Case No. 12-3023

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

ABASI S. BAKER,

Appellant.

Appeal from the United States District Court for the District of Kansas
Honorable Carlos Murguia, United States District Judge
Case No. 2:11-cr-20020-CM

BRIEF OF THE APPELLANT

JONATHAN STERNBERG, Mo. #59533
Jonathan Sternberg, Attorney, P.C.
1111 Main Street
7th Floor, Harzfeld's Building
Kansas City, Missouri 64105
Telephone: (816) 474-3000
Facsimile: (816) 474-5533
E-mail: jonathan@sternberg-law.com

COUNSEL FOR APPELLANT
ABASI S. BAKER

ORAL ARGUMENT REQUESTED

Table of Contents

Table of Authorities

Cases

Constitution of the United States

United States Code

Federal Rules of Appellate Procedure

Statement of Related Cases

This is a direct appeal from an original judgment of conviction and sentence in a criminal case. There are no prior or related appeals.

Jurisdictional Statement

This is an appeal from a final judgment of conviction and sentence entered by the United States District Court for the District of Kansas in a criminal case that the Government had filed upon a grand jury indictment alleging violations of 18 U.S.C. §§ 922, 924, 1951, and 2. The district court had jurisdiction pursuant to 28 U.S.C. § 1355(a).

The district court entered its final judgment imposing sentence on January 18, 2012. The appellant filed his Notice of Appeal on January 23, 2012. Under Fed. R. App. P. 4(b)(1)(A)(i), the Notice of Appeal was timely, as it was filed within ten days of the district court's final judgment. Therefore, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues

I. The district court erred in convicting and sentencing Mr. Baker because the only direct evidence against him was obtained in violation of the Fourth Amendment. Under the present framework for GPS tracking of vehicles, the Government's admittedly warrantless placement of a GPS device on Mr. Baker's vehicle, which led both to his arrest and to the only direct evidence against him, was unlawful and prejudicial.

II. The district court erred in entering a judgment of conviction and sentence against Mr. Baker for brandishing a firearm during a crime of violence in counts 2, 5, 8, and 11 and possession of a firearm in counts 3, 6, 9, and 12, because the Government's evidence was insufficient to connect him to the specifically-charged Glock pistol before February 14, 2011. There was no direct or circumstantial evidence of such possession or use before February 14, 2011, and mere speculation is not evidence.

Statement of the Case

A grand jury charged Abasi Baker with 21 counts related to a string of six robberies and one attempted robbery in Johnson and Wyandotte Counties, Kansas, in January through March, 2011. For each of the events, Mr. Baker was charged with one count of robbery, one of brandishing a gun during a crime of violence, and one of being a felon in possession of a firearm. For two of the events, the indictment similarly charged a co-defendant, Mark Davis. Each count charged Mr. Baker both as a principal or, alternatively, as an aider and abettor.

The Government contended Mr. Baker, using his girlfriend's car and a specific gun belonging to a friend with whom Mr. Baker had been staying in late-February 2011, had committed the six robberies and one attempted robbery, four of which were of payday loan stores. The FBI eventually stopped and arrested Mr. Baker after warrantlessly tracking the car with a GPS device. Mr. Baker's defense was general denial.

The district court severed Mr. Baker and Mr. Davis for trial. The charges against Mr. Baker were tried before a jury over eight days in September 2011. The jury found him guilty of all counts. On January 18, 2012, the district court sentenced Mr. Baker to 164 years in prison, mostly as mandatory consecutive minimum 25-year sentences on six of the brandishing charges.

Mr. Baker timely appealed to this Court.

Statement of Facts

A. Initial robberies

1. Advance America, Kansas City, Kansas (January 6, 2011)

On January 6, 2011, Chillena Kane and Tosheba Harden were working at Advance America, a payday loan store in Kansas City, Kansas (Appellant's Appendix 142-44, 146-48, 415-17). The store was located in the Wyandotte Plaza strip mall, which contained a Price Chopper supermarket (Aplt.App. 142-44, 415-17, 1336).

Around 5:00 p.m., a person entered through the front door, approached Ms. Harden, and said, "Ain't nobody going to get hurt, just give me the money" (Aplt.App. 146, 148-51, 157, 417-18). The person was "completely covered up," wearing a black hooded sweatshirt with the hood over his head and a cold weather mask covering his face (Aplt.App. 150, 153, 417, 419, 426-27). He also wore cloth work gloves, dark jeans, and brown boots (Aplt.App. 154, 162). He was "very tall" and "very thin" (Aplt.App. 158, 428)

Ms. Kane and Ms. Harden only could see the person's eyes (Aplt.App. 150, 419). Nonetheless, they said they could tell it was an African-American male (Aplt.App. 151, 160, 162, 419-20). Both testified they could not identify him (Aplt.App. 156, 428).

At the same time, the employees saw the man was holding a gun (Aplt.App. 149-50, 417). Ms. Harden only could say it was a handgun (Aplt.App. 420). Ms. Kane said it was a black semiautomatc (Aplt.App. 154-55, 163). The man did not wave the gun, but instead held it toward his body (Aplt.App. 153). He did not point the gun at anyone or threaten to shoot anyone (Aplt.App. 163).

Ms. Kane did not have time to reach her "panic button" to set off the store's alarm (Aplt.App. 149). Instead, she grabbed money from a drawer (Aplt.App. 149, 422). At this, the man pulled out a plastic bag with red writing on it, handed it to Ms. Harden, and Ms. Kane put the money from the drawer in it (Aplt.App. 151-52, 163, 422).

The man then made the employees lead him to the store's backroom safe (Aplt.App. 152, 422-23). Ms. Harden opened the safe and gave him a "bait bag" containing $100 that looked like a lot more money (Aplt.App. 153, 423-24). The man left, taking a total of $458 (Aplt.App. 154-55, 424-25).

Ms. Kane and Ms. Harden called the police (Aplt.App. 156, 165-66, 425). The store had security cameras installed, but they were not working (Aplt.App. 421). The police could determine very little either from the witnesses or a canvass of the area (Aplt.App. 170-71).

2. Radio Shack, Kansas City, Kansas (January 10, 2011)

On January 10, 2011, Vanessa Harvey and J'Hlesa Richardson were working at the Radio Shack store in Wyandotte Plaza (Aplt.App. 264-65, 287-88). It was snowing outside (Aplt.App. 264).

Around 6:45 p.m., a person entered, came up to Ms. Harvey, pulled a gun and a plastic bag of his pocket, pointed the gun at her, and said "Get up, don't worry, you won't be hurt" and "Give me all the money" (Aplt.App. 265-66, 268-70, 283). The gun was a black semiautomatic handgun (Aplt.App. 268-69, 292).

The person was wearing a black jumpsuit, a dark hooded sweatshirt with the hood on, and a black scarf wrapped around his face (Aplt.App. 274, 278-79, 292-93). Both employees only could see the person's eyes (Aplt.App. 273, 293). Nonetheless, both said they thought from the voice it was an African-American male (Aplt.App. 273, 292-93). Neither could identify him (Aplt.App. 282, 293).

Ms. Harvey later told the police the man was 5'11" with a "petite" build, though he also could have been 5'7" or 5'9" (Aplt.App. 273-74, 277). Ms. Richardson said he was shorter than 5'9" (Aplt.App. 297).

Ms. Harvey got Ms. Richardson's attention, the man led Ms. Harvey to the cash register with her hands raised, and the two employees took money out of the register to give to him (Aplt.App. 268, 288-90). The man never pointed the gun at or threatened Ms. Richardson (Aplt.App. 299). There was only $300 in the

register, which the man removed and slipped into his pocket (Aplt.App. 270-71, 291). He demanded more money, but was satisfied there was none (Aplt.App. 272, 289).

The man then left the store going north, but disappeared after that (Aplt.App. 275, 295, 300). The employees called the police and their managers (Aplt.App. 275, 296). The store had a security camera, but its quality was too poor to be useful (Aplt.App. 275).

Around the same time, Shawn Sheppard, an employee at the Advance Auto Parts store in Wyandotte Plaza, was outside smoking when he saw a person cross the parking lot and walk backwards into Radio Shack (Aplt.App. 255-56). He said the person wore a black hooded sweatshirt with a black cold weather mask (Aplt.App. 255, 260). He could not see the person's race or physical characteristics (Aplt.App. 258). Three minutes later, Mr. Sheppard saw the person run out of and behind the Radio Shack and disappeared (Aplt.App. 255-57, 259).

Police officers, including Detective Troy Rice, arrived and interviewed witnesses (Aplt.App. 257, 303-07, 664-65).

3. Advance America, Overland Park, Kansas (January 12, 2011)

On January 12, 2011, Patricia Lusher was working alone at the Advance America payday loan store at 103rd Street and Metcalf Avenue in Overland Park,

Kansas (Aplt.App. 438-40, 449). The store was in a strip mall containing a Wal-Mart (Aplt.App. 431-32, 441, 1337).

Around 1:00 p.m., a person entered with a gun in his hand, walked up to Ms. Lusher's counter, set the gun down on the counter while holding it, and said, "Give it to me" (Aplt.App. 442, 444-46). The person was wearing a dark hooded sweatshirt with the hood up, tan pants, and black gloves (Aplt.App. 442, 447). Ms. Lusher could not see his face, but said she thought from his voice he was an African-American male (Aplt.App. 442, 447-48, 463-64). He was short and thin; his gun was dark grey and looked "squareish" (Aplt.App. 446, 463).

Ms. Lusher gave the man all the cash in her drawer (Aplt.App. 446). He stuck the money in his jacket pocket but was dissatisfied with the amount (Aplt.App. 448-49). Ms. Lusher opened other drawers to show him there was no more (Aplt.App. 450). She said the man threatened to shoot her if she did not show him the store's safe (Aplt.App. 450-51).

At this, she took him back to the safe and opened it (Aplt.App. 453-54). The man reached in and took nearly all the items in the safe, including money from a bag containing the store's backup change (Aplt.App. 454-56).

The man left, taking a total of $1,250, and Ms. Lusher pulled an alarm button and called the police and her superiors (Aplt.App. 456-57, 460-61). She did not know where the man went (Aplt.App. 461).

The store had security cameras watching its lobby, but not the back room where the safe was (Aplt.App. 451-52, 456-57, 459-60). A photo of the man was captured from that video (Aplt.App. 461, 1321).

Overland Park Detective David Zickel investigated the robbery (Aplt.App. 764). He spoke with witnesses and canvassed the area (Aplt.App. 766).

4. Dollar General attempted robbery, Kansas City, Kansas (January 16, 2011)

On January 16, 2011, Doris Hicks and Cassie Belcher were working at the Dollar General store in a strip mall at 81st Street and Parallel Parkway in Kansas City, Kansas (Aplt.App. 467-69). Ms. Hicks was the manager and Ms. Belcher the cashier (Aplt.App. 467-68, 488-90). The strip mall also contained a Hen House supermarket (Aplt.App. 468, 205-06, 468, 1338). The store had security cameras throughout viewable live from the store's office, though without sound recording (Aplt.App. 473, 475).

Around 8:15 p.m., Ms. Hicks and Ms. Belcher saw a person enter the store carrying a gun (Aplt.App. 469, 474-75, 481, 490-91, 498). Ms. Hicks was in the store's office with the door closed, but saw it live on the video monitor (Aplt.App. 474-75, 494-97). She called 911 (Aplt.App. 475).

Both employees described the person as wearing a dark hooded sweatshirt with the hood pulled up, dark pants, and dark gloves, and a dark ski mask or bandana covering his face (Aplt.App. 477, 483, 490-91). Ms. Hicks only could see

the person's eyes, but thought from his build he was a man; she said he was dark-skinned, but she could not determine his race (Aplt.App. 477, 484-85). She said he appeared to be between 5'7" and 5'9" with a medium build (Aplt.App. 482). Ms. Belcher said the man was taller than 5'11", her height (Aplt.App. 498). She said she could tell from his voice he was male and thought he was African-American (Aplt.App. 492, 498, 501).

