U.S.C.A. No. 10-30167

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

KARL THOMPSON, JR.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
D.C. No. CR-09-00088-FVS-1

The Honorable Fred Van Sickle, *Senior United States District Court Judge*

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I. INTRODUCTION

This case involves charges of unnecessary and excessive force (both deadly and non-deadly) and obstruction of justice against Spokane Police Department (SPD) Patrol Officer Karl Thompson Jr. for his March 18, 2006, beating of an unarmed and mentally disabled janitor, Otto Zehm.[1]

On June 19, 2009, Thompson was indicted for violating Zehm's Fourth Amendment right to be free from unreasonable seizure in violation of 18 U.S.C. 242 (Count 1) by striking Zehm with at least 13 baton strikes (including alleged head strikes) and firing taser darts at Zehm's chest; by directing a fellow officer to deliver baton strikes (i.e., jabs) and three more taser applications (one taser firing and two five-second drive stuns); and for knowingly making false statements about the basis for force during his employer's criminal investigation, in violation of 18 U.S.C. 1519 (Count 2).

On June 7, 2010, immediately prior to jury selection, the district court orally excluded the following evidence of Zehm's innocence from the government's case-in-chief: i) testimony that Zehm did not take money from the

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[1] After defendant's violent attack, Zehm understandably resisted and was ultimately forcibly restrained in a prone, hogtie restraint for approximately 17 minutes, the end of which he quit breathing and later died. ER 288. Citing to the Medical Examiner's autopsy report, defendant states that Zehm died of "excited delirium" (*Def. Br. 19)*. This is false. Dr. Sally Aiken, Spokane County's board certified Forensic Pathologist and Medical Examiner, concluded that Zehm's death was caused by: "Hypoxic Encephalopathy due to Cardiopulmonary Arrest while restrained (total appendage restraint) in a prone position for *[a SPD reported episode of]* excited delirium." [sic] *See* Autopsy Report, ER 161 and Expert Disclosure, SER __ In layman's terms, Zehm died from a brain death, caused by oxygen deprivation, secondary to sudden cardiopulmonary arrest while forcibly restrained.

ATM; ii) bank records and receipts showing no cash withdrawal at the ATM; and iii) the contents of Zehm's pockets, which included a deposit envelope, a deposit receipt and Zehm's paycheck. The court ruled that evidence of Zehm's underlying innocence "was not relevant" to the determination of the objective reasonableness of defendant's "force decision" since defendant subjectively declared that he was unaware of any aspect of Zehm's innocence prior to the beating. ER 20-23.

The United States proffered Zehm's innocence, *inter alia*, for the following primary reasons and inferences:

> i) Proving that Zehm's actions were "objectively reasonable" in the "totality of circumstances" confronting defendant as opposed to the "subjective sinister" manner defendant described Zehm;
>
> ii) Discrediting defendant's subjective, fabricated version of the "totality of circumstances" and his claim that Zehm was essentially "lying in wait" to lunge, attack or charge at defendant with a plastic soda bottle;
>
> iii) Proving the requisite "intent" element of willfulness for the Section 242 charge of unreasonable and excessive force;
>
> iv) Proving the predicate facts for the Section 1519 obstruction of justice charge (i.e., false entries in official report) and required "knowing" element; and
>
> v) Proving predicate facts for the innocent victim Zehm's own right to use "reasonable" and "proportionate resistance" to resist defendant's (and other law enforcement's) use of unreasonable, excessive and injurious force (i.e., serious and deadly force) during the unlawful seizure.

The excluded *innocence evidence* is critical to the United States' proof on both charges since it tends to show that the defendant lied about his justification for

his initial use of force.[2] Demonstrating that defendant's initial use of force was unjustified is important since it also undermines Thompson's justification for the rest of the force he used against Zehm.

The central issue in this appeal is whether the district court erred and/or abused its discretion in excluding evidence that is relevant to assess disputed facts that comprise the totality of circumstances prior to and during the defendant's precipitous, violent attack on Zehm. This Court has held that, as part of a jury's ultimate analysis of the objective reasonableness of an officer's actions, the jury may consider facts not known to an officer in order to resolve whether the disputed facts and inferences actually existed. *See Boyd v. City and County of San Francisco*, 576 F.3d at 944. This case presents the same issue and the district court erred as a matter of law and abused its discretion by not admitting the evidence the court admitted in *Boyd.*

II. REPLY STATEMENT OF FACTS

A. Defendant's Divergent Version of Facts and Case Theory

In his answering brief, defendant sets forth a decidedly defense version of the force events preceding the victim Zehm's in-custody death. *See Def. Br. 8-20*. This defense theory of the case, like the one relied on (in part) by the district court in its ruling, is not the version of events that the United States intends to prove at trial. *See* ER 288-97, 299, 304-14, 326-27. Indeed,

[2] Proof that defendant's justification for his initial use of force is false goes to establish consciousness of guilt, that he deprived Zehm of his constitutional rights under Section 242, and that he knowingly made a false entry in his recorded interview in violation of Section 1519.

defendant's version is the subject of the false statement charge - Count 2 of the Indictment.

