robbery.

On January 6, 2015, BOYLE deposited $1600 cash into his business bank account. On January 7, 2015 (the day after the robbery), BOYLE paid $12,000 in cash to his dentist for his wife's dental bill. BOYLE later deposited additional cash into his bank account, totaling more than $10,000 in U.S. currency that month. He made additional smaller deposits in February and March. On February 19, 2015, BOYLE paid another $5,500 to his dentist.

Right after the robbery, BOYLE took a trip to Florida with his son, Liam. BOYLE rented a villa in Islamorada, FL from January 14, 2015 to February 14, 2015. The realtor recalled that he did not have a reservation, BOYLE just showed up looking for a place to rent. BOYLE paid $4,055 in U.S. currency. Other records reflect that, on January 12, 2015, BOYLE paid $5,835.78 in cash at an Apple Store in Brandon, FL. On January 14, 2015, he paid $140.91 in cash at Office Depot in Key Largo, FL. On January 14, 2015, he paid $253.14 in cash at World Wide Sportsman in Islamorada, FL. On January 29, 2015, BOYLE paid $299.56 in cash at Dick's Sporting Goods in Miami. BOYLE then took a trip to Las Vegas. On April 14, 2015, BOYLE spent $652.22 at the Flamingo Hotel in Las Vegas.

On March 20, 2015, BOYLE lied and told his parole officer that his photography business was going "quite well" and that his son had been working with him. In reality, BOYLE was not earning any money from his photography business. In June 2015, BOYLE falsely stated to his parole officer that his business was "lucrative" and that they were busy all the time. To the

contrary, his business bank account records and his tax returns reflect that he had little to no income from his photography business and his son confirmed that the photography business generated little to no income. On June 17, 2015, BOYLE spent another $3976.33 at B&H Photo and another payment of $2,431.25 on June 30. On June 29, he made a payment of $2315 to his dentist – all from the proceeds of the bank robberies.

**10. Wells Fargo, 1675 Limekiln Pike, Dresher**

On Friday, July 3, 2015, at approximately 10:27 a.m., BOYLE robbed the Wells Fargo Bank, 1675 Limekiln Pike, Dresher, Montgomery County, Pennsylvania at gunpoint. At 9:30 a.m. (about an hour before the robbery), BOYLE texted his son, Liam, and stated, "I'll be back in a few. Keep an eye on Milo [his dog] until I get back. Thanks Liam." During the robbery, BOYLE wore a "bucket" hat, dark sunglasses, and a red bandana over his nose and mouth, a blue business suit and white rubber gloves for a reported robbery. BOYLE carried a black pistol and provided shiny green bags to the tellers, instructing them to place their money in the bags with no dye packs or GPS devices. BOYLE also demanded money from a day safe, located behind the teller counter. After about three to five minutes, BOYLE fled on foot. An audit determined that BOYLE stole $89,371.

On July 3, 2015, the same day as the robbery, BOYLE made two ATM deposits into his business bank account for $3450 and $1950. BOYLE also made a $1550 deposit into his landlord's account on the same day. Three days later, on July 6, he made another $780 deposit into his business bank account. On July 14, 2015, he made a $3000 payment to his credit card. On July 16, he purchased $1614.16 from B&H Photo. Towards the end of July, he deposited more than $4000 into his business bank account – all from the proceeds of the bank robbery.

**11. PNC Bank, 1216 Welsh Road, North Wales**

On Saturday, July 2, 2016 at approximately 10:13 a.m., BOYLE robbed the PNC Bank, 1216 Welsh Road, North Wales, Montgomery County, Pennsylvania at gunpoint. Prior to the robbery, BOYLE used a TracFone to place diversionary calls to 911, Montgomery Township Police, and the Montgomery Mall Security. All the calls stated that two dark skinned males were planning some sort of an attack at the Montgomery Mall.

While the police were responding to this hoax, BOYLE robbed the PNC Bank in North Wales. BOYLE was wearing a dark sports coat, tie, gray pants, tan "boonie" hat and a canvas type covering with the eyes cut out and a dark colored semi-automatic. BOYLE followed a customer into the bank. At that time, BOYLE gave the three tellers plastic shopping bags and demanded large bills. BOYLE also demanded U.S. Currency from the vault and wanted the keys to the ATM. An audit determined that BOYLE stole $32,744.00.

The investigators began by examining the records for the TracPhone used to place the diversionary calls. They determined that the TracPhone was purchased on May 26, 2016 at a Target in Warrington. During the time that the TracPhone was purchased, BOYLE's mobile phone was connecting to the tower covering that Target store. Moreover, based on IP addresses, the FBI determined that the TracPhone was activated at a Bucks County Free Library branch on June 27, 2016 between 2:33 p.m. and 2:37 p.m. The FBI then obtained surveillance video from various branches, including the Warminster branch of the library. The video showed BOYLE entering the Warminster branch at that time to activate the TracPhone which BOYLE used to place the diversionary call before the robbery.

On July 3, 2016 (the day after the robbery), BOYLE booked a trip to Las Vegas. On July

5, 2016, BOYLE deposited $4,900 cash into his business bank account and a $1,575 cash deposit into his landlord's account. On July 6, BOYLE paid $5,500 toward his credit card and on July 7, 2016, paid another $5,750 toward another credit card. On July 7, he deposited $5,690 in cash into his business bank account – all from the proceeds of the bank robbery.

## III. DISCUSSION

### A. Rule 404(b)

The government seeks this Court's ruling in limine that several of BOYLE's "other crimes, wrongs, or acts" are admissible under the Federal Rules of Evidence, as discussed below.

Rule 404(b) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The drafters of Rule 404(b) "intended to emphasize the admissibility of other crimes evidence." United States v. Long, 574 F.2d 761, 766 (3d Cir. 1978). This emphasis is consistent with the long history in the Third Circuit of favoring admission of such evidence, "if relevant for any other purpose than to show a mere propensity or disposition on the part of the defendant to commit the crime." Id.; see also United States v. Simmons, 679 F.2d 1042, 1050 (3d Cir. 1982); United States v. Dansker, 537 F.2d 40, 58 (3d Cir. 1976).