The man pointed his black handgun at Ms. Belcher, pulled out a white bag, and demanded she open the safe (Aplt.App. 476, 490-91, 493). She explained she did not have the code to the safe – only Ms. Hicks did – and it would not open until 15 minutes after the code was entered (Aplt.App. 491).

At this, the man walked toward the office and motioned through the window for Ms. Hicks to come out (Aplt.App. 477, 491-92). Noticing Ms. Hicks was on the phone, he left, taking no money (Aplt.App. 478, 492). Police officers interviewed the witnesses and recovered the store's video (Aplt.App. 478, 504-05).

5. Check Into Cash, Overland Park, Kansas (February 16, 2011)

On February 16, 2011, Cynthia Caylor was working alone at Check Into Cash, a payday loan store at 110th Street and Quivira Road in Overland Park, Kansas (Aplt.App. 507-12). The store was located in a strip mall that also included a Sun Fresh supermarket (Aplt.App. 509-10, 1339).

Around 3:07 p.m., while Ms. Caylor was at her desk, a person entered the store holding a black semiautomatic handgun "with a long barrel" (Aplt.App. 513, 517, 532-33). The person told her to get up, open the cash register, and take out money, remarking, "You know the drill" (Aplt.App. 514).

The person was "covered up from head to toe" wearing a dark hooded sweatshirt with the hood up, dark pants, and dark gloves, with a scarf covering his face (Aplt.App. 515-16, 531-32). As Ms. Caylor only could see his eyes, she could not say what he actually looked like (Aplt.App. 515, 532-33). From his voice, she thought he was a male (Aplt.App. 515). He had medium-dark skin, which made Ms. Caylor think he was African-American (Aplt.App. 516, 532). His build was "slender" (Aplt.App. 531).

Ms. Caylor took all the money out of the one open cash register and laid it on the counter; the man grabbed it and put it in his sweatshirt (Aplt.App. 518). He then directed her to the back of the store and made her open the safe (Aplt.App. 519-21). After that, he made her open the closed cash register, which held no money (Aplt.App. 521). He had her lie on the ground and left (Aplt.App. 522-23).

Once Ms. Caylor heard the door chime indicating the man had left, she got up and looked outside; she saw someone dressed like the man getting into the passenger side of a black or silver car, which then drove off (Aplt.App. 523-24). She concluded there were two people in the car: the robber and a driver (Aplt.App.

527). The car was a compact car that appeared to be a hatchback (Aplt.App. 528, 537, 543). It was not a full-sized, four-door vehicle (Aplt.App. 537).

Ms. Caylor called her superiors and the police (Aplt.App. 529). She told the police the man took $4,027 (Aplt.App. 530). Detective Zickel investigated that robbery, too (Aplt.App. 765).

6. Check Into Cash, Olathe, Kansas (February 22, 2011)

On February 22, 2011, Christina Mounday was working alone at the Check Into Cash payday loan store at 135th Street and Black Bob Road in Olathe, Kansas (Aplt.App. 578, 582). The store was in a strip mall that also contained a Hen House supermarket (Aplt.App. 578-79, 1340).

Around 4:30 p.m., a person entered the store, pointed a gun toward Ms. Mounday, and said, "Get up, give me all the money" (Aplt.App. 585). The person was wearing black pants, black "driving gloves," a dark hooded sweatshirt with the hood on, and a scarf over his face (Aplt.App. 586). She only could see the person's eyes (Aplt.App. 586-87, 597). Based on the voice, she thought it was an African-American male (Aplt.App. 587-88). He was about 5'10" and "seemed very thin" (Aplt.App. 595). The gun was a black semiautomatic handgun with many scratches (Aplt.App. 591, 600).

The man pulled out a plastic bag, pointed the gun at Ms. Mounday, and told her to put all the money from the register into the bag (Aplt.App. 589). He

demanded to see the safe, but she told him there was no safe (Aplt.App. 589). Since he wanted more money, Ms. Mounday also gave him an envelope she found containing some (Aplt.App. 589). He made her prove there was no money in other drawers (Aplt.App. 589-90). In total, he took $1,333 (Aplt.App. 593-94, 1267-68).

The man made Ms. Mounday sit in a corner and left (Aplt.App. 590, 592). She saw him leave and go west but did not see any vehicle (Aplt.App. 592, 601). She called her superiors and the police (Aplt.App. 592-93, 604-05).

The police interviewed Ms. Mounday, but could not process fingerprints because the suspect wore gloves (Aplt.App. 607-08). The store had security cameras, but their quality was too poor to be useful (Aplt.App. 608). A canine unit tracked a trail west from the store to behind the Hen House but then lost it (Aplt.App. 608-09).

B. Investigation

1. Recovery of exterior video footage

On January 10, 2011, David Allcorn, a loss prevention officer with Ball's Food Stores, which owns the Price Chopper and Hen House supermarket chains, was reporting to work at the Price Chopper store in Wyandotte Plaza (Aplt.App. 175). He saw several police officers, including Detective Rice, who told him the Radio Shack had been robbed (Aplt.App. 176-77, 182).

The Price Chopper had exterior, motion-activated security cameras pointing in all directions (Aplt.App. 178-81, 190). Detective Rice asked Mr. Allcorn to review their security footage for any information related to the robbery (Aplt.App. 177, 666). Specifically, he wanted to see whether the video could identify any vehicle behind the Radio Shack to which the robber may have run (Aplt.App. 182).

Mr. Allcorn checked the video, which he said showed a vehicle traveling with its lights off until it reached the strip mall's exit, whereupon its lights turned on (Aplt.App. 183, 186-87). He said footage from the front of the building showed the same vehicle driving around the Price Chopper and the Radio Shack as early as 5:16 p.m. (Aplt.App. 183-84, 187-88, 192-98). He extracted nine still photos of the vehicle from the video (Aplt.App. 199-204, 1312-20).

Mr. Allcorn said he could tell the photos depicted the same vehicle because it was a grey Nissan with the same snow patterns on the top in all instances and an antenna on its roof toward the back (Aplt.App. 188-89, 202). He admitted there must be many small gray Nissan sedans in the Kansas City Metropolitan Area but did not look to see how many others were in the parking lot (Aplt.App. 234-35).

The vehicle in the video had both front and back license places (Aplt.App. 200). On one shot, the vehicle's license plate number, YF1B8D, was visible (Aplt.App. 198, 240, 1318). Mr. Allcorn said he could see an individual in the passenger seat in one shot, but could not tell anything about the individual

(Aplt.App. 198, 242, 1313-14). He figured that, because the car was in motion, there must have been a driver, too (Aplt.App. 198, 244).

Mr. Allcorn gave all this information to Detective Rice (Aplt.App. 204). On January 19, Detective Rice told Mr. Allcorn about the January 16 attempted robbery at the Dollar General (Aplt.App. 204, 667). As Mr. Allcorn also was the loss prevention officer for the Hen House in that strip mall, Detective Rice requested he review the Hen House's exterior video footage for any sign of the same vehicle (Aplt.App. 205).

The Hen House, too, had exterior cameras pointed in all directions (Aplt.App. 206-08). On their footage from January 16, Mr. Allcorn saw what he thought was a vehicle of the same description as the one from the January 10 footage driving around outside the Hen House and the Dollar General between 7:52 p.m. and 8:13 p.m. (Aplt.App. 211-13, 217-18). He admitted, though, that he could not be sure it was the same vehicle as the January 10 footage (Aplt.App. 242). He extracted eight still photos (Aplt.App. 218, 1324-31).

Mr. Allcorn said the January 16 vehicle was the same color, had the same roof antenna, had the same body style, and was the same make as the one on the January 10 Price Chopper footage, and he could see a "white emblem sticker" on it (Aplt.App. 211-13). He said, this time, the car more clearly was a Nissan Sentra (Aplt.App. 214). In several of the photos, he said he could see something hanging

from the rearview mirror (Aplt.App. 215-16, 221, 1326, 1328-29). He again said he could see someone in the front passenger's seat (Aplt.App. 216-17).

The video did not show the car's license plate number (Aplt.App. 240, 1331). The plate, however, appeared to be white and blue, which Mr. Allcorn said could be from Missouri (Aplt.App. 221, 1331). He admitted he could not actually say the license plate was from Missouri, but only that the car was registered in a state, like Missouri, with both front and back plates (Aplt.App. 243-44).

Mr. Allcorn again provided this information to Detective Rice (Aplt.App. 221). Weeks later, Detective Rice asked Mr. Allcorn to check footage from the Wyandotte Plaza Price Chopper from the time of the January 6 Advance America robbery for a similar vehicle: a grey, four-door Nissan Sentra with a white sticker and an item hanging from the rearview mirror (Aplt.App. 222, 225, 669, 678).

Again, Mr. Allcorn said he saw a vehicle of the same description driving around in front and back of the Price Chopper and the Advance America between 4:26 p.m. and 5:00 p.m. (Aplt.App. 225-29). Again, he extracted still photos (Aplt.App. 230-32, 1302-11). As before, Mr. Allcorn admitted he could not actually say it was the same car (Aplt.App. 242). This time, he could not see any occupants of the car (Aplt.App. 247). He also could not see any license plates (Aplt.App. 240). Detective Rice admitted that, while the vehicle was similar to that in the January 10 and 16 photos, it was not exactly the same (Aplt.App. 707).

Detective Rice and his colleague, Detective Scott Howard, had a description of the alleged suspect from the three robberies: an African-American male (Aplt.App. 671). Detective Rice believed all six robberies had what he termed "significant similarities:" description of the suspect, clothing worn, covered face, gloves, handgun, and use of a plastic bag (Aplt.App. 680).

At a regular February 2011 meeting with police from across the Kansas City Metropolitan Area, including localities in both Kansas and Missouri, Detective Rice heard an Overland Park detective described two unsolved robberies there with the same characteristics (Aplt.App. 683). Thereafter, Kansas City and Overland Park police "joined forces" to further the investigation (Aplt.App. 684). After February 22, Olathe police joined, too (Aplt.App. 685).

In Overland Park, Detective Zickel asked David Timmons, assistant manager of the Wal-Mart in the same strip mall as the Advance America at 103rd and Metcalf, to check the Wal-Mart's external security cameras around the time of the January 12 robbery for a grey Nissan car (Aplt.App. 434, 766-71). The Wal-Mart also has external security cameras pointing in all directions (Aplt.App. 433).

Mr. Timmons saw what he said was one driving in front and in back of the Advance America (Aplt.App. 435-36, 766-71). He extracted still photos (Aplt.App.769-70, 1322-23). He could not see the car's license plate or anything

hanging from its rearview mirror (Aplt.App. 773-75). He could not actually identify the car as a Nissan, either (Aplt.App. 775).

2. Mary Hoffmeister and Abasi Baker

In late January 2011, Detectives Rice and Howard contacted the Missouri Department of Revenue to trace the license plate tag number on Mr. Allcorn's January 10 photo, who identified it as registered to Diane Hoffmeister in St. Joseph, Missouri (Aplt.App. 644-45, 670). Detective Rice asked the St. Joseph police to contact Mrs. Hoffmeister (Aplt.App. 312-13, 672-73).

Mrs. Hoffmeister told them that, while a grey Nissan Sentra was registered in her name, it was used by her daughter, Mary, who lived in Kansas City, Missouri (Aplt.App. 311-12). Mrs. Hoffmeister said Mary's boyfriend of nearly three years, Abasi Baker, also drove the car (Aplt.App. 309-13, 370). Mr. Baker let other people driver the car, too (Aplt.App. 362).

On January 24, 2011, Detective Rice's office contacted Mary (hereinafter "Ms. Hoffmeister") and asked her to come to the police department to speak with investigators (Aplt.App. 326-27). She did so on January 26, 2011, after telling Mr. Baker she was going to (Aplt.App. 327, 348, 645). She gave the police consent to search her car and left it with them (Aplt.App. 328-29, 674, 714, 798-99, 1342).

Ms. Hoffmeister identified photos of the car (Aplt.App. 319-20, 1332-35). Its license plate was Missouri YF1B8D (Aplt.App. 323, 385). It had an antenna on

the roof, a sticker on the back, a hat in the rear window, and a tree-shaped air freshener hanging from the rearview mirror (Aplt.App. 324-25, 379-80, 385-86, 388). Mr. Allcorn opined that the photos matched the car he saw in his videos and stills (Aplt.App. 405-07, 412).

