APPENDIX A

1. Article two; Court order Letters Filed on 12/15/23 Docket sheet pg 4 of 5 and 12/28/23., Direct Appeal opinion pg-8 of-19. Judges code of conduct canon 3.

2. Article Three; trial transcript pg 170 of 244, Trial transcript pg-44 of 188.

3. Article Four; United States Court of Appeals For the sixth ~~District~~ Circuit. Opinion Judgement.

No. 23-1045

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.) ORDER
)
REDO LAMONT ROLLING,)
)
Defendant-Appellant.)

The defendant appeals from the district court's judgment in his criminal case after being found guilty of credit union robbery and attempted interference with commerce by robbery. The defendant moves pro se to withdraw his counsel, and counsel moves separately to withdraw. The defendant also moves pro se to vacate his sentence due to prosecutorial and judicial misconduct and for a copy of audio and video trial proceedings.

Upon review, counsel's motion to withdraw is **GRANTED**, and the Clerk will promptly appoint new counsel under the Criminal Justice Act, 18 U.S.C. § 3006A. The defendant's pro se motion to withdraw counsel is **DENIED** as moot. The Court **DEFERS** any ruling on the pro se motions to vacate his sentence and for copies of the audio and video trial proceedings until new counsel is appointed and can address the issues on appeal.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

No. 23-1045

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ORDER
	)	
REDO LAMONT ROLLING,	)	
	)	
Defendant-Appellant.	)	

The defendant appeals from the district court's judgment in his criminal case after being found guilty of credit union robbery and attempted interference with commerce by robbery. Consistent with its rules, this court continued the defendant's appointed counsel, John M. Karafa, for the purpose of appeal. 6 Cir. R. 12(c)(1). Counsel filed principal and reply briefs on behalf of the defendant. The defendant now moves for the discharge of current counsel and appointment of replacement counsel alleging ineffective assistance and disagreement over trial and appellate strategies. Counsel offers no response. The defendant further moves to vacate his sentence. The briefing period is now closed, and this matter is otherwise ready for submission.

Upon review, the pending pro se motions are **REFERRED** to the panel that ultimately will be assigned this case for review on the merits.

ENTERED PURSUANT TO RULE 45(a)
RULES OF THE SIXTH CIRCUIT

Kelly L. Stephens

Kelly L. Stephens, Clerk

merely "requires . . . a modicum of evidence, however slight, connecting the illegal activity and the place to be searched.'" (quoting *White*, 874 F.3d 497)).

We have recognized the "frothy" nature of the nexus issue in the *Leon* context, often where the challenged affidavit does not specifically allege a direct factual connection between a home sought to be searched and criminal activity. *United States v. Reed*, 993 F.3d 441, 452 (6th Cir. 2021) ("[H]ow can we expect nonlawyer officers to know better than judges that their affidavits do not suffice except in obvious cases?") (quoting *United States v. Ardd*, 911 F.3d 348, 351 (6th Cir. 2018)). There is similar uncertainty in the phone-search context. *See Merriweather*, 728 F. App'x at 505 (rejecting suppression where affidavit alleging phone's likely involvement in drug purchasing "stands in stark contrast to prototypical bare-bones affidavits"); *compare United States v. Smith*, No. 21-1457, 2022 WL 4115879, *6 (6th Cir. Sept. 9, 2022) (Guy, J., writing separately) (arguing that probable cause was present because the "training and experience" of an officer supplied the necessary nexus), *cert. denied*, 143 S. Ct. 2499 (2023) *with id.* at *15-16 (Clay, J., writing separately) (concluding that the affidavit in support of the cell phone search warrant could not support probable cause and could not be relied on in good faith).[3]

In light of this uncertainty, it was not impermissibly reckless for officers to rely on a warrant which contained factual allegations that Rolling's car and Rolling himself had been connected to several robberies committed with another person and that the phone had been found

[3] The division in *Smith* is instructive on this issue. In that case, a warrant affidavit had alleged that Smith was arrested in possession of a loaded firearm and in the company of someone with a fresh gunshot wound, that this information "corroborate[d]" evidence from an anonymous source, and that "affiant believes . . . there could be information on the phone . . . that would show whether Smith possessed a firearm or communicated with anyone about his involvement" in a shooting. 2022 WL 4115879 at *11-12. Panel judges reached different conclusions on the issues of probable cause and good faith reliance. Judge Clay and Judge Moore held that this affidavit was lacking sufficient indicia of probable cause (with Judge Guy arguing that the cell phone warrant was supported by probable cause) while Judge Guy and Judge Moore held that *Leon* applied and the evidence ought not to be suppressed (with Judge Clay arguing that the warrant was so deficient that reliance on it was impermissibly reckless.). *See id.* at *9-12.

		ORDER filed the appellee's motion to file oversize brief consisting of 13,711 words [19] is GRANTED and appellee's brief is accepted as filed. (RLB) [Entered: 10/04/2023 03:46 PM]
10/19/2023	☐ 22 2 pg, 191.4 KB	CORRESPONDENCE: Letter from pro se Redo Lamont Rolling requesting docket sheets. (RLB) [Entered: 10/20/2023 01:49 PM]
10/25/2023	☐ 23 8 pg, 115.29 KB	REPLY BRIEF filed by Attorney Mr. John M. Karafa for Appellant Redo Lamont Rolling. Certificate of Service: 10/25/2023. [23-1045] (JMK) [Entered: 10/25/2023 11:27 AM]
11/13/2023	☐ 24 8 pg, 789.72 KB	Appellant MOTION filed by Redo Lamont Rolling for John M. Karafa to withdraw as counsel for Redo Lamont Rolling abd for appointment of counsel. Certificate of service: 11/07/2023. (RLB) [Entered: 11/14/2023 04:01 PM]
11/13/2023	☐ 25 3 pg, 394.84 KB	SEALED DOCUMENT filed by Party Redo Lamont Rolling. Document: Medical Records submitted with motion to withdraw counsel and appointment of new counsel. Dated: 11/07/2023. (RLB) [Entered: 11/14/2023 04:03 PM]
12/15/2023	☐ 26 22 pg, 3.42 MB	Appellant MOTION filed by Redo Lamont Rolling to vacate sentence due to prosecutorial and judicial misconduct. Certificate of service: 11/14/2023. (RLB) [Entered: 12/27/2023 08:39 AM]
12/19/2023	☐ 27 2 pg, 321.54 KB	Appellant LETTER filed for a docket sheet and status of pending motion. Letter from Redo Lamont Rolling. (RLB) [Entered: 12/27/2023 08:41 AM]
12/27/2023	☐ 28 1 pg, 86.24 KB	LETTER SENT to Redo Lamont Rolling in response to the letter received December 19, 2023, enclosing a copy of the docket sheets. (RLB) [Entered: 12/27/2023 08:44 AM]

Selected Pages: 0 Selected Size: 0 KB

Totals reflect accessible documents only and do not include unauthorized restricted documents.