Most notably, defendant provides an account of the "suspicious circumstances" call and "assault events" that the United States submits defendant did not know and could not know were within the sphere of the "totality of circumstances" when he willfully, precipitously and violently attacked the innocent, unsuspecting and unknowing Otto Zehm.[3] This defense version and *proffer* further supports the United States' critical need for Zehm's *innocence evidence* in its case-in-chief. *Def. Br. 8-20.*

B. Totality of CAD and SPD Radio Information

The amount of information actually available to defendant prior to his attack on Zehm was significantly more restricted than defendant's description. *See pgs. 8-20 of Def. Br.* Despite defendant's revisionist history, the full universe of electronic information available to defendant included only: 1) the computer aided dispatch (CAD) entries, remotely available on a display terminal in the patrol car; and 2) the SPD Radio-Dispatch Center's radio traffic. ER 206.

[3] Defendant provided this Court with an incompleted account of Zehm's past mental health and treatment. *Def. Br. 12.* Defendant fails to disclose the content of Zehm's last mental health visit that occurred shortly before his death. SER 916. During this exam, Zehm exhibited delayed and impaired cognitive functioning, he was slow to respond; could not maintain a conversation, and could not maintain visual contact. He was withdrawn and there was no evidence that he was aggressive or assaultive. It's also noteworthy that Zehm's "pre- assault behavior" is captured on the Zip Trip security video. ER 206. This video does not show Zehm in an excited, agitated, delirious or aggressive state. Rather, his behavior is consistent with someone "only wanting a Snicker's bar" to go with a soda.

The CAD establishes that SPD Radio first dispatched Patrol Officers Steve Braun Jr. and Tim Moses to the suspicious call. The call was classified and remained a level 2, "suspicious circumstance" throughout, meaning no immediate personal safety issues were involved, as such lights and siren were unnecessary. ER 240-242. While defendant was *en route*, a fourth SPD Officer, Dan Strassenberg, "checked in" and informed Radio/fellow officers that he was responding. *Id.* A short time later, Officer Braun informed dispatch/fellow officers that he was already "in the area" of the call. *Id*.

In addition to the foregoing "text" CAD information, the transcribed SPD Dispatch radio traffic communicated immediately prior to defendant's precipitous attack on the innocent Zehm was as follows:

# Name	***Time Track***	***Comment***
"0004 ComOp	18:15:53:05 A3	[*Dispatch*] 25 and 26.
0005 Police	18:15:57:13 A3	[*Braun*] 25 and it's a call at Baldwin and Ruby . . . **I'll check and advise**.
...		
0007 ComOp	18:16:41.07 A3	**325, a white male in his forties with long blond hair, wearing a black jacket and jeans**.
0008 Police	18:16:48:22 A3	[*Braun*] Copy.
0009 ComOp	18: 17:30.18 A3	[*Dispatch*] **325, he's still bent down messing with the ATM machine**
0010 ComOp	18:17:33:25 A3	**and the complain[t]ant thinks he appears to be high.**
0011 Police	18:17:41.04 A3	[*Braun*] copy.
0012 ComOp	18:19:47:04 A3	[*Dispatch*] Adam 325.
0013 Police	18:19:49.15 A3	[*Braun*] Go ahead.

0014 ComOp	18:19:51.20 A3	[*Dispatch*] **He's got some sort of money in his hand**
0015 ComOp	18:19:53.09 A3	**and now he's taken off running towards New Harbour**
0016 ComOp	18:19:57.17 A3	and now they're gonna transfer the call **into us. You sure you don't want a 13 [back up]? [sic]**
0017 Police	18:20:01.29 A3	[*Braun*] **Yeah, you can start one**.
0018 ComOp	18:20:03:28 A3	[*Dispatch*] 322
0019 Police	18:20:06.10 A3	[*Moses*] 22 Francis and Nevada.
...		
0021 Police	18:22:20.25 A3	[*Braun*] **____ 25. I'm in the area**.
0022 ComOp	18:22:23.14 A3	[*Dispatch*] Copy.
0023 ComOp	18:22:39.23 A3	[*Dispatch*] **The 25 is walking southbound Ruby against traffic now**.
0024 Police	18:22:48.25 A3	[*Braun*] __ **W. Try to get down there**.
0025 Police	18:22:56.25 A3	__ **happen to know which side of the street he's on, east or west?**
0026 ComOp	18:23:00.00 A3	[*Dispatch*] **I'll check. Stand by.**
0027 ComOp	18:23:19.22 A3	**And he's actually at the White Elephant now and the complainant did get her card back.**
0028 Police	18:23:25:16 A3	[*Braun*] **Copy, and just to confirm: he took her money**?
0029 ComOp	18:23:30.29 A3	[*Dispatch*] **Affirm**.
0030 Police	18:23:40.25 A3	**[*Thompson*] Edward 252**.
0031 ComOp	18:23:42:29 A3	[*Dispatch*] Edward 252.
0032 Police	18:23:45:12 A3	[*Thompson*] **Could be out at the White Elephant. I'll check on the Ruby side.**

0033 ComOp	18:23:50.04 A3	[*Dispatch*] Copy.
0034 Police	18:23:56.25 A3	[*Thompson*] **He's just walking into the Zip Trip.**
0035 ComOp	18:24:00.04 A3	[*Dispatch*] Copy.
0036 ComOp	18:24:17:00 A3	[*Dispatch*] **Uh, so now the complainant's advising she's not entirely positive that he did get her money**
[time stamp]	**[18:24:18:00]**	**[approx. radio time Thompson's delivers first baton strike at Zehm's Head-Neck-Shoulder area (i.e., deadly force)]** [sic]
0037 ComOp	18:24:21.06 A3	[*Dispatch*] **She did not get a chance to go back and check**.