Stanley Isaacson, a crime scene investigator, processed the car (Aplt.App. 382-83). He took the photos Ms. Hoffmeister had identified, as well as others (Aplt.App. 383-87, 1332-35, 1351-53). Mr. Isaacson collected compact discs from the vehicle, as well as a letter with Mr. Baker's name on it addressed to Ms. Hoffmeister's address and a black CD case bearing the intials ASB (Aplt.App. 390-92, 395). He dusted the car for latent fingerprints, but found none (Aplt.App. 400-01).

Detective Howard interviewed Ms. Hoffmeister for several hours, during which she told him about her relationship with Mr. Baker (Aplt.App. 328-29, 646-47, 673-74, 806). She gave a formal statement (Aplt.App. 331-34, 662).

Ms. Hoffmeister moved to Kansas City, Missouri, in 2001; she met Mr. Baker, an unemployed student, in 2009 (Aplt.App. 315-17). He moved in with her in her home in midtown Kansas City (Aplt.App. 317-18). In June 2011, they had a son together (Aplt.App. 318). Besides school, Mr. Baker spent time in recording studios recording rap music (Aplt.App. 318).

Ms. Hofffmeister was responsible for paying rent and bills (Aplt.App. 318, 370). In January 2011, she worked only on weekends, though overnight each day (Aplt.App. 325-26). She said Mr. Baker did not contribute any more money to her than usual between January and March 2011 and she never saw any change in his spending habits (Aplt.App. 370).

Ms. Hoffmeister said Mr. Baker owned brown Timberland boots (Aplt.App. 332). She said she was at home January 10 because of bad weather, but Mr. Baker may have had her car (Aplt.App. 338). She said Mr. Baker had dropped her off at work on January 16 and then had her car because he picked her up on the morning of January 17 (Aplt.App. 339-40). She said she never had been to either Wyandotte Plaza or the 81st Street/Parallel strip mall in Kansas City, Kansas, the area of 103rd and Metcalf or 110th and Quivira in Overland Park, or West 135th Street in Olathe (Aplt.App. 353-54). She did not believe Mr. Baker had used her car in any robberies (Aplt.App. 375).

In addition to her car, Ms. Hoffmeister allowed the police temporarily to take her mobile phone (Aplt.App. 329, 799-800). She regularly called Mr. Baker on that phone, and vice-versa, sometimes multiple times per day (Aplt.App. 329-30, 358-59). They also each sent text-messages to each other (Aplt.App. 361).

Detective Rice had the phone searched (Aplt.App. 675). There were several missed calls from (816) 838-4629, which was not associated to any name in the

phone's memory (Aplt.App. 675). At the time, Ms. Hoffmeister's mobile phone number was (816) 244-1051 (Aplt.App. 329, 357). By time of trial, it was (816) 824-9520 (Aplt.App. 357).

The police asked Ms. Hoffmeister for Mr. Baker's mobile phone number (Aplt.App. 329, 799-800). At trial, she said his number began with an "838" prefix and thought it could have been (816) 838-4629 but was unsure; she knew that, later, his number was changed to (816) 482-2634 (Aplt.App. 330, 360, 373) (Aplt.App. 330, 373). Detective Rice said Ms. Hoffmeister told him (816) 838-4629 was Mr. Baker's number (Aplt.App. 676). He never independently verified this, though, from T-Mobile, the number's service provider (Aplt.App. 703-04).

After leaving the police, Ms. Hoffmeister told Mr. Baker she had left her car with them (Aplt.App. 349). She also told him the police's investigation concerned a series of robberies in Kansas City, Kansas (Aplt.App. 352-53, 374-75).

On January 28, 2011, Ms. Hoffmeister returned to the police and retrieved her car, though her mobile phone remained there for fifteen days (Aplt.App. 348, 350). Detective Howard interviewed her again (Aplt.App. 660). Later that day, she bent a rim and hubcap on the car; she did not have it fixed for several weeks (Aplt.App. 350-52). Mr. Baker began driving it again anyway (Aplt.App. 351-52).

Between February 14 and March 3, 2011, Mr. Baker did not live with Ms. Hoffmeister, but instead stayed with his yearlong friend, Enjoli Collier, at her

home in Midtown Kansas City, Missouri, paying her $125 to do so; he had never stayed with her before that (Aplt.App. 356, 732-33, 736, 745, 747). As he still used Ms. Hoffmeister's car during this period, there were times he would have her car and she would not know where either he or the car were (Aplt.App. 356, 736). Ms. Collier also drove the car three times (Aplt.App. 737).

Ms. Collier gave Mr. Baker a key, and he was free to come and go as he pleased (Aplt.App. 734). He had no key to her home before this (Aplt.App. 756). Ms. Collier said his coming and going was irregular (Aplt.App. 738).

Ms. Collier owned a .40 caliber Glock semiautomatic Model 27 pistol, serial number EHN890US, which she had purchased in a store in Claycomo, Missouri, in 2009 (Aplt.App. 740-42, 745, 1343-50). She kept it next to the spare tire in the trunk of her car, which she parked in her driveway (Aplt.App. 744). She never told Mr. Baker either that she owned a gun or where it was (Aplt.App. 750, 761). Mr. Baker could not have had access to it before he started staying with her after February 14, 2011 (Aplt.App. 745). In March 2011, Ms. Collier discovered her gun was missing (Aplt.App. 749).

3. GPS tracking and monitoring

Detective Rice gave the phone number (816) 838-4629 to FBI Special Agent John Hauger, who specialized in cell phone investigations (Aplt.App. 677-80). The two obtained court orders to allowing them to retrieve the number's historical

data, which they thought might tell where the phone associated to it was located on the dates of the robberies under investigation (Aplt.App. 677-80, 782-83). They also did the same with Ms. Hoffmeister's phone number (Aplt.App. 677-80).

At this point, the local police asked the FBI to take "a more active role" in the investigation because they did not have equipment necessary to perform a "pin register" on the cell phone numbers (Aplt.App. 685, 720). A pin register is a live record of what number a phone is calling or is being called from and what tower and side of the tower the phone is hitting off when in a call (Aplt.App. 784-85). The field of the side of the tower, called a "sector," is pie-wedge-shaped (Aplt.App. 1062). A tower's range varies, as some are actual towers and some are devices on buildings (Aplt.App. 843-44). Some have a range of up to several miles (Aplt.App. 844). Thus, while a pin register can tell which of three sectors of a tower a phone tracked to, it cannot tell how far away the phone was or where the phone was within the sector (Aplt.App. 845, 1141-45, 1154).

Agent Hauger retrieved a pin register containing historical information for the phone tied to (816) 838-4629 all the way back to January 6, 2011, and going forward live thereafter (Aplt.App. 784, 786-87, 1057, 1065). He said this showed him where the phone as on various dates (Aplt.App. 1070). While Agent Hauger identified the phone as Mr. Baker's, he admitted he could not be sure the phone actually was in Mr. Baker's possession at any time (Aplt.App. 1138-39, 1070).

Plotting these reports on maps, Agent Hauger said the phone was in the sector of a tower near Ms. Collier's residence on January 6 around 5:00 p.m. (Aplt.App. 1071-73). He said it was in the sector of a tower near the Advance America robbery on January 12 and never visited that area again (Aplt.App. 1073-74, 1077-78). He said it was in the sector of a tower near the Dollar General attempted robbery after it occurred and never visited that area again (Aplt.App. 1080-82). He said it was in the sector of a tower near the Check Into Cash robbery in Overland Park on February 16 and never was in that area again (App 1083-88). He said it was in the sector of a tower near the Olathe Check Into Cash robbery on February 22 (Aplt.App. 1100-01).

Agent Hauger admitted, though, that the phone had traveled throughout Johnson and Wyandotte Counties in Kansas many other times during the pin register, not just near the robberies (Aplt.App. 1164). As well, the pin register gave no information relative to the January 10 robbery (Aplt.App. 1075-76).

On March 1, 2011, Agent Hauger put a GPS tracker on the (816) 838-4629 number (Aplt.App. 685). He said he had obtained a warrant to do so on February 28, 2011 (Aplt.App. 789, 812). T-Mobile, however, informed him the number corresponded to a prepaid account that since had been changed to (816) 482-2634 (Aplt.App. 813-15, 879-80). Agent Hauger said he obtained a new search warrant

for that number on March 1, 2011 (Aplt.App. 816). The account's registered birthdate, January 17, 1981, corresponded to Ms. Hoffmeister's (Aplt.App. 880).

The GPS tracker sent the location of the phone containing the number to an e-mail address every 15 minutes while the phone was on (Aplt.App. 788). Agent Hauger regularly provided that location to Detectives Rice and Zickel (Aplt.App. 686, 790, 816-17). The first day, officers responded to the phone's location in midtown Kansas City, Missouri, and located Ms. Hoffmeister's silver Nissan parked in front of Ms. Collier's house (Aplt.App. 817, 819). Agent Hauger said the officers monitored the car and saw other people driving it throughout the day, though he did not know who they were (Aplt.App. 817-19, 856-57).

The next day, March 2, Agent Hauger decided to "slap" a GPS tracking device on Ms. Hoffmeister's car (Aplt.App. 790). He insisted he required no warrant or court order to do so because the car was in public (Aplt.App. 790). As well, Ms. Hoffmeister never consented to placing a GPS device on her car (Aplt.App. 375). Rather, Agent Hauger explained that, after locating the car on the street in front of Ms. Collier's residence on March 1, in the early morning hours of March 2 he and two other officers "went out there and … took the device and put it on the" car's undercarriage (Aplt.App. 791-92).

The GPS tracker sent an e-mail to investigators containing the vehicle's location whenever it started or stopped (Aplt.App. 791). The location also could

be pulled up live on a computer map (Aplt.App. 791). Before that, there had been no way for Agent Hauger to know where the car was at any particular time (Aplt.App. 1147). He explained the GPS tracker on the car was more beneficial than the one on the phone: before he "slapped" the tracker on the car, there was no "definitive" locator of the vehicle and, thus, Mr. Baker (Aplt.App. 1158).

C. March 3, 2011, robbery: Radio Shack, Overland Park, Kansas

On March 3, 2012, Joseph Sapp and Keyle Barner were working at a Radio Shack store in a strip mall at 75th Street and Metcalf Avenue in Overland Park, Kansas (Aplt.App. 549-51, 611-13, 1341).

At about 7:10 p.m., while Ms. Barner was out getting something to eat, a person entered wearing a dark grey hooded sweatshirt with the hood up, a bandana covering his face, and dark pants, holding a gun (Aplt.App. 556-57, 615). Mr. Sapp only could see the person's eyes, but said he could tell from the person's voice it was an Afrian-American male (Aplt.App. 558). Mr. Sapp thought the man was at least 5'10" (Aplt.App. 566). The gun was a semiautomatic handgun with a black grip and silver slide (Aplt.App. 559, 569-70).

Mr. Sapp said he "figured" what was happening and opened the cash register (Aplt.App. 560-61). The man pulled out a plastic bag and demanded Mr. Sapp put all the cash in it (Aplt.App. 561). Mr. Sapp gave the man all the cash, totaling about $300 (App 562, 572). The man demanded money from a safe, but Mr. Sapp

showed him there was no safe (Aplt.App. 562). The man made Mr. Sapp go into the back room and then left, upon which Mr. Sapp called the police (Aplt.App. 563-65). Mr. Sapp did not see where the man went (Aplt.App. 565).

As Ms. Barner was returning to the store, she saw someone come out of the Radio Shack and adjust the hood on their grey hooded sweatshirt (Aplt.App. 564-65, 619, 621). She could not see the person's face or tell anything about the person, but said the person appeared to be "skinny" (Aplt.App. 621-22, 630).

Ms. Barner saw a car parked outside a regular parking spot (Aplt.App. 619, 624-25). The car was a four-door, sliver or grey "newer looking" Honda or Toyota (Aplt.App. 626). She saw the person get into the front passenger side of the car, which then drove off, though she did not see a driver (Aplt.App. 619, 626-27, 634). She then went into the store and discovered Mr. Sapp, who already was on the phone with the police, had been robbed (Aplt.App. 628-29).

