

APPENDIX

Table of Contents

| | Page |
|---|-------------|
| APPENDIX A – Summary Order, Dated April 4, 2018 | A-1 |
| APPENDIX B – Order Denying Petition for Panel Rehearing, Dated April 24, 2018..... | B-1 |
| APPENDIX C – Judgment of the United States District Court for the Southern District of New York, Filed February 10, 2017..... | C-1 |
| APPENDIX D – Excerpts from the Sentencing Proceedings Held Before the Honorable Victor Marrero on February 3, 2017..... | D-1 |
| APPENDIX E – Indictment, Filed February 19, 2016..... | E-1 |

APPENDIX A – SUMMARY ORDER, DATED APRIL 4, 2018

17-464-cr
United States v. Steele

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of April, two thousand eighteen.

Present:

AMALYA L. KEARSE,
GUIDO CALABRESI,
DEBRA ANN LIVINGSTON,
Circuit Judges,

UNITED STATES OF AMERICA,

Appellee,

v.

17-464-cr

JOSEPH STEELE,

Defendant-Appellant,

For Appellee:

JILAN KAMAL (Karl Metzner, *on the brief*),
Assistant United States Attorneys, Of Counsel,
for Joon H. Kim, Acting United States Attorney
for the Southern District of New York, New
York, NY.

For Defendant-Appellant:

LUCAS ANDERSON, Rothman, Schneider,
Soloway & Stern, LLP, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Marrero, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Joseph Steele appeals from a judgment entered by the United States District Court for the Southern District of New York, convicting him of one count of unlawful possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). On October 28, 2016, after a four-day trial, the jury returned a guilty verdict. During Steele’s sentencing hearing, the district court “adopt[ed] the factual recitation in the presentence investigation report regarding the criminal history category, offense level, and sentencing range,” J.A. 452, which included findings that Steele had three prior convictions for a violent felony or serious drug offense, thus triggering a fifteen year mandatory minimum sentence pursuant to the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e). On February 10, 2017, the district court entered a judgment of conviction and sentenced Steele principally to 180 months of imprisonment followed by five years of supervised release. This appeal followed. We assume the parties’ familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I. ACCA

The first issue on appeal is whether Steele’s prior New York state conviction for first-degree robbery constitutes a “violent felony” pursuant to the force clause of the ACCA, which defines a “violent felony” as “any crime punishable by imprisonment for a term exceeding one year . . . that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another.” *Stuckey v. United States*, 878 F.3d 62, 68 (2d Cir. 2017) (quoting 18 U.S.C. § 924(e)(2)(B)(i)); *see also* Def.-Appellant Br. 22–23 (focusing appeal on the force clause). After the parties’ briefs were submitted in this appeal, we issued an opinion in

Stuckey v. United States on December 20, 2017 which squarely addresses this issue. *See* 878 F.3d at 68–72. Steele conceded at oral argument that *Stuckey* forecloses his ACCA challenge. Steele was convicted of first-degree robbery pursuant to subsection (4) of N.Y. Penal Law § 160.15, which provides that “[a] person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he . . . [d]isplays what appears to be a . . . firearm.” N.Y. Penal Law § 160.15(4); Def.-Appellant Br. 28 (admitting “the record sufficiently demonstrates that Steele was previously convicted under subsection (4)”). In *Stuckey*, we held that a conviction pursuant to subsection (4) of N.Y. Penal Law § 160.15 constitutes a “violent felony” under 18 U.S.C. § 924(e)(2)(B)(i); accordingly, Steele was properly sentenced under the ACCA. 878 F.3d at 72.

II. Admissibility of the Gunshot Residue Report

Steele next argues that the district court erred in excluding a gunshot residue report prepared by New York Police Department Criminalist Vanessa Martinez. Steele contends that the report should have been admitted into evidence because it qualifies as a public record pursuant to the public record exception to the hearsay rule. Def.-Appellant Br. 32–38 (citing Fed. R. Evid. 803(8)(A)(iii) (referring to “a record or statement of a public office” that “sets out . . . against the government in a criminal case, factual findings from a legally authorized investigation”)). According to Steele, the gunshot residue report should have been admitted “regardless of the availability of the declarant [Martinez]” and the government failed to “show that the source of information or other circumstances indicate a lack of trustworthiness.” *Id.* (citing cases discussing Fed. R. Evid. 803(8)(B) (emphases omitted)).

