Case No.
CA-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-09-0088-FVS-1

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

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I. STATEMENT OF JURISDICTION AND BAIL STATUS

A. Jurisdiction of the District Court

On June 19, 2009, defendant Karl F. Thompson, Jr. ("Thompson") was indicted in the Eastern District of Washington under 18 U.S.C. §§ 242 and 1519. ER 491/R 1.[1] The district court had jurisdiction under 18 U.S.C. § 3231.

B. Jurisdiction of the United States Court of Appeals

On June 7, 2010, the morning scheduled for the first day of trial, the district court excluded evidence from the government's case-in-chief. ER 20-23/R 398. The United States timely filed a motion for stay and notice of interlocutory appeal including the United States Attorney's certification under 18 U.S.C. § 3731. ER 20-23, 28-35/R 399. On June 18, 2010, after the lodging of the United States' appeal, the district court issued a written order excluding the proffered evidence. ER 1-16/R 412. The Office of Solicitor General reviewed and approved this affirmative appeal. This Court has jurisdiction under 18 U.S.C. § 3731.

C. Bail Status

Defendant is not in custody, subject to a $10,000 personal signature bond.

II. ISSUES PRESENTED

Whether the district court, in a prosecution of a law enforcement officer for excessive force during a *Terry stop* and for obstruction of justice, erred as a

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[1] Where indicated, the abbreviations "ER" refers to the Excerpts of Record; "R" refers to the district court's docket; "TR" refers to official "Transcript."

matter of law and abused its discretion by excluding undisputed evidence of the victim's innocence, offered to prove the falsity of the officer's account of the victim's demeanor and the underlying "totality of circumstances."

III. STATEMENT OF THE CASE

By two-count indictment dated June 19, 2009, a grand jury charged defendant Karl Thompson Jr., a Spokane Police Department (SPD) Patrol Officer, with using excessive force during a purported investigative *Terry stop* of Otto Zehm, a 36 year old, mildly retarded and mentally disabled janitor (Count One). The indictment charged that Thompson "repeatedly struck Zehm ("Zehm") with a baton and tasered him" in violation of 18 U.S.C. § 242. ER 491-92. The indictment also charged defendant with violating 18 U.S.C. § 1519 (Count 2), by knowingly making false statements four days later in a voluntary interview given to SPD investigators, a transcript of which defendant reviewed and signed on March 27, 2006. ER 451-490.

Defendant filed a pretrial motion to exclude certain alleged after-acquired evidence, specifically evidence of Zehm's actual innocence (R 155-157), which the United States opposed. R 230, 232. The United States also filed a motion to allow reference to admissible evidence in its opening statement, including evidence of Zehm's innocence. R 373.

On June 3, 2010, the district court heard argument on these and other related pretrial motions. *See* ER 43-101/R 409-410. The district court ruled during the hearing that it would allow defendant to introduce evidence of the

victim's struggle with other officers *after* defendant's use of assaultive force for the alleged purpose of corroborating defendant's claim that Zehm acted aggressively before defendant's baton strikes. ER 70-78. The court also indicated it would allow defendant to offer evidence of Zehm's past psychiatric and treatment records for the alleged purpose of proving that Zehm could have been experiencing a psychotic episode and was defiant/aggressive when defendant contacted him. *Id.* In contrast, the court preliminarily ruled that evidence of Zehm's innocence, which impeached defendant, would be excluded, but decided to take the issue under advisement. ER 78-79, 85-98. Additional pleadings were filed. R 378-79, 387.

On June 7, 2010, at the final pretrial hearing before jury selection, the district court orally excluded from the government's case-in-chief evidence of Zehm's innocence, including: testimony that Zehm did not take money from the ATM; bank records and receipts showing no cash withdrawal; and the contents of Zehm's pockets, which included a deposit envelope and his paycheck. ER 20-23. The district court reaffirmed its earlier decision allowing defendant to present *after acquired* evidence of Zehm's post-assault struggle with other law enforcement to purportedly corroborate defendant's description of Zehm's as the aggressor. The court indicated that it would allow defendant, if so inclined, to offer evidence of Zehm's past psychiatric records and schizophrenic illness to also purportedly support defendant's claim that Zehm was the aggressor. ER 75,

113. The United States gave notice and filed this interlocutory appeal before jury selection began. R 399.

On June 18, 2010, after the United States' appeal was lodged, the district court filed a 16-page Order that provided further reasoning for excluding evidence of Zehm's innocence. ER 1-16/R 412.

IV. STATEMENT OF FACTS

A. Overview of Victim Innocence and Evidence

At approximately 6:15 p.m. on March 18, 2006, Otto Zehm, 36 years old, 5'9", 190 lbs., a disabled janitor with learning disabilities (i.e., mild retardation, early dementia) and schizo-affective disorder, walked towards a bank's drive-up automated teller machine (ATM) in Spokane, Washington.[2] ER 288-300. Two 18 year old females were in a car at the ATM and the driver began a transaction. She entered her bank card and PIN. *Id.* Shortly thereafter the females noticed Zehm approach and, uncomfortable with his disheveled appearance and proximity to the car and ATM, canceled the transaction. The driver quickly retrieved her card and drove a short distance away. *Id.* Although the driver had

[2] The United States will present evidence at trial that establishes the facts recited herein, which have been asserted/proffered in multiple pleadings and hearings. R 136, 291, 292, 406, 410, and R 40, 54-56, 60, 107, 140-41,143-45, 187-88, 229-31, 236, 238, 245-47, 253, 291, 308, 357, 374-75, 377 and 379. The district court was also provided with the convenience store's security video (i.e., cameras #1-4 and stills of each frame) and a DVD containing merged SPD Radio and computer aided dispatch (CAD) traffic, superimposed over the security video. *See* ER 205-06, 382-85. Appellant has designated records and filed a motion to provide this court with much of the same factual content provided below.

her card, she was uncertain whether her transaction canceled or whether her account remained open to Zehm. *Id.* The passenger called 911 to report that Zehm may be getting money from the account. She reported that Zehm was "messing" with the ATM and was possibly "high." *Id*. They also saw Zehm grab some "paper" from the ATM and remained on the phone with 911 to report Zehm's location as they followed him to a nearby Zip Trip convenience store. The caller reported that Zehm yelled at them and initially ran away when they first started to follow. *Id.*

In fact, Zehm did not take any money from the ATM.[3] Instead, Zehm, who had an account with the bank, merely picked up a deposit envelope and placed it in his leather coat pocket and began walking toward a nearby Zip Trip convenience store. *Id.* Zehm arrived at the Zip Trip approximately five minutes after leaving the ATM. *Id.* Some Zip Trip employees recalled Zehm as a frequent customer who purchased two liter plastic bottles of soda and candy bars.

Meanwhile, the 911 call was routed to SPD Radio, who dispatched Patrol Officers Steve Braun Jr. and Tim Moses to respond. The call was classified as a level 2 "suspicious circumstance," meaning no personal safety issues involved and lights and siren were unnecessary. *Id.* and ER 240-242/R 219. The call required the two dispatched officers to respond and contact the subject and the

[3] Bank records show that Ms. Smith did not actually access her account (i.e., account access attempted, but not completed). The ATM had a standard withdrawal limit of $200 and was the kind where the card is entered for the duration of the transaction.

alleged victims for questioning. Both officers responded and confirmed they were en route. *Id.*

Defendant, 58 year olds, 5'9", 185 lbs., a patrol officer, heard the call while eating dinner at a nearby COPS substation (approximately .8 miles from the Zip Trip) and decided to check himself into the call (i.e., made an entry into the CAD that notified Radio/officers he was responding). *Id.* Defendant knew that two primary officers had been dispatched, but also knew he was likely closest to the call area. *Id.* While defendant was en route, a fourth SPD Officer, Dan Strassenberg, also "checked in" and informed Radio/fellow officers that he was responding. *Id.* While defendant was en route, Officer Braun informed Radio/fellow officers that he was already "in the area." *Id.*

Defendant drove directly to the Zip Trip area. While pulling into the north parking lot, he observed Zehm casually walking toward the store's entrance. ER 300-313/R 60, 187. At the time, Radio "affirmed" that the "subject" may have taken money from the ATM.[4] Defendant observed Zehm look in the officer's general direction and then casually walk into the store. Defendant quickly parked his patrol car perpendicular to a gasoline bay, grabbed his baton, exited

[4] Typically, on a suspicious circumstance call, more preliminary information is developed as the officer responds. Officers in the state of 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 that tip be reliable in its assertion of illegality, not just a tendency to identify a determinate person).

the car, and ran to the store's entrance in pursuit of Zehm - leaving the car door open and engine running. *Id.*

The Zip Trip has four store surveillance cameras, placed in different locations which recorded the events of defendant's forcible attack.[5] The cameras depict Zehm entering and casually walking to the front portion of the store, where he looked at a soda display in the store's southwest corner. *Id.* Zehm had his back to the store's north entrance when defendant entered. As defendant rushed into the store, he drew his straight, ironwood baton and moved it into a (right hand) ready strike position while continuing his run up on Zehm.[6] Zehm, whose back remained to defendant, picked a plastic two-liter soda bottle from the display and began a casual turn toward a candy display behind him. As Zehm turned, Defendant continued rushing toward him with his baton raised in a ready to strike position. *Id.* At this point, defendant was approximately 10-12 feet away from Zehm and closing. *Id.* and ER 205, 382, (*See* DVDs of security video and overlay of SPD Radio/CAD/security video).