View Selected

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

The duties of judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased. The judge should adhere to the following standards:

(A) *Adjudicative Responsibilities.*

(1) A judge should be faithful to and maintain professional competence in the law, and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, a

with that, Your Honor.

THE COURT: So the argument really is that it would be cumulative and more prejudicial than probative.

MR. KARAFA: Thank you. Precisely.

THE COURT: Okay. Mr. Mekaru, any response to that?

MR. MEKARU: Just one added basis for the admission, Your Honor. It would be at this point the government's belief that the defense may also raise a claim of lack of knowledge on the part of Mr. Rolling, that he was just driving without any understanding of what Mr. Jurl was doing. This pattern of multiple robberies would advance the government's case that this is not a of knowledge, that this is an active participation by Mr. Rolling. ~~That's what I proved that I had~~ That's why I plead not guilty because I had no knowledge, so is asked to not allow me to pretend this fact is to deny me my Freedom and Plea

THE COURT: Well, how does -- I mean, if that argument is made, how does the fact that there are six very similar robberies all charged, doesn't that defeat that argument? Why does there need to be an additional uncharged act? Hypothetical

MR. MEKARU: If I had a barometer as to what the jury were thinking then the Court would be right.

THE COURT: I don't care about the jury thinking. I'm not saying -- my question to you is it's -- right now it's a 404(b) analysis and is it more prejudicial than probative. Is it cumulative? So you have six. Why does there need to be an additional one, and isn't that cumulative and more

Q. And over to page 22, the top first three lines.

A. Yes.

Q. Yes. And by all means, my only question is, at the time you were presented with that question about do we have an explanation for the interruption in time --

MR. MEKARU: I'm going to object, Your Honor.

THE COURT: Hold --

MR. MEKARU: This line of questioning is -- this is not impeachment. There is no -- I don't see the fact that there's a discrepancy at all in testimony for impeachment.

THE COURT: Mr. Karafa.

MR. MEKARU: I don't think this is proper.

MR. KARAFA: I'm responding to Mr. Mekaru's redirect examination where he's brought up my client's -- through Agent Bartholomew's testimony my client's 79 days, approximately, of incarceration during August of 2020.

THE COURT: Okay. But --

MR. KARAFA: Just responding, that the agent did not comment on that in his response to that very question when he testified in March of --

THE COURT: You asked him the same exact question, is that what you're telling me? Because otherwise, then, we're not going through this.

MR. KARAFA: I understand. And it was my last question, but I was just clarifying that he didn't mention Mr.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Kelly L. Stephens
Clerk

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Filed: October 17, 2024

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Re: Case No. 23-1045, *USA v. Redo Rolling*
Originating Case No. : 1:22-cr-00034-2

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Enclosed are the court's unpublished opinion and judgment, entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Ms. Ann E. Filkins

Enclosures

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 24a0409n.06

Case No. 23-1045

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
October 17, 2024
KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

REDO ROLLING,
Defendant - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

OPINION

Before: BOGGS, MOORE, and GIBBONS, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. Appellant Redo Rolling was convicted on four counts related to a series of robberies of credit unions and cash advance businesses in Southwestern Michigan. He challenges the constitutionality of a warrant supporting a cell phone search, the district court's failure to declare a mistrial based on certain trial testimony, the sufficiency of the evidence supporting his conviction, and the reasonableness of his sentence. We affirm his conviction and sentence.

I.

In an 18-month span from June 2020 to December 2021, three cash advance businesses and two credit unions in Southwestern Michigan were robbed. Tommy Jurl testified at trial that he and Redo Rolling committed these robberies. Jurl testified that Rolling chose the locations to rob, drove them there, and parked out of sight of the businesses, while Jurl entered the businesses, passed notes to employees, and demanded money. Jurl then left the businesses, cash in hand, and Rolling drove the two away. The robberies took place on June 23, 2020, at a Check 'N Go in

Kalamazoo; on July 16, 2020, at a Check 'N Go in Grand Rapids; on November 18, 2021, at a Lake Michigan Credit Union in Byron Center; on November 24, 2021, at an Honor Credit Union in Wyoming (Michigan); and on November 30, 2021, at a Lake Michigan Credit Union in Grand Haven. *See United States v. Tommy Jurl*, No. 23-1010.

When, on December 2, 2021, Jurl and Rolling attempted to rob the Instant Cash Advance in Grand Rapids, Jurl testified that an employee called the police instead of giving him the money he demanded. The two fled the scene in Rolling's car. On the day before the attempt, detectives, having obtained a warrant based on video and witness information linking the car to the locations of previous robberies, had placed a GPS tracking device on Rolling's silver Ford Taurus. Using that GPS, the police pulled the two over a few blocks away and arrested them.

Rolling was charged with two counts of aiding and abetting robbery affecting commerce, in violation of 18 U.S.C. § 1951(a) and § 2, three counts of aiding and abetting credit union robbery, in violation of 18 U.S.C. § 2113(a) and § 2, and one count of aiding and abetting an attempted robbery affecting commerce, in violation of 18 U.S.C. § 1951(a) and §2. Jurl, who had originally been charged alongside Rolling, pled guilty to only one count of credit union robbery in exchange for testifying against Rolling. After a five-day trial in August 2022, the jury found Rolling not guilty of the two robbery-affecting-commerce charges but convicted him of the four remaining charges. The district judge sentenced Rolling to 120 months' imprisonment and ordered he pay $32,554 in restitution jointly and severally with Jurl. Rolling appealed.

II.

Rolling raises four issues on appeal. He challenges the constitutionality of a search warrant for a cell phone found at his feet at his arrest. He argues that references to uncharged drug activity at his trial were sufficiently prejudicial to warrant a mistrial, even though he did not object to their

admission at trial. He contends that the evidence was legally insufficient for the jury to convict him. And he argues that his sentence was unreasonable. All four of these challenges fail.

A.

Rolling's challenge to the cell phone search warrant argues that the affidavit underlying the warrant application did not establish a sufficient nexus to criminal activity to support a finding of probable cause.

The Fourth Amendment requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Probable cause for a search warrant is "a fair probability that contraband or evidence of a crime will be found in a particular place" based on "all the circumstances set forth in the affidavit." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The affidavit must "establish a nexus" between the evidence expected to be found and the location to be searched. *United States v. Helton*, 35 F.4th 511, 517 (6th Cir. 2022).

As a conclusion of law, a district court's decision on the existence of probable cause is reviewed de novo. *United States v. Sheckles*, 996 F.3d 330, 337-38 (6th Cir. 2021). The probable cause standard itself, however, gives "great deference" to the initial warrant-issuing judge's decision: it asks whether the determination is supported by a "substantial basis" in the affidavits seeking the warrant. *Id.* (quoting *United States v. Allen*, 211 F.3d 970, 973 (6th Cir. 2000)(en banc)).