The Supreme Court has held that evidence is admissible under Fed. R. Evid. 404(b) when the following requirements are satisfied: (1) a proper evidentiary purpose; (2) relevance under Fed. R. Evid. 402; (3) a weighing of the probative value of the evidence against its prejudicial

effect under Fed. R. Evid. 403; and (4) a limiting instruction concerning the purpose for which the evidence may be used. See United States v. Console, 13 F.3d 641, 659 (3d Cir. 1993) (citing Huddleston v. United States, 485 U.S. 681, 691-92 (1988)).

Ultimately, Rule 404(b) is a rule of inclusion, not exclusion. Console, 13 F.3d at 659; United States v. Sampson, 980 F.2d 883 (3d Cir. 1992); Government of Virgin Islands v. Edwards, 903 F.2d 267, 270 (3d Cir. 1990). "Thus, the burden on the government is not onerous. All that is needed is some showing of a proper relevance. Whereupon the trial court must judge the government's proffered reason, the potential for confusion and abuse, and the significance of the evidence, and decide whether its probative value outweighs its prejudicial effect." Sampson, 980 F.2d at 888. "The parameters of Rule 404(b) are not set by the defense's theory of the case; they are set by the material issues and facts the government must prove to obtain a conviction." Id.

Where the government offers bad act evidence, "it must clearly articulate how that evidence fits into a chain of logical inference, no link of which can be the inference that because the defendant committed . . . offenses before, he therefore is more likely to have committed this one." Sampson, 980 F.2d at 886. Once the government has done so, the district court must weigh the probative value of the evidence against its potential to cause undue prejudice and articulate a rational explanation on the record for its decision to admit or exclude the evidence. See United States v. Himelwright, 42 F.3d 777, 780 (3d Cir. 1994); United States v. Jemal, 26 F.3d 1267, 1272 (3d Cir. 1994); Sampson, 980 F.2d at 889; see also Huddleston, 485 U.S. at 691. Evidence is unfairly prejudicial if it suggests a decision on an improper basis. See Fed. R. Evid. 403, Advisory Committee Note. "Rule 403 makes explicit that the law shields a defendant 'against

unfair prejudice, not against all prejudice.'" United States v. Smith, 292 F.3d 90, 99 (1st Cir. 2002) citing United States v. Candelaria-Silva, 162 F.3d 698, 705 (1st Cir. 1988) (internal quote marks omitted) and United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989) ("[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided."). See United States v. Johnson, 199 F.3d 123, 128 (3d Cir. 1999) ("'In weighing the probative value of evidence against the dangers ... in Rule 403, the general rule is that the balance should be struck in favor of admission'") (quoting United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980)). The district court's weighing process under Rules 404(b) and 403 are reviewed only for abuse of discretion, and the district court receives considerable leeway. See Sampson, 980 F.2d at 886.

Whatever danger of prejudice associated with the proffered 404(b) evidence can be ameliorated through a proper limiting instruction. As the Third Circuit has stressed, a limiting instruction will eliminate any potential for unfair prejudice and ensure that the jury does not consider the evidence for an improper purpose. United States v. Sriyuth, 98 F.3d 739, 748 (3d Cir. 1996); Sampson, 980 F.2d at 886. As the Third Circuit has observed, "We note ... that it is a basic tenet of our jurisprudence that a jury is presumed to have followed the instructions the court gave it, see United States v. Gilsenan, 949 F.2d 90, 96 (3d Cir. 1991), and the court's [limiting] instructions did not allow the use of the evidence [to establish the defendant's criminal propensity]. If we preclude the use of evidence admissible under Rule 404(b) because of a concern that jurors will not be able to follow the court's instructions regarding its use we will inevitably severely limit the scope of evidence permitted by that important rule." Givan, 320 F.3d at 462.

**B. Application**

In applying the Huddleston test for the admission of 404(b) evidence, the government can show that all four elements are met for the admission of the proffered 404(b) evidence. First, the government offers the proffered evidence for proper evidentiary purposes. In fact, the proffered evidence proves a panoply of 404(b) factors.

- First, the prior convictions shows BOYLE's motive for committing the bank robberies. In his prior sentencing hearing, BOYLE admitted that he committed the prior robberies because he was about to be evicted from his home. Here, prior to the first robbery, BOYLE was served a notice of eviction. BOYLE then continued to use the proceeds of the bank robberies to pay for living expenses, including his rent. BOYLE, therefore, had the same motive to commit the two sets of robberies, namely his "panic of losing my house." Importantly, this motive is both highly probative and unique to BOYLE - before embarking on both strings of robberies BOYLE was confronted with the potential immediate loss of his home; he began robbing banks out of "panic" and then could not stop - as distinct from simply the general desire for money which animates many robbers. Moreover, the rental payments were for the same home in both sets of robberies. When this evidence is combined with the evidence that BOYLE had not been working and had told his parole officer that he needed to find a less expensive house in which to live, BOYLE's motive to commit the robberies becomes crystal clear.
- Second, the prior convictions show BOYLE's intent. In his prior sentencing hearing, BOYLE admitted that although he initially used the proceeds from the bank robberies for home related expenses, he then got "greedy" and robbed additional banks to pay medical

bills, make car payments, pay tuition, and buy photography equipment. The same is true here. The evidence shows that BOYLE used the proceeds of the initial robbery to pay back rent and then used the proceeds from additional bank robberies to pay medical bills, make car payments, pay tuition, and buy photography equipment. The photography equipment in particular are quite unusual items to buy from the proceeds of bank robberies and constitute part of BOYLE's *modus operandi*. The identical pattern between the 2008 robberies and the currently charged robberies demonstrates BOYLE's purposes and intent in carrying out the second string of robberies.