ER 206, 241-42 (emphasis added).[4] The forgoing CAD and Radio transcript constitute the "full extent" of call information available before defendant precipitously assaulted the unknowing and confused Zehm on the "suspicious circumstance" complaint. ER 206, 240-42.[5]

In addition to the CAD/Radio information, defendant did subjectively observe Zehm from the time he walked into the Zip Trip until defendant

[4] The full sphere of call information available to defendant is on the DVD containing the merged SPD Radio - CAD dispatch information, overlaid on the Zip Trip security video. ER 206, 219-42; *see also* district court's order excluding 911 audio tape and related pleadings–exhibits. ER 115/R 431.

[5] Defense counsel cites an *ipse dixit* account (i.e., his own declaration) for the proposition that there is a conflict in the actual content of the SPD Dispatch's radio traffic. *Def. Br. 8, 11.* The purported conflict is the product of counsel's own confused *ipse dixit* declaration. It is clear from the actual recorded and transcribed radio traffic that defendant was never informed that the complainants were "scared" as defense counsel asserts. *See* ER 206, 240.

violently attacked him seconds later.[6] Defendant's subjective account of these "observations" remain in dispute even though a large portion of defendant's attack and Zehm's reaction is captured on the Zip Trip's four security cameras. ER 382-85, 206. Defendant described Zehm's otherwise innocent behavior in a very sinister, calculating and "about to be assaultive" manner.[7] ER 468-69. (Thompson's statement , pg. 18-19); ER 206 (Zip Trip video cameras).

[6] The CAD/Radio traffic information does not and cannot support a rational belief that Zehm "may have" been involved in a "premature robbery." A "robbery" (even a "premature" one) requires the taking of property through "threatened use of immediate force, violence, or fear of injury" by a direct *or* indirect communication of the intent to use immediate force, violence, or cause injury." *State v. Shcherenkov*, 191 P.3d 99, 101 (Wash. App. 2008), *citing, State v. Redmond*, 210 P. 772, 773 (Wash. Sup. Ct. 1922). Thus, "[u]nder this test, the subjective courageousness or timidity of the victim is irrelevant; the acts of the defendant must constitute intimidation to an ordinary, reasonable person." *[sic] Id*. at 627-28 (citation omitted). Defendant's post-hoc embellishment characterizing Zehm as a "premature robbery" suspect is specious, particularly since neither the CAD nor the Radio traffic reflect any "threat" or attributable "intent" to steal money from the reportedly "open" ATM account (e.g., there is no credible basis to even believe a misdemeanor theft occurred)). *Id.*

[7] Defendant apparently now denies describing Zehm as "lying in wait" or preparing to ambush him. *Def. Br. 15*. However, defendant described Zehm's purportedly aggressive behavior, *inter alia,* as follows in his statement: "In my mind at that point, in our proximity, my belief was that he was preparing to assault me." ER . "When [Zehm] turned around and saw me entering, he, he did not immediately flee. He picked up an object [plastic soda bottle] and it was held in a manner that I realized was in a position that he could use it as a significant weapon against me." [sic] *Id.* Defendant's statements clearly indicates that he viewed Zehm's actions in picking up the soda bottle as calculated and in anticipation of using it to assault defendant. *Id.*

C. Defendant's On-Scene Statements - AMR's "Patient Care Report"

Shortly after defendant fired taser probes into Zehm and repeatedly struck him with his ironwood baton, two American Medical Response (AMR) personnel arrived to provide medical treatment and hospital transport. They discovered en route that the call was far more urgent since Zehm stopped breathing. On arrival, they needed information about Zehm's injuries and causation for medical diagnosis and treatment, so they spoke with SPD Officer Tim Moses. SER 955/R 253. Moses told the AMR personnel that Zehm had been hit in the head, neck, and upper torso with a police baton. *Id*. Moses received his information about the location of the baton blows directly from defendant when defendant recounted on-scene the "reasons" for the force used on Zehm. *Id.* Moses understood that this information was critical for proper medical treatment. *Id.*[8]

One of the AMR medical technicians wrote a "Patient Care Report" on the call and carefully noted in several locations that *Zehm had been* ***"hit in the upper torso, neck and head by a night stick per SPD***." *Id.*

D. Defendant's False Account Also Provided to SPD's Police Chief

At approximately 7:30 p.m. on March 18, 2006, Acting Police Chief James Nicks arrived on scene and was given a briefing by SPD Patrol and Investigative personnel, including those who spoke directly with defendant. After receiving this briefing, Acting Chief Nicks gave a television press conference and stated:

[8] The defense contends that Officer Moses, after first speaking with defendant and then defense counsel, changed his testimony on this subject. SER 974/R 283.