The affidavit at issue supported the search warrant for a phone found at Rolling's feet. This affidavit, prepared by a Wyoming, Michigan police detective, focused on the connections between Rolling, his car, and the previous robberies. It described the process by which detectives linked a silver Ford Taurus to the Honor Credit Union robbery and then to Rolling. It alleged a belief,

based on a larger investigation, that Jurl and Rolling were the two suspects in the Honor robbery as well as similar robberies in the area. It detailed the discovery of two recorded "bait" bills in Rolling's wallet—bills that came from different credit union robberies. And it described the discovery of clothing linked to two robberies in a warrant-backed search of Rolling's home. It stated that the cell phone to be searched was found on the floorboards of Rolling's car, below where he was sitting and driving when he and Jurl were arrested on December 2. Finally, the affidavit relied on the detective's "experience and training," stating that "cell phone records greatly assist in investigations by showing exact times suspects use their phones before, during, and after commission of crimes." DE 35-4, Affidavit Supporting Phone Search Warrant, Page ID 94.

This affidavit contains much more linking Rolling and the car to crimes than the sparse "boilerplate" language found insufficient in *United States v. Ramirez*, the district court case to which Rolling analogizes this one.[1] 180 F. Supp. 3d 491, 493-96 (W.D. Ky. 2016). The question, however, is whether the indicia of criminal activity alleged, in addition to recited statements regarding experience and training, can support probable cause for the further search of a cell phone absent any phone-specific allegations in the warrant application.

Rolling argues that seizing a phone at the time of an arrest, then applying for a warrant to search the phone based on general-purpose allegations that could be made at the time of many arrests, is functionally similar to the warrantless search of a cell phone incident to arrest, which the Fourth Amendment does not permit. *Riley v. California*, 573 U.S. 373 (2014). While the point is well taken and appealing at first glance, this *Riley*-violation-in-slow-motion theory overlooks

[1] The *Ramirez* affidavit merely alleged that the phone to be searched had been seized from the suspect upon his arrest and that based on the officer's experience and training, "individuals may keep text messages or other electronic information stored in their cell phones which may relate them to the crime and/or/co-defendants/victim." 180 F. Supp. 3d at 493.

the legal significance of the intervention by the neutral magistrate before a warrant can issue. *Riley* itself took care to draw this distinction between warrantless searches and those obtained after application to a "neutral and detached" decisionmaker. *Id.* at 382 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

This court has not decided whether the requisite probable cause nexus for a warrant to search a cell phone is only "a fair probability" that "the phone's data 'will aid in a particular' investigation and disclose evidence of criminal activity" or if, instead, the affidavit must make factual allegations that "the phone itself is being used 'in connection with criminal activity.'" *Sheckles*, 996 F.3d 330, 338 (citations omitted); *United States v. Bass*, 785 F.3d 1043, 1049 (6th Cir. 2015) (sufficient nexus alleged when affidavit stated that suspect used cell phones to communicate with co-conspirators and was using the particular phone when arrested); *United States v. Merriweather*, 728 F. App'x 498, 505 (6th Cir. 2018) (declining to decide correctness of underlying probable cause determination, where affidavit stated that cell phone had been found in car along with drugs at time of arrest). Here, the district court found it "reasonable to infer that a cell phone possessed during a robbery conducted with the aid of another individual will contain evidence related to that offense." DE 70, Opinion on Motion to Suppress, Page ID 382. While the inference may be reasonable,[2] we need not decide today whether mere allegations of participation in criminal activity committed by more than one person automatically support a probable-cause determination for the search of cell phones found at the time of an arrest. Even if the nexus between Rolling's cell phone and the robberies were insufficient to support a finding of

[2] It also may not be reasonable, given that the alleged robbers were apprehended together and could instead have communicated about the robbery in person.

probable cause, suppression of the seized cell phone evidence is not the correct remedy when officers relied on the warrant in good faith.

Under *United States v. Leon*, evidence gained by means of a deficient warrant need not be suppressed if law enforcement officers permissibly relied on the warrant in good faith. 468 U.S. 897 (1984). Suppression remains "appropriate" in certain circumstances: (1) if the issuing magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth"; (2) where "the issuing magistrate wholly abandoned his judicial role" in such a way that "no reasonably well trained officer should rely on" it; (3) where the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) where the warrant is "so facially deficient, i.e., in failing to particularize the place to be searched or the things to be seized" that law enforcement cannot "reasonably presume it to be valid." *Id.* at 923. But absent these circumstances, the warrant's later invalidation by a reviewing court does not require suppression of the evidence as long as the officers relied on the warrant in good faith. *Id.* at 923-24.

Rolling's insufficient-nexus argument, aimed at the third of the four *Leon* circumstances, is unavailing. *Leon* and its progeny impose a lower bar for avoidance of suppression than that required for a finding of probable cause. *See id.* at 914. Even lacking probable cause, suppression is not required unless the warrant application is "bare bones," which means the warrant was so obviously insufficient that law enforcement itself was "entirely unreasonable" to search and seize evidence based on it. *United States v. White*, 874 F.3d 490, 506 (6th Cir. 2017) (quoting *Leon*, 468 U.S. at 923). A "minimally sufficient nexus" suffices to avoid the "bare bones" label. *United States v. Neal*, 106 F.4th 568, 572 (6th Cir. 2024) (per curiam) ("A 'minimally sufficient nexus'"

merely "requires . . . a modicum of evidence, however slight, connecting the illegal activity and the place to be searched.'" (quoting *White*, 874 F.3d 497)).

We have recognized the "frothy" nature of the nexus issue in the *Leon* context, often where the challenged affidavit does not specifically allege a direct factual connection between a home sought to be searched and criminal activity. *United States v. Reed*, 993 F.3d 441, 452 (6th Cir. 2021) ("[H]ow can we expect nonlawyer officers to know better than judges that their affidavits do not suffice except in obvious cases?") (quoting *United States v. Ardd*, 911 F.3d 348, 351 (6th Cir. 2018)). There is similar uncertainty in the phone-search context. *See Merriweather*, 728 F. App'x at 505 (rejecting suppression where affidavit alleging phone's likely involvement in drug purchasing "stands in stark contrast to prototypical bare-bones affidavits"); *compare United States v. Smith*, No. 21-1457, 2022 WL 4115879, *6 (6th Cir. Sept. 9, 2022) (Guy, J., writing separately) (arguing that probable cause was present because the "training and experience" of an officer supplied the necessary nexus), *cert. denied*, 143 S. Ct. 2499 (2023) *with id.* at *15-16 (Clay, J., writing separately) (concluding that the affidavit in support of the cell phone search warrant could not support probable cause and could not be relied on in good faith).[3]

In light of this uncertainty, it was not impermissibly reckless for officers to rely on a warrant which contained factual allegations that Rolling's car and Rolling himself had been connected to several robberies committed with another person and that the phone had been found

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in the car. *See id.* at *17 (Moore, J., concurring in the judgment). Even if the judge's inference that the phone itself was used in planning or discussing the robberies and would thus contain evidence of crime was too tenuous to support a finding of probable cause, it was not too great a leap for good faith reliance. *See White*, 874 F.3d at 500 ("The takeaway from these cases is that reasonable inferences that are not sufficient to sustain probable cause in the first place may suffice to save the ensuing search as objectively reasonable").[4] The district court did not err in denying the motion to suppress.