- Third, the prior convictions show BOYLE's plan. In his prior sentencing hearing, BOYLE admitted that he used the proceeds from the bank robberies to purchase photography equipment with the plan to operate a successful photography business. Here, the evidence shows that BOYLE used the proceeds from these bank robberies to buy photography equipment with the plan to operate a successful aerial photography business. BOYLE's statements to his parole officer further illuminate his plan. On some occasions, BOYLE admitted that he was not making any money through his photography business, yet he continued to pay his rent and other personal expenses. The only possible source of that income was the proceeds of the bank robberies. On other occasions, BOYLE lied to his parole officer and stated that his business was successful, when BOYLE's financial records and other evidence conclusively proves that his business was not successful. BOYLE's false statements to his parole officer further evidence his plan to launder the proceeds of the bank robberies through his moribund photography business.
- Fourth, the prior convictions show BOYLE's preparation. BOYLE learned several

significant lessons from his prior bank robberies. BOYLE was caught because he parked too close to a bank and his vehicle was observed on camera. BOYLE learned his lesson from this mistake and took pains not to repeat it. For this series of robberies, BOYLE always parked far away from the bank. Indeed, bank surveillance video shows BOYLE fleeing long distances on foot after robbing the victim banks, running through hedgerows and empty fields. BOYLE also borrowed a car from one of his children to commit some of the robberies, rather than using his own car, the mistake that ultimately led to his arrest in the 2008 robberies. Thus, BOYLE's efforts to overcompensate for his 2008 errors help the government to reveal his preparation and identity for the current charges.

- Fifth, the prior convictions show BOYLE's identity. BOYLE used the same techniques in both series of robberies. During the robberies BOYLE often wore a jacket, tie, and hat (occasionally a broad-brimmed beach hat, which gave rise to his distinctive nickname). He always covered his face. Notably, he always left his mobile phone at home. He almost always used a firearm.[5] He always demanded money verbally. He often provided the tellers with bags in which to place the money[6] and performed what is known as a bank take-over.[7] In all of the robberies, BOYLE acted alone - a rarity in take-over robberies -

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[5] Bank robbers use firearms in very few bank robberies (because of the mandatory minimum sentences involved). Most bank robberies are "note jobs" or verbal demands. Between 2012 and 2016 in Philadelphia County, there were 368 bank robberies. Of those 368 bank robberies, only 25 involved a firearm being carried or brandished. BOYLE carried a firearm in 10 of the 11 bank robberies. He brandished the firearm in 9 of those 10.

[6] It is also unusual for bank robbers to force a bank employee to open the vault or ATM. Most bank robbers only take money from the teller drawers. In 7 of the robberies, BOYLE either obtained money from the vault or attempted to obtain money from the vault.

[7] It is also unusual for bank robbers to take over the entire bank as opposed to just approaching one teller. BOYLE often herded employees and customers into an office or forced

and almost immediately demanded access to bottom drawers, ATMs, and vaults, places that he knew were likely to contain the most cash. He also regularly instructed victim tellers not to trigger silent alarms or provide dye-packs, thereby demonstrating a familiarity with banks' anti-robbery countermeasures. The witnesses' descriptions of BOYLE's appearance and behavior in both strings of robberies is also remarkably consistent. All of the victims described the robber as an older, heavy-set, white male, at least six feet tall – a general description which matches BOYLE (who is about 6'1 and weighed in excess of 200 pounds at the time of the bank robberies). They also described the robber as being calm and soft-spoken, but impatient to receive the money. All of the banks that BOYLE robbed were in the same general area of Montgomery County and Bucks County relatively near BOYLE's home in Doylestown. This target area is yet another telltale part of BOYLE's *modus operandi*. As he admitted for the 2008 robberies, all of the banks he robbed were within 20 miles of his home.

In considering whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, Rule 404(b) "does not establish a mere imbalance as the standard, but rather requires that the evidence 'may' be barred only if its probative value is 'substantially outweighed' by prejudice." United States v. Long, 574 F.2d 761, 765 (3d Cir. 1978). In part, this means that the test is almost surely not met where the probative value of the evidence is itself high. The remedy is "extraordinary," and should be applied sparingly; the balance should be

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them to lie down on the floor. Furthermore, most take-over robberies are committed by multiple offenders. BOYLE always entered the bank alone. BOYLE executed a take-over robbery in 9 of the 11 bank robberies. One-man bank take-over robberies is a signature which is virtually unique to BOYLE.

struck in favor of admissibility. United States v. Terzado-Madruga, 897 F.2d 1099, 1117 (11th Cir. 1990); accord, United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980); United States v. Day, 591 F.2d 861, 878 (D.C. Cir. 1978).

In this case, the probative value of the proffered evidence is very high and the risk of unfair prejudice is low under Rule 403. The quintessential example of unfair prejudice under Rule 403 is the United States v. Cunningham, 694 F.3d 372 (3d Cir. 2012). In that case, the Third Circuit held that the probative value of video excerpts of pre-pubescent children being bound, raped, and violently assaulted was substantially outweighed by danger of unfair prejudice. The Third Circuit found that the evidence presented was the "kind of highly reprehensible and offensive content that might lead a jury to convict because it thinks that the defendant is a bad person and deserves punishment, regardless of whether the defendant committed the charged crime." Id. at 386 (citing United States v. Gonzalez–Flores, 418 F.3d 1093, 1098 (9th Cir. 2005). Certainly, the facts of Cunningham are not the only examples of inflammatory evidence, but this is the type of unfair prejudice which Rule 403 is designed to preclude.

In this case at bar, there is no chance that the proffered evidence will inflame the passions of the jury and induce the jury to convict because the defendant is a bad person and deserves punishment, regardless of whether the defendant committed the charged crime. The proffered evidence establishes BOYLE's motive, opportunity, intent, preparation, plan, knowledge, identity. The proffered "bad acts" are exactly the same type of conduct as the charged conduct, rather than some other type of conduct which could be potentially inflammatory. The true risk here is that the jury would use the fact that BOYLE has a prior bank robbery conviction to show propensity. However, the law provides that any prejudice of that nature can be cured with a

limiting instruction which specifically instructs the jury that they should consider this evidence only for a limited purpose and that the jury is specifically precluded from considering that evidence to show propensity. The prosecutor should also remind the jury in the government's closing arguments that they are precluded from using the 404(b) evidence to show propensity and that they can only use this evidence for a limited purpose.

Therefore, the government has met all of the elements under the Huddleston test and the government's proffered 404(b) evidence should be admitted at trial.

## IV. CONCLUSION

For these reasons, the government respectfully requests that this Court rule that the proffered evidence is admissible under the Federal Rules of Evidence.