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[5] Given angles of the cameras and shelves, the video does not record all of Zehm's or defendant's movements, particularly when Zehm is on the floor. The government intends to introduce expert human factors engineering testimony to explain the parties' "frame-by-frame" physical behavior. R 56.

[6] Defendant, a law enforcement officer with more than 30 years experience, including a 10 year stint with LAPD (Metro) from 1968-78, before moving to North Idaho (Hayden), submitted a request to SPD to use a personal ironwood, straight handle baton rather than a standard issue "24" metal side arm baton (PR-24). Defendant stated the straight arm baton (30" in length) provided him with the ability to keep suspects further away and, in his experience, was less likely to break during a force engagement. ER 294.

Zehm, finally alerted to defendant's rush and started backing away from the advancing officer, who did not slow down or stop, but rather continued to close in on the startled Zehm. *Id.* Within 2.5 seconds of Zehm turning, defendant delivered the first of several vertical, overhand, baton strikes directed at Zehm's head and neck area.[7] *Id.* Less than 1.5 seconds after this first baton strike, defendant delivered a second overhand baton strike directed at Zehm's head-neck-shoulder area.[8] Defendant's second baton strike immediately dropped Zehm to the ground. Zehm landed on his seat and rolled to his back, still facing defendant, who stood over him. *Id.*

While standing directly over Zehm, defendant threatened to use his taser if Zehm did not drop the plastic soda bottle, which Zehm held defensively over his face/head to protect himself from further baton strikes. *Id.* Since Zehm refused to drop the defensively held plastic soda bottle, defendant drew his taser with his left hand and fired probes (i.e., taser darts) at Zehm's chest from close range. *Id.* Zehm screamed and rolled over onto his stomach and dropped the plastic soda bottle while trying to get to his hands and knees. Defendant (still standing over

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[7] A baton strike directed above a subject's shoulder is considered *deadly force* under SPD's Defensive Tactics Policy and is proscribed in any circumstance where deadly force is not authorized. *See Price v. Sery*, 513 F.3d 962, 969 (9th Cir. 2008); and *Smith v. City of Hemet,* 94 F.3d 689, 700-04 (9th Cir. 2005) (en banc) (discussing deadly force definition and highest threat level required for its use). Defendant admitted deadly force was not justified. ER 472.

[8] Several percipient witnesses will testify that defendant's first two baton strikes, and several thereafter, were aimed/directed at Zehm's head, neck, or upper shoulder. ER 313-14, 233-34.

Zehm) moved from Zehm's feet around to the top of Zehm's head and delivered at least two more baton strikes at Zehm's upper body. *Id.*

Zehm, now on all fours, turned away from the assaultive defendant and tried crawling down the aisle, away from defendant. Defendant followed, using his left hand to grab the back left shoulder of Zehm's leather jacket and delivered two more vertical, overhand baton strikes at Zehm's upper torso as he crawled up the aisle. *Id.* At the end of the aisle, after shooting Zehm with his taser and delivering 6-7 baton strikes to Zehm's upper torso, defendant sat down on top of the alleged *Terry stop* subject Zehm, who held his arms/hands clenched closely to his body. *Id.* At this point, approximately 40 seconds after defendant first entered the store, the primary dispatched officer, Steven Braun Jr. (30 years old, 6'5", 285 lbs.) entered the store. *Id.* Defendant directed Braun to deliver baton strikes to Zehm's upper torso to try to get Zehm to "release" his arms-hands for cuffing. Per instruction, Braun delivered two power strikes (jabs) to Zehm's left rib cage and to the back of his left shoulder. These jabs were unsuccessful in getting Zehm to release his arms-hands. *Id.* Defendant then directed Braun to fire taser darts at Zehm. Braun drew and fired his taser at close range and struck Zehm in the lower left wrist-forearm. However, the taser was not fully effective and the darts ultimately dislodged from Zehm's wrist. *Id.* ER 164. Zehm continued to struggle and tried to pull his arms away from the officers. The security video depicts Zehm flailing under defendant's-Braun's continued assault. ER 313-14, 205, 382.

Defendant, with baton still in hand, directed Braun to apply taser "drive stuns" to Zehm. Per direction, Braun applied two, five second taser drive stuns to Zehm, one to his left arm pit and the other to the center of Zehm's chest. ER 296. These two taser stuns were likewise unsuccessful in getting Zehm to submit his clenched hands-arms for cuffing. Defendant claimed that he and Braun also provided verbal commands while using force, telling Zehm to "quit resisting" and to "roll over." ER 300-313. The parties (i.e., Zehm on the floor and the two officers standing - crouching over him) have migrated to the center aisle. ER 205.

Seconds later, Defendant now standing near Zehm's legs, delivered a series of seven successive vertical, baton strikes in an eight second time frame. *Id.* Defendant's vertical baton strikes, in Braun's presence, were no longer directed at Zehm's upper torso, rather they were directed at Zehm's lower extremities. Neither Defendant nor Braun went "hands on" during the attack (i.e., each officer used one hand to try to move Zehm into a cuff position and used the other to hold/apply batons or taser). *Id.* A few seconds later, Braun called SPD Radio with a report that Zehm is "fighting pretty good." ER 240-242, 382, 205.[9] Two seconds later, defendant called Radio and stated "Code 6," which is a request for assistance from available units. After this radio call,

[9] Braun, who was present for the finale of defendant's baton attack (i.e., baton strikes to Zehm's legs), claims he did not see defendant deliver "any" of his last seven, successive vertical baton strikes to Zehm's legs. *Id.*

defendant put his baton away and went "hands on" to try to roll the still flailing-resisting Zehm into a prone cuffing position. *Id.*

Based on the security video time stamps, defendant's entire assault on Zehm, consisting of at least 15 baton strikes (13 by defendant and two he directed Braun apply) and four taser applications (one by defendant and three he directed Braun to apply) took place within approximately 1 minute, 15 seconds. *Id.*

Seven more SPD officers quickly responded to the Code 6 call. The additional SPD officers easily rolled Zehm to his stomach and cuffed him. While on the floor, Zehm resisted the cuffs and flailed his legs. The officers decided to place Zehm into a prone, hog-tie restraint. ER 297-300/R 187. Zehm continued to pull against the restraints, so he was double cuffed. Even though Zehm was no longer a threat or a safety concern, and while double cuffed in a hog-tie position on the floor, three or more officers continued to apply downward pressure on Zehm's neck, back and legs. *Id.*

SPD Patrol Officer Erin Raleigh saw that Zehm was bleeding from his mouth and feared he might possibly spit at the officers. So, Raleigh placed a plastic non-rebreather mask (absent the manufacturer's recommended oxygen tank) on Zehm's mouth and nose while he remained face down and hog-tied. *Id.*

Seventeen minutes after being beaten, tasered, cuffed, hog-tied, double cuffed, and three minutes after the plastic non-rebreather mask was applied to his face, Zehm stopped breathing. *Id.* Zehm's last statement to the officers

(including defendant) before losing consciousness was ***"All I wanted was a Snickers!"*** ER 298-99. Fire department medics who were called to remove a taser dart from Zehm's chest attempted CPR and an ambulance transported Zehm to the ER and approximately 45 minutes later, the ER recovered a pulse. However, Zehm was clinically brain dead and life support systems were removed two days later. *Id.*

On March 22, 2006, four days after defendant's encounter with Zehm, SPD Detective Terry Ferguson finally interviewed defendant about the incident.[10] ER 304-307, 451-85. On March 27, 2006, defendant reviewed a transcript of the recorded interview, made some minor changes and approved the transcript with his signature.[11]

During his interview, defendant claimed his initial strikes were justified because he described Zehm as aggressive and defiant, claiming that he saw in Zehm's face and body language an intent to attack or charge him. ER 307-12, 451-85. Defendant described Zehm's alleged demeanor as being immediately aggressive and defiant, with assaultive intent, and other alleged culpable behavior during the purported *Terry stop*, all of which allegedly occurred just before defendant delivered his first two baton strikes. *Id.*

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[10] Defendant consulted with counsel before his employer's criminal investigation interview. The parties agree the interview was voluntary and did not violate defendant's *Garrity* rights.

[11] Defendant's interview forms the basis for the Section 1519 obstruction of justice charge in Count 2. ER 451.

Defendant claimed that Zehm saw him pull into the parking lot and then entered the store and intentionally went to a location in the store where weapons (i.e., glass items) were located. *Id.* Defendant claimed that Zehm looked back to see him enter the store and then selected a two liter plastic soda bottle in anticipation of defendant's contact. Defendant stated that Zehm kept his back to him as he approached, with baton drawn, and that when he got to four feet away, Zehm quickly turned on him, took an aggressive stance toward him, with one foot in front of the other, made direct eye contact and stared at him, held the soda bottle in a threatening position, and was openly "defiant." ER 307-12, 465-68

Defendant stated that Zehm did not display any fear or confusion, stood his ground, held the plastic bottle horizontally at chest level in a "loaded position," and that Zehm's muscles were fully tensed under his leather jacket. *Id.* Defendant claimed he immediately gave a loud verbal command to Zehm to "Drop it" [the pop bottle] and that Zehm immediately, defiantly and forcefully responded: "Why?" Defendant claimed that he firmly repeated the order, "Drop it now," twice as loudly. Defendant said Zehm's response was an immediate, defiant, and forceful: "No"! Defendant claimed that Zehm made these defiant, aggressive verbal responses while maintaining his about to "strike" or "charge" position. *Id.* Defendant asserted that Zehm projected an intent to assault him

with the plastic soda bottle and therefore he decided to use baton strikes to Zehm's legs to preempt Zehm's impending assault. ER 469-71[12]

Defendant claimed he gave additional warnings to "drop the pop" before firing his taser at Zehm. Defendant further claimed that Zehm started to stand up after being tased and that more baton strikes were necessary to negate Zehm's movement. *Id.* Defendant further claimed that Zehm, despite the baton strikes, made it to his feet, promptly took a boxing stance and started throwing multiple punches at defendant's face and chest, which defendant claimed struck him in the chest. ER 472-475.