The police interviewed Mr. Sapp and Ms. Barner (Aplt.App. 574, 630, 636-38). The Radio Shack store had security cameras, but they were not recording (Aplt.App. 565-66).

D. Arrest of Abasi Baker and Mark Davis

Ms. Hoffmeister said Mr. Baker was using her car on March 3, 2011 (Aplt.App. 354).

Agent Hauger continued GPS tracking of both the (816) 838-4629 phone number and Ms. Hoffmeister's car on March 2 and 3 (Aplt.App. 820-21). On March 3, he periodically checked both trackers (Aplt.App. 822-23). Around 7:15 p.m., he received a message from the car's GPS tracker corresponding to the area of 75th Street and Metcalf Avenue in Overland Park (Aplt.App. 823-24, 1088-89).

At this, Agent Hauger asked the Overland Park police whether there had been a recent robbery in that area; they told him about the Radio Shack robbery (Aplt.App. 823-24). After further monitoring the car's GPS tracker, he eventually requested officers respond to its GPS location (Aplt.App. 825). The GPS tracking showed the car still located in Kansas, though traveling east on I-70 toward and eventually through Downtown Kansas City, Missouri (Aplt.App. 826-28).

Agents Hauger, Kevin McCrary, and Dirk Tarpley, still tracking the car via GPS, coordinated with Kansas City, Missouri, police to lie in wait and stop it on US-71 (Aplt.App. 828-29, 928-29). All three agents were present (Aplt.App. 830, 906, 928).

Upon the stop, Mr. Baker was driving the car and another man, Mark Davis, was in the passenger's seat (Aplt.App. 830, 948). Both were arrested and taken to the FBI office in Kansas City, Missouri, where the agents also had the car towed (Aplt.App. 354, 686-87, 830, 930). A photo of both men after booking was admitted into evidence: Mr. Baker was on the left and Mr. Davis on the right

(Aplt.App. 739, 831, 1354). Mr. Baker was 31 and Mr. Davis 33 (Aplt.App. 832). They were about the same size (Aplt.App. 832). Ms. Hoffmeister knew Mr. Davis was a friend of Mr. Baker's but only had met him twice (Aplt.App. 340-41, 356).

On arrest, Mr. Baker was wearing a black winter coat, a black t-shirt, black and silver tennis shoes, and blue jeans (Aplt.App. 834). Mr. Davis was wearing black boots, a grey t-shirt, and blue jeans (Aplt.App. 835). The FBI found other clothing in the car, including a grey hooded sweatshirt in the back seat (Aplt.App. 835-36, 875-76, 942-43). They also found a stocking cap, a baseball cap, a single black glove, and a black, scarf-like cloth (Aplt.App. 934-35, 945, 1009-15, 1032). Agent Tarpley found a white plastic bag in the car's center console containing $261 in loose cash (Aplt.App. 908, 919-20). An air freshener shaped "like a Christmas tree" hung from the rearview mirror (Aplt.App. 934).

Mr. Baker was carrying a mobile phone corresponding to (816) 482-2634 (Aplt.App. 900-01, 950, 1093). A second phone, which Sprint reported corresponded to (816) 215-6668 and was registered to Mr. Davis, was in the car (Aplt.App. 1093-94).

Later, after obtaining a warrant, Agent Hauger did a historical cell site analysis on Mr. Davis's phone, too (Aplt.App. 1095-97, 1102). It had not been activated until January 21, but Agent Hauger said he placed it within the sector of a tower near the February 22 Check Into Cash robbery (Aplt.App. 1097-99, 1150).

Agent Hauger said he determined that, between January 21 and March 3, there had been a total of 90 calls and text-messages from Mr. Baker's phone to Mr. Davis's phone and 50 vice-versa (Aplt.App. 1103). Agent Hauger said one text-message Mr. Baker's phone sent to Mr. Davis's on March 3, 2011, at 12:35 p.m., stated, "Got to get money tonight cuz I need it" (Aplt.App. 1106). He said a response at 12:37 p.m. stated, "We on it my nigga, I need it too" (Aplt.App. 1107). He said a reply at 12:38 p.m. stated, "Im at the lo key stop. Be here 'til then" (Aplt.App. 1107). Finally, he said another message from Mr. Baker's phone at 5:19 p.m. stated, "What time you wanna move bro bro?" (Aplt.App. 1108).

With a warrant, the FBI took oral DNA swabs from Mr. Baker and Mr. Davis, which it then gave to the Johnson County crime lab (Aplt.App. 877-78, 994-95). There, investigator Dustin Calvin compared Mr. Baker's and Mr. Davis's DNA to sterile swabs from the other clothes in the car (Aplt.App. 1009-19).

Mr. Calvin said the stocking and baseball caps had a mixture of DNA "from at least three individuals," of which Mr. Baker was the "major contributor" (Aplt.App. 1009-11). He said DNA from both Mr. Baker and Mr. Davis were on the inside and outside of the glove, as well as on the hooded sweatshirt (Aplt.App. 1013, 1018-19, 1029). Testing on the black cloth was undeterminable (Aplt.App. 1014-15, 1032). Mr. Calvin admitted the tests could not tell when someone had touched an item, as "DNA can remain intact for years" (Aplt.App. 1038, 1042).

At the time of the arrest, Agent Tarpley noticed a handgun in the car's center console (Aplt.App. 908, 914). He personally seized the gun (Aplt.App. 908-09, 923-24). It was a black, .40 caliber, semiautomatic Glock Model 27, serial number EHN890; it was found with a loaded magazine containing eight rounds, which also were admitted into evidence (Aplt.App. 915-18, 922). Its slide was a slightly lighter color than the darker composite bottom (Aplt.App. 917).

Mr. Calvin also tested the gun, magazine, and cartridges for latent fingerprints and DNA samples (Aplt.App. 961-71). There were no usable prints (Aplt.App. 971, 974). Forensic biologist Mickey McGinness performed DNA testing on the gun; she said DNA from three individuals, including both Mr. Baker and Mr. Davis, was on various parts of the gun (Aplt.App. 1022-25).

E. Proceedings below

On March 4, 2011, a criminal complaint was filed against Mr. Baker in the U.S. District Court for the District of Kansas (Aplt.App. 7). The court ordered detention pending trial (Aplt.App. 8).

On March 29, 2011, Mr. Baker was indicted on 21 counts (Aplt.App. 8, 15-30). Counts 1, 4, 7, 10, 13, 16, and 20 charged robbery in violation of 18 U.S.C. §§ 1951 and 2 (Aplt.App. 15, 17-18, 20-21, 23, 25). Counts 2, 5, 8, 11, 14, 17, and 21 charged use and brandishing of a firearm in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2 (Aplt.App. 16-17, 19-20, 22, 25-

26). Counts 3, 6, 9, 12, 15, 18, and 22 charged being a felon in possession of a firearm in violation of 18 U.S.C. §§ 924(g)(1), 924(a)(2), and 2 (Aplt.App. 16, 18-19, 21-22, 24, 26). The gun charges all specifically charged use of a .40 caliber Glock model 27, serial number EHN890 (Aplt.App. 15-30).

Counts 1, 2, 3 related to the January 6 Advance America robbery in Kansas City (Aplt.App. 15-16). Counts 4, 5, and 6 related to the January 10 Radio Shack robbery in Kansas City (Aplt.App. 17-18). Counts 7, 8, and 9 related to the January 12 Advance America robbery in Overland Park (Aplt.App. 18-19). Counts 10, 11, and 12 related to the January 16 attempted robbery of Dollar General in Kansas City (Aplt.App. 20-21). Counts 13, 14, and 15 related to the February 16 Check Into Cash robbery in Overland Park (Aplt.App. 21-22). Counts 16, 17, and 18 related to the February 22 Check Into Cash robbery (Aplt.App. 23-24). Finally, Counts 20, 21, and 22 related to the March 3 Radio Shack robbery in Overland Park (Aplt.App. 25-26). All 21 counts charged Mr. Baker with both principal liability and aiding and abetting (Aplt.App. 15-30, 57, 140, 1198-99).

Mr. Davis also was indicted in counts 16, 17, 20, and 21, and separately in other counts alleging felon in possession of a firearm (Aplt.App. 23-25). On June 27, 2011, the court severed the defendants for trial (Aplt.App. 9).

The charges against Mr. Baker were tried before a jury over eight days in September 2011 (Aplt.App. 9-10). His defense was general denial; he did not

testify, nor did he call any witnesses (Aplt.App. 1180-83). He stipulated that, before January 2011, he had been convicted of a crime in Missouri federally prohibiting him from possessing a firearm or ammunition (Aplt.App. 1166). He had a Missouri robbery conviction in 1999 for which he served ten years in prison (Aplt.App. 90-91). He also stipulated the Glock handgun recovered from the Nissan had traveled in interstate or foreign commerce (Aplt.App. 1166).

After deliberating for about six hours and 45 minutes, the jury unanimously convicted Mr. Baker on all charges (Aplt.App. 64-67, 1255-57).

Mr. Baker timely moved for a judgment of acquittal notwithstanding the verdict or, alternatively, a new trial (Aplt.App. 68-69). The trial court denied the motion (Aplt.App. 101-05).

A Presentence Investigation Report advised Mr. Baker's criminal history category was IV and his base offense level was 25 (Aplt.App. 87, 90-91). This did not apply to Counts 2, 5, 8, 11, 14, 17, and 21, though, because there was a statutory mandatory minimum sentence for those offenses, which must be imposed consecutively (Aplt.App. 88). The report recommended 84-105 months concurrently for each of the robbery and possession charges, plus seven years consecutively for the first brandishing charged followed by 25 years for each additional brandishing charge, each consecutively (Aplt.App. 95-96). The report

said nothing warranted departure (Aplt.App. 99-100). Mr. Baker did not object to the report (Aplt.App. 1269).

The district court sentenced Mr. Baker to 164 years in prison: 84 months concurrently on counts 1, 3, 4, 6, 7, 9, 10, 12, 13, 15, 16, 18, 20, and 22, seven years consecutively on count 2, and 25 years consecutively on each of counts 5, 8, 11, 14, 17, and 21 (Aplt.App. 106-08, 1293, 94, 1297-98).

Mr. Baker timely appealed to this Court (Aplt.App. 11, 117). He is incarcerated at the U.S. Penitentiary in Terre Haute, Indiana (Aplt.App. 14).

Summary of the Argument

In *United States v. Jones*, 132 S.Ct. 945 (2012), the Supreme Court unanimously held the covert installation and monitoring of a GPS tracking device on a suspect's vehicle is a search subject to the Fourth Amendment.

In this case, the lead FBI Agent investigating the crimes with which Appellant Abasi Baker was charged trespassed on Mr. Baker's car in the middle of the night without a warrant or consent and placed a GPS tracking device on it. Only after seeing the car's GPS location reported two days later near a recent robbery did he use the GPS tracker to stop and arrest its occupants. From this, the Government netted not only Mr. Baker but also the only direct evidence against him for the offenses for which he eventually was charged.

While Mr. Baker's counsel did not timely raise this error, *Jones* confirms the admission of this evidence obtained unlawfully was prejudicial plain error.

The district court also erred in convicting and sentencing Mr. Baker for brandishing and possessing a specific firearm in the first four robberies for which he was charged. The Government presented no direct or circumstantial evidence linking Mr. Baker to that firearm before February 14, 2011. Indeed, the only evidence presented was that he would not have had access to that firearm before that date. For the four robberies that occurred before that date, the evidence was insufficient to convict Mr. Baker of brandishing or possessing that specific firearm.

Argument

I. The district court erred in convicting and sentencing Mr. Baker because the only direct evidence against him was obtained in violation of the Fourth Amendment. Under the present framework for GPS tracking of vehicles, the Government's admittedly warrantless placement of a GPS device on Mr. Baker's vehicle, which led both to his arrest and to the only direct evidence against him, was unlawful and prejudicial.