Respectfully submitted,

LOUIS D. LAPPEN
United States Attorney

/s/
ROBERT J. LIVERMORE
SEAN P. MCDONNELL
Assistant United States Attorneys

**CERTIFICATE OF SERVICE**

I certify that, by electronic filing, I have served or caused to be served a copy of the foregoing upon:

Nino Tinari, Esq.
Counsel to RICHARD BOYLE

/s/
ROBERT J. LIVERMORE
Assistant United States Attorney

A. It was probably -- because it was based on the weather when the weather was good, it was probably around a month.
Q. A month?
A. Yes.
Q. Okay.
MR. LIVERMORE: Thank you, sir.
THE COURT: Anything more, Mr. Tinari?
MR. TINARI: No further questions for my client.
THE COURT: Mr. Boyle, you can step down.
Okay, is there anything more, gentlemen, as to what brought us together here today?
MR. LIVERMORE: Not on that motion from the Government, Your Honor.
THE COURT: The 404(b).
MR. LIVERMORE: Correct.
THE COURT: Anything else on this particular motion?
MR. TINARI: No, Your Honor.
THE COURT: Okay. Turning to the 404(b), do you want argument? Is this what --
MR. TINARI: Well, we responded to their motion, Your Honor, and Your Honor's aware that in this matter, especially if you permit the 404(b) material to come in, we know it's prejudicial. The question is, is it so --
THE COURT: Well, evidence is always prejudicial.
MR. TINARI: Yes, that's the standard line I hear

time and time again, Your Honor, but we're talking about something that's beyond prejudicial because if this information comes in, Your Honor, there's no doubt that no matter what kind of cautionary instruction the Court would give and I know that there's the argument that the jury --

THE COURT: Not that it's just an argument. It's pretty much --

MR. TINARI: It's probably --

THE COURT: It's a tenet of jurisprudence. You know, you can't have a criminal justice system that assumes juries are not following instructions.

MR. TINARI: That's true except that, of course, when we really put it in practicalities, we know what occurs; human nature being as it is.

But irrespective of that, just those robberies, bank robberies that we're talking about then certainly is going to have a tremendous overwhelming prejudicial effect in this matter, Your Honor.

I think the Government, at least from their perspective as I understand it, has much evidence that they want to present. There's been a lot of discovery, a lot of investigation. That seems to me to be sufficient for them to put forward their case without having to put this additional evidence in that is overwhelmingly prejudicial that it outweighs its probative value. When you have that amount of

evidence that they claim they have, then there's no need to put this additional evidence in because all it does is emotionalizes the jury, I suggest to the Court, and that's the reason we say that once you balance it out, that the prejudicial effect is so overwhelming so much so that it outweighs the probative value here, Your Honor.

THE COURT: Okay. Do you have a response to the Government's review of your use of the Davis case?

MR. TINARI: No, I don't have it at the moment, Your Honor, but I know that they had cited it.

THE COURT: Well, basically, they're drawing a distinction between that case and this one in terms of the prior conviction in Davis relating to one particular crime whereas the actual issue at hand was another, was different.

MR. TINARI: Right.

THE COURT: It seems to me, Mr. Tinari, that the operation of law on some of these kinds of 404(b) questions really requires an analysis under Huddleson, and the Government has made it out here, and it may be when I see ultimately the way the case is going in, it may be that you can revisit the issue of an over-the-top kind of prejudice problem, but for now, I'm going to grant the Government's motion.

MR. TINARI: Well, let me -- may I inquire of the Court whether or not Your Honor's going to permit them to

bring it in on their case-in-chief or at some other time period?

THE COURT: Well, I think that we have -- since we don't have a trial date, we can always revisit that again.

MR. TINARI: Okay.

THE COURT: It's always important for counsel, both the Government's counsel and defense counsel, to work on trial strategy as the trial date looms. My experience is that people tend to change their plans or at least modify their plans when we have a date and that's certainly something that you and Mr. Livermore can confer about.

MR. TINARI: Very well, Your Honor.

MR. LIVERMORE: In terms of the date, Your Honor, or --

THE COURT: In terms of when you plan to introduce your evidence and under what circumstances. But for now, the motion's been granted.

MR. LIVERMORE: Thank you, Your Honor.

THE COURT: Sometimes my experience, Mr. Tinari, is that strategic and technical decisions sometimes are made that aren't necessarily just devoted to a ruling, but that's not my job.

MR. TINARI: Okay. Very well, Your Honor.

THE COURT: My job is simply to figure out whether the law has been met.

(Jury panel left.)

THE COURT: Okay?

MR. TINARI: Your Honor, may we before we leave, may we speak to a matter that may be of some necessity to clear up?

Your Honor has informed the Government they're in the position and should not be in a position to talk about the 404(b) --

THE COURT: Right.

MR. TINARI: However, on Monday, they'll have witnesses that will be speaking about the bank robberies in the past.

As I think we had this discussion, I thought that it would be better and should be better that we wait until the -- at the rebuttal stage if that is the appropriate time to bring in 404(b) material and that's what I'm requesting again, that this Court --

THE COURT: Well, enlighten me as to what witnesses and what --

MR. TINARI: Well there's a witness by the name of Greg Dietz. He's a state trooper. He's going to talk about the 2008 robberies as well as Aileen Sabol. I think I'm pronouncing her name correctly.

MR. LIVERMORE: Yes, she is the probation officer.

MR. TINARI: Yeah, she's the parole officer. So

we're right at almost immediately the 404(b) material and that was the concern that we discussed before and that perhaps the better -- so we can avoid an immediate prejudice, and evidence is always prejudicial, and it's prejudicial here, but perhaps the 404(b) material should come in after if the Government has not been able to establish its case without the 404(b) material.

THE COURT: Mr. Livermore.

MR. LIVERMORE: Judge, you ruled on this. The Court has ruled on this. The evidence is coming in and we're going to comply with the Court's ruling on that in terms of what evidence we can present. We intend to do that in our case in chief.

Judge, I know Mr. Tinari has asked that it be excluded. I know he's asked that the Government should hold it in rebuttal, but that was not what the Court ordered. We argued this, Judge. There's an order on that.

THE COURT: I'm looking here to pull up the -- which opinion it is.

Kat, which one is it? Docket 39?

On May 1st, 2017. The order itself is a little -- I've written better ones, but the evidence of the prior convictions in Montgomery County and information provided by the defendant to the Parole Board or parole officer was specifically ruled on in terms of that motion.

