No. 17-10749

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TROY MARKEITH GRIFFIN,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:15-cr-453, Hon. Mary S. Scriven

REPLY BRIEF OF TROY MARKEITH GRIFFIN

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Adams, Natalie Hirt – Assistant United States Attorney;
2. Allen, Adam Benjamin – Assistant Federal Public Defender;
3. Anderson, Howard C. – Assistant Federal Public Defender;
4. Armsden, Kenneth – Victim;
5. Bayer, Steven – Victim;
6. Bentley, III, A. Lee – Former United States Attorney;
7. Burns, P.A. – Appellate counsel for Defendant-Appellant;
8. Burns, Thomas A. – Appellate counsel for Defendant-Appellant;
9. Candela, Anthony Michael – Trial counsel for Defendant Tevin Jamar Marketh Major;
10. Candela Law Firm, P.A. – Trial counsel for Defendant Tevin Jamar Marketh Major;
11. Carr, Jason – Victim;
12. Coleman, Kenni – Victim;
13. Crawford, Stephen M. – Trial counsel for Craig Demetrio Koonce;
14. Dugan, Ramona – Victim;
15. Elm, Donna – Federal Public Defender;
16. Gammons, Carlton Curtiss – Assistant United States Attorney;

17. Griffin, Troy Markeith – Defendant-Appellant;

18. Griffin, Jr., Troy Markeith – Defendant;

19. Koonce, Craig Demetrio – Defendant;

20. Law Office of Ray Christopher Lopez – Trial counsel for Defendant-Appellant;

21. Lopez, Ray Christopher – Trial counsel for Defendant-Appellant;

22. Love, Samuel – Claimant;

23. Maier, Elizabeth – Victim;

24. Major, Tevin Jamar Marketh – Defendant;

25. Merkley, Kathy – Victim;

26. Minardi, Richard Charles – Trial counsel for Defendant Craig Demetrio Koonce;

27. Muench, James A. – Assistant United States Attorney;

28. Muldrow, W. Stephen – Acting United States Attorney;

29. Pizzo, Hon. Mark A. – United States Magistrate Judge;

30. Rhodes, David P. – Assistant United States Attorney, Chief, Appellate Division;

31. Richard C. Minardi, P.A. – Trial counsel for Craig Demetrio Koonce;

32. Roberts, Juwaan – Defendant;

33. Sansone Law, P.A. – Trial counsel for Defendant Troy Markeith Griffin, Jr.;

34. Sansone, William Fargo – Trial counsel for Defendant Troy Markeith Griffin, Jr.;

35. Scriven, Hon. Mary S. – United States District Judge;

36. Twin Horse Saloon – Victim;

37. Waterman, David C. – Assistant United States Attorney, Appellate Division; and

38. Wilson, Hon. Thomas G. – United States Magistrate Judge.

No publicly traded company or corporation has an interest in the outcome of this appeal.

November 1, 2017

/s/ Thomas Burns
Thomas A. Burns

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ARGUMENT AND CITATIONS OF AUTHORITY

I. THE JURISDICTIONAL NEXUS EVIDENCE WAS INSUFFICIENT

Whenever the Government needs to marshal evidence to establish the jurisdictional nexus for a Hobbs Act robbery of a bar in Florida, it has an array of creative options at its disposal.[1]

For instance, perhaps a bar's patrons sought refuge in a classic American cocktail, the Old Fashioned. The recipe for an Old Fashioned is: two ounces of rye or bourbon, a dash of bitters, simple syrup, a cherry, and an orange or lemon peel (only a philistine would befoul an Old Fashioned by muddling the flesh of the citrus itself); stirred, not shaken; and served on the rocks. If so, the Government could establish the jurisdictional nexus by introducing evidence that the bourbon or rye came from Kentucky, *e.g.*, Bulleit, *Bulleit Whiskeys*, *at* https://www.bulleit.com/whiskeys/ (last visited Nov. 1, 2017), the bitters were produced in Trinidad, *e.g.*, Angostura, *Who We Are*, *at* http://www.angostura.com/OurBusiness/WhoWeAre (last visited Nov. 1, 2017), the simple syrup was produced from sugarcane grown in Louisiana, *see, e.g.*, American Sugar Cane League, *About the League*, *at*

[1] The parties have already stated their positions with respect to the obstruction enhancement, *compare* Griffin Br. 13-14, *with* U.S. Br. 14-17, so further discussion of that point is unnecessary.

http://www.amscl.org/about-the-league (last visited Nov. 1, 2017), or the cherry was imported from Italy, *e.g.*, Luxardo, *The Original Maraschino Cherries*, *at* http://www.luxardo.it/products/gourmet/the-originai-maraschino-cherries.html (last visited Nov. 1, 2017).