(Not raised below; review sought for plain error)

Standard of Review

When a defendant fails to object to the admission of evidence, the propriety of its admission is reviewable for plain error. *United States v. Franklin-El*, 555 F.3d 1115, 1127 (10th Cir. 2009). "Plain error occurs when there is (i) error, (ii) that is plain, which (iii) affects the defendant's substantial rights, and which (iv) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Lopez–Medina*, 596 F.3d 716, 738 (10th Cir. 2010).

Error is plain if it is "clear or obvious under current law." *United States v. Cooper*, 654 F.3d 1104, 1117 (10th Cir. 2011) (citation omitted). To have the requisite "affect on substantial rights," an error must be "prejudicial," which means "there must be a reasonable probability that the error affected the outcome of the trial." *United States v. Marcus*, 130 S.Ct. 2159, 2164 (2010) (citation omitted).

"[T]he ultimate determination of" whether a search was reasonable "under the Fourth Amendment is a question of law reviewable de novo." *United States v. Long*, 176 F.3d 1304, 1307 (10th Cir. 1999).

* * *

Attaching a GPS tracking device to a vehicle and then using it to monitor the vehicle's movements on public streets is a search within the meaning of the Fourth Amendment, usually requiring a warrant. Evidence obtained in violation of the Fourth Amendment is inadmissible at trial. In this case, without a warrant, the FBI attached a GPS tracking device to Mr. Baker's car. Its monitoring of that device led directly to Mr. Baker's arrest and the only non-circumstantial evidence against him. Did the district court err in convicting and sentencing Mr. Baker?

Admitting they had no warrant to do so, Government agents trespassed in early morning hours on Appellant Abasi Baker's car and covertly installed a GPS tracking device on its undercarriage. For the next two days, they tracked the car's every movement. Only after seeing the car's location reported near a suspected robbery did the agents decide, while still tracking the vehicle live, to stop and arrest its occupants. From their actions, they netted not only Mr. Baker and his codefendant but also the only direct evidence against Mr. Baker for the offenses for which he eventually was charged – including the gun described in the brandishing charges contributing to the bulk of his 164-year sentence.

In its recent decision in *United States v. Jones*, 132 S.Ct. 945, 949 (2012), however, the Supreme Court unanimously held, "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the

vehicle's movements, constitutes a 'search'" within the meaning of the Fourth Amendment, subject to all the Fourth Amendment's other requirements. A "search" conducted without a warrant is "per se unreasonable under the Fourth Amendment." *Katz v. United States*, 389 U.S. 347, 357 (1967). A conviction after admission of evidence from an unreasonable search is reversible error if "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

Jones was decided only five days after Mr. Baker was sentenced. His counsel did not object to the evidence at Mr. Baker's trial that *Jones* confirms was obtained in gross violation of the Fourth Amendment. As such, the propriety of admitting that evidence only can be reviewed for plain error.

Even under plain error review, however, it is readily apparent that the Government obtained all its direct evidence against Mr. Baker – including his DNA, car, the gun, and the clothing and telephones in the car – in violation of the Fourth Amendment. The admission of that evidence was plain error. The Court should reverse the judgment of conviction and sentence against Mr. Baker.

A. The district court plainly erred in admitting any evidence directly or indirectly resulting from the GPS tracking of Mr. Baker's car.

FBI Special Agent John Hauger testified that, in "late February 2011," he made the decision "to slap on a GPS tracker" on the car that had "been identified as … Mr. Baker's vehicle" (Appellant's Appendix 790). He explained that, "at

about 330 or 4 o'clock in the morning on March 2nd, [2011,] we had located the vehicle at 3508 [Paseo] in Kansas City, Missouri, myself and two other members of my squad went out there and … took the device and put it on … the [undercarriage] of the car" (Aplt.App. 791).

As Agent Hauger described it, the device sent an e-mail to a designated address "whenever the vehicle starts and the vehicle stops," and additionally could be pulled up "live time on a computer screen" that displayed "a map" on which he could "follow along where th[e] vehicle is" (Aplt.App. 791). When asked "[I]f that vehicle's in a public place accessible to members of the public [is] any sort of court order required on that?" he responded, "No" (Aplt.App. 790).

Six months before Agent Hauger made the decision to effect this GPS tracking of Mr. Baker's car and over a year before he testified to that decision at trial, however, the District of Columbia Circuit already had ruled that such GPS tracking and monitoring *was* a search and a warrant *was* required. *See United States v. Maynard*, 615 F.3d 544, 564-66 (D.C. Cir. 2010). Moreover, months before the trial in this case, the Supreme Court already had granted certiorari from *Maynard, sub. nom. Jones*, to review this very question. *See* 131 S.Ct. 3064 (2011). Finally, in its unanimous decision in *Jones* affirming *Maynard*, the Supreme Court confirmed Agent Hauger's statement was grossly incorrect. 132 S.Ct. at 949.

Instead, under *Jones*, placement of a GPS tracking device on a car is a "search" within the meaning of the Fourth Amendment. Applying *Maynard* and *Jones* to this case, Agent Hauger's warrantless search of Mr. Baker's car violated the Fourth Amendment. All evidence directly or indirectly obtained from that search should have been excluded. The district court plainly erred in admitting it, requiring reversal of the judgment of conviction and sentence against Mr. Baker.

1. Under current law, it is clear and obvious that the Government's placement and monitoring of a GPS tracking device on Mr. Baker's vehicle was a "search" subject to the Fourth Amendment.

In *Jones*, the Government applied for and was granted a search warrant authorizing it to install a GPS tracking device on a vehicle that was registered to Mr. Jones's wife. 132 S.Ct. at 948. The Government installed the device one day after the warrant expired. *Id.* It then used the device to track the vehicle's movements live. *Id.*

Later, Mr. Jones and others were indicted for several drug conspiracy crimes. *Id.* Before trial, Mr. Jones moved to suppress the evidence the Government had obtained through use of the GPS device. *Id.* The district court overruled the motion, holding "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* (quoting *United States v. Jones*, 451 F.Supp.2d 71, 88 (D.D.C. 2006)). The D.C. Circuit reversed Mr. Jones's conviction outright,

holding the admission of evidence obtained through the warrantless use of a GPS device violated the Fourth Amendment. *Maynard*, 615 F.3d at 568.

The Supreme Court affirmed the D.C. Circuit. *Jones*, 132 S.Ct. at 954. In doing so, however, the Court did not apply the "reasonable expectation of privacy" analysis Justice Harlan first introduced in his concurrence in *Katz*, 389 U.S. at 360-61. Instead, the Court applied a much older "physical trespass" test.

Observing the Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," the Court stated, "It is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment." *Jones*, 132 S.Ct. at 949 (citing *United States v. Chadwick*, 433 U.S. 1, 12 (1977)). Thus, the Court held, "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" *Id.*

In its analysis, the Court acknowledged two separate tests for identifying a Fourth Amendment search: the "physical trespass test" and the *Katz* "reasonable expectation of privacy" test. Justice Scalia, writing the principal opinion, stated it was unnecessary to reach the question whether Mr. Jones had a "reasonable expectation of privacy" in the vehicle or in the whole of his movements on public roads. As he explained,

> The Government contends that the Harlan standard shows that no search occurred here, since Jones had no "reasonable expectation of

> privacy" in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all. But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates. *Katz* did not repudiate that understanding.

Id. at 950 (citations omitted).

Justice Alito, however, concurring in the judgment, reasoned the case should be analyzed "by asking whether [Mr. Jones's] reasonable expectations of privacy were violated by" the GPS monitoring. *Id.* at 957. Without identifying the specific point at which the surveillance became a Fourth Amendment search, however, Justice Alito concluded the monitoring of Mr. Jones's movements violated his reasonable expectations of privacy. *Id.* at 964.

In this case, the FBI attached a GPS device to Mr. Baker's vehicle by trespass. It then monitored his movements for two days, only eventually arresting him and searching and seizing the vehicle and the items in it once it was satisfied the results of its GPS monitoring had given it enough proof Mr. Baker had been involved in a robbery. It then used the GPS monitoring to effect the physical arrest of Mr. Baker and his co-defendant, Mark Davis.

Under *Jones* – the clear and obvious current law – the Government's installation of the GPS device on Mr. Baker's vehicle and its subsequent use of that device to monitor the vehicle's movements plainly constituted a Fourth Amendment search under the "physical trespass test." Even under Justice Alito's minority opinion, it also constituted a search under the *Katz* "reasonable expectation of privacy" test.

2. Under current law, it is clear and obvious that the Government's warrantless placement and monitoring of a GPS tracking device on Mr. Baker's car violated the Fourth Amendment, mandating all resultant direct or indirect evidence be suppressed.

a. The warrantless search violated the Fourth Amendment.

Agent Hauger admitted he did not obtain a search warrant before he placed the GPS device on Mr. Baker's vehicle and used it to monitor Mr. Baker's activities (Aplt.App. 790-91). "A warrantless search … is unreasonable per se under the Fourth Amendment unless the Government shows that the search falls within one of a carefully defined set of exceptions …." *United States v. Glover*, 104 F.3d 1570, 1583 (10th Cir. 1997). The Fourth Amendment requires such exceptions be "few in number and carefully delineated …." *United States v. U.S. Dist. Ct. for E. Dist. of Mich.*, 407 U.S. 297, 318 (1972).

The Supreme Court has carved out a number of "well-delineated exceptions" to the warrant requirement. *Katz*, 389 U.S. at 357. For example, it has held the presence of exigent circumstances excuses a warrantless search and a warrantless

search and seizure of an individual for the limited purpose of briefly investigating reasonably suspicious behavior is permissible. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Warden v. Hayden*, 387 U.S. 294 (1967). Consent searches, searches conducted incident to a valid arrest, automobile searches, and searches of items in plain view also are allowed without a warrant. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (consent searches); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (items in plain view); *Chimel v. California*, 395 U.S. 752 (1969) (incident to arrest); *Carroll v. United States*, 267 U.S. 132 (1925) (automobiles).

None of these exceptions, however, applies either to the use of a GPS device in general or to the facts of this case. And neither Mr. Baker nor Ms. Hoffmeister, the vehicle's owner, consented to a GPS tracking device (Aplt.App. 375).

As such, the Government's attachment and use of the GPS device to monitor Mr. Baker's activities required a search warrant. Especially because of the risk that unfettered use of surveillance technology fundamentally could alter the relationship between the Government and its citizens, "the deliberate, impartial judgment of a judicial officer" must be "interposed between the citizen and the" Government. *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963).

The warrantless attachment and use of the GPS device to monitor Mr. Baker's activities violated his rights against unreasonable search and seizure under the Fourth Amendment, and was unlawful.

b. All evidence directly or indirectly obtained through the unlawful search should have been suppressed.

Under the exclusionary rule, the Government may not introduce into evidence "tangible materials seized during an unlawful search [or] … testimony concerning knowledge acquired during an unlawful search." *Murray v. United States*, 487 U.S. 533, 536 (1988) (citations omitted). The related "fruit of the poisonous tree" doctrine applies the exclusionary rule to "physical evidence and live witness testimony obtained directly or indirectly" from an unlawful search. *Unites States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112, 1116 (10th Cir. 1998).

These rules, too, have various exceptions that apply when an officer has made a mistake of fact, such as searching the wrong address. But no exception applies to undo mistakes of law by law enforcement acting unilaterally, as opposed to pursuant to the mistake of a third party, such as a faulty warrant or an invalid statute. *United States v. Clarkson*, 551 F.3d 1196, 1203-04 (10th Cir. 2009).

Ordinarily, new Supreme Court precedents decided while a case is on direct review apply to that case on review without any retroactivity analysis. *Teague v. Lane*, 489 U.S. 288, 310 (1989); *Griffith v. Kentucky*, 479 U.S. 314, 322–23 (1987). On extremely rare occasion, however, adherence to prior, erroneous precedent overturned by the Supreme Court in the interim can invoke the "good faith" exception to the exclusionary rule. *See United States v. McCane*, 573 F.3d

1037, 1041-44 (10th Cir. 2009), *cert. denied* 130 S.Ct. 1686 (2010). This, however, is not one of those cases.