B.

Rolling's second principal argument is that references made during Jurl's trial testimony and Rolling's cross examination to uncharged drug-related activity were unfairly prejudicial to Rolling, necessitating a mistrial.

While the denial of a motion for a mistrial is reviewed for abuse of discretion, because Rolling neither objected to this testimony at trial nor moved for a mistrial, we review the failure to declare a mistrial for plain error. *United States v. Caver*, 470 F.3d 220, 243-45 (6th Cir. 2006). This standard means that even if a clear error is established, the conviction will be reversed only where it (1) affected substantial rights and (2) seriously affected the fairness, integrity, or public reputation of judicial proceedings. *United States v. Cunningham*, 679 F.3d 355, 385 (6th Cir. 2012). The underlying mistrial inquiry is framed by five factors:

> (1) whether the remark was unsolicited, (2) whether the government's line of questioning was reasonable (3) whether a limiting instruction was immediate, clear, and forceful, (4) whether any bad faith was evidenced by the government, and (5) whether the remark was only a small part of the evidence against the defendant.

[4] Rolling argues that it could not be good faith to rely on this warrant application ten years after *Riley*. But this court itself has continued to dispute the nexus standard in those same ten years. *See supra.*

Zuern v. Tate, 336 F.3d 478, 485 (6th Cir. 2003) (citing *United States v. Forrest*, 17 F.3d 916, 920 (6th Cir. 1994)).

We typically apply the *Forrest* factors, however, once it is established that testimony or statements were improper. *See id.* (*Forrest* "listed five factors to consider whether a mistrial is warranted after an improper reference") (habeas context); *United States v. Gonzalez*, 257 F. App'x 932, 936 (6th Cir. 2007) (*Forrest* applies to "improper reference"); *United States v. Pugh*, No. 96-3954, 1998 WL 165143, at *4 (6th Cir. March 31, 1998) (holding that district judge's remark challenged in motion for mistrial was "neither improper or flagrant, nor made in bad faith" and not applying *Forrest* factors); *U.S. v. Tate*, 124 F. App'x 398, 400 (6th Cir. 2005) (per curiam).

The statements at issue occurred multiple times during trial. Jurl mentioned owing Rolling money in relation to drug usage several times on direct examination, testifying, for instance, about the November 24, 2021 Honor, Michigan credit union robbery that "I told [Rolling], all right, we can do another one, you know, just to pay him back, you know what I mean, because I had owed him—I had used a lot of his drugs, you know, I smoked a lot of crack, and I told him that I would do another one to pay him back so we can kind of make even on it." DE125, Trial Transcript, Page ID 1352, 1357-58. On cross-examination by Rolling's lawyer, Jurl testified that he had been "smoking crack a lot back then" and then that it was "ironic" that Rolling's lawyer had asked that question. DE125, Trial Transcript, Page ID 1387. Later, on re-direct examination, Jurl testified that what he thought was "ironic" was that "the reason why [Rolling and Jurl are] in this courtroom now [is] because I began to use the crack that he started selling in my apartment." DE125, Trial Transcript, Page ID 1409. Rolling testified in his own defense. On cross-examination by the government, he denied providing Jurl drugs and also that Jurl owed him drug money.

The government asked again, and Rolling denied it again, after an "asked and answered" objection by his counsel that was not ruled on by the district court.

The parties characterize this testimony in sharply different ways. For Rolling, it represents inadmissible and impermissibly prejudicial evidence, dispelling the presumption of innocence and casting Rolling as a threatening drug dealer on trial for masterminding a robbery scheme. For the government, the testimony was admissible either as *res gestae* evidence filling in the story of the robberies, or as admissible other-act evidence under Federal Rule of Evidence 404(b) that tended to establish Rolling's motive, intent, plan, or knowledge.

This evidence could have been admitted as *res gestae* or "background" evidence, filling in the story of the robberies. *See United States v. Clay*, 667 F.3d 689, 697 (6th Cir. 2012). Rolling argues that, properly considered, *res gestae* evidence is always admissible under another rule—the term does not do any independent work. Indeed, "*res gestae*" does not transform inadmissible evidence into admissible evidence by incantation. But in "limited circumstances when the evidence includes conduct that is inextricably intertwined with the charged offense," this background exception to Rule 404(b) can allow evidence "that is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness's testimony, or completes the story of the charged offense." *Id.* (quotation omitted).

The existence of a debt that Jurl owed to Rolling fills in a missing link, explaining why Jurl might have carried out a riskier role in a robbery scheme, yet abided by Rolling's decision to divide the proceeds in Rolling's favor. The statement that the debt was specifically for the sale of controlled substances, where no such activity was charged, is a closer call. Because Rolling's

counsel never objected to this testimony, however, there was no chance for the parties or the court to develop its admissibility.

The evidence could also have been admitted under Rule 404(b) itself. This Rule provides for the potential admissibility of "evidence of any other crime, wrong, or act" for the purpose of "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b). Generally, to admit 404(b) evidence, the prosecution must give notice to the defendant prior to trial and the district court must make specific determinations. *See id.* (b)(3); *United States v. Hardy*, 228 F.3d 745, 750 (6th Cir. 2000). But where, as here, the defendant does not object to the evidence, this process is "superseded," and any error that may have resulted from allowing the government to elicit Jurl's testimony is reviewed for plain error. *United States v. Cowart*, 90 F.3d 154, 157 (6th Cir. 1996); *United States v. Aldridge*, 455 F. App'x 589, 593-94 (6th Cir. 2012); *United States v. Smith*, No. 22-3932, 2024 WL 196936, at *2 (6th Cir. Jan. 18, 2024).

To support admissibility under Rule 404(b), the government relies on *United States v. Cody*, 498 F.3d 582, 590-91 (6th Cir. 2007), in which evidence regarding a drug habit was considered admissible as helping establish the defendant's motive for bank robberies. Rolling responds that *Cody* stands only for the proposition that 404(b) permits admission of other-act evidence showing the *defendant's* motive. In *Cody*, the challenged testimony was made by the defendant's wife and son, who testified that charged bank robberies were committed "to acquire money to . . . purchase more drugs . . . and to pay off debts that they owed" to a drug dealer. *Id.* *Cody* upheld the use of testimony regarding an *uncharged party's* drug selling, and a *defendant's* uncharged drug use, as evidence supporting the *defendant's* motive to commit charged robberies.