MR. TINARI: That's correct, Your Honor, but what I'm suggesting, that even though Your Honor ordered at that time, we're also asking the Court to reconsider that that evidence come in later rather than immediately and I don't think the order states -- maybe I'm reading --

THE COURT: Well, I wouldn't presume to say when it's going to come in.

MR. TINARI: That's the point. The Government is of a mind that Your Honor ruled that it should come in in the case-in-chief and that's not exactly, it's my understanding, the wording of the order. So that what occurs, Your Honor, is that if the Government is not going to speak to the 404(b) matters and then he presents the 404(b) material, and I have not spoken about it, then here the jurors are going to listen to evidence where I have not had the opportunity to explain it prior to it going into evidence and that even makes it even more prejudicial.

THE COURT: Well, I mean, that happened.

MR. TINARI: Well.

THE COURT: Let me just say --

MR. TINARI: Yes.

THE COURT: -- now that I'm looking at the May 1st, 2017 order, which is -- I think it has a docket number, but I want to make sure that there was never any misunderstanding or ambiguity that the order was granting the Government's 404(b)

motion.

MR. TINARI: You did that. There's no question about that. We're not arguing that at this point.

THE COURT: To the extent that the language of the actual order might not be as clear as it should have been, it is clear. It's clear to everybody that's involved in the case that the motion was granted.

MR. TINARI: Yes, I don't think there's any --

THE COURT: And I wasn't perceiving you as quarreling with that.

MR. TINARI: We argued that. Your Honor heard the arguments. The question is the timing at this point.

We're --

THE COURT: Well, again, Mr. Tinari, I can't really comment on whether or not the -- the effect or the possible effect or how you deal with it is, you know, better, worse, early, or late in a fairly long case. I don't know. I can't really assess that.

MR. LIVERMORE: Judge, if I might, I do agree with Mr. Tinari's last point and, that is, Judge, I think that both parties, prosecution and the defense, should be able to comment on that in the opening statement and I don't think that the first time that the jury hears about this evidence is going to be from a witness. I think Mr. Tinari should be able to comment in his opening statements as to this evidence and,

you know, I think both parties should.

MR. TINARI: Well, that wasn't the point I was trying to make. The point I'm trying to make is that the Government -- and Your Honor has reflected upon it and has made the determination that the opening remark by the Government should not be dowsed with 404(b) material. We already made -- Your Honor talked about that and I think you decided that what I do --

THE COURT: What you do, Mr. Tinari, is within reason -- I have no reason to think it won't be within reason -- and is up to you. I wouldn't presume to tell you how to play it, so to speak.

MR. TINARI: Yes.

THE COURT: I think I've leveled the playing field as much as I possibly can and I'm not going to intrude on the order of presentation of witnesses.

MR. TINARI: Thank you, Your Honor.

THE COURT: Okay. Anything else?

MR. TINARI: So just to be clear, he is not going to speak in his opening about the 404(b) material?

THE COURT: I think that's correct.

MR. TINARI: Thank you.

THE COURT: So anything else?

MR. LIVERMORE: Nothing.

MR. TINARI: I'm sorry, I didn't mean to turn my

arguments. Arguments are different from statements, but I'll explain all that to you later. And only after all of that, then I give you the instructions and then you get to deliberate.

So we're going to be together for, as I indicated, a number of days, and as instructions may need to be repeated or clarified, I'll try and do my best.

In the meantime, I just wish you a very safe journey home. Thanks very much. See you Monday.

Have a good weekend.

THE DEPUTY CLERK: All rise.

(Jury out.)

THE COURT: Okay.

MR. TINARI: I do have a matter to bring to the Court's attention, Your Honor.

THE COURT: Sure.

MR. TINARI: Since the Government may be eliciting evidence concerning prior conduct, Your Honor, I would ask the Court, of course, to give limiting instructions as to how the jury is to use this kind of testimony. That's number one.

And, number two, Your Honor, that the conduct that he's going to present, the conduct of Mr. Boyle that he's intending to present, I would think it has to be limited only to -- not to define what he did back in 2008 in every detail other than the fact that back in 2008, there were a certain

amount of robberies from the bank and Mr. Boyle pled to them.

THE COURT: Well, certainly, the instruction would be that it's not evidence for any kind of propensity, et cetera. Perhaps you can agree on what you think the limited purpose is.

MR. TINARI: Not only for propensity, Your Honor, but not for them to consider this --

THE COURT: No, it's not evidence.

MR. TINARI: Yes. Yes.

THE COURT: I understand. I just want to know what you would -- perhaps you can agree on what the issue is that it's germane to and then I'll be happy to incorporate that in a limiting instruction.

MR. LIVERMORE: Yes, Your Honor, just logistically, do you want to give the instruction before we do the introduction of that evidence?

MR. TINARI: Before and after, I would think, Your Honor. I would ask the instruction be given before and then a reminder at the conclusion of the testimony.

THE COURT: There's more than one witness that will be falling into this bucket, right?

MR. LIVERMORE: That's correct, Your Honor.

THE COURT: You want it before and after each witness?

MR. TINARI: Well, I don't know if it's before and

after each witness, but perhaps if we go through the first one and do it. I don't know how many you're going to call in that regard. Is it three, two?

MR. LIVERMORE: Judge, it will be at least three.

THE COURT: Are they going to be one after the other?

MR. LIVERMORE: No. So Monday, there will be two. Basically the case agent and the parole officer will be Monday.

THE COURT: Okay.

MR. LIVERMORE: And then at some point, the parole officer changed hands, there's a new parole officer, and she'll be later in the week.

THE COURT: And you need both of them? Why?

MR. LIVERMORE: We do, Judge, because of statements that Mr. Boyle made to the parole officers specifically concerning his employment that the Government alleges to be false statements about his employment.

THE COURT: Statements, separate statements made to two separate people?

MR. LIVERMORE: Correct, Your Honor.

THE COURT: Okay.

MR. LIVERMORE: Two separate parole officers.

THE COURT: Maybe what I'll do then is if there's two of them in order on Monday, I'll give a limited

instruction as an intro, and then after the second one, some kind of dusting off of that instruction when a third witness comes.

MR. TINARI: That will be fine, Your Honor, but I just am concerned about how far they're going to go in terms of their testimony concerning that prior conduct. There has to be some limitation. My understanding, I would suggest, Your Honor, is that they should only talk about the fact that it was a guilty plea and the fact that -- for those particular robberies and not to go into the facts of those cases. We're not going to be trying another robbery case going back to 2008.