In *McCane*, an arresting officer effected what he thought was a valid search incident to arrest, even though the defendant already had been handcuffed and was seated in the officer's patrol car at the time of the search. *Id.* at 1038-39. Previously, this Court had held such a search was valid and proper. *Id.* at 1041 (citing *United States v. Humphrey*, 208 F.3d 1190 (10th Cir. 2000)). While *McCane* was on appeal, however, the Supreme Court decided in *Arizona v. Gant*, 556 U.S. 332 (2009), that such a search was unlawful. 573 F.3d at 1040.

This Court, however, held the officer's reliance on this Court's own, prior, settled case law at the time he effected what that law (indeed, the law of every Circuit) said was a valid search fit the exclusionary rule's "good faith" exception:

> Just as there is no misconduct on the part of a law enforcement officer who reasonably relies upon the mistake of a court employee in entering data, [*Arizona v. Evans*, 514 U.S. 1, 15 (1995)], or the mistake of a legislature in passing a statute later determined to be unconstitutional, [*Illinois v. Krull*, 480 U.S. 340, 349-50 (1987)], a police officer who undertakes a search in reasonable reliance upon the settled case law of a United States Court of Appeals, even though the search is later deemed invalid by Supreme Court decision, has not engaged in misconduct. … Relying upon the settled case law of a United States Court of Appeals certainly qualifies as objectively reasonable law enforcement behavior.

Id. at 1044-45.

This makes sense. As the Eighth Circuit has explained, "[O]fficers have an obligation to understand the laws that they are entrusted with enforcing, at least to a level that is objectively reasonable. Any mistake of law that results in a search or seizure, therefore, must be objectively reasonable to avoid running afoul of the Fourth Amendment." *United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005). The officer in *McCane* merely followed the unequivocal law as it existed at the time of the search he was effecting. His actions were objectively reasonable.

That rare and highly specific situation in *McCane*, however, did not happen here. In this case, Agent Hauger's insistence that he did not need a warrant to trespass on Mr. Baker's vehicle and place and monitor a GPS tracker on it was not objectively reasonable. First, unlike in *McCane*, before *Jones*, this Court never had held that a GPS tracking device was not a "search."

More importantly, however, unlike in *McCane* this was not unequivocal, settled law in all other circuits at the time Agent Hauger opted in February/March 2011 to forgo a warrant. Instead, the question was in nationwide flux. The D.C. Circuit's decision in *Maynard* was in August 2010, six months earlier, and had generated nationwide headlines; the U.S. Justice Department, who had lost *Maynard* and sought further review, was well aware of it. The D.C. Circuit denied rehearing en banc in November 2010, three months before Agent Hauger's

decision. 625 F.3d 766. And in April 2011, five months before the trial below, the Supreme Court granted certiorari. 131 S.Ct. 3064.

Plainly, with a three D.C. Circuit Judges and then an en banc majority already disagreeing with him, this Court not having answered the question, and the issue already before the Supreme Court, it cannot be said that Agent Hauger's gross mistake of law in placing and monitoring a GPS tracking device on Mr. Baker's car without a warrant was "objectively reasonable." He should have known better. His actions do not fit any exception to the exclusionary rule.

As Agent Hauger also admitted, the arrest of Mr. Baker and Mr. Davis occurred *entirely* due to the GPS tracking and would not have been possible from cell phone tracking alone (Aplt.App. 1147, 1158). Thus, it is plain that the exclusionary rule and fruit of the poisonous tree doctrine mandate that all physical evidence and testimony obtained directly or indirectly from the warrantless GPS search should have been suppressed. This includes:

- the .40 caliber semiautomatic Glock Model 27, serial number EHN890, and its magazine and rounds (Aplt.App. 908-09, 914-18, 923-24);
- the booking photo of Mr. Baker and Mr. Davis (Aplt.App. 739, 831, 1354);
- the clothes Mr. Baker and Mr. Davis were wearing on arrest (Aplt.App. 834-35)
- the other clothing found in the car (Aplt.App. 835-36, 875-76, 934-35, 942-43, 1009-15, 1032);

- the plastic bag containing $261 in cash (Aplt.App. 908, 919-20);
- the car's rearview mirror air freshener (Aplt.App. 934);
- the two mobile phones and all information found in them, including call records and text-messages (Aplt.App. 900-01, 950, 1093-94, 1103, 1106-08);
- the historical cell site analysis of Mr. Davis's phone (Aplt.App. 1095-99, 1102, 1150);
- tests of DNA taken from Mr. Baker and Mr. Davis and made on the clothing and gun, and related testimony (Aplt.App. 877-78, 961-74, 994-95, 1009-19, 1022-25, 1029, 1032); and
- all testimony related to the GPS tracking of the Nissan, the arrest of Mr. Baker, and all the above evidence.

Under current law, it is clear and obvious that this evidence was obtained unlawfully through the warrantless GPS tracking search of Mr. Baker's car and should have been suppressed. Its admission was plain error.

B. The district court's plain error prejudiced Mr. Baker.

For plain error to be reversible, it must have affected the defendant's substantial rights. That is, it must be "prejudicial," which means "there must be a reasonable probability that the error affected the outcome of the trial." *United States v. Marcus*, 130 S.Ct. 2159, 2164 (2010) (citation omitted).

In the Fourth Amendment context, this is akin to the "harmless error" doctrine, which holds, "The beneficiary of a constitutional error [must prove] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

As such, it does not matter whether the jury speculatively might have convicted the defendant absent the evidence. For, in determining whether the erroneous admission of evidence gathered in violation of the Fourth Amendment warrants reversal, this Court "is not concerned … with whether there was sufficient evidence on which [Mr. Baker] could have been convicted without the evidence complained of"; rather its concern is "whether there is a reasonable possibility that the evidence complained of *might have contributed to the conviction*." *Fahy*, 375 U.S. at 86-87 (emphasis added).

In this case, the evidence described above unquestionably contributed to Mr. Baker's conviction. It was the *only* direct, non-circumstantial evidence against Mr. Baker. Without the car itself, Mr. Baker's and Mr. Davis's persons, and all the evidence found in the car, all the Government would have had to show the jury would have been vague descriptions of witnesses who could not identify the robbers they saw, a single car license plate photo matching Ms. Hoffmeister's car, some grainy and relatively useless security camera images, and some maps.

Most importantly, the Government would not have had the gun specifically charged in all the brandishing and felon-in-possession counts. Without the gun, the Government simply would have had no proof that Mr. Baker ever had anything to with a specific .40 caliber Glock Model 27, serial number EHN890.

Thus, as in *Maynard*, "Without the GPS data the evidence that [Mr. Baker] … actually [committed the crimes charged] is so far from 'overwhelming' that … the Government has not carried its burden of showing the error was harmless beyond a reasonable doubt." 615 F.3d at 568.

Thus, there is "a reasonable probability that the" plainly erroneous admission of the evidence obtained directly and indirectly from the Government's unlawful GPS tracking and monitoring "affected the outcome of [Mr. Baker's] trial." *Marcus*, 130 S.Ct. at 2164.

As in *Maynard*, the Court should reverse the district court's judgment of conviction and sentence against Mr. Baker.

II. The district court erred in entering a judgment of conviction and sentence against Mr. Baker for brandishing a firearm during a crime of violence in counts 2, 5, 8, and 11 and possession of a firearm in counts 3, 6, 9, and 12, because the Government's evidence was insufficient to connect him to the specifically-charged Glock pistol before February 14, 2011. There was no direct or circumstantial evidence of such possession or use before February 14, 2011, and mere speculation is not evidence.

(Raised passim *by defense of general denial; preserved at Aplt.App. 68-69)*

Standard of Review

This Court reviews "a challenge to the sufficiency of the evidence de novo." *United States v. Dobbs*, 629 F.3d 1199, 1203 (10th Cir. 2011). "Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the government, a reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Id.* (citations omitted). The Court "will reverse a conviction 'only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (citations omitted).

* * *

Mr. Baker was charged with seven separate counts each of brandishing and being a felon in possession of a specific firearm for seven different robberies in January through March 2011. The Government only presented direct and circumstantial evidence connecting him to that firearm after February 14, 2011. Four of the robberies occurred before that date. Was there sufficient evidence Mr. Baker had brandished or possessed that firearm in those four earlier robberies?

A. The Government had to prove Mr. Baker possessed the specifically-charged Glock firearm in order to convict him of brandishing and possession.

18 U.S.C. § 924(c)(1)(A)(ii) provides, in relevant part:

> [A]ny person who, during and in relation to any crime of violence … for which the person may be prosecuted in a court of the United States, uses or carries a firearm … shall, in addition to the punishment provided for such crime of violence … (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years.

Counts 2, 5, 8, and 11 of the indictment in this case charged Appellant Abasi Baker "did unlawfully use, carry, and brandish a firearm, that is, a .40 caliber Glock pistol, Model 27, serial number EHN890," in violation of this section on January 6, January 10, January 12, and January 16, 2011 (Appellant's Appendix 16-17, 19-20). Alternatively, it charged he aided and abetted these offenses (*Id.*).

18 U.S.C. § 922(g)(1) provides, in relevant part,

> It shall be unlawful for any person … who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year … to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition, or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Counts 3, 6, 9, and 12 charged Mr. Baker "shipped and transported in interstate and foreign commerce, possessed in and affective interstate and foreign commerce, and received a firearm, namely, a .40 caliber Glock pistol, Model 27, serial number EHN890, and ammunition" in violation of this section on those same

dates (Aplt.App. 16, 18-19, 21). Alternatively, they charged aiding and abetting these offenses (*Id.*).

Echoing the indictment, the jury instructions specifically recited the charges against Mr. Baker for brandishing and possessing "a .40 caliber Glock pistol, Model 27, serial number EHN890" (Aplt.App. 41-44).

Generally, when an "indictment … identif[ies] the firearm type," "a jury must find that element proved beyond a reasonable doubt." *Castillo v. United States*, 530 U.S. 120, 123 (2000). Under current law, though, the Government did not actually have to specify the type of firearm it alleged Mr. Baker used and possessed on the dates in question. *United States v. Bishop*, 469 F.3d 896, 902-03 (10th Cir. 2006), *abrogated in part on other grounds by Gall v. United States*, 552 U.S. 38 (2007); *United States v. Avery*, 295 F.3d 1158, 1170-71 (10th Cir. 2002).

Because the Government *did* limit the indictment to a specific gun, however, the jury had to find beyond a reasonable doubt that Mr. Baker had brandished and possessed it *and only it* in order to convict him of those charges. *Bishop*, 469 F.3d at 902-03 ("[i]f an indictment charges particulars, the jury instructions and evidence introduced at trial must comport with those particulars") (applying *United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991) (specific gun)).

For each of the eight separate brandishing and possession counts relating to the robberies before February 14, however, the Government failed to prove this.

B. The Government presented no direct or circumstantial evidence connecting Mr. Baker to the Glock firearm before February 14, 2011.

The .40 caliber Glock pistol in question, which was admitted into evidence, was found in Mr. Baker's car at the time of his arrest (Aplt.App. 908, 914). The gun was black, though its upper metal slide was a slightly lighter color than the darker composite bottom (Aplt.App. 917).

The Glock lawfully belonged to Mr. Baker's friend, Enjoli Collier (Aplt.App. 740-42, 745, 1343-50). Starting *after* February 14, 2011, until his arrest on March 3, 2011, Mr. Baker lived at Ms. Collier's residence; she testified he never had stayed with her before this, and the Government presented no evidence to contradict this (Aplt.App. 732-33, 745, 747).

The evidence was that Ms. Collier kept the gun next to the spare tire in the locked trunk of her car, which she parked in her driveway (Aplt.App. 744). Ms. Collier never told Mr. Baker either that she owned a gun or where it was (Aplt.App. 750, 761). He could not have had any access to it before he started staying with her in late February 2011 (Aplt.App. 745). Ms. Collier specifically testified Mr. Baker could not have had access to the gun on January 6, January 10, January 12, or January 16, 2011, the dates of the offenses charged in counts 2, 5, 8, and 11 and 3, 6, 9, and 12 (Aplt.App. 745).