There were several citizen witnesses in the store when defendant ran up on Zehm and attacked him almost instantly. However, it does not appear any of them saw the attack in its entirety. ER 313-14. Others did not focus on defendant's engagement of Zehm before the first baton strike. The security video's resolution is a bit grainy and also fails to reveal the intimate details of Zehm's or defendant's facial expressions. The store's shelving also hides most of Zehm's and defendant's bodies (i.e., from chest down) during the more significant time frames. The few witnesses in a position to partially see Zehm's initial reaction to defendant described it as surprised and defensive, rather than defiant and aggressive. ER 205, 313-14. Some witnesses will testify that they

[12] Forensic video analysis , human factor engineering, and defensive tactics principles, as well as percipient witnesses, dispute defendant's claim that the first baton strikes were directed at Zehm's lower extremities. Witnesses will testify that defendant's initial baton strikes were directed at Zehm's head, neck or upper shoulder. ER 446-49.

did not hear defendant give any alleged verbal commands before striking Zehm. *Id.* Virtually all of the witnesses said they did not hear Zehm say anything before defendant's first two baton strikes. Most witnesses did hear defendant threaten Zehm, but only after Zehm was knocked to the floor and was then directed to drop the soda bottle or be tased. *Id.*

Witnesses will also testify that, just prior to being tased, Zehm held the soda bottle in a defensive posture to protect his head-face. *Id*. Civilian witnesses will further testify that Zehm never regained his feet after being knocked to the floor. *Id.* The store's security video does not show Zehm ever returning to his feet after defendant's first baton strikes dropped Zehm to the ground. *Id.*

As indicated, the grainy security video does contradict many aspects of defendant's description of Zehm, but it does not capture the detail of defendant's initial confrontation, which is the foundation for the Grand Jury's Section 242 and Section 1519 charges. Further, the civilian witnesses who were not in an optimal position to fully observe the initial encounter may not be able to fully challenge defendant's description of Zehm's face, alleged assaultive demeanor and intent immediately before the first baton strike. Further still, the current trial setting is March 7, 2011, and the civilian witnesses who observed defendant's attack on Zehm will be testifying almost five years after the March 18, 2006, incident. R 413.

B. District Court's Rulings - Overview of Error

On June 7, 2010, the district court issued an oral decision excluding evidence of Zehm's innocence from the government's case-in-chief. The Court ruled the evidence was irrelevant since the defendant was allegedly unaware of Zehm's innocence when he decided to use force (i.e., not relevant to the jury's objective reasonableness determination). ER 20, 29-33.

On June 18, 2010, eleven days after the United States' notice of appeal was filed and lodged, the district court issued a written decision. ER 1-16/R 412. This decision now concluded that Zehm's innocence was relevant under *Boyd v. City and County of San Francisco*, 576 F.3d 938 (9th Cir. 2009). *Id.* In its order, the district court separated the proffered evidence into two categories. The first included testimony, bank records, and the contents of Zehm's pockets that confirmed that Zehm did not take money. ER 9. The second category was Zehm's final comment before losing consciousness, "*All I wanted was a Snickers!*" ER 14.

The court also discussed the objective reasonableness standard set forth in *Graham v. Connor*, 490 U.S. 386 (1989) and this circuit's decision in *Boyd v. City and County of San Francisco*, *id.,* which held that evidence *not known* by an officer may nonetheless be relevant and admitted "to resolve factual disputes" about what actually occurred prior to and during an officer's use of force.[13] ER

[13] The district court suggested the Fourth and Seventh Circuits, unlike this circuit, *categorically exclude evidence* outside an officer's contemporaneous knowledge in excessive force cases. ER 8. The cases cited, upon further review,

4-7. The district court went on to characterize evidence of Zehm's innocence as "prior acts" covered by Rule 404(b) and noted that a "rational juror" could conclude that an innocent person may be less likely to resist an officer than a person who has committed a crime.[14] ER 10. "Thus, Zehm's innocence tends to support the government's contention that he lacked an obvious motive to assault officer Defendant" and "could provide some assistance to jurors in evaluating the *accuracy* of Officer Defendant's account of the incident." ER 10-11, 15.

Nevertheless, the court concluded that the evidence was inadmissible under Rule 403 because the court did not believe a jury would follow a limiting instruction.[15] ER 11-15. The court expressed concern that Zehm's innocence would "divert" the jury's focus on Zehm's thoughts rather than evaluating his

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do not support this broad proposition. *See Kopf v. Skrym*, 993 F.2d 374, 379 (4th Cir. 1993) (not categorically excluding evidence of unknown facts that might be relevant to impeaching officer's account of incident); *Sherrod v. Berry*, 856 F.2d 802, 806 (7th Cir. 1988) (en banc) ("Our holding today should not be interpreted as establishing a black-letter rule precluding the admission of evidence which would establish whether the individual alleging a 42 U.S.C. § 1983 violation was unarmed at the time of the incident. *[I]mpeachment by contradiction is a technique well recognized in the federal courts*.") (emphasis added).

[14] The district court ruled that Zehm's innocence constituted "prior acts" under Rule 404(b). ER 10, citing *United States v. Curtin*, 489 F.3d 935, 943 n.3 (9th Cir. 2006) (en banc) (reversing trial court's evidentiary ruling on Rule 403 grounds). The 404(b) material at issue in *Curtin* (i.e., large quantities of child pornography and erotica) is not what the Court described as "innocent acts" here. *Id*. Innocence is the absence of a culpable act. It can also be acting in good faith, without knowledge of incriminatory circumstances, defects or objections. *See* Black's Law Dictionary, 5th Ed (1979).

[15] The district court also barred the ATM's video of Zehm. The United States does not challenge this aspect of the district court's decision.

behavior and would evaluate the reasonableness of defendant's actions based on Zehm's innocence rather than what defendant knew – a report of possible misdemeanor theft at the ATM.[16] ER 11-13. The court also relied on an inaccurate, understated and defense favorable view of the facts, and incorrectly reached a pretrial conclusion that the government "has adequate means to test the accuracy of Officer Defendant's account without resorting to the disputed evidence." ER 14 (referencing Zip Trip security video and citizen witnesses).

The district court further indicated that Zehm's innocence was relevant and likely admissible to prove the Section 1519 obstruction of justice charge, but it again surmised that the jury would not be able to follow an instruction limiting consideration to just that charge. ER 15 n.7. With regard to Zehm's final statement, "***All I wanted was a Snickers!***", the district court concluded that it had insufficient context to assess its admissibility and reserved judgment until trial.[17] ER 13-14.

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[16] 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 205, 219-42; *see also* court's order excluding 911 audio tape and related pleadings – exhibits. ER 115/R 431.

[17] The United States is not directly challenging this portion of the Court's ruling since it is not a final ruling. The government submits, however, that the significance of Zehm's last words cannot be fully understood in the absence of evidence of his actual innocence, since doing so will not place his last words in their proper context (i.e., Zehm's dying declaration of intent and confusion at being attacked is predicated on his actual innocence).

V. SUMMARY OF ARGUMENT

The district court acknowledged that the innocence evidence, despite being outside defendant's knowledge when he used violent force, is nevertheless relevant to show that Zehm was unlikely to have acted in the aggressive manner defendant claims. ER 10-11. This Circuit recognizes that evidence outside an officer's knowledge, bearing upon the credibility of the officer's account of what he perceived or upon the totality of circumstances, is admissible. *See Boyd,* 576 F.3d at 943-945 (9th Cir. 2009). The evidence excluded is material and constitutes a significant portion of the government's proof of both charges since it tends to show that the defendant lied about his justifications for using force on Zehm.[18]

The district court erred by failing to recognize the requirements of Rule 403's inquiry. *United States v. Hinkson*, 585 F.3d 1247, 1261-1262 (9th Cir. 2009) (en banc) (first step in abuse-of-discretion review "is to determine de novo whether the trial court identified the correct legal rule to apply to the relief requested"). The Rule 403 test *is biased in favor of admission* of evidence: it permits the exclusion of evidence only when its potential harm "substantially outweighs" its probative value. While the district court properly quoted the rule, its analysis treated Rule 403 like a run-of-the-mill, unweighted balancing test. ER

[18] Proof that defendant's justification for force was a lie proves consciousness of guilt for depriving Zehm of his constitutional right to be free from excessive force in violation of Section 242 and his making false entries in his recorded statement in violation of Section 1519.