THE COURT: No, I don't think we are.

MR. TINARI: Okay. Well, Judge, I'm just suggesting that we're not going to have the agent or the trooper coming in and discussing exactly the nature of how that investigation took place and how they came in contact with Mr. Boyle and whether or not he had disguises or didn't have disguises.

THE COURT: Well, I guess it depends whether or not it's pertinent to this case.

MR. TINARI: Well, I don't know. I understand he's talking about motive, but I don't think anything more other than the fact that there were robberies that he pled guilty to and nothing more than that. It should be sanitized because it will be so overly prejudicial, Your Honor, which would be, I

would suggest, a 403 issue for the Court so overwhelming that its probative value is lessened tremendously.

I know we talked about this, Your Honor, but we never talked about the scope of that testimony. We talked about 404(b) material, but the scope is what we haven't spoken about, and I think this is the appropriate time for me to know.

MR. LIVERMORE: Judge, the fact of the convictions, if it was just the convictions themselves, I don't think that would be admissible under 404(b). It's the facts underlying that. That's where the 404(b) --

THE COURT: What Mr. Tinari is inquiring about is how many of those facts.

MR. LIVERMORE: Absolutely, and I will e-mail Mr. Tinari this afternoon and I'll delineate all the facts that I intend to elicit from the witnesses.

THE COURT: It's like the equivalent of an offer of proof and I'll be the last to know.

MR. LIVERMORE: Judge, I think that's fair and I will send Mr. Tinari that this afternoon.

THE COURT: Thank you.

MR. TINARI: Just to -- we can always agree to disagree and I disagree that -- I think he reversed --

THE COURT: Well, wait and you might not disagree at all.

MR. TINARI: Perhaps, but I'm just saying that he's just reversed what the 404(b) is, and that is the facts coming in, but not the convictions, and I suggest to Your Honor that that's not what 404(b) is --

THE COURT: Well, let's just see what the interplay is. It could be that it's coming in to show some sort of pattern or knowledge, I don't know, but we'll see. Wait and see.

MR. LIVERMORE: Thank you, Your Honor.

THE COURT: Okay. See you Monday, folks. Mr. Boyle, take care.

MR. TINARI: Thank you, Your Honor.

THE COURT: So, as I mentioned, you're free to leave stuff here if you wish, but just for this Monday morning, there will be some third graders in the courtroom.

MR. TINARI: Well, we don't have much today, but I think later on --

THE COURT: It's just Monday. It was funny. I was asked to find a gavel, for the third graders to see a gavel.

Okay, folks, thank you very much.

MR. MCDONNELL: Thank you, Your Honor.

(Court adjourned)

MR. TINARI: Your Honor, may we see you at sidebar just for a moment?

THE COURT: Yes.

(Sidebar:)

MR. TINARI: I think this is the beginning of the 404(b) material.

THE COURT: Okay. Thanks for the heads-up.

MR. TINARI: Thank you. Appreciate it.

THE COURT: So do I.

(End of sidebar.)

THE DEPUTY CLERK: Please stand and raise your right hand.

GREG DIETZ, GOVERNMENT'S WITNESS, SWORN

THE DEPUTY CLERK: Would you please have a seat.

(Witness complied.)

THE DEPUTY CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: First name is Greg, last name is Dietz, D-I-E-T-Z.

THE COURT: Okay, Mr. Dietz, we'll start with that. Welcome. Make yourself comfortable.

THE WITNESS: Thank you, ma'am.

THE COURT: Keep your voice up. Okay, great.

You may proceed.

bank robberies?
A. Again, my understanding is there were no fingerprints recovered. They were processed, but there were none identified linking them to the defendant.
Q. And based upon your training and experience, is that unusual for police not to find fingerprints of the suspect during a robbery?
A. That's not unusual at all. That's actually more common than it is that you don't find anything.
Q. And what was the general description of the robber provided by the tellers in those cases?
A. In all of the cases or?
Q. Let's talk about the Durham one.
A. Okay. The one in Durham Township, it varied from a physical description of about 5'10" to about 6-foot, and anywhere ranging from 190 pounds to about 220 pounds is what the tellers sort of gave us as a description.
Q. So the tellers had various descriptions of the same robbery suspect, is that correct?
A. Correct.
Q. And based upon your training and experience, is that unusual for tellers or for anyone --
MR. TINARI: Your Honor, I object to that, Your Honor.
THE COURT: Sustained.

Could I see counsel over here.

(The following transpired at sidebar:)

THE COURT: Is there going to be something that is a little more similar to this in terms of methodology?

MR. LIVERMORE: Well --

THE COURT: This is pretty -- this is not real close. I understood that this set of robberies were a little closer in terms of methodology or technique, at least that are at issue here.

MR. LIVERMORE: Well, yes and no, Judge. The big thing --

THE COURT: Well, yes, I had understood it to be a little closer, but okay, go ahead.

MR. LIVERMORE: Judge, the big thing is the phone.

THE COURT: The what?

MR. LIVERMORE: The phone. The fact --

THE COURT: Well, let's go to that.

MR. LIVERMORE: We already did that. We already covered that.

MR. MCDONNELL: And motive. The motive is identical.

MR. LIVERMORE: Exactly. And also, where the vehicle was parked. That's another important point, Judge.

THE COURT: Well, except that so far at least there was no vehicle at the Colonial Bank, the first one they've

heard about.

MR. LIVERMORE: Well, in the other robberies you're going to hear more testimony about the vehicles, Judge. I'm not far from being done on this particular witness.

THE COURT: Okay, but red sweatshirt is pretty different from the -- from all this other stuff.

MR. LIVERMORE: Judge, I have the photographs from the robberies.

THE COURT: Okay.

MR. LIVERMORE: Those are more similar.

THE COURT: I would say let's see -- I'd like to see something that's more similar in order to justify the 404(b).

MR. LIVERMORE: Yes, Your Honor, absolutely.

(End of sidebar.)

THE COURT: Sorry for the interruption. Go ahead.