A trial court’s evidentiary rulings are accorded deference. We will reverse only if we find an abuse of discretion, which occurs when we find that “the challenged evidentiary rulings were ‘arbitrary and irrational.’” *United States v. Quinones*, 511 F.3d 289, 307–08 (2d Cir.

2007) (quoting *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001)); *see also United States v. Garcia*, 291 F.3d 127, 136 (2d Cir. 2002). There was no such abuse of discretion here. Assuming arguendo that we agree with Steele that the report fell within the public record exception to the hearsay rule, we conclude that it was reasonable for the district court to determine, as it did, that admitting the report by itself would be misleading, and to exclude the report pursuant to Federal Rule of Evidence 403. *See* Fed. R. Evid. 403; *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167–68 (1988) (noting, in discussing public records exception, that “safeguards built into other portions of the Federal Rules, such as those dealing with relevance and prejudice, provide the court with additional means of scrutinizing and, where appropriate, excluding evaluative reports or portions of them”); *see also* J.A. 65–66 (in opposing Steele’s motion to offer into evidence the gunshot residue report, the government argued that the report was inadmissible pursuant to Rule 403). Although the district court did not specifically cite Rule 403 in its analysis, “[w]e do not require a district court ‘to articulate the relevant considerations on the record,’ and we ordinarily assume that such due consideration was given.” *United States v. Morgan*, 786 F.3d 227, 232 (2d Cir. 2015) (citation omitted); *see also United States v. Oberoi*, 547 F.3d 436, 455 (2d Cir. 2008) (observing “the decision ‘must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason’” (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (internal quotation marks omitted))), *judgment vacated on other grounds*, 559 U.S. 999 (2010). The district court was thus well within its discretion, and certainly did not “act[] arbitrarily and irrationally,” *Garcia*, 291 F.3d at 136, in excluding the gunshot residue report because its “probative value [was] substantially outweighed by a danger of . . . misleading the jury.” Fed. R. Evid. 403.

III. Improper Remarks on Summation

Finally, Steele argues that the government encouraged the jury to predetermine Steele's guilt before deliberations and improperly vouched for one of its witnesses on summation. Specifically, Steele challenges the following two statements made by the government:

- 1) “[S]ince you have been paying . . . attention, you already know what the evidence shows: Joseph Steele is guilty as charged.” J.A. 328.
- 2) “[Betancourt] has no motive to lie . . . he’s a good citizen and he did what we hope all good citizens do when they see that kind of danger on the street And I think after listening to that 911 call, you know he testified to you truthfully.” *Id.* at 331–32.

To warrant reversal of a conviction, an improper remark by a prosecutor must “cause[] the defendant substantial prejudice so infecting the trial with unfairness as to make the resulting conviction a denial of due process.” *United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005) (quoting *United States v. Shareef*, 190 F.3d 71, 78 (2d Cir. 1999)). And where, as here, Steele “did not object to the [government’s] remarks at trial, reversal is warranted only [if] the remarks amounted to a ‘flagrant abuse.’” *United States v. Germosen*, 139 F.3d 120, 128 (2d Cir. 1998) (quoting *United States v. Araujo*, 79 F.3d 7, 9 (2d Cir. 1996)).

Steele argues that the first challenged remark undermined the presumption of innocence by urging the jury to predetermine Steele’s guilt. This argument is unconvincing. The full context of this first remark consists of repeated reminders to the jury to look to “what the evidence shows.” J.A. 328 (“Now, ladies and gentlemen, you have seen and heard the evidence. I know you have been paying close attention. And since you have been paying close attention, you already know what the evidence shows: Joseph Steele is guilty as charged.”). Therefore, “[v]iewed in context, we doubt[] that the prosecutor’s statement would have been viewed by the jury as more

than an exhortation to find [the defendant] guilty based on the evidence.” *United States v. Perez*, 144 F.3d 204, 210 (2d Cir. 1998) (internal quotation marks omitted); *see also United States v. Miller*, 116 F.3d 641, 683 (2d Cir. 1997) (“We doubt that the statement that [defendants] were ‘guilty on all counts’ would have been viewed by the jury as more than an exhortation to find them guilty based on the evidence.”).

