> [b]y the great weight of the ruled cases, venue, even in a criminal case, need not be proved beyond a reasonable doubt. 13 Encyc. of Evidence 931, and cases cited from eleven states pro and two states contra. But the learned trial judge included venue, as among the things in the case, which should be proved beyond a reasonable doubt; *so the point is not before us here.*

32 F.2d at 132 (emphasis added).

Thus, it appears that venue is relegated to proof by a preponderance based on a decision in which the court did not even attempt to decide the issue. Moreover, *Blair*'s simple numerical canvass of 13 state cases decided at least 40 years before *Winship* cannot stand unchallenged today.

While the trail of Second Circuit cases applying the preponderance standard to venue leads back to *Blair,* none of the cases in the chain attempts to justify or explain the use of the preponderance standard for venue. They instead merely state the prevailing law without further comment.

Thus, all "preponderance" roads lead to *Blair*, which is to say, in essence, they lead *nowhere*, since in *Blair* the Eighth Circuit *did not even analyze or decide the issue of the burden of proof for venue.*

No decision has attempted to reconcile the irreconcilable: the preponderance standard for venue *with* the Supreme Court's Fifth and Sixth Amendment jurisprudence

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not an "element." Yet *Griley*, leads back to *Dean v. United States* (and, consequently, directly to *Blair*) via, sequentially, the following cases: *United States v. White*, 611 F.2d 531, 534-36 (5th Cir. 1980); *United States v. Turner*, 586 F.2d 395, 397 (5th Cir. 1978); and *United States v. Luton*, 486 F.2d 1021 (5th Cir. 1973).

that require all facts necessary for conviction need be proved beyond a reasonable doubt. Tradition is not an adequate or availing rationale.

C. Venue for the Lynbrook Robbery is Not Proper in this District

The government cited to Judge Pauley's unpublished decision in *United States v. Davis*, 2010 WL 3306172 (S.D.N.Y. Aug. 20, 2010), for the proposition that venue for a Hobbs Act robbery will be proper in any district where interstate commerce is effected by the robbery. Gov. Brief at 40. The decision is *Davis* relies on *United States v. Stephenson*, 895 F.2d 867, 875 (2d Cir 1990) which states that proposition without any discussion or analysis. It is respectfully submitted that reliance on these decisions would be error. The concept that a person should be tried in the place where the crime was committed was of sufficient importance to be mentioned twice in the United States Constitution. Given that the requirements to serve as the President of the United States are only listed in one place in the Constitution, venue should not be treated as a minor inconvenience.

Much of the government's opposition to the dismissal of the Lynbrook robbery count illustrates how far down the slippery slope of ignoring the requirements for venue we have fallen. The government's factual recitation in the main concerns the impact that the Lynbrook robbery had on interstate commerce. The government confuses venue and jurisdiction. This Court has jurisdiction to try what is essentially and historically the state crime of robbery because the particular robbery charged has an effect on interstate

commerce. If a court were to determine where a trial should be held based on the facts that give it jurisdiction over the offense, then the prosecution would have almost limitless locations for a trial, and the requirement for proving venue would become meaningless.

The law in this circuit is clear that acts preparatory to an offense are not sufficient to establish venue. *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181 (2d Cir. 1989). It can be readily demonstrated that the actions described by the government as having occurred in the Southern District were merely preparatory to the offense. Assuming for the purposes of this argument only that every act the government alleges occurred in the Southern District can be established at trial, that is that the defendants met in the Southern District of New York, obtained weapons, changed cars, and then drove to Eastern District of New York, but no robbery occurred.

Under such a scenario, the defendants could not be charged with robbery because no such crime occurred. Similarly, the defendants could not be charged with a 924(c) offense related to the Lynbrook robbery because the defendants cannot carry a weapon during and in furtherance of a crime that did not occur. This example points out that the essential conduct of the offense of robbery is the taking of property, not planning a robbery or talking about a robbery, but the actual taking of property by force or threat of force.

A robbery is not and cannot be a continuing offense. To determine the appropriate venue for a robbery trial there must be a determination of where the essential conduct

element of the crime took place. *See Rodriguez-Moreno,* 526 U.S. 275, 281(1999). In the matter now before this Court, the "essential conduct" in Count 7 and Count 8 occurred in the Eastern District of New York, and it is respectfully requested that those counts be dismissed for lack of venue.

D. Conclusion

For the foregoing reasons, Counts 7 and 8 should be dismissed, and the government should be required to prove venue as to all remaining counts by the beyond a reasonable doubt standard.