While the witnesses to the January 6, 10, 12, and 16 robberies testified their robber had *a* gun they described either as a black or dark-grey semiautomatic

handgun, none could offer any further information about the gun (Aplt.App. 154-55, 163, 268-69, 292, 420, 446, 463, 476). Notably, the Government did not show any of them the Glock and ask if it was the gun they had seen the robber use.

As such, for the four robberies before February 14, the Government was left with mere speculation that that the gun used had been Ms. Collier's Glock. While, viewing the evidence in a light most favorable to the Government, the circumstances of Mr. Baker's living at Ms. Collier's residence after February 14 and his eventual arrest with the gun on March 3 make for at least circumstantial evidence of that specific gun's role in the three robberies after February 14, this simply is not so for the four earlier robberies. The Government was left in its closing argument to speculate to the jury, contrary to Ms. Collier's testimony, that Mr. Baker not only could have known about the gun prior to February 14, but that he had located and taken it during some hypothetical visit in early January 2011 (Aplt.App. 1176-77).

This Court has confirmed many times that, "To support a jury verdict, evidence must be based on more than mere speculation, conjecture, or surmise." *Rice v. United States*, 166 F.3d 1088, 1092 (10th Cir. 1999). Especially in a circumstantial case, the Government has the "burden of establishing [elements of an offense] 'beyond a mere likelihood or probability,' or by more than mere

speculation." *United States v. Beckner*, 134 F.3d 714, 719 (5th Cir. 1998) (citation omitted).

The Government did not meet that burden in this case. Its suggestion that Mr. Baker took Ms. Collier's Glock Model 27, serial number EHN890, and used or possessed it in robberies that occurred before any evidence suggested he could have known it existed or where it was constituted mere conjecture and speculation. It was not evidence. Indeed, a reasonable inference would be that some other gun, never recovered (and never charged) was used in those four robberies.

The evidence was insufficient to prove beyond a reasonable doubt that Mr. Baker used or possessed Ms. Collier's Glock Model 27 pistol, serial number EHN890, on January 6, 10, 12, or 16, 2011. The Court should reverse the district court's judgment of conviction and sentence against Mr. Baker on counts 2, 3, 5, 6, 8, 9, 11, and 12 of the indictment.

Conclusion

The Court should reverse the district court's judgment of conviction and sentence against Mr. Baker. Alternatively, it should reverse the judgment of conviction and sentence against him on counts 2, 3, 5, 6, 8, 9, 11, and 12 of the indictment.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg

Jonathan Sternberg, Mo. #59533
1111 Main Street
7th Floor, Harzfeld's Building
Kansas City, Missouri 64105
Telephone: (816) 474-3000
Facsimile: (816) 474-5533
E-mail: jonathan@sternberg-law.com

COUNSEL FOR APPELLANT
ABASI S. BAKER

Oral Argument Statement

The issues in this case are complex and important. The interchange of oral argument would assist the Court in understanding and deciding them. Because of the volume of the record in this case and the intricacy of the issues on appeal, Mr. Baker requests at least twenty minutes for argument.

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 13,386 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), because this brief has been prepared in a proportionally spaced typeface, Times New Roman size 14 font, using Microsoft Word 2010.

I further certify that the electronic copy of this Brief of the Appellant filed via the Court's ECF system is an exact, searchable PDF copy thereof, that it was scanned for viruses using Microsoft Security Essentials and, according to that program, is free of viruses.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I hereby certify that on May 16, 2012, I electronically filed the foregoing using the Court's CM/ECF system which will send notification of such filing to the following:

Ms. Terra Morehead, Terra.Morehead@usdoj.gov

I also certify that, on May 16, 2011, I mailed a true and accurate copy of the Appellant's Appendix to the following:

Ms. Terra Morehead,
Assistant U.S. Attorney
500 State Avenue, Suite 360
Kansas City, Kansas 66101

/s/Jonathan Sternberg
Attorney

10th Cir. R. 28.2 Materials

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**CRIMINAL ACTION**
v.	)	
	)	**No. 11-20020-01-CM**
ABASI BAKER,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

On September 15, 2011, a jury found defendant guilty on seven counts of robbery in violation of 18 U.S.C. § 1951, seven counts of brandishing a firearm during and in relation to the crime of robbery and seven counts of being a felon in possession of a firearm. This matter is before the Court on Defendant's Motion For Judgment Of Acquittal Notwithstanding The Jury Verdict Or In The Alternative Granting A New Trial (Doc. #57) filed September 22, 2011. For reasons stated below and substantially the reasons stated in the Government's Response To Defendant's Motion For Judgment Of Acquittal Notwithstanding The Verdict, Or In The Alternative, Granting A New Trial (Doc. #63) filed November 29, 2011, the court overrules defendant's motion.

Legal Standards

In reviewing both a motion for new trial and a motion for judgment of acquittal, the court views the evidence in the light most favorable to the government. United States v. Hughes, 191 F.3d 1317, 1321 (10th Cir. 1999). The court must grant a motion for judgment of acquittal when the evidence is insufficient to sustain a conviction. Fed. R. Crim. P. 29(a). The court must uphold the jury's guilty verdict, however, if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Haber, 251 F.3d 881, 887 (10th Cir.

2001) (quoting United States v. Schlunegar, 184 F.3d 1154, 1158 (10th Cir. 1999)). "The evidence necessary to support a verdict need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt." United States v. Wood, 207 F.3d 1222, 1228 (10th Cir. 2000) (internal quotations omitted). The court considers both direct and circumstantial evidence, as well as reasonable inferences that can be drawn from that evidence. United States v. Davis, 1 F.3d 1014, 1017 (10th Cir. 1993). An inference is "reasonable" only if "logical and probabilistic reasoning" can lead to the conclusion. United States v. Jones, 44 F.3d 860, 865 (10th Cir. 1995) (citation omitted). The court does not examine the evidence in "bits and pieces," but rather evaluates the sufficiency by "consider[ing] the collective inferences to be drawn from the evidence as a whole." United States v. Hooks, 780 F.2d 1526, 1532 (10th Cir. 1986) (citation omitted).

A court may grant a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33. A court should grant a motion for a new trial if, after weighing the evidence and the credibility of the witnesses, it determines that "the verdict is contrary to the weight of the evidence such that a miscarriage of justice may have occurred." United States v. Gabaldon, 91 F.3d 91, 93–94 (10th Cir. 1996) (quoting United States v. Evans, 42 F.3d 586, 593 (10th Cir. 1994)). But courts disfavor new trials, United States v. Gleeson, 411 F.2d 1091, 1093 (10th Cir. 1969), and exercise great caution in granting them, United States v. Sinclair, 109 F.3d 1527, 1531 (10th Cir. 1997). The decision whether to grant a motion for new trial is committed to the sound discretion of the trial court. United States v. Stevens, 978 F.2d 565, 570 (10th Cir. 1992). The burden of proving that a new trial is warranted rests on defendant. United States v. Walters, 89 F. Supp.2d 1206, 1213 (D. Kan. 2000).

Analysis

Defendant argues that no reasonable jury could have found him guilty on the charges related to six of the seven robberies. In particular, defendant claims that the government presented inaccurate and inconclusive evidence in an attempt to link him to the scene of those six robberies.

A conviction may be based solely on circumstantial evidence and reasonable inferences drawn therefrom. United States v. Sanders, 240 F.3d 1279, 1281 (10th Cir. 2001). "While the jury may draw reasonable inferences from direct or circumstantial evidence, an inference must be more than speculation and conjecture to be reasonable, and caution must be taken that the conviction not be obtained by piling inference on inference." United States v. Jones, 44 F.3d 860, 865 (10th Cir. 1995) (citations and internal quotations). The identity of a defendant need not be established by eyewitness testimony and can be inferred through circumstantial evidence. See United States v. Kwong, 14 F.3d 189, 193 (2d Cir. 1994); United States v. Capozzi, 883 F.2d 608, 617 (8th Cir. 1989), cert. denied, 495 U.S. 918 (1990); see also Simmons v. McGinnis, No. 04 Civ. 6150 PACDF, 2006 WL 3746739, at *10 (S.D.N.Y. Dec. 19, 2006) (even without direct eyewitness testimony, evidence placing petitioner near scene of the crime, in the company of other robber, and further placing petitioner in two locations where proceeds of crime were recovered by police would be sufficient to support verdict).

At trial, defense counsel suggested that the cell phone records and video tapes did not show that defendant was at the scene of the first six robberies.[1] Even so, the jury is entitled to reject a

[1] Defendant now argues that "the clear and convincing evidence clearly proved that the Defendant was not present at the time of six of the seven robberies." Doc. #57 at 2. At trial, defendant did not call any witnesses. And defense counsel's cross-examination of government witnesses certainly did not amount to "clear and convincing evidence" that defendant was not (continued...)

theory consistent with innocence and accept one consistent with guilt so long as substantial evidence supports its choice. United States v. Garcia, 868 F.2d 114, 116 (4th Cir. 1989); see Wood, 207 F.3d at 1228 (evidence necessary to support a verdict need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt). Substantial circumstantial evidence linked defendant to the scene of all seven robberies. In particular, cell phone records placed defendant in the vicinity of all of them. Videotapes showed that a car which matched the description of defendant's vehicle was circling the various locations before several of the robberies.[2] When officers stopped defendant and Mark Davis on March 3, 2011, defendant was driving the same vehicle and he had the same cell phone as those in the vicinity of the earlier six robberies. In plain view, officers found in defendant's vehicle a .40 caliber Glock pistol, money in a plastic grocery bag and clothing items which matched the descriptions of the clothing worn by the robber in most of the robberies. Enjoli Collier actually owned the pistol, but defendant frequently visited Collier's residence and lived there for a period of time in February of 2011. Based on witness descriptions of the weapon used in each robbery, a jury could reasonably conclude that defendant or his accomplice used the .40 caliber Glock pistol in each of the seven robberies. Moreover, in each of the robberies, the robber demanded that the employee put the money in a plastic grocery bag which was similar to the one that officers found in defendant's vehicle after the robbery on March 3, 2011. Viewing all reasonable inferences from the evidence in a light most favorable to the government, a reasonable jury could find defendant guilty on all 21 counts. Accordingly, the court overrules

---

[1](...continued)
present at the scene of the seven robberies

[2] Defendant did not own the vehicle, but he and his girlfriend, Mary Hoffmeister, had exclusive control over the vehicle.

defendant's motion for judgment of acquittal.[3] See United States v. White, 673 F.2d 299, 301 (10th Cir. 1982) (acquittal is proper only if evidence implicating defendant is nonexistent or is "so meager that no reasonable jury could find guilt beyond a reasonable doubt").

IT IS THEREFORE ORDERED that Defendant's Motion For Judgment Of Acquittal Notwithstanding The Jury Verdict Or In The Alternative Granting A New Trial (Doc. #57) filed September 22, 2011 be and hereby is **OVERRULED**.

Dated this 7th day of December, 2011 at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

[3] In the alternative, defendant seeks a new trial. The court may order a new trial when it perceives that the jury improperly weighed some or all of the evidence. See United States v. Cesareo-Ayala, 576 F.3d 1120, 1126 (10th Cir. 2009). The court has no reason to believe that the jury improperly weighed any evidence in this case. In his alternative motion for new trial, defendant relies on insufficiency of the evidence. Because the court finds that based on the evidence, a reasonable jury could find defendant guilty, the court likewise overrules defendant's motion for new trial. See id.

United States District Court
District of Kansas

UNITED STATES OF AMERICA
v.
ABASI S. BAKER

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:11CR20020-001-CM

USM Number: 20897-031

Defendant's Attorney Willis L. Toney

THE DEFENDANT:

[ ] pleaded guilty to count(s): __.
[ ] pleaded nolo contendere to count(s) ___ which was accepted by the court.
[**x**] was found guilty on counts 1 through 18, 20, 21, and 22 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count

See next page.

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 shall 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 shall notify the court and United States attorney of material changes in economic circumstances.