Steele’s argument that the second challenged remark constituted improper vouching is also unconvincing. Again, the full context for the government’s remark begins with the government directing the jury to consider the evidence: “I am going to talk about each . . . piece[] of evidence and how they support one another for the next few minutes. Let’s start with the 911 caller.” J.A. 330. The government then proceeded to describe the 911 caller’s testimony, play excerpts from the 911 call, and describe what that 911 call shows. *Id.* at 330–31. Only after reminding the jury of the evidence in the record did the government make the statement at issue here, which is reproduced with more context as follows:

So that’s what he told the 911 operator at the time. And then he came to court on Monday and he testified in front of all of you. Now, look, did he want to be here? No. I think we can all understand that. He doesn’t know the defendant. He was in the wrong place at the wrong time, and there is nothing in this for him. He has no motive to lie. But he’s a good citizen and he did what we hope all good citizens do when they see that kind of danger on the street: He called 911 because he thought someone was going to get hurt, and then he came here and he answered my questions. He answered [defense counsel’s] questions. And I think after listening to that 911 call, you know he testified to you truthfully. He was consistent. The 911 caller testified totally consistently with what he had said and what he had told that 911 operator a year ago

J.A. 331–32. This excerpt shows that the jury was still being urged to “decide this case based on the evidence” by considering whether the 911 caller had a motive to lie, and by drawing attention to how the 911 caller’s trial testimony was consistent with the information he gave during the 911 call. *Miller*, 116 F.3d at 683; *see also United States v. Spinelli*, 551 F.3d 159,

169 (2d Cir. 2008) (“The prosecutor is of course entitled to argue forcefully and vigorously to the jury in support of her witness’s credibility. But the argument must be based on evidence in the record.”). “In a particular context . . . what might superficially appear to be improper vouching for witness credibility may turn out on closer examination to be permissible reference to the evidence in the case.” *Perez*, 144 F.3d at 210. That is precisely what happened here. The government’s comments did not rise to the level of “flagrant abuse,” *Germosen*, 139 F.3d at 128, nor did they cause Steele to suffer “substantial prejudice,” *Carr*, 424 F.3d at 227.

* * *

We have considered Steele’s remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the District Court.

FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk

**APPENDIX B – ORDER DENYING PETITION FOR PANEL REHEARING,
DATED APRIL 24, 2018**

Case 17-464, Document 80, 04/24/2018, 2287132, Page 1 of 1

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of April, two thousand and eighteen,

Before: Amalya L. Kearse,
Guido Calabresi,
Debra Ann Livingston,

Circuit Judges.

United States of America,
Appellee,

v.

Joseph Steele,
Defendant - Appellant.

ORDER
Docket No. 17-464

Appellant Joseph Steele having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

Catherine O'Hagan Wolfe



**APPENDIX C – JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED FEBRUARY 10, 2017**

Case 1:15-cr-00836-VM Document 75 Filed 02/10/17 Page 1 of 11

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of New York

| | | |
|--------------------------|---|-----------------------------|
| UNITED STATES OF AMERICA |) | JUDGMENT IN A CRIMINAL CASE |
| v. |) | |
| JOSEPH STEELE |) | Case Number: 15 CR 836 |
| |) | USM Number: 73353-054 |
| |) | Nathaniel Marmur |
| |) | Defendant's Attorney |

THE DEFENDANT:

pleaded guilty to count(s) _____

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) One indictment S1 16 CR 584 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|----------------------------|---------------------------------|----------------------|--------------|
| 18 U.S.C. § 922(g)(1) | Felon in Possession of a Weapon | 10/10/2015 | 1 |

The defendant is sentenced as provided in pages 2 through 11 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) Two is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

| |
|----------------------------|
| USDC SDNY |
| DOCUMENT |
| ELECTRONICALLY FILED |
| DOC #: <u>4/10/17</u> |
| DATE FILED: <u>4/10/17</u> |

2/3/2017
Date of Imposition of Judgment

Signature of Judge

Hon. Victor Marrero, U.S.D.J.
Name and Title of Judge

2/10/2017
Date

DEFENDANT: JOSEPH STEELE
CASE NUMBER: 15 CR 836

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

One hundred eighty (180) months

The court makes the following recommendations to the Bureau of Prisons:

Court recommends that Defendant be designated to Fort Dix or other facility in Pennsylvania.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.
 as notified by the United States Marshal.