Today's case presents a further twist on this posture: testimony regarding a *defendant's* uncharged drug selling, and a *witness's* uncharged drug use, as evidence supporting the *witness's* motive.

By the text of the rule, however, admissible other-act evidence may show the "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident" of "a person." Fed. R. Evid. 404(b)(2); *see U.S. v. Robinson*, 272 F. App'x 421, 430 (6th Cir. 2007) ("Rule 404(b) applies to any person" and explicitly contemplates the use of a witness's other-act evidence by the defendant for the introduction of exculpatory testimony as "reverse 404(b)" evidence). It was not plain error to admit this evidence for the purpose of illuminating Jurl's motive. In addition, the existence of a debt that Jurl owed to Rolling could have also been admitted as to Rolling, to show Rolling's own motive to aid and abet Jurl in committing robberies and share the profits.

On our standard of review, Rule 404(b) does not bar the admission of this testimony if it is used to show Jurl's motive or Rolling's motive for involvement in a string of robberies, or perhaps the outlines of the coordination the government claimed. And if the testimony was arguably admissible—if it would have been within the discretion of the district court to admit it—the failure to declare a mistrial absent a motion is not plain error. It bears noting that rather than objecting at the time, Rolling's counsel used Jurl's drug use to impeach his testimony.

Finally, the evidence could have survived Rule 403's test for prejudice. As with an objection under Rule 404, when the evidence was not objected to at trial, a challenge on appeal based on Rule 403 is reviewed for both abuse of discretion and plain error. *See United States v. Lester*, 98 F.4th 768, 776-77 (6th Cir. 2024). As the challenged testimony was probative of the relevant motives, plans, and circumstances of Rolling, Jurl, and the robberies, and defense counsel made use of it for impeachment, admission of this testimony was not plain error.

Although Rolling forcefully argues the *Forrest* factors, he merely gestures to the clearness, substantial rights, and fairness prongs of the plain error test that we apply in this posture. The facts of *Forrest* itself demonstrate the different context of that case. There, defense counsel objected immediately to a law enforcement agent's testimony hinting that defendant Forrest had been imprisoned for robbery, then pointed out at a sidebar that this was prejudicial information and Forrest had not testified in his own defense. 17 F.3d at 919-20. The district court agreed and ordered the question "excised." *Id.* at 920. When the agent was called again, he "blurted out" information regarding the same criminal history—defense counsel objected, and the district judge sustained the objection and immediately instructed the jury to "disregard those remarks." *Id.* On cross-examination of the agent by defense counsel, the agent a third time referenced the robbery imprisonment, after which the defense moved for a mistrial, which was denied. *Id.*

All this is to reiterate that even if a hypothetical motion for a mistrial would have been worth considering, the failure to order a mistrial sua sponte is reviewed more deferentially than a contested ruling on admissibility. The plain error test necessarily contemplates some situations in which the denial of a mistrial upon motion is outside the discretion of the district court and reversible, but the refusal to do so sua sponte on the same facts is not. *But see United States v. Cruse*, 59 F. App'x 72, 78-79 (6th Cir. 2003) (finding a "blurted" statement harmless where the "statement was immediately objected to and sustained with a curative instruction"). True, an objection and limiting instruction could certainly aid a jury in considering evidence only for a proper purpose. Logically, however, it cannot be easier to obtain a new trial by failing to object the first time, and then mounting a challenge on appeal.

On plain error review, we cannot conclude that the failure to declare a mistrial upon this testimony was a reversible abuse of the district court's discretion.

C.

Third, Rolling argues that the evidence at trial was insufficient to support his conviction. In evaluating a challenge to a conviction on sufficiency of the evidence, we ask whether any reasonable juror could have found "the essential elements of the crime beyond a reasonable doubt." *United States v. Hughes*, 505 F.3d 578, 592 (6th Cir. 2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In doing so, we "view all evidence and resolve all reasonable inferences in favor of the government," and we do not independently judge the credibility of witness testimony. *Id.* Reversal on insufficiency of the evidence is a difficult standard for a defendant to meet. Rolling does not meet this standard.

The jury convicted Rolling of violating 18 U.S.C. § 1951, which provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so" shall be fined or imprisoned. "Robbery" is defined as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining." *Id.* Under 18 U.S.C. § 2, someone who aids or abets the commission of a crime against the United States may be charged as a principal. To obtain these convictions, the government must establish beyond a reasonable doubt that Rolling aided and abetted the robberies, and attempted robbery, as set out in Counts 3, 4, 5, and 6.

Rolling argues that Jurl's testimony was the primary evidence linking him to the crimes, that the only two charges for which Jurl's testimony stood in isolation were the counts on which

he was acquitted, and thus that the jury must have found Jurl's testimony not credible. Then, assuming that the jury disregarded Jurl's testimony, Rolling argues that there was insufficient evidence to convict him on the remaining four charges.

This court, guided by the Supreme Court, has consistently held that inconsistency in jury verdicts does not mean the evidence supporting the convictions is legally insufficient. *United States v. Ashraf*, 628 F.3d 813, 823 (6th Cir. 2011) (citing *United States v. Powell*, 469 U.S. 57, 65 (1984)). A defendant may not argue that a partial acquittal means the jury "rejected the government's theory" in a way that undercuts a guilty verdict on other charges. *Id.* It follows that "inconsistent verdicts are generally held not to be reviewable." *United States v. Lawrence*, 555 F.3d 254, 262 (6th Cir. 2009).

With this in mind, sufficient evidence existed for the jury to find that Rolling aided and abetted the credit union and cash advance robberies. Jurl's sworn testimony implicated Rolling from start to finish: selecting locations and timing, providing transport, and dividing up the proceeds. But Jurl's testimony did not stand alone. Location data from the GPS tracker placed Rolling's car driving around a credit union before he and Jurl were arrested. Bait bills from two separate robberies were found in his wallet when he was arrested, and distinctive red shoes linked to a robbery were found in his trunk. Rolling admitted on the stand to lying to the police, when first stopped on December 2, 2021, about whether he knew Jurl and where he had picked Jurl up—casting doubt on Rolling's contention that he had driven Jurl to all the robberies without knowing what Jurl was doing there. Finally, unlike when he gave rides to other friends, Rolling did not park immediately outside the destination—supporting an inference that Rolling knew what would happen and did not want to be captured on a credit union's security camera.