> "I'll begin with officers responded to a suspicious persons call, actually occurred several blocks from here at a bank and citizens observed this individual near a cash machine concerned about his behavior. Concerned that he might be looking at possibly doing a robbery. The citizen called the police department. Officers responded to the area in order to investigate this person's actions.
>
> We had one officer that came to the store here contacted the suspect inside the store. The officer was alone at the time, confronted the individual. ***The suspect lunged at the officer during the initial contact*** *and basically a fight occurred at that time.*
> . . .
>
> Oh of course, yes [the officers followed procedure], the officers came on scene used the lowest level meant to control him verbally. **The suspect attacked the officer.**
>
> The Officer was by himself. **The officer used a straight handled baton as a defensive technique .** . . tried to use his taser that was ineffective . . ." (emphasis added)

ER 302. In an "All [SPD] Police" e-mail sent that evening and in a press release later that week, SPD's Public Information Officer, Cpl. Tom Lee, described Zehm as having "lunged" at or "attacked" the defendant, thereby falsely justifying defendant's use of violent force. ER 303. On or about March 22, 2006, more than 72 hours after the incident, defendant gave a recorded interview to SPD investigators. Present with defendant were his Guild attorney and the SPD Guild's Vice President.

III. ARGUMENT

A. Standard of Review

Where evidentiary issues largely involve issues of law, (i.e., to what extent may evidence be admitted to contradict an officer's subjective account of force events and whether the court conflated a jury's "totality of circumstances"

determination with its "objective reasonableness" determination), they are subject to *de novo* review**.** *See U.S. v. Cuozzo,* 962 F.2d 945, 947 (9th Cir. 1992); *U.S. v. Keiser,* 57 F.3d 847, 853 (9th Cir. 1995). The United States submits it also prevails under the two step de novo/abuse of discretion standard provided in *U.S. v. Hinkson,* 585 F.3d 1247 (9th Cir. 2009). *See Gov. Br. 22, 41-45.*

B. Correct Ruling - *Innocence* Relevant

Defendant's challenge (*Def. Br. 40-42*) to the district court's finding that Zehm's innocence is relevant is without merit. The district court appropriately concluded that "Zehm's innocence tends to support the government's contention that [Zehm] lacked an obvious motive to assault officer Thompson." ER 10-11. First, defendant asserts that Zehm's innocence is not relevant because it does not refute Thompson's right to conduct an investigatory stop based on the 911 call and the CAD reports. The United States does not assert that Zehm's innocence is relevant to assess whether Thompson had reasonable suspicion to contact Zehm to ask questions.[9] The United States agrees, for purposes of this appeal, that there may have been a basis for an initial brief *Terry stop*, but there most certainly was not a basis to precipitously attack and violently seize Zehm on the

[9] Officers in Washington are instructed that a 911 caller's tip must be 1) verified as reliable; and 2) contain sufficient objective facts indicating a crime has occurred before a *Terry stop* can be performed. *State v. Hopkins*, 117 P.3d 377, 881 (Wash. 2005); *see also Florida v. J.L.,* 529 U.S. 266, 272 (2000) (reasonable suspicion requires the tip be reliable in its assertion of illegality, not just its tendency to identify a determinate person).

911 “suspicious circumstance” call.[10] The United States has, however, charged Thompson with using unnecessary and excessive force during this investigatory stop, and with obstructing justice by lying about this incident in his statement to investigators.

Second, defendant's reliance on *U.S. v. Scott*, 446 F.2d 509, 510 (9th Cir. 1971) is misplaced. With minimal analysis, this Court upheld the district court's refusal to give a “jury instruction” that stated the defendant's "failure to flee from or resist arrest [w]as a factor tending to prove his innocence." *Ibid*. The United States is not asserting that Zehm's innocence warrants a specific jury instruction on “innocence,” as sought in *Scott*. Moreover, Plaintiff is not asserting that every innocent individual will be passive or retreat from an officer. However, Plaintiff does assert that Zehm's actual innocence is relevant because it tends to support the inferences/conclusions that Zehm was confused by Thompson's immediate aggressive confrontation; that Zehm did not appear by facial expression or body language, aggressive and confrontational; and that Thompson's descriptions of Zehm's behavior are deliberate, manufactured lies. Therefore, the district court's ruling that Zehm's innocence meets the standard under Rule 401 is correct. *Cf.*

[10] Each element of a *Terry stop* must be analyzed separately and reasonableness of each must be independently determined. *U.S. v. Thomas*, 863 F.2d 622, 628 (9th Cir.1988). "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 498-99 (1983). When the circumstances show that there is no need for force, any force used is constitutionally unreasonable. *See Motley v. Parks*, 432 F.3d 1072, 1089 (9th Cir.2005).