BY MR. LIVERMORE:

Q. Sir, now, in terms of the Durham bank robbery, did you have a photo lineup in that particular case for the tellers?

A. There was a photo lineup completed, yes.

Q. Okay. Now, after Mr. Boyle was arrested, did Mr. Boyle make any statements to you, did you speak to him?

A. Yes. After the FBI agents arrived at the State Police Barracks and interviewed Mr. Boyle, I was then brought into the room and conducted an interview specifically related to the Durham Township bank robbery.

Q. So the one on the left, as we look at that, that shows the garments that Mr. Boyle was wearing that day. Then the one below that, he has a baseball cap on. And to the right, he has -- it looks like a baseball cap, but I'll leave that up to the jury. And his hands are not covered on the one, on the left-hand side, below the first photo. I'm saying that for the record.

Am I correct so far, Trooper, or Detective, I'm sorry?

A. I guess, yes. Yes.

Q. In essence, the photos speak for itself, would that be correct, as best as we can?

A. I think you made a great statement. They're a little grainy, but, yeah, you can pretty much get a pretty good idea.

Q. Looking also at those photos, is it only one with a mask or is there a mask or a covering on the face? I wasn't able to discern that, but maybe you can help.

Does it look like it?

A. I'm sorry, what's your question, can you repeat?

Q. In any of those pictures, does it look like a mask or a covering on the face or is it discernible at all?

A. The pictures I'm looking at did not appear to have any type of mask on in any of those pictures.

MR. TINARI: With your permission, Your Honor, may we have displayed the document that was just partially read?

THE COURT: Exhibit 11?

MR. TINARI: Yes, Your Honor. It would be Richard Boyle's statement.

MR. LIVERMORE: 11.

MR. TINARI: 11. Thank you, Your Honor. That's the one.

THE COURT: There it is.

MR. TINARI: Okay.

BY MR. TINARI:

Q. The second page of that document, which is dated 2-12-08, can we begin that second page with the word pronoun "I" and read from there, please.

Do you follow me where it says, "I feel"?

A. "I feel terrible about the pain I've caused everyone. This has affected from the bank employees, law enforcement, and my family who were entirely innocent. I don't know if I can ever forgive myself for making such" -- I want to say "awful mistakes. I hope I don't lose my family because of the pain and embarrassment this will cause them, but I wouldn't blame them if they never wanted to see me again."

Q. So when -- after the statement was taken in its totality, he signed it, is that correct?

A. Yes. He initialed it, and then signed the bottom of the page, yes.

Q. And then he took responsibility for all of the events of

the mistakes he made, correct, he pled guilty?
A. He pled guilty, yes.
Q. Took responsibility for those actions that we're talking about here today?
A. Yeah. He pled guilty in court, correct.
MR. TINARI: No further questions, Your Honor.
THE COURT: Any redirect?
MR. LIVERMORE: No redirect, thank you, Your Honor.
THE COURT: Okay. Just to reiterate here, folks, Mr. Dietz's testimony about these other events from 2007, 2008, plus Exhibit 1 and Exhibit 11 have been presented and allowed to be part of the trial for just these limited purposes, and it's up to you as to whether or not you believe the evidence and if you believe it, whether you accept it for that limited purpose. But the point is, you cannot use it to determine or just to conclude that Mr. Boyle has a bad character or has any inclination to commit crime.
Okay. It's just for that very limited purpose. Okay, thanks.
You may step down, sir.
THE WITNESS: Thank you, Your Honor.
THE COURT: Thank you. Have a good rest of your day.
THE WITNESS: Thank you. You as well.
(Witness excused.)

filed a motion as a placeholder if I can put it that way.

MR. TINARI: I'm sorry, I was talking to him. I'm sorry.

THE COURT: No, no, no. The current motion is more of a placeholder than anything else; would that be fair to say, Mr. Tinari?

MR. TINARI: And, of course, I think we talked about Caldwell last time. I think that's still extant to discuss, Your Honor, but, again, I think you described it correctly, this is a holding pattern.

THE COURT: Okay. Thank you.

Let me hear what the air traffic controller here in the whole pattern has to say, Mr. Livermore.

MR. LIVERMORE: Judge, which issue would you like me to start with?

THE COURT: Either.

MR. LIVERMORE: Judge, in terms of the 404(b) issue, Your Honor, as we laid out in our motion, it's the Government's position that the Court and the prosecutors assigned to this case, Judge, we scrupulously followed the law. In terms of the Huddleston test, we admitted the evidence, and during the course of the trial, the District Court repeatedly instructed the jury in terms of the limiting instruction on multiple occasions during the course of trial while the evidence was coming in. And, again, as I mentioned,

Judge, in my motion, the prosecutor also advised the jury in closing arguments in terms of the limited nature of that stuff and, Judge, I think that played out in the jury question in terms of the evidence the jury wanted to see. The jury didn't ask anything about the 404(b) evidence. They wanted to see the financial evidence and they wanted to see other matters that really went to sort of these particular 11 bank robberies that were charged here and I think that was the focus of the jury and I don't think there's any suggestion anywhere in the record here that anyone in the case, that anything improper in reference to 404(b) evidence --

THE COURT: Well, I will say this and I think it's important for Mr. Boyle particularly to hear this. There was a great deal of attention paid to have the 404(b) touch be as light as could be and certainly there was more of it around, more of it available that was excluded on the theory that enough was enough. Okay, I just want to make sure that that perspective is articulated because there was more to be offered, as I recall, and I recall being somewhat stingy in terms of allowing any of it in.

MR. LIVERMORE: And, Judge, that's going to play out in the record.

THE COURT: Okay. Well, presumably so. I hope so. That's how I remember it anyway. Okay, sorry to interrupt.

MR. LIVERMORE: And, Judge, in terms of the second

## Rule 404. Character Evidence; Other Crimes, Wrongs, or Acts

**(a) Character Evidence.**

**(1)** *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

**(2)** *Exceptions for a Defendant or Victim in a Criminal Case.* The following exceptions apply in a criminal case:

**(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

**(B)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

**(i)** offer evidence to rebut it; and

**(ii)** offer evidence of the defendant's same trait; and

**(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

**(3)** *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

**(b) Other Crimes, Wrongs, or Acts.**

**(1)** *Prohibited Uses.* Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

**(2)** *Permitted Uses.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

**(3)** *Notice in a Criminal Case.* In a criminal case, the prosecutor must:

**(A)** provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

**(B)** articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

**HISTORY:** Jan. 2, 1975, P. L. 93-595, § 1, 88 Stat. 1932; March 2, 1987, eff. Oct. 1, 1987; April 30, 1991, eff. Dec.1, 1991; April 17, 2000, eff. Dec. 1, 2000; April 12, 2006, eff. Dec. 1, 2006; April 26, 2011, eff. Dec. 1, 2011; April 27, 2020, eff. Dec. 1, 2020.