Further, as the government points out, Rolling seems to assume in his sufficiency of the evidence challenge that the evidence from the phone seized in his car would be excluded based on his Fourth Amendment claim. Because we affirm the district court's decision denying Rolling's motion to suppress, the cell phone evidence remains available for the jury to have permissibly considered alongside Jurl's testimony. This evidence corroborates Jurl's testimony. The cell phone evidence provides a further basis for the jury to find that Rolling had knowledge that the trips with Jurl were made to commit the charged robberies. Based on the evidence adduced at trial, we find that a reasonable juror could have found the essential elements to convict Rolling on Counts 3, 4, 5, and 6 beyond a reasonable doubt.

Rolling's challenge to the legal sufficiency of the evidence fails.

D.

Fourth, and finally, Rolling argues that his sentence was unreasonable. We review sentences for procedural and substantive unreasonableness under an abuse of discretion standard. *United States v. Cunningham*, 669 F.3d 723, 728 (6th Cir. 2012).

A sentence is procedurally reasonable when "district courts properly calculate the guidelines range, treat the guidelines as advisory, consider the [18 U.S.C. §] 3553(a) factors and adequately explain the chosen sentence." *United States v. Allen*, 93 F.4th 350, 355 (6th Cir. 2024). The parties agreed with the district court's ultimate calculation of the guidelines range, and Rolling does not contest the district court's treatment of the guidelines, whether it considered the § 3553(a) factors, or the adequacy of its explanation. Rolling's sentence is procedurally reasonable.

A sentence that is within the guidelines range is accorded a rebuttable presumption in favor of substantive reasonableness. *United States v. Sexton*, 894 F.3d 787, 797 (6th Cir. 2018). Rolling takes issue with the district court's denial of his motion for a downward variance and argues that

the district court "overstated Mr. Rolling's criminal history" by relying on, and giving too much weight to, selective and comparatively remote incidents. CA6 R. 13, Appellant Br., at 35-36. On the contrary, the district court considered Rolling's entire criminal history, listing several different offenses and characterizing the history as "quite serious," and a "theft history as well as an assaultive history . . . which gives the Court some concern." DE128, Sentencing Hearing, Page ID 1691. The district judge denied the government's motion for an upward variance as well as Rolling's motion for a downward variance, and rejected the government's contention that Rolling was the organizer or leader of the robberies, decreasing his guidelines range. The district judge also noted that Rolling's past sentences for different offenses had not served as a deterrent.

And although a sentencing judge may consider the remoteness of past criminal history in making a downward departure, *see* USSG § 4A1.3(b) and commentary (giving examples of circumstances that may merit a downward departure), the failure to do so is not an abuse of discretion. *See United States v. Lundy*, 366 F. App'x 590, 593 (6th Cir. 2010). This is especially so considering that Rolling never raised the remoteness of his prior crimes during sentencing. *United States v. Walls*, 546 F.3d 728, 737 (6th Cir. 2008) (holding that a district court does not abuse its discretion when it does not consider mitigating factors not raised during sentencing). On abuse of discretion review, we cannot conclude that Rolling's sentence was substantively unreasonable.

We affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-1045

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

REDO LAMONT ROLLING,

Defendant - Appellant.

FILED
Oct 17, 2024
KELLY L. STEPHENS, Clerk

Before: BOGGS, MOORE, and GIBBONS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's judgments of conviction and sentence are AFFIRMED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX B

1. Article one: trial transcript pg. 84, 85, 86, 106, of 199.

2. Article two: trial transcript pg. 38, 39, of 44, 12, 13, of 153.

of the offense, a complicated element, frankly.

THE COURT: Mr. Mekaru.

MR. MEKARU: Your Honor, counsel asked this witness: The charge is that you aided and abetted Tommy Jurl in the commission of these robberies. Do you agree with that? Asked: What do you have to say about that allegation? So he was asked about an element. He was asked about whether he committed the crime. I'm asking about elements of the offense. I'm trying to sort out whether this is -- he has a disagreement, some other evidence about this, something to say that these elements are not -- have not been met. He certainly wanted to comment about his participation.

THE COURT: Then question him about that, okay? You're free to question him about that. Just phrase them -- phrase your questions correctly.

MR. MEKARU: All right.

BY MR. MEKARU:

Q. So, let's see. Let's go back, then. November 18th -- excuse me, not November 18th. The first one, June 23rd, 2020, this was the robbery down in Kalamazoo where -- do you remember Mr. Jurl went into the Check 'N Go? Did you give him a ride?

A. Yes, I did.

Q. So I understand you gave Mr. Jurl -- Jewels, I think you referred to him as, a ride from Muskegon down to Kalamazoo?

A. Yes.

Q. Okay. Did you park right in front?

A. Park in front of, what?

Q. Sorry. Did you park right in front of the Check 'N Go?

A. No, I don't remember parking in front of no Check 'N Go.

Q. You do remember giving him a ride?

A. Yes.

Q. But you did not park in front, did you?

A. In front of, what?

Q. In front of the Check 'N Go?

A. No, I didn't park in front of no Check 'N Go.

Q. Okay. So he asked you for a ride to go to the Check 'N Go. Why didn't you --

A. He didn't ask me for a ride to the Check 'N Go. That Check 'N Go did not come out of his mouth.

Q. Oh.

A. He needed to pick up something, park here, and it wasn't in no front of a Check 'N Go. It was like in a residential area.

Q. So it was Mr. Jurl who decided where you should park?

A. Yes. He had the phone. He had my phone.

Q. Whose phone?

A. He had my phone.

Q. So your testimony is that you give your phone to a man that you say you've only known for two years?

A. Three. Roughly, like, three. I met Jewel -- I met Mr. Jurl --

Q. That's not -- I just asked --

A. Yes.

Q. -- Is that true? You're saying you gave your phone to him and you have known him --

A. Same man I let spend the night at my house.

Q. -- two or three years, right?

A. Right. And spend the night at my house.

Q. That wasn't the question.

A. Right.

Q. And if I understand this, you're 49 years old, right?

A. Yep.

Q. Tommy Jurl is 47 years old, so he's only two years younger than you, isn't that true?

A. Yes.

Q. But you're saying that it's your belief that Tommy Jurl was somebody who looked up to you because you were older, right?

A. Yeah.

Q. Isn't it true that you provided Tommy Jurl drugs?

A. No.

Q. Isn't it true that he owed you money for the drugs that you provided to him?

A. No.

Q. Money that he owed you?

A. Jurl didn't owe me no money.

Q. He didn't owe you money for the drugs that you had given him?

MR. KARAFA: Objection, asked and answered.

THE WITNESS: I didn't give him no drugs.

MR. KARAFA: Excuse me, sir. Asked and answered early on about some drug debt.

THE COURT: Mr. Mekaru.

MR. MEKARU: I'll move on.