U.S. v. Donley, 878 F.2d 735, 737-739 (3d Cir. 1989) (decedent's statement of intent to separate from defendant relevant to challenge defendant's version of killing); *Boyd*, 576 F.3d at 944; *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891) (determinations of weight and credibility of witness testimony have long been held to be "part of every case [that] belongs to the jury, *who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men."*).

C. Jury To Decide "Totality of Circumstances" and "Objective Reasonableness"

An excessive force inquiry "nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom." *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002); *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005); *Graham v. Connor*, 490 U.S. 386, 399 n. 12 (1989).

Defendant argues that no case has specifically held that the jury is required to first determine the disputed facts ("totality of circumstances") before reaching its objective reasonableness determination. *Def. Br. 29.* Notably, *Graham* observed that the "reasonableness test" was not capable of precise definition or mechanical application, but that its proper application require careful attention to "the facts and circumstances" of each particular case. *Id*. It is only logical that a jury perform a "totality of [factual] circumstances" determination before reaching its ultimate objective reasonableness determination on the lawfulness of the

officer's force conduct. *Id.* Determining the facts that comprise the "totality of the circumstances" is a "predicate to an intelligent resolution of the question presented." *See U. S. v. Grubb*, 547 U.S. 90, 94 n.1 (2006) (assessing whether anticipatory search warrants are constitutional per se is essential predicate to determining if a specific warrant satisfied the Fourth Amendment) (internal citation omitted). However, it is insignificant whether the process is labeled formally two-step, two-factor, or not labeled at all. Ultimately, a jury makes two determinations - what happened and was the officer's actions objectively reasonable.

This two-factor analysis is implicit in *Boyd* and other cases where courts admitted evidence to support or refute disputed facts relevant to a determination of what happened and whether an officer's use of force was reasonable. *See Alpha v. Hooper*, 440 F.3d 670 (5th Cir. 2006), *Bradford v. City of Modesto, supra* (9th Cir. 2006), Opening Br. at 31-32. In *Boyd*, the jury was presented with conflicting evidence of whether Boyd took action to encourage police to respond to his actions and goal of "suicide by cop." In order to conclude that the defendant officers' actions were reasonable, the jury implicitly and preliminarily, needed to conclude that Boyd, in fact, sought 'suicide by cop.' *See Boyd*, *id.,* 949-950.

Defendant has not cited any case requiring the trier of fact to simply accept the officer's subjective account of the underlying facts and circumstances, and exclude evidence that contradicts that account. *See Sherrod*, 856 F.2d 802, 806

(7th Cir. 1988); *Boyd, id*. In fact, the Supreme Court in *Graham* stated that a factfinder may consider outside evidence *"in assessing the credibility of an officer's account of the circumstances that prompted the use of force*." 490 U.S. at 399 n.12. In addition, this Court has recognized that the trial courts need to be vigilant to *"not to simply accept what may be a self-serving account by the police officer.*" *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir. 1994). Impeachment and contradictory evidence is essential to a jury evaluating the credibility of witnesses and determining the facts in issue. *See Sherrod v. Berry,* 856 F.2d 802, 806 (7th Cir. 1988); *Scott v. Harris*, 127 U.S. 1769, 1775-76 (2007) (Factfinder can reject a party's account of force events where version is blatantly contradicted by video evidence); *see also The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 Fordham Urban Law Journal, pg. 640-61 (2003).

Under the defendant's objective reasonableness standard, officers could violate Section 242 without any risk of accountability, knowing that the citizenry and government are powerless to challenge or contradict a fabricated, self-serving account of force facts, so long as the account minimally justifies the use of force. *Cf. Sherrod, id.; Boyd, id.,* at 944; *Failure of Prosecutors*, *id*. at 648-50.

To illustrate, an officer subjectively claims that he reasonably shot and killed a citizen because he claimed the subject had a gun and verbally threatened to shoot if the officer did not immediately leave. At trial, the government seeks to introduce evidence that the officer's account is false by offering evidence that

the dead citizen was mute from birth and therefore could not have made any verbal threat. Defendant objects and relies on the flawed objective reasonableness analysis used by the district court and defendant here, and argues that the jury should only judge defendant from defendant's "on-scene perspective," based solely on "what the officer claims he knew-heard at the time." The defendant officer acknowledges that it is undisputed that the citizen cannot speak, but unabashedly declares that he was unaware of this immutable evidence when he decided to use force.[11] The exclusion of evidence of the innocent victim's inability to speak, clearly unknown to the officer, would of course be absurd.