14. The district court also viewed the weighing analysis to be balancing between "two competing rights," with no acknowledgment that there is a heavy thumb on one side of the scale favoring admission. *Id.*

The Court struggled to figure out which "right" should win out, ultimately relying on the conclusory statement that the government had "adequate [other] means to test the accuracy of [defendant's] account without resorting to the disputed evidence." *Ibid.* Not only does this analysis give short (if any) shrift to the loaded nature of the Rule 403 inquiry, but it also allowed an inappropriate factor -- the district court's pretrial view that there was "adequate" other government evidence, without finding the innocence "needless[ly] cumulative" -- to be the determining factor.

The district court also abused its discretion by giving too little weight to the probative value of the *innocence* evidence and too much weight to the evidence's potential harm. The district court characterized the evidence as tending to show whether Zehm would "resist" defendant. ER 10. But, the defendant's story has been that Zehm effectively tried to ambush him, by going into a convenience store, looking back at defendant to see him enter, grabbing a soda bottle to arm himself, lying in wait, and then preparing to strike or thrust the bottle at the defendant once he approached. ER 304-13, 462-71. Affirmatively engaging a police officer in combat is a particularly dramatic form of resisting arrest and the *innocence evidence* is clearly more probative to the credibility of that story than claim that Zehm engaged in some less aggressive form of resistance.

Furthermore, the innocence evidence is a direct credibility challenge to defendant's specific claims that Zehm showed no fear, looked determined and was not at all confused about the confrontation (i.e., defendant's assessment of Zehm's intent). Additionally, the evidence is probative not only to the excessive-force charge, but also to the obstruction charge since it tends to prove that the untrue statements defendant made to police investigators about Zehm's behavior were knowingly false. The district court, however, gave the obstruction charge only modest consideration. *See* ER 15 n.7 (court noting it was "mindful" of additional count, but expressing disbelief jury could segregate evidence).

The district court also erroneously concluded Zehm's mental state was irrelevant. The court believed that the innocence evidence would divert the jury's attention away from Zehm's acts to his mental state and make it difficult for the jury to evaluate how the incident would have looked to an officer (defendant) who "may have" reasonably believed that Zehm might have committed a crime. However, the very point of introducing Zehm's mental state is to establish how Zehm acted and the prosecution is challenging the very reasonableness of the officer's claim that he was responding to a possible "premature robbery." ER 461.

The district court's prejudice analysis also failed to acknowledge that excluding the evidence will lead the jury to believe that Zehm was actually guilty of the underlying misdemeanor theft suspicion,[19] which itself causes an inaccurate

[19] Or, as defendant claims, a "possible premature robbery." ER 461.

and unfairly prejudicial influence against the victim and the prosecution's case (i.e., portraying the victim in a false, criminally culpable light). The district court erroneously dismissed the suggestion that any potential for "unfair prejudice" could be prevented/mitigated through an instruction limiting the purpose for which the innocence evidence was to be admitted. ER 13 n. 6.

VI. ARGUMENT

A. Standard of Review

Evidentiary rulings raising predominantly legal questions concerning the interpretation of applicable legal principles under the Federal Rules of Evidence are reviewed *de novo*. *See United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir.), *cert. denied*, 531 U.S. 983 (2000). The Ninth Circuit also reviews *de novo* a district court's rulings involving questions of law or mixed questions of law and fact. *United States v. McConney,* 728 F.2d 1195, 1204 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984).

Pure evidentiary rulings are generally reviewed under an *abuse of discretion* standard. (*Old Chief v. United States*, 519 U.S. 172, 174 n. 1 (1997)), involving a two step review process. *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). The first step requires the appellate court to review *de novo* whether the trial court properly identified and applied the correct legal rules to the relief requested. *Id.* If the trial court based its ruling on an erroneous interpretation of law, it is deemed to have abused its discretion (i.e., *per se* abuse of discretion). *Id*. If the trial court relied on the correct interpretation of

law, the second step is to determine whether the court's application of the correct legal principle resulted in a decision that is illogical, implausible, or is without support from reasonable inferences drawn from the record. *Id.,* at 1262. If any of the three criteria apply, the Court of Appeals can conclude that the district court abused its discretion.[20] *Id.*

B. District Court Erred by Excluding Evidence of Zehm's Innocence From Government's Case-In-Chief

1. Evidence To Be Viewed In Light Most Favorable to Proponent, Maximizing Probative Value and Minimizing Unfair Prejudice

It is well settled that in performing its Rule 403 analysis of the proffered evidence, a district court is required to view "the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *United States v. Jamil*, 707 F.2d 638, 642 (2d. Cir. 1983) (reversing on interlocutory appeal, district court's pretrial exclusion of

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[20] This standard – typically discussed in the context of a defendant's post-conviction appeal of the trial court's *admission* of evidence against defendant – is sometimes characterized as highly deferential. *See e.g., United States v. Verduzco*, 373 F.3d 1022, 1029 n.2 (9th Cir. 2004); but *see United States v. Smith*, 459 F.3d 1276, 1295 (11th Cir. 2006) (Although trial courts are accorded wide discretion to *admit* evidence under Rule 403, the trial court's discretion to *exclude* evidence under Rule 403 is "narrowly circumscribed."). The reason "[w]e give wide latitude … in determining the admissibility of evidence ... [is that the trial judge] is in the best position to assess the impact and effect of evidence based upon what he perceives from the live proceedings of a trial, while we can review only a cold record." *United States v. Blaylock*, 20 F.3d 1458, 1463-64 (9th Cir. 1994) (reversing trial court's exclusion of evidence on Rule 403 grounds) (quoting *United States v. Layton*, 767 F.2d 549 (9th Cir. 1985)). This rationale loses force, however, where an interlocutory appeal is taken from a pretrial ruling because the trial court's decision is not based on "the live proceedings of a trial," but rather upon same "cold record" and proffer provided to the appellate court.

government's evidence on Rule 403 grounds); *United States v. Hans*, 684 F.2d 343, 346 (6th Cir. 1982) (reversing on interlocutory appeal, district court's pretrial exclusion of government's evidence on Rule 403 grounds).

Here, the district court failed its duty and relied on inaccurate, understated and a defense favorable version of the facts.[21] The court further failed to view the evidence in its most favorable, probative light and made no effort to minimize any potential prejudicial impact.[22] ER 2-3. It is the role of the appellate court to ensure that a trial court's rulings, cloaked in the exercise of "discretion does not mean immunity from accountability." *Jamil*, 707 F.2d at 642 (quotation omitted). The district court's omissions constitute reversible legal and factual error. *Id.*

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[21] The district court relied on facts derived from defendant's version of the case. ER 2-5, n. 1. Several of these facts, *inter alia*, are erroneous including descriptions that: investigators (and implicitly defendant) did not learn Zehm was innocent until after Zehm died two days after the force incident - in reality, defendant and SPD personnel knew within minutes of defendant's forcible seizure that no money had been taken from the ATM; complainants were "scared" of Zehm - actually said they were "uncomfortable"; defendant merely drove to Zip Tip, unsheathed his baton, and approached Zehm - defendant actually injected himself on the "suspicious circumstance" call, raced to Zip Trip, saw Zehm enter, hurriedly parked car, pulled out baton, ran into store, chased down the unsuspecting Zehm, with baton raised in a ready strike position, and then struck and assaulted the surprised Zehm within 2.5 seconds of Zehm turning to see defendant. ER 2-3.

[22] In the Section 1983 summary judgment context, where the district court must similarly assume the truth of the putative plaintiff's account, a district court may not ignore or marginalize plaintiff's version of disputed facts by crediting the defendant's version of events. *See Wall v. County of Orange*, 364 F.3d 1107, 1111 (9th Cir.2004) ("By deciding to rely on the defendants' statement of fact, the district court became a jury.").

2. District Court Failed to Recognize Rule 403's Preference for Inclusion and that its Discretion was "Narrowly Circumscribed"

Rule 403 provides the disfavored mechanism of excluding relevant and otherwise admissible evidence when the danger of unfair prejudice, confusion of the issues, or misleading the jury, *inter alia,* "***substantially outweighs***" the evidence's probative value. "Unfair prejudice" is defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *See* Advisory Committee Notes to Rule 403; *Jamil, Id.*

The balancing test under Rule 403 is weighted heavily in favor of admitting relevant evidence. *United States v. Udeozor*, 515 F.3d 260, 264-65 (4th Cir. 2008) ("Rule 403 is a rule of inclusion, generally favoring admissibility."). The strong presumption in favor of admitting relevant evidence reflects the broader emphasis that trials are primarily a truth-seeking enterprise. *Id.* The district court's ability to *exclude* probative evidence is a dangerous power because *it may corrupt the central truth-seeking function of the jury* and *undermine the accuracy of its verdict*. *Id.*

"Since the trial judge is granted such a powerful tool by Rule 403, he must take special care to use it sparingly." *United States v. Jamil*, 707 F.2d 638, 642 (2nd Cir. 1983) (citation omitted). Exclusion of evidence under Rule 403 is an "extraordinary remedy," to be used "sparingly" because it permits the trial court to exclude probative evidence. *United States v. Patterson*, 819 F.2d 1495, 1505 (9th Cir. 1987). "The balance under the Rule, therefore, should be struck in favor of admissibility." *United States v. Smith*, 459 F.3d 1276, 1295 (11th Cir. 2006).