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

before 2 p.m. on _____.
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOSEPH STEELE
CASE NUMBER: 15 CR 836

ADDITIONAL IMPRISONMENT TERMS

DEFENDANT: JOSEPH STEELE
CASE NUMBER: 15 CR 836

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Five (5) years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: JOSEPH STEELE
CASE NUMBER: 15 CR 836

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature

Date

DEFENDANT: JOSEPH STEELE
CASE NUMBER: 15 CR 836

SPECIAL CONDITIONS OF SUPERVISION

- (1) The defendant shall submit his/her person, residence, place of business, vehicle, and any property or electronic devices under his control to a search on the basis that the probation officer has reasonable suspicion that contraband or evidence of a violation of the conditions of the defendant's probation/supervised release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.
- (2) The defendant shall participate in an outpatient mental health treatment program approved by the United States Probation Office. The defendant shall continue to take any prescribed medications unless otherwise instructed by the health care provider. The defendant shall contribute to the cost of services rendered based on the defendant's ability to pay and the availability of third-party payments. The Court authorizes the release of available psychological and psychiatric evaluations and reports, including the presentence investigation report, to the health care provider.
- (3) The defendant is to report to the nearest Probation Office within 72 hours of release from custody.
- (4) The defendant is to be supervised by the district of residence.

DEFENDANT: JOSEPH STEELE
CASE NUMBER: 15 CR 836

PROBATION

You are hereby sentenced to probation for a term of :

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. You must participate in an approved program for domestic violence. *(check if applicable)*
7. You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. *(check if applicable)*
8. You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.
9. If this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment.
10. You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

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

DEFENDANT: JOSEPH STEELE
CASE NUMBER: 15 CR 836

STANDARD CONDITIONS OF SUPERVISION

As part of your probation, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of the time you were sentenced, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature

Date

DEFENDANT: JOSEPH STEELE
 CASE NUMBER: 15 CR 836

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| <u>Assessment</u> | <u>JVTA Assessment*</u> | <u>Fine</u> | <u>Restitution</u> |
|-------------------------|-------------------------|-------------|--------------------|
| TOTALS \$ 100.00 | \$ | \$ | \$ |

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

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

| <u>Name of Payee</u> | <u>Total Loss**</u> | <u>Restitution Ordered</u> | <u>Priority or Percentage</u> |
|----------------------|---------------------|----------------------------|-------------------------------|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| TOTALS | \$ 0.00 | \$ 0.00 | |

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

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

DEFENDANT: JOSEPH STEELE
CASE NUMBER: 15 CR 836**SCHEDULE OF PAYMENTS**

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

A Lump sum payment of \$ 100.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

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

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

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

F Special instructions regarding the payment of criminal monetary penalties:

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

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

Joint and Several

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

The defendant shall pay the cost of prosecution.

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

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

DEFENDANT: JOSEPH STEELE
CASE NUMBER: 15 CR 836

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be:

ineligible for all federal benefits for a period of _____
 ineligible for the following federal benefits for a period of _____
(specify benefit(s))

OR

Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 862(b)

IT IS ORDERED that the defendant shall:

be ineligible for all federal benefits for a period of _____
 be ineligible for the following federal benefits for a period of _____
(specify benefit(s))

successfully complete a drug testing and treatment program.
 perform community service, as specified in the probation and supervised release portion of this judgment.
 Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

Pursuant to 21 U.S.C. § 862(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility. The clerk of court is responsible for sending a copy of this page and the first page of this judgment to:

**APPENDIX D – EXCERPTS FROM THE SENTENCING PROCEEDINGS
HELD BEFORE THE HONORABLE VICTOR MARRERO ON FEBRUARY 3, 2017**

H23WsteS

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 UNITED STATES OF AMERICA,

4 v. 15 Cr. 836 (VM)

JOSEPH STEELE

Defendant

Sentence

New York, N.Y.
February 3, 2017
3:00 p.m.