This example, like the example in *Sherrod*, illustrates two important points. First, evidence that undermines the credibility of an officer's account of the underlying facts and circumstances is admissible, even if it turns out the officer was factually unaware of the evidence. *Boyd, id.* Second, the relevant issue is not whether the officer knew about the evidence at the time of his force decision, but whether the evidence tends to show he lied about what he knew. *See* Advisory Committee Notes to the 1972 Proposed Rules on Relevancy ("The fact may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action."). Contrary to the district court's (and defendant's) suggestion, evidence of Zehm's innocence *is* about

[11] The government's evidence challenging the credibility of the officer's account of the facts need not render the officer's account impossible. It need only be relevant to making the officer's account less likely than it would be without the evidence. *See* Fed.R.Evid. 401.

what Defendant Thompson claims he knew at the time of his force decision – not because Defendant Thompson was necessarily aware of the evidence, but because it tends to show that his account of Zehm's conduct was objectively false and that defendant knew it was false when he made his statement to investigators. *Id.*

D. *Boyd's* Rule 403 Ruling Not Limited to "Suicide by Cop"

There is no merit to defendant's assertion (*Def. Br. 35-37*) that *Boyd* only applies to cases involving "suicide by cop." This Court's statement in *Boyd* on the admissibility of evidence belies defendant's characterization: "*[W]here what the officer perceived just prior to the use of force is in dispute, evidence that may support one version of events over another is relevant and admissible.*" [sic] *Boyd*, 576 F.3d at 944.

In *Boyd*, 576 F.3d at 942, the citizen plaintiff claimed that police officers used excessive force during an arrest resulting in Boyd's death. The plaintiffs challenged the district court's admission of evidence supporting the officers' defense that Boyd's motive was "suicide by cop." *Id.,* at 944. This Court clearly held that where the officer's subjective account of the basis for force is in dispute, evidence both "for" and "against" the officer's version is "relevant and admissible." *Id. See also Graham, id., Kopf v. Skyrm, id.*

E. Rule 403 Analysis Most Favorable to Proponent

Defendant wants this Court to apparently view the United States' summarized case and proffered *innocence* evidence, for Rule 403 exclusion

purposes, in a light most favorable to him, rather than in a light most favorable to the proponent. *See Def. Br. 8-20.* This proposition is clearly erroneous. *See* 2 J. Weinstein & M. Berger, Weinstein's Evidence § 403.02[2][c] (2003) (relevant evidence sought to be excluded under Rule 403 is to be viewed in a light most favorable to the proponent, thereby maximizing probative value and minimizing prejudicial impact); *U.S. v. Merrill*, 513 F.3d 1293 (11th Cir. 2008) (admitting 33,000 prescriptions of defendant doctor's patients who were not the subject of any criminal count in the indictment); *U.S. v. Russell*, 971 F.2d 1098, 1105-07 (4th Cir. 1992); *U.S. v. Brown*, 688 F.2d 1112, 1118 (7th Cir. 1982); *U.S. v. Moore*, 917 F.2d 215, 233 (6th Cir.1990).

In fact, federal precedent recognizes that even in "close cases" involving the balancing of maximized probativity versus minimized identified prejudice, the presumption and preference under Rule 403 for admissibility should still prevail. *U.S. v. Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990). The district court did not recognize, perform or even acknowledge its obligation, nor did it utilize this approach in its summary Rule 403 ruling. *See also Gov. Br. pgs. 23-24* citing *U.S. v. Jamil*, *id*., (reversing on interlocutory appeal, district court's Rule 403 exclusion of government's evidence); *U.S. v. Hans*, *id.* (reversing on interlocutory appeal, district court's pretrial exclusion of government's evidence on Rule 403 grounds). *See also U.S. v. Merrill*, 513 F.3d 1293 (11th Cir. 2008) (exclusion of relevant evidence under Rule 403 is extraordinary and should be

used sparingly). Not surprisingly, defendant makes no substantive reference to this standard and obligation in his response.

F. Exclusion is Extraordinary

Defendant argues that the district court has significant discretion in the balancing of evidence under Rule 403 (i.e., determining when probative value is "substantially" outweighed by unmitigable risk of unfair prejudice). *Def. Br. 26, 43*. However, a district court's discretion in making Rule 403 determinations is not unfettered and not without accountability. *See* e.g., *U.S. v. Crosby*, 75 F.3d 1343, 1349 (9th Cir. 1996) (district court abused discretion in refusing to admit evidence pursuant to Rule 403); *U.S. v. Blaylock*, 20 F.3d 1458, 1464 (9th Cir. 1994) (same); *Baker v. Delta Air Lines, Inc.,* 6 F.3d 632, 642 (9th Cir. 1993) (same); *U.S. v. Armstrong*, 621 F.2d 951, 953 (9th Cir. 1980) (same); 2 James B. Weinstein et al., Weinstein's Federal Evidence § 403.02[2][c] (2d ed.2003) (discussing the preference under Rule 403 for admissibility); *see also Jones v. U.S.*, 262 F.2d 44, 47 (4th Cir. 1958) ("Even if a fact, standing alone, does not conclusively demonstrate guilt, a defendant is not entitled to have it filtered out of the evidence. An effort to blinker out all circumstantial color and tone would result only in distortion."); and previously cited cases *Jamil, Patterson, Smith, Hankey, and Day, id.,* Opening Br. at 25-26.