This and other Circuits have emphasized that a district court should rarely exercise its power to exclude relevant evidence under Rule 403. The "major function" of Rule 403 "is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *United States v. Hankey,* 203 F.3d 1160, 1172 (9th Cir. 2000) (quoting *United States v. Mills,* 704 F.2d 1553, 1559 (11th Cir. 1983); *see also United States v. McRae*, 593 F.2d 700 (5th Cir. 1979), *cert. denied,* 444 U.S. 862 (1979); *United States v. Cole*, 755 F.2d 748 (11th Cir. 1985) (exclusion of relevant, admissible evidence under Rule 403 is extraordinary remedy, to be invoked sparingly). In *United States v. Day*, 591 F.2d 861 (D.C. Cir. 1978). the court of appeals said that courts, in determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, should employ the sound rule that the balance should generally be struck in favor of admission, particularly where the evidence indicates a close relationship to the offenses charged. *Id.*

The need for the innocence evidence to prove the government's case is a factor to be used in weighing the evidence's admissibility under the balancing test. *Day, id.*, *see also Old Elk v. Dist. Court of 13th Judicial Dist. of Mont.***,** 429 U.S. 1030 (1976) (prosecutor entitled to prove defendant is convicted felon in case in chief since it is part of offense conduct). ***"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."*** *Day*, 591 F.2d at 877, n. 29 (emphasis added); *see also*

Recurring Trial Problems, Fifth Edition, Federal Judicial Center 2001, Part V - Evidence, Section V.A.4.a.

To the extent it is argued that the foregoing error is not one of law, but rather subject to review under an *abuse of discretion* standard, the government submits that the Court's patent errors in failing to recognize Rule 403's weighted scale in favor of admission and its circumscribed discretion to exclude relevant evidence remains reversible. "Although a district court has 'broad discretion in balancing probative value against the potential prejudicial impact," *United States v. Feinman*, 930 F.2d 495, 499 (6th Cir. 1991), "[w]here a decision to exclude evidence on the basis of Rule 403 is overly restrictive such that it precludes a plaintiff from the full opportunity to present his case to a jury, it will be deemed an abuse of discretion." *Doe v. Claiborne County*, 103 F.3d 495, 515 (6th Cir. 1996); *see also* Recurring Trial Problems, *id.,* Part V.A.4.a.

The district court here relied on an erroneous view of the facts, failed to fairly consider the probative value in a light most favorable to the government, and further, failed to properly balance the evidence (and its relationship to the government's case) in favor of admission under Rule 403. These errors constitute abuse of discretion. *Hinkson, id.*

3. Elements for Sections 242 and 1519 Charges

To establish defendant's guilt under 18 U.S.C. 242, the government must prove that defendant acted under color of law, deprived Zehm of his right to be free from unreasonable force guaranteed by the Fourth Amendment, and acted willfully.

United States v. Lanier, 520 U.S. 259, 264 (1997); *United States v. Reese*, 2 F.3d 870, 880 (9th Cir. 1993), *cert. denied*, 510 U.S. 1094 (1994).

In determining whether the officer's conduct is "willful" within the meaning of § 242, the jury may consider "***all the attendant circumstances***" existing at the time the officer used force. The jury may infer from all of the attending facts and circumstances, or from the blatantly wrongful conduct that causes a deprivation, that the defendant officer acted with a purpose to deprive a victim of a plainly established constitutional right. *See United States v. Screws*, 325 U.S. at 106; *see also United States v. Reese*, 2 F.3d at 881 (9th Cir.) ("Intentionally wrongful conduct, because it contravenes a right definitely established in law, evidences a reckless disregard for that right; such reckless disregard, in turn, is the legal equivalent of willfulness."). Intent (willfulness) is almost always proven by circumstantial evidence surrounding the factual circumstances of the use of force. *Id.*

With regard to Count 2's obstruction of justice charge, the United States is required to prove, beyond a reasonable doubt, that defendant: (1) knowingly (2) made a false entry in a record or document (3) with intent to impede or influence a federal investigation. *United States v. Hunt*, 526 F.3d 739, 743-44 (11th Cir. 2008); *United States v. Fontenot,* 611 F.3d 734 (11th Cir. 2010) (government not required to prove defendant knew matter would be investigated by federal agency); *United States v. Lanham*, -- F.3d --, 2010 WL 3305937 (6th Cir. 2010) (1519 also applies

to material omissions in police report); *see also United States v. Thompson*, 2010 WL 1734785 (E.D. Wash. 2010).

Section 1519 does not require that the record or document be related to any ongoing federal investigation when the false entries were made. Instead, the statute makes it unlawful to falsify any record or document "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States ... or in relation to or in contemplation of any such matter." 18 U.S.C. § 1519 As such, the government is required to prove defendant's "specific intent" (i.e., knowledge) and, as with proving willfulness, proof of defendant's knowledge and intent almost always relies upon circumstantial evidence and inferences drawn from the "totality of circumstances" of the charged conduct. *United States v. Santos*, 553 U.S. 507, 521 (2008) (plurality) (knowledge "must almost always" be proven by circumstantial evidence).

4. Innocence Relevant and Probative to Totality of Circumstances, Zehm's Actions, Defendant's Actions and False Statements

A claim that an officer used excessive force in the course of an investigative stop is analyzed under the Fourth Amendment's objective reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 394 (1989). "The 'reasonableness' of a particular use of force must be judged from the perspective of a *reasonable* officer on the scene, rather than with 20/20 hindsight." *Id.*, at 396 (emphasis added). The inquiry focuses on whether the officer's actions are objectively reasonable in light of all of "the then existing facts and circumstances." *Id.*, at 397; *see Price v. Sery*, 513 F.3d

962, 968 (9th Cir. 2008) (objective reasonableness is based on "objective facts" and reasonable inferences that may be drawn therefrom). *Graham* cautions that the "[t]est of reasonableness ... is not capable of precise definition or mechanical application," but that "its proper application requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396.

These facts and circumstances for the jury to resolve include, but are not necessarily limited to, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting or attempting to evade arrest by flight." *Ibid.*; *see Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir.), *cert. denied*, 545 U.S. 1128 (2005) (quoting *Graham*). The foregoing *Graham* factors are not exclusive and the Ninth Circuit authorizes fact finders to consider additional case dependant factors, including, but not necessarily limited to: whether a warning was given before force was used, *Deorle v. Rutherford*, 272 F.3d 1272, 1282-84 (9th Cir. 2001); "the availability of alternative methods of capturing or subduing a suspect," *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir.2005) (en banc); whether back up officers were in close proximity, *Bryan v. MacPherson,* 608 F.3d 614, 622-24 (9th Cir. 2010); and whether the subject is mentally ill or emotionally disturbed, as opposed to being an armed and dangerous criminal, *Deorle, id.* The Ninth Circuit has directed the fact finder to examine the "totality of the circumstances" (i.e., the discreet factual inquiry) of each case and to consider "whatever specific factors may be appropriate..." *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994); *Santos v. Gates*, 287 F.3d 846, 853

(9th Cir. 2002) (excessive force inquiry "nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom."). When the circumstances show there is no need for force, any force used is constitutionally unreasonable. *See Fontana v. Haskin*, 262 F.3d 871, 880 (9th Cir. 2001); *McDowell v. Rogers*, 863 F.2d 871, 880 (6th Cir. 1988). This Court has held that the most significant of the three factors is the second; whether the suspect poses a threat to the safety of an officer or others. *Smith, id*., at 702.

Significantly, in *Graham*, the Court noted that notwithstanding the objective reasonable analysis, "in assessing *the credibility of an officer's account* of the circumstances that prompted the use of force, a factfinder may consider, *along with other factors*, evidence that the officer may have harbored ill-will toward the citizen." *Id.,* 490 U.S. at 399 n.12 (emphasis added). Thus, the assessment of what happened (with due consideration of the witness' credibility) is distinct from determining whether the officer's actions were objectively reasonable. *Graham, id.*

In accord with this distinction, this Court and others have held that evidence *not known* by an officer at the time of the challenged incident may be *relevant and admissible* under Rule 401 to assess disputed facts, including the probability and credibility of refuted descriptions of the victim's behavior and the circumstances that purportedly influenced the officer's decisions. *See Boyd*, 576 F.3d at 944; *Alpha v. Hooper*, 440 F.3d 670 (5th Cir. 2006). This evidence has included the victim's actions preceding the incident, possession of weapons or drugs, and/or use of drugs or his/her intoxication at the time of the incident. *See Boyd*, 576 F.3d at

944; *Alpha v. Hooper*, 440 F.3d at 670, 672; *Bradford v. City of Modesto*, 2009 WL 3489413, at *4 (E.D. Cal. Oct. 26, 2009) (unreported) (evidence plaintiff was unarmed, while unknown to defendant officer, is "*probative of the credibility of plaintiff* on his claim that . . . he did not move his hand to . . . his waistband immediately before the officers began to fire at him.") (emphasis added).