III. Separate Trial

The Government has now provided both a copy of the Report of Investigation containing the post-arrest statement of Neil Morgan and a copy of the government's proposed redactions. For the reasons outlined below, it is respectfully submitted that this Court must either preclude the admission of any evidence of Mr. Morgan's post-arrest statement or grant Mr. McIntosh a separate trial.

In *Crawford* v. *Washington,* 541 U.S. 36 (2004), the Supreme Court held that an out-of-court "testimonial" statement offered against an accused is inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. The term "testimonial" has been explained to mean,

> extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, and statements that were made under circumstances which would lead an objective witness reasonably to believe that

> the statement would be available for use at a later trial (internal quotation marks and citations omitted); *see also Saget, 377 F.3d at 228* (identifying as testimonial under *Crawford* "a declarant's knowing responses to structured questioning in an investigative environment or in a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings").

United States v. Williams, 506 F.3d 151, 157 (2d Cir. 2007) (internal quotation marks and citations omitted).

The Report of Investigation clearly indicates that Morgan was advised of his *Miranda* rights and waived those rights. The standard notice of *Miranda* rights informs the person being questioned that anything he says may later be used against him in a court of law. The term "testimonial" has been applied to police interrogations. *See United States v. Lung Fong Chen*, 393 F.3d 139, 150 (2d Cir. 2004).

Neil Morgan's post-arrest statement is clearly testimonial and cannot therefore be admitted into evidence at a joint trial with Louis McIntosh.

IV. Discovery

The Government objects to providing a witness list to counsel. A witness list was never requested. Defense counsel requested an unredacted criminal history report for each of the civilian witnesses that the Government intends to call at trial. Counsel agreed to accept this information under a Protective Order that would permit counsel and the our investigator to discuss witnesses with Mr. McIntosh but that would not permit Mr. McIntosh to receive either the criminal history or any personal information about the

witnesses. For those witnesses who have no criminal history, obviously there is nothing for the government to disclose. The material requested is not a prior statement of the witness and is not therefore covered under the timing provisions of 18 U.S.C. §3500.

It is beyond dispute that this Court has the discretion to order the government to disclose the identity of its witnesses prior to trial. *See United States v. Bejasa*, 904 F.2d 137, 139 (2d Cir. 1990); *United States v. Cannone*, 528 F.2d 290, 300 ("district courts have authority to compel pretrial disclosure of the identity of government witnesses..."). Counsel has made a more limited request. All that is sought is an unredacted official document that reflects the witnesses' prior contacts with law enforcement. A redacted criminal history report will only show convictions. An unredacted report will permit counsel to obtain information about prior arrests. Prior arrests that did not result in a conviction provide counsel with completely appropriate impeachment material.

A criminal history report provides very limited information and this document is only a starting point of the defense investigation. Criminal history reports provide a means of finding arrest records and court documents of the witnesses' prior bad acts. It is not uncommon for such records to be stored in archives or under seal. While counsel can promptly seek an unsealing order, retrieving documents from official archives can take an unknown amount of time that is beyond counsel's ability to control.

Accordingly, the prompt disclosure of the witnesses' criminal history report is essential to avoid delay of the trial. This request was made before the initial motions

were filed in an effort to avoid the need to request a continuance during the trial. *See United States v. Alessi*, 638 F.2d 466, 481 (counsel was granted a continuance to prepare for the cross-examination of a last minute witness.)

Any concerns that the Government may have for the security of its witnesses can be addressed by the issuance of a Protective Order. Counsel has made a sufficient showing of need for the prompt disclosure of the unredacted criminal history reports of the government witnesses. The request is made under conditions that address the government's security concerns. Accordingly, it is respectfully requested that this Court order the government to provide counsel with unredacted copies of their witnesses' criminal history reports immediately.

V. Search of the Camera

On June 13, 2011, the Government sought and obtained a search warrant for a number of locations and vehicles. The affidavit submitted in support of the warrant application established probable cause for the places to be searched. Attached to that warrant was a two page Rider detailing exactly what the law enforcement officers were authorized to search pursuant to the warrant. Paragraph "i" of the Rider authorized the seizure of "Photographs, in particular, photographs of co-conspirators, assets, controlled substances, firearms, ammunition and other weapons, and robbery targets." The Rider to the first search warrant does not mention a camera.