In *Blaylock*, *id.,* at 1463-64, the district court summarily excluded evidence of defendant's medical condition that would have challenged the credibility of the complaining officer's testimony that defendant had no physical limitations in

committing the charged offense. This Court reversed defendant's conviction and the district court's failure to correctly assess the evidence and perform its duty under Rule 403 (i.e., assess probative value in view of Rule's preference for admission and also minimize the evidence's risk of a decision based on "unfair prejudice"). In reversing defendant's conviction, this Court observed that "[t]he jury probably would have found that some of this [medical] information tended to discredit the officers' testimony, lent credibility" to a defense witness's testimony, and strengthened the defendant's justifiable offense conduct. *Id.*

Here, the probative value (i.e., *inter alia,* discrediting defendant's version and corroborating prosecution (citizen) witnesses' testimony) is substantial and the danger that the evidence will be used for an improper decision making purpose is similarly mitigable. Defendant has not been charged with Zehm's death, so there will most certainly be a limiting instruction restricting the use and inferences from Zehm's death/autopsy evidence. SER 1060. Issuing a corollary limiting instruction on a less emotional subject (i.e., innocence vs. death), based on and guided by *Graham's* reasonableness factors, and similarly restricting the purposes/inferences that the Zehm innocence evidence can be considered (i.e., witness credibility (officers and witnesses) and requisite intent elements under §242 and §1519), will sufficiently mitigate any concerns about the jury being confused or being unable to properly compartmentalize offense element deliberations. This is particularly true where the primary purpose the evidence is being offered on is an area that is exclusively within the province of the jury, that

is “credibility determinations.” *U.S. v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973) (A fundamental premise of criminal trial system is that "the jury is the lie detector."); *Blankenhorn v. City of Orange*, 485 F. 3d 463 (9th Cir. 2007) (Excessive force cases nearly always involve two dramatically different versions of a single event).

G. Court Erred In Assessment of Need for Evidence

During his recorded interview, defendant said that Zehm kept his back to him as he approached with his baton drawn and that when he got to four feet away, Zehm turned on him, took an aggressive stance, made direct eye contact, stared at him, rejected two verbal commands and held the soda bottle in a defiant, threatening manner, reflecting a clear intent to attack and assault him. ER 307-12, 451-68. Defendant also unequivocally recounted that Zehm did not display any fear or confusion, stood his ground and that Zehm's muscles were fully tensed “under his leather jacket.” *Id*. Defendant said that since Zehm projected an intent to attack him with the soda bottle, he had to use baton strikes (he claims to Zehm's “legs") to "preempt" Zehm’s imminent assault. ER 469-71; 472-75.

While the grainy security video does contradict multiple aspects of defendant's description, it does not capture in detail defendant's initial confrontation of Zehm. ER 491. It does not appear that any citizen witnesses saw defendant’s attack in its entirety; some did not focus on defendant's attack until after the first baton strike. *Id.* Further, there is no audio of the security

video. *Id.* Further still, defendant will argue, *inter alia,* that civilian witnesses were not in a position to fully observe or hear the initial encounter, and therefore cannot challenge defendant's description of Zehm's face, his alleged assaultive demeanor or even his intent immediately before the first baton strike. *Id.* Still further, the current trial setting is March 7, 2011, and civilian witnesses who observed defendant's attack on Zehm on March 18, 2006, will now be called to testify to events that occurred almost five years prior. R 413.[12]

The government's need for the innocence evidence to prove its case is also a factor to be used in weighing the evidence's admissibility under Rule 403's balancing test. *U.S. v. Day,* 591 F.2d 861, 877 (D.C. Cir. 1978) ***"In so weighing the evidence, the court should be mindful of the heavy burden the government bears to prove its case beyond a reasonable doubt and should not unduly restrict the government in the proof of its case."*** *Id.* (emphasis added). Defendant's statement of the case (*Def. Br. 8-20*) and expert disclosures (SER 844-882; 932-954; 1057, 1063, 1070.) supports the United States' critical need for Zehm's innocence evidence and its importance in aiding the jury's "search for the truth." Finally, the United States case cannot be evaluated in a vacuum, that

[12] One of these percipient witnesses, Mr. Tracy LeMont LeBlanc, passed away on October 1, 2010. *See* Mr. LeBlanc's obituary is at http://www.spokesmanreview.com/obits/?ID=81326. Mr. LeBlanc is the large male who flinches when defendant rapidly approaches and enters the store with baton in hand to chase down the unsuspecting Zehm. ER 206 (Camera 1).

is without meaningful consideration of defendant's anticipated cross examination and likely case presentation. *Id.*[13]

H. *Bruton* and *Layton* Reliance Misplaced

"All evidence which tends to establish the guilt of a defendant is, in one sense, prejudicial to that defendant." *U.S. v. Bailleaux*, 685 F.2d 1105, 1111 (9th Cir.1982). Simply because the evidence is damaging or prejudicial to a defendant's case does not mean, however, that the evidence should be excluded. "[I]t is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403." *U.S. v. McRae*, 593 F.2d 700, 707 (5th Cir.). Thompson's reliance (*Def. Br. 49-50*) on *Bruton v. U. S.*, 391 U.S. 123 (1968), and *U.S. v. Layton*, 767 F.2d 549 (9th Cir. 1985), to support the district court's conclusion that a limiting instruction would be ineffective is misplaced.