In *Boyd*, 576 F.3d at 942, the citizen plaintiffs claimed that police officers used excessive force during an arrest that resulted in Boyd's death.[23] The plaintiffs challenged the district court's admission of evidence supporting the officers' defense that Boyd's motive for his final acts was "suicide by cop." *Id*., at 943. The Ninth Circuit, relying on Rule 401, held that "where *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.*" *Id*., at 944 (emphasis added). Significantly, this principle applies to evidence *not* known by the officer(s) at the time force is used. *Id.*

5. Court Conflated "Totality of Circumstances" and "Objective Reasonableness" Determinations

The district court's exclusion of Zehm's innocence relied on an erroneous view of the Fourth Amendment's objective reasonableness standard. The *Graham* standard presents a two-stage analysis, where the jury must find the "underlying

[23] Violations of 42 U.S.C. § 1983, and its criminal analog, 18 U.S.C. § 242, are reviewed under a Fourth Amendment "objective reasonableness" standard. *Adickes v. Kress and Co.,* 398 U.S. 144, 215, n. 23 (1970). Unlike a § 1983 violation, however, a § 242 violation requires proof that the actor "willfully" violated another's constitutional right. *Id.*

facts and circumstances" existing just prior to and at time of the officer's use of force (i.e., "Totality of Circumstances" determination). This necessarily involves a credibility determination of the officer's and others' account. The second step involves the jury determining whether the officer's actions, even if reasonably based on mistaken facts, were "objectively reasonable" in light of the underlying facts and circumstances (i.e., the totality of circumstances) as previously determined by the jury.[24]

In excluding Zehm's innocence, the district court relied on legal principles analyzing the jury's objective "Reasonableness Determination" (not the TCD) and drew the erroneous conclusion that a jury may only consider evidence that the officer was aware of at the time of his force decision. The district court framed its analysis as follows:

> "What evidence may the parties offer in order to prove or disprove the officer's account? More precisely, may the parties offer evidence of which the officer was unaware when he decided to use force against the suspect?"

ER 7. The district court originally concluded evidence of Zehm's innocence was irrelevant since defendant was unaware of it when he used force (Zehm's innocence "was not known by officer Thompson"). ER 78-79. The court restated its relevance

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[24] An officer must have "a reasonable belief," not just "a belief," in the existence of a threat before utilizing force during a seizure. *Price v. Sery*, 513 F.3d 962, 968-70 (9th Cir. 2008). ***The objective reasonableness analysis takes into account both the nature of the perceived threat and the soundness of the officer's basis for making that assessment.*** *Id.* The officer must have a reasonable belief force is necessary, based on the nature of the threat – not merely the officer's subjective fears. *Id.*

ruling at the June 7, 2010, hearing when it officially excluded Zehm's innocence from the government's case-in-chief. ER 19, 29-33.

In its written order issued 11 days later, the district court ruled that "Officer Thompson has a right to have his conduct 'judged from [an] on-scene perspective ... based upon the information [he] had when the conduct occurred." ER 12. However, the district court relied on cases addressing "the reasonableness" of an officer's decision to use force, not cases analyzing the question the court originally posed – *May the parties offer evidence the officer claims he was unaware of to challenge the credibility of the officer's account?* For example, the district court relied on *United States v. Banks*, 540 U.S. 31 (2003), involving federal agents knocking on the door of an apartment to execute a search warrant, while the tenant suspect was in the shower. After waiting 10-15 seconds, and getting no response, the agents entered the apartment. The tenant complained the agents entry was unreasonable because they did not wait long enough. The Supreme Court disagreed, noting, "it is enough to say that the facts known to the police are what count in judging reasonable waiting time ... and there is no indication ... the police knew that [the tenant] was in the shower and ... unaware of an impending search." ER 6-7 (citations omitted).

Banks is inapposite here for at least two reasons. First, unlike the facts *sub judice* and in *Boyd*, *supra,* there was *no dispute* in *Banks* about the *underlying facts and circumstances* confronting the officers. Second, there is nothing about the tenant being in the shower that casts doubt upon the credibility of the officers'

account of the "totality of circumstances" (i.e., they "knocked and waited, without response for 15 seconds"). Here, the district court conflated the jury's final "objective reasonableness determination" ("ORD") with the jury's discreet totality of circumstances determination (TCD). *Graham, id.,* at 399 n. 12.

The court also suggested there is a circuit split providing what it viewed as "contradictory answers" to the question of whether the government may introduce evidence of which the officer was unaware to call into question or to disprove the officer's account of the underlying facts he claims justified his use of force. The district court indicated the Fourth and Seventh Circuits bar all evidence not known by an officer "in determining whether he acted reasonably." However, when *Kopf v. Skyrm*, 993 F.2d 374 (4th Cir. 1993) and *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988) are compared to *Boyd, id.,* the distinction disappears. The district court erroneously cited *Kopf* and *Sherrod* for the proposition that "information of which an officer was unaware is inadmissible in determining whether he acted reasonably." However, like *Banks*, *Kopf* and *Sherrod* are inapposite because there was, once again, no dispute in those cases about the underlying facts and circumstances when force was used. Further, there was no challenge to the credibility of the officer's version of the force events. *Kopf, id.,* at 380 (reasonableness issue relating to release of canine under undisputed circumstances); *Sherrod, id.,* at 804-806 (totality of facts not disputed).

In fact, the *Sherrod* Court emphasized that its holding did not create a rule preventing the introduction of evidence the officer was unaware of at the time he

used force:

> "Our holding today should not be interpreted as establishing a black-letter rule precluding the admission of evidence which would establish whether the individual alleging a 1983 violation was unarmed at the time of the incident."

Id. *Sherrod* held that *if there had been a factual dispute* leading up to the use of force, evidence that the suspect was unarmed would have been admissible to challenge the credibility of the officer's account:

> ***[I]mpeachment by contradiction is a technique well recognized in the federal courts by which specific errors in the witness's testimony are brought to the attention of the trier of fact***. For example, if an officer testifies that "I saw a shiny, metallic object similar to a gun or a dangerous weapon in the suspect's hand," then proof that the suspect had neither gun nor knife would be material and admissible to the officer's credibility on the question of whether the officer saw any such thing (and therefore had a reasonable belief of imminent harm).

Id., at 806 (emphasis added). In sum, the district court erroneously relied on cases that *do not* involve a material dispute over what the underlying material facts and circumstances were just prior to the use of force.

In contrast, *Boyd* – the only Ninth Circuit case cited by the district court – involved "a dispute about the facts the officer claimed justified his use of force." *Boyd, id.,* at 944. Indeed, the factual dispute in *Boyd* was central to the court allowing evidence, *inter alia*, that the decedent committed two crimes earlier that night, even though the officer was unaware of this when he used lethal force. The *Boyd* court held that "*where 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.*" *Id.* (emphasis added).

No case has been found nor cited by the district court that requires the jury to

simply accept the officer's subjective account of the underlying facts and circumstances, and thereafter imposes a duty on the district court to exclude any evidence that contradicts that account. *Sherrod, id.,* at 806; *Boyd, supra;* and *Price v. Sery, id.* A purely subjective standard that wholly defers to the officer's account of the underlying facts and circumstances and which bars the admission of contradictory evidence would effectively eliminate any meaningful check on criminal police misconduct and would render the jury's "totality of circumstances" and "reasonableness" determinations meaningless. *Sery, id.* Officers could violate Section 242 with impunity, knowing that, as long as they invent an account that justifies their use of force, the government is powerless to contradict them or prosecute their offense. Cf. *Sherrod, id.; Boyd, id.*

The 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 of evidence discussing definition of "relevancy."[25] Contrary to the district court's suggestion, evidence of Zehm's innocence *is* about what defendant claims he knew at the time of his force decision – not because defendant 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 the statement. *Boyd,*

[25] Of course, the government's evidence challenging the credibility of the officer's account of the facts for the use of force 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.

supra.

In *Bowden v. McKenna*, 600 F.2d 282 (1st Cir. 1979) there was a dispute over underlying facts and circumstances and the court of appeals found the district court erred excluding evidence of decedent's unknown guilt because it tended to show that the defendant had a motive to resist the officers and was probative for the jury's credibility assessment. *Id.* Notwithstanding concerns about unfair prejudice or 20/20 hindsight review, the First Circuit in *Bowden* found the district court's exclusion of the unknown evidence under Rule 403 "understated the importance of the testimony, and overstated the prejudice." *Id. See also Roshan v. Fard*, 705 F.2d 102 (4th Cir. 1983) (district court erred in excluding under Rule 403 evidence of motive for attack - assault, which also went to credibility of party's version of force events). In both cases, the appellate courts reversed the district court's exclusion of relevant evidence due to disputes about the underlying facts.