BY MR. MEKARU:

Q. So he didn't owe you money for drugs that other people had used that you said that he had to pay for?

A. No.

Q. Like his girlfriend, you didn't tell him that he had to pay for the drugs that his girlfriend had used?

A. No.

Q. You didn't tell him he owed you money because somebody stole some tile from your house and you blamed him?

A. No. They did steal some tiles from my house but -- it wasn't from my house. It was from my girlfriend's house while I was at KPEP. The flooring that I have for the house on Catherine Street -- I was living with my girlfriend. I bought that house, wasn't no heat in there, no heat in there, no water heater. That's what I saying, went to get water heater,

be willing to inquire of my client that I did present to him the plea agreement, did go over it with him, and I've answered any questions I could answer with regard to his options in this case, I would appreciate that.

THE COURT: Thank you. And I do normally always do that. I just wasn't sure if there was an outright denial at this point or if there was ongoing, but at least up to this point we can question, so let's swear him in, please.

REDO LAMONT ROLLING,

having been sworn by the Clerk at 10:59 a.m. testified as follows:

THE DEFENDANT: Yes.

THE COURT: You can have a seat. It's okay. It might be better. Thank you. All right. Tell me your full name for the record, please.

THE DEFENDANT: Redo Lamont Rolling.

THE COURT: Okay. So, Mr. Rolling, I don't know the extent of the plea negotiations but there was at least one plea offer that was made that came in the form of a plea agreement that Mr. Karafa shared with you; is that correct?

THE DEFENDANT: Correct.

THE COURT: And that was towards the beginning of this month in July?

THE DEFENDANT: Correct.

THE COURT: And so you had an opportunity to read

that plea agreement in its entirety?

THE DEFENDANT: Correct.

THE COURT: And you had the opportunity to discuss the plea offer and the plea agreement with Mr. Karafa?

THE DEFENDANT: Correct.

THE COURT: Okay. And I would assume you had some questions. If you did, did he answer those questions to your satisfaction?

THE DEFENDANT: Somewhat, yes.

THE REPORTER: Anna, I need the volume on.

THE COURT: Okay. And I heard somewhat. Do you still have other questions about that plea agreement or that plea offer?

THE DEFENDANT: I mean, it -- like, the prosecution stated that, like, I didn't know nothing about the robberies as far as that Tommy Jurl was going to rob.

THE COURT: Hang on. Don't talk about the specifics of the case. I just want you -- the whole purpose of me questioning you, and I'll let Mr. Karafa question you if he has any additional questions --

THE DEFENDANT: Okay.

THE COURT: -- is I just want to make sure that you're aware of the plea offers that are made, that you fully discussed them, and that you are not inclined at this point to take advantage of that offer, okay?

Dan Mekaru. I'm an assistant United States attorney. I'm a prosecutor.

Seated next to me at counsel's table is FBI Special Agent Bartholomew.

All right. I'll read off this list of witnesses. Tekoah Parnell, T-e-k-o-a-h, Parnell. Brian Cramer, Carrie Mongar, George Meek, Samantha Elizabeth Taylor, Lauren Beall, Whitney Busscher, Kayleigh Dewitt, Kevin Roelofs, Detective Sergeant Jason Matter, he's with the Michigan State Police. Officer Jennifer Eby, she's with the Wyoming Police Department. Makayla Villanueva, Michael Ross, Joseph Snell, Carson Judd, Detective Eric Rasch, he's with the Grand Haven Department of Public Safety. Elena Cardoso-Cisneros, Steven Schuster, Daniel Huey with the Kent County Sheriff's Office. Detective Aaron Gray with the Wyoming Police Department. Special Agent Joseph Raschke with the FBI. Detective Sergeant Robert Meredith with the Wyoming Police Department. Tommy Jurl, and possibly a Tiffany Flaska.

THE COURT: Thank you.

MR. MEKARU: Thank you.

THE COURT: Mr. Karafa, if you could give --

MR. KARAFA: Thank you.

THE COURT: That's just so everybody in the jury assembly room can hear you.

MR. KARAFA: Oh, thank you.

THE COURT: If you walk away from the microphones, they won't be able to hear you.

MR. KARAFA: Very good.

THE COURT: Okay.

MR. KARAFA: Good morning, ladies and gentlemen. My name is John Karafa. I'm an attorney in the Muskegon office of Gravis Law. I represent the defendant here, Mr. Redo Rolling. He always corrects me. It's Redo Rolling.

THE DEFENDANT: Redo.

MR. KARAFA: Redo. I thought that's what I said. He is a Muskegon resident. Thank you, Mr. Rolling. Have a seat.

The witnesses which the defense may call in this trial --

THE COURT: Hold on. Mr. Karafa, hang on. We lost you on that microphone.

MR. KARAFA: Is it back?

THE COURT: Yes.

MR. KARAFA: Thank you. The witnesses we may call in this trial include a gentleman named Roy Foreman, a lady named Shirman Brown, a --

THE COURT: Hang on. Hang on. What's going on? You know, we put new batteries in these every time and there's always an issue. We'll try it again. Let's start with the witnesses again, please.

MR. KARAFA: All right. Thank you. The witnesses

APPENDIX C

1. Article one: trial transcript. pg. 16 of 199.

2. Article two: trial transcript, pg. 232 of 263.

Q. Just really short.

A. I owed him some money. He took me to the -- he took me to the WalMart to get some things for him to steal and I got caught.

Q. July 2021?

A. Yes.

Q. What happened then? Well, there were two retail frauds. One was October 2020 and the other was July 2021.

A. Oh, the 2021, that was not me. That was a picture of another guy. That was a completely different guy. He looks like me but that was not me.

Q. Okay. Did you get a conviction?

A. No. That was -- that wasn't even a case. I guess his car was on --

Q. That's okay. So maybe I'm just misunderstanding. So you just have the single conviction involving WalMart?

A. In 2020 October, yes.

Q. Okay. All right. You began your testimony and you were being asked questions about smoking crack?

A. Yes.

Q. And Mr. Karafa noted that you were smiling, and you said it was ironic that you bring it up. Why is that ironic?

A. Because I began using the drug cocaine when Mr. Rolling started staying with me in my apartment, so everything just went downhill from that point from us being here now back

talking about -- I look at all the defendants in terms of this defendant and this defendant to see in applying these factors, so one of those factors is the right to a larger share. I haven't seen great evidence of that other than Mr. Jurl indicating he received minimal amount, but there's some evidence that contradicts that.

Exercise of decisionmaking authority. Yes, there's some browser history of locations. I don't know that that proves to me Mr. Rolling is the leader versus Mr. Jurl or if they're equally involved. I'm not seeing -- separate and apart from what Mr. Jurl has indicated, and some of which is contradicted by either the evidence or by his own statements -- evidence that convinces me one or the other was the leader. They're both -- I'm quite convinced they're both involved, obviously, but I don't know that I have enough evidence to say that Mr. Rolling was the leader as opposed to Mr. Jurl or that neither one was, that they both collaborated together to do this.