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

### Other provisions:

**Notes of Advisory Committee on Rules.** Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 for methods of proof.

Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character of a witness may be gone into as bearing on his credibility. McCormick §§ 155–161. This pattern is incorporated in the rule. While its basis lies more in history and experience than in logic as underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutger, L.Rev. 574, 584 (1956); McCormick § 157. In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

The limitation to pertinent traits of character, rather than character generally, in paragraphs (1) and (2) is in accordance with the prevailing view. McCormick § 158, p. 334. A similar provision in Rule 608,

to which reference is made in paragraph (3), limits character evidence respecting witnesses to the trait of truthfulness or untruthfulness.

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e. evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 581–583 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 657–658 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission in its ultimate rejection of Uniform Rule 47, 615:

"Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Much of the force of the position of those favoring greater use of character evidence in civil cases in dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of "character," which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in Schlagenhauf v. Holder, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964). It is believed that those espousing change have not met the burden of persuasion.

Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325 (1956).

**Notes of Committee on the Judiciary, House Report No. 93-650.** The second sentence of Rule 404(b) as submitted to the Congress began with the words "This subdivision does not exclude the evidence when offered". The Committee amended this language to read "It may, however, be admissible", the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.

**Notes of Committee on the Judiciary, Senate Report No. 93-1277.** This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those

considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time.

**Notes of Advisory Committee on 1987 amendments.** The amendments are technical. No substantive change is intended.

**Notes of Advisory Committee on 1991 amendment.** Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such evidence by the defense, see, e.g., United States v. McClure, 546 F.2nd 670 (5th Cir. 1990) (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. See, e.g., Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).

The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. Compare Fla. Stat. Ann § 90.404(2)(b) (notice must be given at least 10 days before trial) with Tex. R. Evid. 404(b) (no time limit).

Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. Cf. Fla. Stat. Ann § 90.404(2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supercede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. § 3500, et. seq. nor require the prosecution to disclose directly or indirectly the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16.

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule in limine on 404(b) evidence before it is offered or even mentioned during trial. When ruling in limine, the court may require the government to disclose to it the specifics of such evidence which the court must consider in determining admissibility.

The amendment does not extend to evidence of acts which are "intrinsic" to the charged offense, see United States v. Williams, 900 F.2d 823 (5th Cir. 1990) (noting distinction between 404(b) evidence and intrinsic offense evidence). Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b). Finally, the Committee does not intend through the

amendment to affect the role of the court and the jury in considering such evidence. See United States v. Huddleston [Huddleston v. United States], 485 U.S. 681, 108 S. Ct. 1496 (1988).

**Notes of Advisory Committee on 2000 amendments.** Rule 404(a)(1) has been amended to provide that when the accused attacks the character of an alleged victim under subdivision (a)(2) of this Rule, the door is opened to an attack on the same character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain,* 768 F.2d 790 (7th Cir. 1985) (when the accused offers proof of self-defense, this permits proof of the alleged victim's character trait for peacefulness, but it does not permit proof of the accused's character trait for violence).

The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the accused's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the accused's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412–415. By its placement in Rule 404(a)(l), the amendment covers only proof of character by way of reputation or opinion.

The amendment does not permit proof of the accused's character if the accused merely uses character evidence for a purpose other than to prove the alleged victim's propensity to act in a certain way. *See United States v. Burks,* 470 F.2d 432, 434-5 (D.C.Cir. 1972) (evidence of the alleged victim's violent character, when known by the accused, was admissible "on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily harm"). Finally, the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609.

The term "alleged" is inserted before each reference to "victim" in the Rule, in order to provide consistency with Evidence Rule 412.

**Notes of Advisory Committee on 2006 amendments.** The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley,* 689 F.2d 562, 576 (5th Cir. 1982) ("when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp.,* 966 F.Supp. 203 (S.D.N.Y. 1997) (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co.,* 576 F.Supp. 627, 629–30 (D. Ky. 1984)

("It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States,* 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules,* pp. 264–5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. Pa. L. Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

Nothing in the amendment is intended to affect the scope of Rule 404(b). While Rule 404(b) refers to the "accused," the "prosecution," and a "criminal case," it does so only in the context of a notice requirement. The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases.

**Notes of Advisory Committee on 2011 amendments.** The language of Rule 404 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

**Notes of Advisory Committee on 2020 amendments.** Rule 404(b) has been amended principally to impose additional notice requirements on the prosecution in a criminal case. In addition, clarifications have been made to the text and headings.

The notice provision has been changed in a number of respects:

• The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. The earlier requirement that the prosecution provide notice of only the "general nature" of the evidence was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.

• The pretrial notice must be in writing—which requirement is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

• Notice must be provided before trial in such time as to allow the defendant a fair opportunity

to meet the evidence, unless the court excuses that requirement upon a showing of good cause. See Rules 609(b), 807, and 902(11). Advance notice of Rule 404(b) evidence is important so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied—even in cases in which a final determination as to the admissibility of the evidence must await trial. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures to assure that the opponent is not prejudiced. See, e.g., United States v. Lopez-Gutierrez, 83 F.3d 1235 (10th Cir. 1996) (notice given at trial due to good cause; the trial court properly made the witness available to the defendant before the bad act evidence was introduced); United States v. Perez-Tosta, 36 F.3d 1552 (11th Cir. 1994) (defendant was granted five days to prepare after notice was given, upon good cause, just before voir dire).

• The good cause exception applies not only to the timing of the notice as a whole but also to the timing of the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. A good cause exception for the timing of the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial.

• Finally, the amendment eliminates the requirement that the defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is provided when the government moves in limine for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus outlived any usefulness it may once have had.

As to the textual clarifications, the word "other" is restored to the location it held before restyling in 2011, to confirm that Rule 404(b) applies to crimes, wrongs and acts "other" than those at issue in the case; and the headings are changed accordingly. No substantive change is intended.