In *Scott v. Henrich,* 39 F.3d 912 (1994), the Ninth Circuit further observed that cases involving "deadly force" present an even more difficult challenge for the fact finder in making its "totality of circumstances" and "objective reasonableness determinations" because frequently the only survivor is the officer. In these types of circumstances, the Ninth Circuit instructs the courts to be vigilant and *"not to simply accept what may be a self-serving account by the police officer," id.,* at 915*,* since the decedent victim's version of the reasonableness of his or her behavior is not available to the trier of fact. Rather, Ninth Circuit precedent directs the district courts to "ensure that the officer is not taking advantage of the fact that the witness

most likely to contradict his story - the [dead] person . . . is unable to testify" and requires the fact reviewer to " *look at the circumstantial evidence that, if believed,* ***would tend to discredit the police officer's story.*** *Id.* (emphasis added). *See also Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir.) (where defendant officer is only surviving witness to testify about force encounter, the court must undertake a fairly critical assessment of," *inter alia*, the officer's original reports or statements ... ***to decide whether the officer's testimony could reasonably be rejected at a trial.***"), *cert. denied*, 513 U.S. 820 (1994) (emphasis added).[26]

Zehm's underlying "innocence" is the purest form of objective evidence and explains his actions, conduct and intent in an inculpable light, and is significantly probative and admissible to prove important aspects of the "totality of circumstances" (i.e, disputed facts) that the United States contends the defendant actually confronted when he willfully decided to attack Zehm.[27] The court's exclusion of Zehm's innocence allows defendant to wrongfully benefit from Zehm's

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[26] *Henrich, id.,* and *Plakas, id.,* involved qualified immunity motions. However, a court's ruling on qualified immunity is the same as a fact finder's determination of the merits of an excessive force claim. *Henrich, id.,* ("qualified immunity inquiry is the same as the inquiry made on the merits."). The "critical review" principle would appear to apply in both civil and criminal cases where the alleged victim, the best person to contradict the officer, is dead. *Id.*

[27] An insightful trial lawyer once said, "*We much better know there is a fire when we see much smoke rising than we could know it by one or two witnesses swearing to it. The witnesses may commit perjury, but the smoke cannot.*" Unsent Letter of Abraham Lincoln to J.R. Underwood and Henry Grider (Oct. 26, 1864), in *The Quotable Lawyer* 323 (Shrager and Frost, 1986); also cited in *Piava v. City of Reno,* 939 F.Supp. 1474, 1487 (D. Nev. 1996) and quoted in *Hopkins v. Andaya,* 958 F.2d 881, 888 (9th Cir. 1992). Zehm's underlying innocence and absence of conscious guilt is likewise pure, undisputed, objective evidence.

death and to capitalize on the injustice of unfairly and prejudicially "stigmatizing" Zehm in front of the jury. Exclusion also allows defendant to provide unchallenged, false attributions of Zehm in a culpable, sinister light (i.e., stole money from two girls; lied in wait to attack officer).

6. Evidence of Victim's Intent and Behavior is Probative for Civil Rights and Obstruction of Justice Prosecution

Zehm lost consciousness during the confrontation with officers and died two days later. In the murder context, when the victim's state of mind is in issue, even if not an element of the charged offense, an unavailable victim's prior statements are allowed to be admitted to refute an asserted motive or the defendant's proffered reason for his violent acts. *See United States v. Tokars*, 95 F.3d 1520, 1535 (11th Cir. 1996) (murder victim's statement relevant to assess defendant's motive to kill), *cert. denied*, 520 U.S. 1132 (1997); *United States v. DiNome*, 954 F.2d 839, 846 (2d Cir. 1991), *cert. denied*, 506 U.S. 830 (1992); *United States v. Donley*, 878 F.2d 735, 737-739 (3d Cir. 1989), *cert. denied*, 494 U.S. 1058 (1990); Rules 803(3), 804(b)(6) (hearsay claims forfeited if a party's deliberate wrongdoing renders declarant unavailable). In *Donley*, 878 F.2d at 738, the victim/decedent's prior statement regarding her intent to separate from her husband/defendant was relevant to refute the defendant's asserted motive for murder. The victim's motive, drawn from her conduct, was necessary and relevant to give context to the government's version of events, which "did not comport" with the defendant's claimed facts and motive. *Id*., at 738 n.5.

Zehm's innocence here is comparable to a murder victim's prior statement

and should be admitted to corroborate the United States' evidence and to refute the defendant's version of events. The court's erroneous exclusion denies the United States an opportunity to "present a coherent version of what it claimed had happened" before and during defendant's violent attack on Zehm. *See id*., at 738.

Evidence of Zehm's innocence is offered here to address a factual dispute created by the defendant's false portrayal of the victim, which relates to the threshold issue for the jury to resolve: the factual disputes over the "totality of circumstances" confronting the officer. Accordingly, the government must be entitled to introduce evidence bearing upon the disputed underlying facts and circumstances. *See Boyd, id.*

7. District Court Abused Its Discretion In Ruling Probative Value of Evidence Outweighed by Potential for Unfair Prejudice

The district court ruled that evidence of Zehm's innocence was inadmissible under Rule 403 because, in the court's eyes, a jury would not be able to follow an instruction that limited the purposes of its consideration and would cause juror confusion and unfair prejudice to defendant. ER 4-13, 15 n.7/R 412. This conclusion is erroneous for several reasons. First, because it rejects the presumption that a jury can and will follow the court's instructions. *See Cook v. LaMarque*, 593 F.3d 810, 827-828 (9th Cir. 2010). In addition, the district court underestimated the probative value of this evidence and overstated its potential for prejudice and juror confusion. Cf. *United States v. McFall*, 558 F.3d 951, 963 (9th Cir. 2009).

A court must balance the competing interests of probative value and unfair

prejudice. *Ibid.* "Unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *United States v. Allen*, 341 F.3d 870, 886 (9th Cir. 2003) (quoting Advisory Committee Notes and holding that skinhead and white supremacy evidence is relevant to prove defendant's motive and racial animus, and is not unduly prejudicial), *cert. denied*, 541 U.S. 975 (2004). A court abuses its discretion if it errs in its assessment of the probative value of proffered evidence or the potential for prejudice. *McFall*, 558 F.3d at 963; *United States v. Gonzales-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005).

In *McFall*, 558 F.3d at 963, the district court erred by not considering the probative value of a witness's grand jury testimony that could corroborate the defendant's story. The district court also erred in concluding that the government had no opportunity to impeach the grand jury testimony by admissible evidence and, therefore, overestimated the potential, undue prejudice to the government. *Ibid*.

In *Boyd*, 576 F.3d at 948-949, this Court held that the district court appropriately concluded that the probative value of evidence of Boyd's motive for suicide by cop was not outweighed by any potential undue prejudice. In *Boyd*, *id*., at 948, this Court summarized and affirmed the district court's multiple rulings admitting evidence under Rule 403 of Boyd's motive for suicide by cop, including Boyd's 11-year anniversary of his confrontation with police that resulted in the loss of his legs, and his arrest three days prior to the shooting, prior lawsuits against

police officers; a prior incarceration; and Boyd's drug intoxication at time of shooting/death. *Id*., at 948-949. While the details of the district court's balancing under Rule 403 are not described, the *Boyd* court stated that "the record reflects that the court conscientiously weighed the probative value against the prejudicial effect for each piece of evidence, which is a showing sufficient for affirmance." *Id*., at 949.

Significantly, the probative evidence's potential for unfair prejudice can be eliminated or sufficiently mitigated by a limiting instruction. *See United States v. Cherer*, 513 F.3d 1150, 1158-1159 (9th Cir. 2008) (court appropriately evaluated Rule 403 considerations of evidence admissible under Rule 404(b) and a limiting instruction "reduced" the risk of unfair prejudice); *United States v. Curtin*, 489 F.3d 935, 943, 958 (9th Cir. 2007). A jury is presumed to follow a court's instruction that limits the jury's consideration of certain evidence. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *Richardson v. Marsh*, 481 U.S. 200, 206-207 (1987) (citing cases); accord *Cook v. LaMarque*, 593 F.3d 810, 827-828 (9th Cir. 2010); *Dubria v. Smith*, 224 F.3d 995, 1002 (9th Cir. 2000), *cert. denied*, 531 U.S. 1148 (2001). For example, when evidence is admitted under 404(b), a jury is routinely advised that the evidence may only be considered for a particular purpose, including *inter alia* motive, intent, and knowledge. *See*, *e.g.*, *Cherer*, 513 F.3d at 1158-1158; *Curtin*, 489 F.3d at 958. Rule 404(b) is a "rule of inclusion," *see Boyd*, 576 F.3d at 947 (internal citation omitted), subject only to the provisions of Rule 403. *See Curtin*, 489 F.3d at 944.

The United States suggested that a limiting instruction could be given to cure the potential for any undue prejudice. ER 277-78. However, the court and the parties did not address the issue during the hearings on the motion, because the Court's focus was on whether Zehm's innocence was actually relevant. *See* ER 86-98. The court's subsequent order summarily concludes, without significant discussion, that the jury could not follow a limiting instruction. ER 13 n. 13.

8. Court Understated Probative Value and Overstated Prejudice

While the district court acknowledged the relevance of evidence of Zehm's innocence for Count 1, it does not appear that the court fully appreciated the significant and probative value of this evidence. This error may be due, in part, to the court's erroneous conflation of the jury's two distinct factual questions. *See Graham,* 490 U.S. at 399 n.12. The court's concern that admission of this evidence will result in the jury's undue focus on Zehm's "thought processes" rather than his actions misstates the purpose of this evidence. While a victim's unknown thoughts may not be relevant to making the ultimate determination of the objective reasonableness of an officer's actions, the evidence is certainly relevant to evaluating what exactly the victim did before the assault began. *See Boyd.*

The district court's concern regarding purported juror confusion is unwarranted. In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court concluded that a jury could *not* be expected to compartmentalize one defendant's confession against another defendant because it unconstitutionally implicated the guilt of the second defendant, solely as a result of the confessing defendant's

admission. Zehm's innocence here is not so "clearly prejudicial that a curative instruction could not mitigate [its] effect." *Dubria*, 224 F.3d at 1002 . In fact, Zehm's innocence is far less emotional and less likely to create an "improper" basis or bias for judgment than the offensive and repugnant evidence this Court approved in *Boyd*, which included the alleged victim's prior incarceration, prior run-ins (11 years and 3 days before) with the police, prior litigation with the police, racially derogatory statements to police, rap lyrics applauding law enforcement deaths, and intoxication at the time of the shooting. *Boyd*, 543 F.3d at 948-49.