On January 24, 2012, the Government obtained a search warrant authorizing law

enforcement officers to search 23 devises including the camera that was seized in Mr. McIntosh's residence, a residence that he shares with his mother. The affidavit submitted in support of the application for the second search warrant includes information that had been provided to law enforcement concerning Mr. McIntosh taking pictures with his cell phone and showing people images on his cell phone. The affidavit does not set forth any alleged facts indicating that the camera seized belonged to Mr. McIntosh or had ever been used by him.

The government offers a variety of rationales in an effort to uphold the search of the camera none of which are sufficient. The government contends that the application for the second warrant provided probable cause to establish that Mr. McIntosh took photographs with his cell phone. Gov. Brief at 10. That fact is undisputed, but fails to provide probable cause to search a camera that no one ever claims to have seen Mr. McIntosh touch.

In essence, the government has offered a bait and switch approach to probable cause – the government argues that because there was probable cause to search a cell phone camera, there was probable cause to permit a search of any camera even when the application for the warrant contains no facts to establish that McIntosh ever used the camera at issue.

The government then argues that because the first search warrant allowed them to search for photographs, they should be permitted to search any place where a photograph

could possibly be stored. The government's own actions demonstrate the paucity of this argument. The first search warrant allowed the agents to seize, not any photograph, but rather the specific photographs described in the Rider to the search warrant. The first search warrant permitted the agents to seize "photographs of co-conspirators, assets, controlled substances, firearms, ammunition and other weapons, and robbery targets." The first search warrant did not authorize the agents to search any place where a photograph might be stored, and the government was well aware of this limitation because it determined that a second search warrant was necessary.

The government then asks this Court to rely on *United States v. Rogers*, 521 F.3d 5 (1st Cir. 2008), to validate the search of the camera. In *Rogers*, the court found that "given the current state of technology, the term "photo" reasonably includes images captured on videotapes or by a digital camera." *Id.* at 10 (internal quotation marks omitted). This logic is unavailing when applied to the facts in this case. Reliance on current state of technology does not support the search of a camera when a warrant only authorizes a search for a specifically described type of photograph.

Essentially, the government argues that the *Rogers* opinion would permit the search of any place where a latent image might be recovered. Latent images are not new technology. Matthew Brady began to take photographs of the civil war in 1861. Those photographs began as latent images on glass plates. George Eastman brought photography to the mass-market with the introduction of the "Brownie" in 1900. The

Brownie captured latent images on celluloid film. The camera in question captures latent images on a digital storage device.

The method of storing latent images may change but there is no basis under Fourth Amendment jurisprudence to claim that current technology has altered the definition of a "photograph" so that it would now, according to the government, mean any place where a latent image could possibly be found. The Fourth Amendment still requires that a warrant be issued "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched." There was not a single fact alleged in the application for the second warrant that could establish probable cause for the search of the camera.

Finally, the Government argues that the good faith exception should allow the government to introduce evidence from an otherwise unlawful search. *United States v. Leon*, 468 U.S. 897 (1984). The good faith exception is not sufficient to save this search. The same agent submitted the affidavit in support of both search warrants. The fact that a second search warrant was sought clearly indicates that the agent knew that he could not rely on the first warrant to search the camera. The government argues that the agent did not omit any key facts from the warrant application. The problem for the government is not that the agent omitted key facts, but rather that as to the camera he had no facts at all.

A review of the affidavits submitted in support of the two search warrants establishes that the agent who signed these affidavits was experienced. He understood

what kind of factual detail was required to establish probable cause to obtain a search warrant. Thus, he knew that he had alleged no facts relevant to the camera and that it would therefore be unreasonable for him to rely on a warrant that he knew failed to allege facts that could establish probable cause for the search of the camera.

It is respectfully submitted that the images recovered from the search of the camera be suppressed.

Dated: New York, New York
February 6, 2012

Respectfully submitted,

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Exhibit A

The National Academy of Sciences Report on Forensic Sciences: What it Means for the Bench and Bar

The Honorable Harry T. Edwards
Senior Circuit Judge and Chief Judge Emeritus
United States Court of Appeals for the D.C. Circuit
and
Co-Chair, Committee on Identifying the Needs of the Forensic Science Community
The National Academy of Sciences

Presentation at the

Superior Court of the District of Columbia

Conference on

THE ROLE OF THE COURT IN AN AGE OF DEVELOPING SCIENCE & TECHNOLOGY

Washington, D.C.