Before:

HON. VICTOR MARRERO,

District Judge

APPEARANCES

PREET BHARARA

United States Attorney for the
Southern District of New York

JILAN J. KAMAL

Assistant United States Attorney

NATHANIEL MARMUR

Attorney for Defendant

H23WsteS

1 have been a reference, to more than one firing of the weapon,
2 and I believe the evidence showed that there was just one
3 discharge. To the extent that the report has more than one, I
4 believe that should be corrected, and I'll see if I can
5 identify exactly where that was.

6 THE COURT: The Court will direct that those
7 corrections be made as well.

8 Mr. Marmur, do you have any additional comments in
9 connection with sentencing?

10 MR. MARMUR: I apologize. I did just locate it. It
11 was in that same paragraph, under justification, the fourth
12 line down. It says he shot a handgun several times, and I
13 think all the parties would agree that the evidence at trial
14 showed a single discharge.

15 THE COURT: All right.

16 MR. MARMUR: I do have a few brief comments for your
17 Honor. First of all, I want to apologize again with respect to
18 the lateness of the letter I filed today. I wanted to make
19 sure, given some of the confusion in the law, that we had fully
20 preserved Mr. Steele's rights with respect to the ACCA charge,
21 and so rather than just stating it orally, I thought it best if
22 I at least put it down on paper.

23 THE COURT: All right. Why don't we turn to that,
24 Mr. Marmur. The issues you raise conceivably might have an
25 impact on the sentence here. As you point out, the law in this

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1 area is in confusion, to say the least.

2 MR. MARMUR: It is.

3 THE COURT: There are cases pending in the Second
4 Circuit that may shed some light and there are cases pending in
5 the Supreme Court, as you indicate, that also may shed light or
6 perhaps confuse it even more. The question is, however, to the
7 extent you're raising an issue that conceivably might be
8 clarified by any of these appellate decisions, is it prudent to
9 proceed with sentencing or more prudent to wait until those
10 matters are better clarified?

11 MR. MARMUR: That's a good question, your Honor.
12 Originally, the government and I had discussed the possibility
13 of adjourning sentence until after the Beckles case was decided
14 by the Supreme Court. Mr. Steele has been in pretrial lock-up
15 now for more than 16 months, and obviously we're not sure when
16 the Supreme Court will decide the Beckles case. I thought, and
17 I don't want to speak for the government, correctly or
18 incorrectly, that we should go ahead and get Mr. Steele
19 sentenced so he can get to a facility where he can engage in
20 programs and get settled. I appreciate that by raising the
21 issue I put the Court in a position that it has to decide the
22 issue. I also recognize that this particular issue can deserve
23 quite a bit of attention, and I'm not sure at the end of the
24 day that substantial briefing would shed more light on it than
25 we have right now.

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1 THE COURT: I would not encourage any briefing at this
2 stage in this court, at this time.

3 MR. MARMUR: My sense was all of that would be
4 somewhat a fool's errand given that the Supreme Court is soon
5 to decide it. What I thought at least was that as long as we
6 make sure that we preserve his rights, we don't waive anything
7 with respect to his ability to challenge the ACCA on appeal or
8 potentially collaterally, if necessary, that it made sense to
9 go ahead with the sentencing. If the law comes out against the
10 defense, then so be it; the issue will have gone away. If it
11 comes out in favor of the defense, if there's argument there,
12 our position would be we've preserved our right to be able to
13 litigate it.

14 The government can certainly speak for itself as to
15 what position they will take, but I think generally their
16 position has been that if things change in that regard, the
17 defendant should be entitled to at least try to obtain the
18 benefit of the change in law. Right now the law -- and I don't
19 want to mischaracterize it, there are aspects of it that have
20 been beneficial to the defense; I'm not quite sure that our
21 specific situation fits into what the prevailing law is with
22 respect to New York robbery, in particular the fourth
23 subsection of that which involves a gun, but there have been
24 some very good arguments, and I cited to the Court the Stuckey
25 case before Judge Oetken.