Moreover, as noted above, given the limitations of the video and the percipient witnesses evidence concerning defendant's initial approach and baton strikes, the district court seriously miscalculated the importance and value Zehm's innocence has to the United States' case-in-chief. The court's ruling bars evidence that supports an element of the United States' claim that defendant lied in his antecedent statement. The district court's erroneous conclusion that a jury instruction could not eliminate or mitigate the potential for undue prejudice from the objective and uncontested evidence's admission is a gross overestimation of the potential for prejudice. Cf. *United States v. McFall*, 558 F.3d 951, 963 (9th Cir. 2009); *United States v. Gonzales-Flores*, 418 F.3d 1093, 1098-1099 (9th Cir. 2005).

To the extent the district court relied on the different locations (Zip Trip v. ATM) and/or the amount of time between Zehm's actions at the ATM and the attack as a bases for its ruling (i.e., 5 mins. pre-attack vs. 17 mins. post-attack), such

a distinction is likewise "illogical."[28] Cf. *United States v. Stever*, 603 F.3d 747, 753 (9th Cir. 2010).

9. Zehm Had Right to Provide Reasonable and Proportionate Resistance to Defendant's Unlawful Force

The district court's suppression of the victim Zehm's innocence may also prejudice the United States' ability to secure a jury instruction that Zehm had a long established right, based on innocence, to use proportional self-defense against defendant's unlawful, forcible seizure. *See John Bad Elk v. United States*, 177 U.S. 529, 537-538 (1900). The court's ruling likewise appears to blunt the unlawful officer "danger creation" principle recognized in *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1362-66 (9th Cir. 1994), which is also a foundation of the prosecution's theory.

The Government's prosecution is premised, *inter alia*, on Zehm's right to reasonably resist and use proportional force to avoid injury or death. *Gulliford v. Pierce County*, 136 F.3d 1345, 1350-1351 (9th Cir. 1998). As such, the United States should be entitled to an instruction, supported by objective evidence, that informs the jury of the victim Zehm's innocence and his right to "reasonably resist" the defendant officer's unlawful and forcible seizure. *John Bad Elk v. United*

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[28] The district court's post appeal order sets forth its supplemental rationale for excluding Zehm's innocence. The prior hearings are relevant because they reflect the oral rulings that permits defendant to introduce evidence of both Zehm's struggle with officers *after* defendant's attack and his psychiatric history to allegedly corroborate defendant's version of events. The court's oral statements do not directly compare the admissibility of evidence proffered by the United States and defendant based on time or location, however they do logically provide the bases for the court's conclusions.

States, *id.* The instruction needs to be supported by evidence placing facts of Zehm's incontestable "innocence" in the proper context and would explain to the jury Zehm's incontestable legal right to reasonable and proportional resistance. *Id.*

The "right to resist" evidence is also needed to counter the court's allowance of fellow officers' testimony describing Zehm's post-assault behavior. Without an instruction and evidence of the innocent victim Zehm's right to "reasonably resist," the district court will improperly foster a "false account" of the factual and legal landscape of Zehm's "rights" in relation to defendant's unlawful and excessive force. *John Bad Elk v. United States*, *supra*, involved similar legal circumstances, and the Supreme Court held that it was error to deny the subject victim a jury instruction informing the jury of his right to reasonably resist an alleged unlawful arrest and use of force by federal agents. The error, the Supreme Court stated in reversing, was "plain," particularly since it "*placed the transaction in a false light before the jury, and denied to the plaintiff in error those rights which he clearly had*." *John Bad Elk., id.* (emphasis added). *See also 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 on him during an arrest.").

The district court's ruling here is similarly erroneous since it effectively denies the United States its right to secure (on behalf of itself and the victim Otto Zehm) a proportionate self-defense instruction based on Zehm's actual innocence. *Id.* The district court's order must be reversed to allow the government to prove its self defense theory based on the pure, objective and uncontested evidence of

Zehm's innocence. *See Graham, id.; John Bad Elk*, *id.*; *Hinkson, id.,* at 1261-62.

10. Inconsistent Rulings

Finally and significantly, the district court abused its discretion in barring evidence of Zehm's innocence to corroborate the government's case that Zehm acted defensively while at the same time admitting evidence of Zehm's post-force reactions to defendant's assault to purportedly corroborate defendant's defense that Zehm acted aggressively before defendant's use of force. Cf. *Stever*, 603 F.3d at 753.[29] To the extent the district court relied on the different locations (i.e., Zip Trip v. ATM) and/or the amount of time between Zehm's actions at the ATM and defendant's attack as bases for its ruling, such a distinction is illogical. Cf. *Stever*, 603 F.3d at 753.

In *Boyd*, 576 F.3d at 944, the Ninth Circuit concluded that events unknown to the officer who shot Boyd and which took place *three days* and *ten years* before the shooting were relevant to the disputed facts. Here, approximately five minutes passed between Zehm being at the ATM to when he entered the Zip Trip and was instantly attacked by defendant. Zehm's interactions with police "after" defendant's assault lasted approximately 17 minutes, until he lost consciousness. The last 17 minutes of Zehm's post-force contact with police is admissible to corroborate defendant's claims, there is no reason to exclude evidence that is undisputed, more objective and equally corroborative of the government's version of what occurred,

[29] The government is not challenging the prior rulings, but is highlighting them to shed light on inconsistencies that also support reversal of the instant order.

and which is more temporally related to the full circumstances of defendant's attack. Cf. *Stever*, 603 F.3d at 753.

11. Prejudice to the Prosecution

To reverse on the basis of an evidentiary ruling, the appellate court must conclude both that the district court abused its discretion and that the error was prejudicial. "When error is established, we must presume prejudice, unless it is more probable than not that the error did not materially affect the verdict." *Boyd*, 576 F.3d at 949 (quoting *United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc)). 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 not accurate and is not supported by the record. ER 14. Further, the exclusion of Zehm's innocence substantially prejudices the Government's case in at least three ways.

First, contrary to the district court's assumptions, apart from Zehm's innocence, there is limited evidence to directly challenge the credibility of defendant's descriptions of Zehm's face, demeanor and conduct immediately before defendant's initial strikes. The video's resolution does not reveal Zehm's or defendant's facial appearance and the store's shelving obstructs most of defendant's and Zehm's body positions (i.e., shelves block view from chest down). Only a couple of witnesses, who were some distance away and did not focus on the entire dispute, can truly challenge defendant's description of Zehm's demeanor before the first strike. Most of the witnesses did not alert to defendant's attack until after the

first baton strikes. *See* ER 205 (video).

Second, demonstrating that defendant's initial use of force was unjustified is significant and material to proving the Section 242 charge because it undermines defendant's claimed justification for the rest of defendant's force. Defendant may not use unreasonable force against a person and then cite the escalation he caused as a ground for justifying additional force against a person. *See Duran v. City of Maywood*, 221 F.3d 1127, 1130-31 (9th Cir. 2000) (affirming jury instruction allowing finding of liability because "the police officer's use of excessive and unreasonable force caused an escalation of events that led to the [victim's] injury"); *Alexander v. City and County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994) (same); *Espinosa v. City and County of San Francisco*, 598 F.3d 528, 548 (9th Cir. 2010) ("[E]ven though the officers reasonably fired back in self-defense, they could still be held liable for using excessive force" because reckless and unconstitutional provocation created need to use force).

Third, the exclusion of Zehm's innocence prevents the government from introducing critical evidence on the 1519 count, which the court indicated was otherwise admissible, *but for* the evidence's alleged unfair prejudice to the Section 242 count. The court's ruling materially blunts the government's ability to show that defendant knowingly made false statements about his justifications for violent force.

In sum, the district court's decision cripples and prejudices the United States' ability to prove, beyond a reasonable doubt, the charged offenses and its ability to

portray the decedent victim Zehm in a contextually accurate light.

VII. CONCLUSION

The United States bears a heavy burden of proof and needs the contextually accurate innocence evidence to prove essential elements of its case. Therefore, the United States respectfully requests the district court's order excluding evidence of the decedent victim Zehm's innocence from the government's case-in-chief be reversed.

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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.

s/ Timothy M. Durkin
Timothy M. Durkin
Assistant United States Attorney
Plaintiff-Appellee

CERTIFICATE OF SERVICE

It is hereby certified that on September 21, 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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I further certify that some participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

s/ Timothy M. Durkin
Timothy M. Durkin
Assistant United States Attorney
Plaintiff-Appellee

BRIEF FORMAT CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that Appellee's brief is proportionately spaced, has a typeface of 14 points or more and contains 13,961 words.

Dated September 21, 2010

s/ Timothy M. Durkin

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RE: ***United States v. Karl Thompson – Filing Date for Appellant's Opening Brief***

Dear Carl:

As we discussed this morning, the United States requested today a 14 day extension for the filing of appellant's opening brief that was due on September 7, 2010. You informed me that you had no objection to this short extension. The Clerk of the Ninth Circuit Court of Appeals has informed us that appellant's opening brief is now due by September 21, 2010. The appellee's answering brief is now due by October 21, 2010.

Please contact me should you have any further questions. Thank you.

Sincerely yours,

JAMES A. McDEVITT
United States Attorney

TIM M. DURKIN
Assistant U. S. Attorney

TMD/jj

cc: Thomas Rice, FAUSA – EDWA
Victor Boutros, Trial Atty., Civil Rights Criminal Section
Jennifer Eichhorn, Attorney, Civil Rights Appellate Section