Or perhaps a bar's patrons desired to be whisked away to the steamy and sultry land of samba, bossa nova, capoeira, and futebol, in which case they might enjoy the quintessentially Brazilian cocktail, the caipirinha. The recipe for a caipirinha is: several Persian limes, two ounces of cachaça (*i.e.*, Brazilian white rum), and fine sugar; muddled and shaken, not stirred; and served on the rocks with raw sugarcane for garnish. If so, the Government could introduce evidence that the limes were grown in California, *e.g.*, Wonderful Citrus, *Limes*, *at* http://www.wonderfulcitrus.com/our-citrus/limes.html (last visited Nov. 1, 2017), the cachaça was distilled in Brazil, *e.g.*, Novo Fogo, *Steel Cachaça*, *at* http://www.novofogo.com/silver-cachaca/ (last visited Nov. 1, 2017), or the raw sugarcane was grown in and imported from Mexico, *e.g.*, White Mountain, *White Mountain Pure Cane Sugar*, *at* http://www.whitemountaingrp.com (last visited Nov. 1, 2017).

Alternatively, perhaps a bar's patrons wanted their cares to melt away while enjoying quite possibly the most deceptively powerful drink known to humankind, the margarita. The recipe for a margarita is: the juice of a freshly squeezed lime, 1.5 ounces of tequila, and 0.75 ounces of triple sec; shaken, not stirred; and served on the rocks in a salt-rimmed glass. If so, aside from the limes, the Government could introduce evidence the tequila was distilled in Mexico, *e.g.*, Tequila Patrón, *Patrón Silver*, *at* https://www.patrontequila.com/products/patron-silver.html (last visited Nov. 1, 2017), the triple sec was distilled in France, *e.g.*, Cointreau, *Cointreau Unique*, *at* https://www.cointreau.com/us/en/products/cointreau-liqueur (last visited Nov. 1, 2017), or the salt was imported from Oregon, *e.g.*, Rokz, *Lime Infused Margarita Salt*, *at* https://shop.rokz.com/products/lime-infused-margarita-salt (last visited Nov. 1, 2017).

In any of those three scenarios (Old Fashioned, caipirinha, margarita), the Government could establish the requisite jurisdictional nexus for Hobbs Act robbery by introducing testimony or evidence that even one such cocktail ingredient originated from outside Florida. *See, e.g.*, *United States* v. *Paredes*, 139 F.3d 840, 841, 844-45 (11th Cir. 1998)

(finding sufficient jurisdictional nexus evidence to support convictions for Hobbs Act robberies that netted "a case of beer, a carton of cigarettes, and under $170" where convenience stores were not involved in interstate commerce other than selling "some" merchandise that originated outside of Florida, such as beer, cigarettes, and nuts); *United States* v. *Guerra*, 164 F.3d 1358, 1359, 1361 (11th Cir. 1999) (finding sufficient jurisdictional nexus evidence to support convictions for Hobbs Act robbery that netted $300 where gas station was part of nationwide chain and sold interstate gasoline, oil, cigarettes, beer, soda, gum, and chips to interstate patrons). But the Government would still need to prove the bar continued to purchase those ingredients and sell those cocktails at the time of the robbery.

Alas, none of these options were on the table because the good patrons of the Twin Horse Saloon apparently were not cosmopolitans who reclined on settees while puffing long cigarettes and sipping cocktails. *See* Doc. 252 at 121 ("It's a neighborhood family bar, we have the same patrons daily."), 138 ("It's just a neighborhood little bar, pretty much everybody from the neighborhood comes there."), 139 ("They're just neighborhood people."). No, they drank beer and played pool. *See* Doc.

252 at 121 ("There's a pool table when you first walk in"). Given that beer-drinking, pool-playing reality, the Government's options were more limited. Namely, it could have established the interstate jurisdictional nexus in only one of three ways.

First, it could have introduced testimony and evidence that the bar's beer distributor was headquartered or delivered its products from outside the State of Florida. *E.g.*, *Guerra*, 164 F.3d at 1359, 1361 (finding sufficient jurisdictional nexus evidence to support convictions for Hobbs Act robbery that netted $300 where, *inter alia*, gas station was part of nationwide chain). But that would not have worked here because the bar's beer distributor was headquartered in Jupiter, Florida, had warehouses in Tampa, Florida and Fort Myers, Florida, controlled a cross stock operation in Fort Pierce, Florida, and maintained an office in Sebring, Florida.[2] Doc. 253 at 23. Simply put, it was a Florida beer distributor that delivered beers to a Florida bar. *See* Doc. 253 at 23. That is not interstate commerce.

[2] It also had a distribution center in Minneapolis, Minnesota, but that was unrelated to its beer distribution to Florida customers such as the Twin Horse Saloon. *See* Doc. 253 at 23.

Second, it could have introduced testimony and evidence that at least some of the bar's patrons had traveled to it from outside the State of Florida. *E.g.*, *Guerra*, 164 F.3d at 1359, 1361 (finding sufficient jurisdictional nexus where gas station, *inter alia*, sold merchandise to interstate patrons). But there was no such evidence for this "neighborhood family bar" full of "neighborhood people" who are "the same patrons daily." Doc. 252 at 121, 138-39. For reasons unstated on this record, the Government chose not to take that approach. And without such evidence, there again is no interstate commerce.