H23WsteS

1 THE COURT: Judge Oetken, yes.

2 MR. MARMUR: And he rejected it, so I wanted to be
3 forthright with the Court that I'm not citing a case where the
4 defense has prevailed, but I think even he recognized it was an
5 interesting issue that was created. I guess it's a long-winded
6 way of saying I think it's in Mr. Steele's best interest to go
7 forward with the sentencing at this time so long as we haven't
8 waived our rights going forward, and that was the purpose of
9 the letter today, just to make absolutely sure of that. Again,
10 I wish I had put it in earlier so that the Court would have
11 more time to reflect on it, but I wanted to make sure that I
12 hadn't overlooked anything.

13 THE COURT: All right. Thank you.

14 Ms. Kamal, does the government have any views on this
15 matter?

16 MS. KAMAL: Just very briefly, your Honor. To be
17 clear, the shifting sands around the definition of crimes of
18 violence have affected how robbery in the first degree, which
19 is one of the defendant's predicate offenses, have been handled
20 in this circuit for the purposes of ACCA designation and for
21 career offender designation. That conversation with defense
22 counsel, both Mr. Marmur and his predecessor, Mr. Marvinny,
23 have been ongoing since the beginning. It has been the
24 government's position from the outset, from the Jones case,
25 which was issued by the Second Circuit but then vacated, and

H23WsteS

1 now through the pending Beckles case before the Supreme Court,
2 that "robbery in the first degree/displays a firearm" is in
3 fact a qualifying crime of violence for the purpose of ACCA.

4 The government does also recognize that the law is
5 actively changing and actively under consideration, so to the
6 extent that Mr. Marmur's letter has come late in the day, the
7 government has certainly not been sandbagged in any way by
8 this, and other defendants who have already been sentenced
9 under ACCA, under what may have been now disqualified
10 definitions of crime of violence, have had their opportunity to
11 litigate that. At this point, the government reaffirms its
12 position that "robbery in the first degree/displays what
13 appears to be a firearm" is a qualifying ACCA predicate, but we
14 also recognize the defense's position, that if there were a
15 change in the law that could be beneficial to the defense, if
16 he wishes to preserve the issue for appeal, we certainly would
17 not try to obstruct that.

18 THE COURT: Thank you.

19 Mr. Steele, please rise. Is there anything you would
20 like to say on your own behalf before the Court imposes
21 sentence?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: You may.

24 THE DEFENDANT: First of all, I want to bring to your
25 attention, your Honor, that since my release in 2002, I worked

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1 time in prison. I think probation recognizes fairly that 15
2 years is a very long sentence, and in light of all the factors
3 here, it is enough. He will be in his mid-50s when he's
4 released, and my guess is by then he will have achieved many
5 positive things in jail and will come out as somebody who is
6 very unlikely to recidivate at that age.

7 We would ask the Court to impose the mandatory minimum
8 sentence. Thank you.

9 THE COURT: Thank you.

10 In accordance with the decision by the United States
11 Supreme Court in United States v. Booker, while the United
12 States Sentencing Guidelines are not mandatory, the Court
13 nonetheless "must consult those guidelines and take them into
14 account when sentencing." Therefore, the Court has considered
15 the findings of fact stated in the presentence investigation
16 report as well as the guidelines analysis and the
17 recommendations contained therein. The Court has weighed this
18 information along with the factors listed in 18 U.S.C. 3553(a)
19 in coming to its final sentencing decision in this case.

20 The Court adopts the factual recitation in the
21 presentence investigation report regarding the criminal history
22 category, offense level, and sentencing range. Therefore, the
23 Court finds that under the guidelines Mr. Steele's offense
24 level amounts to 33 and his criminal history category falls
25 into category VI. The guidelines range of imprisonment for

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1 that offense level and criminal history category is 235 to 293
2 months.