MR. MEKARU: All I can say, Your Honor, we spent time speaking to Mr. Jurl and proffered him and made an assessment about his wherewithal, and we found his information to be credible. You heard his testimony about who planned the robberies, who look the larger role, who decided who was to receive what money from the robberies, so we do, and it is our position, base our assessment of the scoring largely on the

APPENDIX D

1. Article one: pretrial transcript pg. 6, 7, 8 of 44
2. Article two: Direct Appeal opening brief
3. Article Three: trial transcript pg. 5 of 153
4. Article Four: trial transcript pg. 17 of 43

THE COURT: Well, the motion to suppress, I think the response I just got --

MR. MEKARU: Friday.

THE COURT: Yeah.

MR. MEKARU: I tried to get it --

THE COURT: Right.

MR. MEKARU: It would have been due today but I got it to you early in anticipation of today's hearing.

THE COURT: We'll get to that. My question is typically you guys have a plea deadline. Has that passed?

MR. MEKARU: The first one did so --

THE COURT: There's multiple?

MR. MEKARU: Well, to the extent that --

THE COURT: Okay.

MR. MEKARU: Yes, Your Honor.

THE COURT: Okay.

MR. MEKARU: It will not be the same deal, but certainly we will entertain additional discussions for other plea resolutions.

THE COURT: All right. Let's go through what's pending. There are four motions outstanding, and I think at least three of them we can try to resolve right now, but let's start with the -- start backwards, I guess, with the motion to suppress. Are both sides in agreement there doesn't need to be a hearing, because from what I read there isn't -- there

aren't any allegations as it relates to the truth or veracity of the affiants, correct?

MR. KARAFA: That's correct, Your Honor. I probably should add something to that in response to the Court's question, and that is, I've outlined the briefs and, of course, attached the affidavits, and I think there's one proposition that the four corners approach is all that needs to be analyzed, though my client raises with me the prospect of some testimony in a state prelim case. I'm not sure I can articulate the materiality of that, but he refers to a state preliminary hearing case in district court in Wyoming with regard to perhaps the December 2, 2021, attempted robbery where an officer suggested that information was obtained with regard to the Ford Taurus license place number, not through the MSP enlargement process that's set forth in the affidavit, Detective Huey's affidavit, but rather outside of that. I don't have that information but that would be the only basis I would have to suggest that perhaps a hearing is needed to take -- at least I have to get that transcript and review that information.

THE COURT: Is that included in this motion, because I don't know that I saw it?

MR. KARAFA: That is not included in this motion, Your Honor.

THE COURT: All right. As it stands right now from

what I'm seeing in the motion there is no need for an evidentiary hearing. Obviously if something changes, you'll let me know.

Let's tackle the other motions. First of all, that was the motion to suppress, ECF 35.

ECF 37 is defendant's motion to preclude improper co-conspiracy evidence or other hearsay evidence offensive to the confrontation clause.

The response -- first of all, it is a two page motion that's somewhat generic, I think, because at the time maybe Mr. Karafa wasn't aware of the co-defendant cooperating and testifying. I assume --

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

THE COURT: -- he has testified in grand jury so this, I think, becomes moot, correct? Certainly that person, I assume, if we go to trial, is going to testify; is that correct, Mr. Mekaru?

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

THE COURT: And we're talking about the co-defendant, Mr. Jurl, and you agree that would be moot, then?

MR. KARAFA: Your Honor, I agree with that until, of course, the trial when Mr. Jurl takes the stand, and if something comes up that may arguably be hearsay that is inadmissible, we can raise it then, but with regard to the main concern that was raised here, yes, so that's resolved.

I have reviewed the entire record of proceedings. In my professional opinion, the articulable appealable issues which I identified in my review of the pretrial and trial record, and which I included in Defendant-Appellant Redo Lamont Rolling's Opening Brief on Appeal, are as follows:

A. The Trial Court Erred In Denying Defendant's Pretrial Motion To Suppress Evidence Obtained From the Issuance of an Unlawful Warrant Which Authorized Agents to Electronically Track Mr. Rolling's Car.

B. The Trial Court Also Erred In Denying Defendant's Pretrial Motion To Suppress Cell Site Location Evidence.

C. The Trial Court Erred In Denying Defendant's Pretrial Motion To Suppress Evidence From the Search of Mr. Rolling's Residence, as There Was No Articulated Basis Establishing A Connection to Contraband, Only Investigatory Hunches and Suspicions.

D. The Trial Court Erred In Denying Defendant's Pretrial Motion To Preclude Evidence of a Prior Uncharged Robbery Under FRE 404b and in Permitting the Case Agent to Unduly Prejudice Mr. Rolling's Defense By Evidence of Rolling's Term of Incarceration.

E. The Trial Court Erred In Denying Defendant's R. 29 Motion For Judgment of Acquittal At the Close of the Government's Case.

F. The Sentencing Court's denial of Mr. Rolling's motion for a variance below the advisory guidelines range culminated in the imposition of a substantively unreasonable sentence.

Having reviewed the entire record, I determined in my opinion that, other than those mentioned above and incorporated into the enclosed brief on your behalf filed on April 26, 2023, there were no other rulings by the trial court or sentencing court which would form the basis for a meritorious argument on appeal. I will be a bit more specific for you in this regard.

But first I want to respond to your letter which states your thoughts on appealable issues. For example, you first state in your recent letter to me:

> *"My issues are the 14th Amendment (Equal Protection under the law). For the prosecution to openly admit that there was no evidence against me only Jurl's testomy (sic). Cause he believes Jurl is a creditible (sic) witness due to his crack cocaine addition (sic)."*

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THE COURT: Well, hold on. If you prepared it, it shouldn't be a joint statement. If there are issues, it shouldn't be a joint statement.

MR. MEKARU: I prepared it and gave it to him for his comment and approval, and it was certainly my understanding we had an agreement.

THE COURT: Okay.

MR. MEKARU: Now counsel has pointed out that for this joint statement -- I tried to keep it simple, so the allegation here is aiding and abetting the robberies, so in the first element, that the robbery, you know, affected commerce or that the credit union was robbed is part of the aiding and abetting instruction. Now, the subpart for that is the break down of what are the elements for a robbery affecting commerce and what are the subparts for a credit union robbery. That's something that I originally had submitted to the --

THE COURT: Mr. Mekaru, I'm going to stop you there. Tell me what the issue is. What's the issue?

MR. MEKARU: Do you want the subparts as part of the instruction? I was trying to keep it simple just for the introduction to say generally these are the factors you have to consider, the elements you have to consider, or do you really want the break down of those individual elements?

THE COURT: Okay. Are we talking about for counts