Third, the Government could have introduced testimony and evidence that the beer itself was brewed outside Florida. This Court's precedent, of course, supports the notion that could be a viable approach as a general matter. *E.g.*, *Guerra*, 164 F.3d at 1359, 1361 (finding sufficient jurisdictional nexus evidence to support convictions for Hobbs Act robbery that netted $300 where gas station was part of nationwide chain and sold interstate gasoline, oil, cigarettes, beer, soda, gum, and chips to interstate patrons); *Paredes*, 139 F.3d 840 at 841, 844-45 (finding sufficient jurisdictional nexus evidence to support convictions for Hobbs Act robberies that netted "a case of beer, a carton of cigarettes,

and under $170" where convenience stores were not involved in interstate commerce other than selling "some" merchandise that originated outside of Florida, such as beer, cigarettes, and nuts).

Ultimately, the third option is what the Government attempted to prove. *See* Doc. 253 at 23-38. But its proof failed because it never established (1) the interstate beers, which had been delivered at least five months before the robbery, were still being sold at the bar, or (2) the bar continued to purchase and serve interstate beers up to and after the date of the robbery. *See* Griffin Br. 6, 12.

Nevertheless, the Government argues its evidence was sufficient because Miller Lite, Coors, and Heineken are brewed outside the State of Florida. *See* U.S. Br. 4-5, 13-14. But that is a straw man argument that begs the question, because the interstate character of those beers is not and never has been in dispute. Instead, the question is whether the Twin Horse Saloon *continued* to purchase and serve those interstate beers up to and after the date of the robbery. *See* Griffin Br. 6, 12.

Attempting to plug that hole in its proof, the Government argues its evidence was sufficient because it did not need to produce invoices of such transactions, but could instead rely only on testimony. *See* U.S. Br.

13-14. As a general matter, of course, that is a correct statement of law; evidence may be sufficient whether it is testimonial, documentary, direct, or circumstantial. Nevertheless, although the "test for evaluating circumstantial evidence is the same as in evaluating direct evidence," it "must at some point connect, to allow the trier of fact to draw the inference that the fact asserted is true." *United States* v. *Henderson*, 693 F.2d 1028, 1030-31 (11th Cir. 1982) (reversing conviction because circumstantial evidence was insufficient). But that rule treating all testimony and evidence the same has no real application here.

The problem, instead, as Mr. Griffin previously explained (Griffin Br. 6, 12), is that even the testimony—never mind the invoices—did not establish the necessary facts for a jurisdictional nexus. That is, the testimony never established the Twin Horse Saloon continued to purchase and serve interstate beers up to and after the date of the robbery.

For instance, instead of testifying the Twin Horse Saloon continued to purchase and serve interstate beers, David Brooks (of the beer distributor) testified he "believe[d]" his company still sold "items" to the Twin Horse Saloon. Doc. 253 at 32. But he never testified whether those "items" continued to include beers brewed outside Florida. Doc. 253 at

32. And such an inference would not have been reasonable, because it turns out that many fine beers are brewed in and distributed from Florida. *E.g.*, Coppertail Brewing Co., *Florida Inspired, Tampa Brewed*, *at* http://coppertailbrewing.com/beer/ (last visited Nov. 1, 2017); Cigar City Brewing, *Florida Cracker*, *at* https://cigarcitybrewing.com/beer/florida-cracker/ (last visited Nov. 1, 2017); Cigar City Brewing, *Jai Alai*, *at* https://cigarcitybrewing.com/beer/jai-alai-ipa/ (last visited Nov. 1, 2017). "[I]ntuition cannot substitute for admissible evidence when a defendant is on trial." *United States* v. *Hamblin*, 911 F.2d 551, 558 (11th Cir. 1990) (reversing conviction for insufficient evidence).

Likewise, Albert Velocci (the bar owner) never testified he continued to purchase interstate beers from the Florida beer distributor, that the Twin Horse Saloon was itself engaged in interstate commerce (*e.g.*, with patrons or beer distributors outside the State of Florida), or that it purchased fewer interstate beers from his Florida beer distributor as a result of the robbery.[3] Doc. 253 at 35-36.

[3] For that reason, Mr. Velocci's testimony that "the money that was stolen during th[e] robbery[] would ... have been used in furtherance of [his] business" (Doc. 253 at 38) means nothing; there was no evidence his business was engaged in interstate commerce during the appropriate timeframe.

In short, the Government misplaces its reliance on *Guerra* and *Paredes* (*see* U.S. Br. 12-13) because those cases are fully consistent with Mr. Griffin's theory of the case. The issue is the timeframe, not the interstate character of beers that were purchased five months or more before the robbery. Absent sufficient evidence of a jurisdictional nexus, this Court should reverse the convictions and remand for entry of judgment in favor of Mr. Griffin.

CONCLUSION

The Court should reverse the judgment or vacate it and remand for further sentencing proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 1,875 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century Schoolbook font.

November 1, 2017

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 1st day of November, 2017, to:

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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 1st day of November, 2017, to:

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