May 6, 2010

On February 18, 2009, after more than two years of work, the Committee on Identifying the Needs of the Forensic Science Community at the National Academy of Sciences issued a report entitled, "Strengthening Forensic Science in the United States: A Path Forward."[1] The Committee was composed of a diverse and accomplished group of professionals. Seven of the 17 Committee members are prominent professionals in the forensic science community, with extensive experience in forensic analysis and practice; 11 members of the Committee are trained scientists (with expertise in physics, chemistry, biology, engineering, biostatistics, statistics, and medicine); 10 members of the Committee have Ph.Ds, 2 have MDs, 5 have JDs, and one has an M.S. in chemistry.

The Committee's project involved an extraordinary amount of time, because of the extensive research and countless interviews that we undertook. In addition, there were many hours of Committee meetings – which involved deliberations between forensic analysts and practitioners, experts in the physical and life sciences, a former federal prosecutor, a defense attorney, a crime lab director, a medical examiner, an engineer, statisticians, educators, and a judge. Our interactions were challenging and fruitful. And, in the end, despite our differing professional perspectives, the Committee was unanimous in its findings and recommendations.

With the benefit of hindsight, I can now say that the substance of the Committee's Report really was not hard to write. The problems that plague the forensic science community have been well understood for quite some time by thoughtful and skilled forensic professionals, and their views and concerns were well known to us. For example, in 2003, when he was President of the American Academy of Forensic Sciences (AAFS), Kenneth Melson, a former prosecutor and now Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, wrote:

> [M]ore research is needed in the techniques and science already in use. With the importance of forensic science to truth and justice, the science employed and relied upon by judges and juries must be valid. It does not matter how well forensic scientists abide by testing protocols or how reliable the techniques are, if the underlying science does not actually reveal what the expert says it does. Method validation studies and new research must be ongoing even in the areas of traditional forensic science disciplines. Justice demands good science and we have an obligation to provide it. We can no longer expect the courts or public to accept the truth of our science merely because we say it is good. In order to maintain the integrity of both the science and the justice system, we must prove that it is so. Moreover, we cannot overlook the fact that scientific evidence was presented at many of the trials where innocent people were convicted and later exonerated by DNA. The evidence in many of the trials showed associations between the defendants and the victims or crime scenes. While modern day science is exonerating the innocent, it is also showing us that some inferences drawn from scientific associations in the past were wrong. The use of DNA to exonerate wrongly convicted persons has certainly taught us lessons about forensic science in general and underscores the importance of continuing research.[2]

Thomas Bohan, the most recent Past President of the American Academy of Forensic Sciences, published a similar statement earlier this year.[3]

When Congress passed legislation in 2005 directing the National Academy of Sciences to create an independent committee to study the forensic science community, it did so at the urging of the Consortium of Forensic Science Organizations. The legislation establishing our Committee was, in effect, a response to a *call for help* from forensic science professionals.

The Committee spent an enormous amount of time listening to testimony from and reviewing materials published by numerous experts, including forensic practitioners, heads of public and private laboratories, directors of medical examiner and coroner offices, scientists, scholars, educators, government officials, members of the legal profession, and law enforcement officials. Not only did we examine how the forensic disciplines operate, we also carefully considered any peer-reviewed, scientific research purporting to support the validity and reliability of existing forensic disciplines. Additionally, we invited experts in each discipline to refer us to any pertinent research. Committee members and staff spent countless hours reviewing these materials. And before the Report was released, it was peer-reveiwed by outside experts in the fields of science, law, and forensic practice.

I started the NAS project with no skepticism regarding the forensic science community. Rather, I assumed, as I suspect many of my judicial colleagues do, that the forensic disciplines are well grounded in scientific methodology and that crime laboratories and forensic practitioners follow proven practices that ensure the validity and reliability of forensic evidence offered in court. I was surprisingly mistaken in what I assumed.

What our Committee found is that, although there are many dedicated and skilled forensic professionals, the quality of practice in the forensic disciplines varies widely and the conclusions reached by forensic practitioners are not always reliable. The reasons for this include:

- the paucity of scientific research to confirm the validity and reliability of forensic disciplines and establish quantifiable measures of uncertainty in the conclusions of forensic analyses;
- the paucity of research programs on human observer bias and sources of human error in forensic examinations;
- the absence of scientific and applied research focused on new technology and innovation;
- the lack of autonomy of crime laboratories;
- the absence of rigorous, *mandatory* certification requirements for practitioners;
- the absence of uniform, *mandatory* accreditation programs for laboratories;
- the failure to adhere to robust performance standards;