As this Court is aware, the presumption is that a jury will follow a court's instruction. *See Cook v. LaMarque*, 593 F.3d 810 (9th Cir. 2010), *Gov. Br.* at 41. Moreover, the nature of the evidence in *Bruton* and *Layton* is of a different emotional scale and distraction than evidence of Zehm's innocence. In *Layton*, 767 F.2d at 556, this Court affirmed the district court's exclusion of tape

[13] Defendant's belated expert disclosures identify experts in the area of defensive tactics (use of force), police procedures, emergency medicine; radiology, forensic pathology; biomechanical engineering; electronic forensics, and a "police psychologist." *Id.* Defendant disclosed that he expects a police psychologist to opine that the Zip Trip videotape is an inadequate recorder of Zehm's behavior and the officer's observations (i.e., video is unreliable), and that the officer's memory is fallible and that his inaccurate recall of force events was not intentional. *Id*. SER 94.
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recordings of zealot Jim Jones's final appeal to followers during their mass suicide, which included the cries of multiple children as they apparently were witnessing others' deaths and dying themselves. This Court noted the significant "emotional impact" and distraction that would be caused by the tape as compared to its nominal probative value. *Id.,* at 555-556.

In *Bruton*, 391 U.S. at 136-137, the Court recognized the impossibility of a jury ignoring a defendant's admission of guilt that equally implicated a co-defendant who was contesting guilt. Evidence of Zehm's innocence would not generate the kind of emotional reaction, images, or distraction that was presented in the Jones' recording. As set forth in the government's opening brief (pp. 41-45), the district court abused its discretion in minimizing the probative value of Zehm's evidence, overstating the risk of prejudice and disregarding the ability of a limiting instruction to mitigate any potential prejudice. *Cf. McFall, supra*.

I. Zehm's Right to Proportionately Resist Excessive Force

Defendant asserts that Zehm did not have any right to resist his forcible, violent seizure. *Def. Br. 51.* This assertion does not comport with federal or state law. The innocent Zehm had the right to "reasonably resist" defendant's excessive, forcible seizure. *See John Bad Elk v. U.S.*, 177 U.S. 529, 537-538 (1900); *U.S. v. Moore*, 483 F.2d 1361, 1364 (9th Cir. 1973) (right to proportional resistance available where officer uses excessive force, engages in bad faith, or provocative conduct); *U.S. v. Span*, 970 F.2d 573, 579-81 (9th Cir. 1992). *Gulliford v. Pierce County*, 136 F.3d 1345, 1350-1351 (9th Cir. 1998); *State v.*

Valentine, 935 P.2d 1294, 1014 (Wash. 1997) (person has right to use "reasonable and proportionate force to resist an attempt to inflict injury" during a seizure.). Defendant's argument to the contrary is specious.

Zehm possessed the right to reasonably resist and use proportional force to avoid injury or death. Zehm's innocence and his "right to resist" excessive force is also needed, *inter alia*, to counter fellow SPD officers' testimony describing Zehm's "post-assault" behavior as aggressive. ER 1. Without an instruction and contextual evidence of the innocent victim Zehm's right to "reasonably resist" defendant's unlawful, excessive force, the district court will improperly foster a "false account" of Zehm's "rights" in relation to defendant's excessive and injurious force. *U.S. v. Span,* 970 F.2d 573, 580 (9th Cir. 1992) (right to resist injurious force is not triggered by officer's lack of probable cause to arrest, "rather by the officer's bad faith or provocative conduct.").

J. Prejudice Supports Reversal

The district court's conclusory statement that the government "has adequate means to test the accuracy of Officer Thompson's account without resorting to the disputed evidence" is error, not supported by the record and does not follow the appropriate balancing required under Rule 403. ER 14. "When error is established, we must presume prejudice. ..." *Boyd*, 576 F.3d at 949 (quoting *U.S. v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc)). The exclusion of Zehm's innocence substantially prejudices the Government's case in multiple ways as outlined in Appellant's opening brief and in this reply.

K. Section 1519 Obstruction of Justice - Innocence Admissible

Defendant addresses admissibility of the innocence evidence on the Obstruction count in one sentence (Def. Br. 44). The district court addressed the issue in a similar manner. ER 15 n.7; *See Gov. Br. 27, 50*. Defendant cannot and does not seriously contest that the district court failed to discharge its duties to perform a similar Rule 403 balancing analysis of the evidence on this count. The Court's failure to maximize probative value, minimize and mitigate risks of unfair prejudice, and fashion an appropriate limiting instruction was error and an abuse of discussion, warranting reversal.

VI. CONCLUSION

The United States respectfully request that this Court reverse the district court's ruling and hold that evidence of Zehm's innocence is admissible in Plaintiff's case-in chief.

Respectfully submitted this 2nd day of December 2010.

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STATEMENT OF RELATED CASES

Counsel for the plaintiff-appellee certifies that no cases are pending in this Court that are deemed related to the issues presented in the instant appeal.

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CERTIFICATE OF SERVICE

It is hereby certified that on December 2, 2010, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

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BRIEF FORMAT CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that Appellant's brief is proportionately spaced, has a typeface of 14 points or more and contains 6,881 words.

Dated: December 2, 2010

s/ Timothy M. Durkin

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