January 18, 2012
Date of Imposition of Judgment

s/ Carlos Murguia
Signature of Judge

Honorable Carlos Murguia, U. S. District Judge
Name & Title of Judge

1/18/2012
Date

DEFENDANT: ABASI S. BAKER
CASE NUMBER: 2:11CR20020-001-CM

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 1951 and 2	Robbery, Class C felonies	01/06/11	1
		01/10/11	4
		01/12/11	7
		01/16/11	10
		02/16/11	13
		02/22/11	16
		03/03/11	20
18 U.S.C. §§ 924(c)(1)(A)(ii) and 2	Use of a Firearm During and in Relation to a Crime of Violence, Class A felonies	01/06/11	2
		01/10/11	5
		01/12/11	8
		01/16/11	11
		02/16/11	14
		02/22/11	17
		03/03/11	21
18 U.S.C. §§ 924(g)(1), 924(a)(2) and 2	Felon in Possession of a Firearm, Class C felonies	01/06/11	3
		01/10/11	6
		01/12/11	9
		01/16/11	12
		02/16/11	15
		02/22/11	18
		03/03/11	22

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 164 years .

This term of imprisonment consists of 84 months on each of Counts 1, 3, 4, 6, 7, 9, 10, 12, 13, 15, 16, 18, 20 and 22, to be served concurrently; 84 months on Count 2, to be served consecutively; and 25 years on each of Counts 5, 8, 11, 14, 17 and 21, with each of those counts to be served consecutively.

[x] The court makes the following recommendations to the Bureau of Prisons: That the defendant be considered for designation to a facility in Leavenworth, Kansas, to facilitate family ties.

[**x**] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ___ on ___.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before _ on ___.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years .

This term of supervised release consists of 3 years on each of Counts 1 through 18, 20, 21 and 22, with all counts to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable)

[**x**] The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon. (Check if applicable)

[**x**] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check if applicable)

[ ] The defendant shall register as a sex offender, and keep the registration current, in each jurisdiction where the defendant resides, where the defendant is an employee, and where the defendant is a student. For initial registration purposes only, the defendant shall also register in the jurisdiction in which convicted, if such jurisdiction is different from the jurisdiction of residence. Registration shall occur not later than 3 business days after being sentenced, if the defendant is not sentenced to a term of imprisonment. The defendant shall, not later than 3 business days after each change in name, residence, employment, or student status, appear in person in at least one jurisdiction in which the defendant is registered and inform that jurisdiction of all changes in the information required. (Check if applicable)

[ ] The defendant shall participate in an approved program for domestic violence. (Check if applicable)

If this judgment imposes a fine or restitution, it is to be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or the probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substances or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or other dangerous weapon.

2. The defendant shall submit his/her person, house, residence, vehicle(s), papers, business or place of employment and any property under the defendant's control to a search, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	Assessment	Fine	Restitution
Totals:	$ 2,100.00	$	$ 7,344.00

[ ] The determination of restitution is deferred until _. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[**x**] The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Advance America Payday Loans	$ 458.00	$ 458.00	
Radio Shack	$ 300.00	$ 300.00	
Advance America Payday Loans	$1,249.00	$1,249.00	
Check Into Cash	$4,027.00	$4,027.00	
Check Into Cash	$1,300.00	$1,300.00	
Totals:	$7,334.00	$ 7,334.00	

[ ] Restitution amount ordered pursuant to plea agreement $ _

[ ] The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options set forth in this Judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[**x**] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[**x**] the interest requirement is waived for the [ ] fine and/or [**x**] restitution.

[ ] the interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [ ] Lump sum payment of $ due immediately, balance due

[ ] not later than ____, or

[ ] in accordance with ( ) C, ( ) D, ( ) E, or ( ) F below; or

B [**x**] Payment to begin immediately (may be combined with ( ) C, (**x**) D, or (**x**) F below); or

C [ ] Payment in monthly installments of not less than 5% of the defendant's monthly gross household income over a period of __ years to commence __ days after the date of this judgment; or

D [**x**] Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of three years, to commence 30 days after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within _ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [**x**] Special instructions regarding the payment of criminal monetary penalties:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than $25.

Payments should be made to Clerk, U.S. District Court, U.S. Courthouse - Room 259, 500 State Avenue, Kansas City, Kansas 66101.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount Joint and Several Amount and corresponding payee, if appropriate.

Case Number (including Defendant Number)	Defendant Name	Joint and Several Amount

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[**x**] The defendant shall forfeit the defendant's interest in the following property to the United States: The court orders the forfeiture of the defendant's interest in the .40- caliber Glock pistol, Model 27, serial number EHN890, and ammunition, seized in connection with this case.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, (8) costs, including cost of prosecution and court costs.

DEFENDANT: ABASI S. BAKER
CASE NUMBER: 2:11CR20020-001-CM
DISTRICT: KANSAS

STATEMENT OF REASONS

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A [] **The court adopts the presentence investigation report without change.**

B [x] **The court adopts the presentence investigation report with the following changes.**
(Check all that apply and specify court determinations, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.) (Use page 4 if necessary.)

1 [] **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level, or specific offense characteristics):

2 [] **Chapter Three of the U.S.S.G. Manual** determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

3 [] **Chapter Four of the U.S.S.G. Manual** determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

4 [X] **Additional Comments or Findings** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions). The court finds that the restitution amount due to Check Into Cash in Olathe, Kansas, is $1,300, rather than $2,300 as reported in Part D of the presentence report. Accordingly, the court finds that the total amount of restitution owed is $7,334, rather than $8,334.

C [] **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**

II COURT FINDING ON MANDATORY MINIMUM SENTENCE (Check all that apply.)

A [] No count of conviction carries a mandatory minimum sentence.

B [X] Mandatory minimum sentence imposed on Counts 2, 5, 8, 11, 14, 17, and 21.

C [] One or more counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on

[] findings of fact in this case
[] substantial assistance (18 U.S.C. § 3553(e))
[] the statutory safety valve (18 U.S.C. § 3553(f))

III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES)

Total Offense Level: 25
Criminal History Category: IV
Imprisonment Range: 84 to 105 months - Cts. 1, 3, 4, 6, 7, 9, 10, 12, 13, 15, 16,18, 20, 22
Imprisonment Range: 84 months - Ct. 2 consecutive
Imprisonment Range: 25 years - Cts. 5, 8, 11, 14, 17, 21 consecutive
Supervised Release Range: 1 to 3 years - Cts. 1, 3, 4, 6, 7, 9, 10, 12, 13, 15, 16, 18, 20 and 22
Supervised Release Range: 2 to 5 years - Cts. 2, 5, 8, 11, 14, 17 and 21
Fine Range: $12,500 to $125,000
[X] Fine waived or below the guideline range because of inability to pay.

DEFENDANT: ABASI S. BAKER
CASE NUMBER: 2:11CR20020-001-CM
DISTRICT: KANSAS

STATEMENT OF REASONS

[redacted]

IV ADVISORY GUIDELINE SENTENCING DETERMINATION (Check only one.)

A [X] **The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart.**

B [] **The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons.** (Use page 4 if necessary.)

C [] **The court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual.**
(Also complete Section V.)

D [] **The court imposes a sentence outside the advisory sentencing guideline system.** (Also complete Section VI.)

V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (if applicable)

A **The sentence imposed departs** (Check only one.):
[] below the advisory guideline range; or
[] above the advisory guideline range.

B **Departure based on** (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):
[] 5K1.1 plea agreement based on the defendant's substantial assistance;
[] 5K3.1 plea agreement based on Early Disposition or "Fast-track" Program;
[] binding plea agreement for departure accepted by the court;
[] plea agreement for departure, which the court finds to be reasonable;
[] plea agreement that states that the government will not oppose a defense departure motion.

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):
[] 5K1.1 government motion based on the defendant's substantial assistance;
[] 5K3.1 government motion based on Early Disposition or "Fast-track" program;
[] government motion for departure;
[] defense motion for departure to which the government did not object;
[] defense motion for departure to which the government objected.

3 **Other**
[] Other than a plea agreement or motion by the parties for departure (Check reason(s) below.):

Reason(s) for Departure (Check all that apply other than 5K1.1 or 5K3.1.)

[]	4A1.3	Criminal History Inadequacy	[]	5K2.1	Death	[]	5K2.11	Lesser Harm
[]	5H1.1	Age	[]	5K2.2	Physical Injury	[]	5K2.12	Coercion and Duress
[]	5H1.2	Education and Vocational Skills	[]	5K2.3	Extreme Psychological Injury	[]	5K2.13	Diminished Capacity
[]	5H1.3	Mental and Emotional Condition	[]	5K2.4	Abduction or Unlawful Restraint	[]	5K2.14	Public Welfare
[]	5H1.4	Physical Condition	[]	5K2.5	Property Damage or Loss	[]	5K2.16	Voluntary Disclosure of Offense
[]	5H1.5	Employment Record	[]	5K2.6	Weapon or Dangerous Weapon	[]	5K2.17	High-Capacity, Semiautomatic Weapon
[]	5H1.6	Family Ties and Responsibilities	[]	5K2.7	Disruption of Government Function	[]	5K2.18	Violent Street Gang
[]	5H1.11	Military Record, Charitable Service, Good Works	[]	5K2.8	Extreme Conduct	[]	5K2.20	Aberrant Behavior
			[]	5K2.9	Criminal Purpose	[]	5K2.21	Dismissed and Uncharged Conduct
[]	5K2.0	Aggravating or Mitigating Circumstances	[]	5K2.10	Victim's Conduct	[]	5K2.22	Age or Health of Sex Offenders
						[]	5K2.23	Discharged Terms of Imprisonment
						[]	Other guideline basis (*e.g.*, 2B1.1 commentary)	

Explain the facts justifying the departure. (Use page 4 if necessary.)

DEFENDANT: ABASI S. BAKER
CASE NUMBER: 2:11CR20020-001-CM
DISTRICT: KANSAS

STATEMENT OF REASONS

[redacted]

VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM
(Check all that apply.)

A **The sentence imposed is** (Check only one.):
- [] below the advisory guideline range; or
- [] above the advisory guideline range.

B **Sentence imposed pursuant to** (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):
- [] binding plea agreement for a sentence outside the advisory guideline system accepted by the court;
- [] plea agreement for a sentence outside the advisory guideline system, which the court finds to be reasonable;
- [] plea agreement that states that the government will not oppose a defense motion to the court to sentence outside the guideline system.

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):
- [] government motion for a sentence outside of the advisory guideline system,
- [] defense motion for a sentence outside of the advisory guideline system to which the government did not object;
- [] defense motion for a sentence outside of the advisory guideline system to which the government objected.

3 **Other**
- [] Other than a plea agreement or motion by the parties for a sentence outside of the guideline system (Check reason(s) below.):

Reason(s) for Sentence Outside the Advisory Guideline System (Check all that apply.)

- [] the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1);
- [] to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A));
- [] to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B));
- [] to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C));
- [] to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D));
- [] to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6));
- [] to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7)).

Explain the facts justifying a sentence outside the advisory guideline system. (Use page 4 if necessary.)

DEFENDANT: ABASI S. BAKER
CASE NUMBER: 2:11CR20020-001-CM
DISTRICT: KANSAS

STATEMENT OF REASONS

[redacted]

VII COURT DETERMINATIONS OF RESTITUTION

A [] Restitution Not Applicable.

B Total Amount of Restitution: $7,334.00

C Restitution not ordered (Check only one.):

1 [] For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

2 [] For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

3 [] For other offenses for which restitution is authorized under 18 U.S.C.§ 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

4 [] Restitution is not ordered for other reasons. (Explain)

D [] Partial restitution is ordered under 18 U.S.C. § 3663(c) for these reasons:

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (if applicable).

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases.

Defendant's Soc. Sec. No.: 515-86-6995

Defendant's Date of Birth: 08/16/1979

Defendant's Previous Address:
6824 Agnes Avenue
Kansas City, Missouri 64132

Defendant's Present Address:
Corrections Corporation of America
Leavenworth Detention Center
100 Highway Terrace
Leavenworth, Kansas 66048

Date of Imposition of Judgment: January 18, 2012

s/ Carlos Murguia

Signature of Judge

Honorable Carlos Murguia, U.S. District Judge
Name and Title of Judge

1/18/2012

Date Signed