3 Mr. Steele was found guilty after trial of one count
4 of being a felon in possession of a weapon. The probation
5 office has recommended the Court impose a sentence of 180
6 months. Subsection (a)(1) of 18 U.S.C. Section 3553 requires
7 that courts take into consideration "the nature and
8 circumstances of the offense and the history and
9 characteristics of the defendant." Subsection (a)(2) of 18
10 U.S.C. section 3553 requires that the Court consider the need
11 for the sentence to promote certain objectives of the criminal
12 justice system; namely, punishment, specific and general
13 deterrence, and rehabilitation. Pursuant to Section
14 3553(a)(6), the Court is also directed to consider the need to
15 avoid unwarranted sentencing disparities among defendants with
16 similar records and similar offenses in other cases, as well as
17 in connection with the case at hand.

18 Mr. Steele, please rise. Taking into account the
19 nature and circumstances of the offense and the history and
20 characteristics of the defendant, and considering all of the
21 factors listed in 18 U.S.C. Section 3553, the Court finds that
22 a sentence of 180 months is reasonable and appropriate, in that
23 such a term is "sufficient, but not greater than necessary" to
24 promote the proper objectives of sentencing.

25 Upon your release from imprisonment, you shall be

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1 placed on supervised release for a term of five years.

2 I will not impose a fine because the Court has
3 determined that you do not have the ability to pay such a fine.
4 However, you are ordered to pay to the United States a special
5 assessment of \$100, which shall be due immediately.

6 Ms. Kamal, is there forfeiture in this case?

7 MS. KAMAL: There is not, your Honor.

8 THE COURT: Mr. Steele, you must comply with standard
9 conditions 1 through 13 of supervised release and the following
10 mandatory conditions: You shall not commit another federal,
11 state, or local crime; you shall not illegally possess a
12 controlled substance; you shall not possess a firearm or
13 destructive device; you shall refrain from unlawful use of any
14 controlled substance; you shall submit to one drug testing
15 within 15 days of placement on probation or supervised release
16 and at least two unscheduled drug tests thereafter, as directed
17 by the probation officer.

18 You shall cooperate in the collection of DNA, as
19 directed by the probation officer.

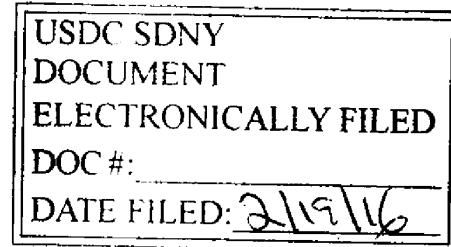
20 In addition, you shall obey the following special
21 conditions: You shall submit your person, residence, place of
22 business, vehicle, or any other property or electronic devices
23 under your control to search on the basis that the probation
24 officer has reasonable suspicion that contraband or other
25 evidence of a violation of the conditions of supervised release

APPENDIX E – INDICTMENT, FILED FEBRUARY 19, 2016

Case 1:15-cr-00836-VM Document 15 Filed 02/19/16 Page 1 of 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA : INDICTMENT
:
- v. - : S1 15 Cr. 836 (VM)
:
:
JOSEPH STEELE, :
a/k/a "Joseph M. Steele," :
a/k/a "Joseph Maurice Steele," :
a/k/a "Joshua Steele," :
:
Defendant. :
----- x

COUNT ONE

(Felon in Possession)

The Grand Jury charges:

1. On or about October 10, 2015, in the Southern District of New York and elsewhere, JOSEPH STEELE, the defendant, after having been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, to wit, a conviction on or about January 13, 1998, in Bronx County Supreme Court, of robbery in the first degree, and having had three convictions for three violent felonies or serious drug offenses, all of which were committed on occasions different from one another, namely, (i) the conviction on or about January 13, 1998, in Bronx County Supreme Court, of robbery in the first degree, a class B felony; (ii) a conviction on or about March 9, 1994, in York County Court of Common Pleas, York, Pennsylvania, of

possession with intent to deliver a controlled substance; (iii) a conviction on or about February 5, 2010, in York County Court of Common Pleas, York, Pennsylvania, of possession with intent to manufacture or deliver a controlled substance; knowingly did possess in and affecting commerce a firearm, to wit, a .380 caliber Imez pistol, Model IJ70-17A, which had previously been shipped and transported in interstate and foreign commerce.

(Title 18, United States Code, Sections 922(g)(1), 924(e), and 2.)



FOREPERSON



PREET BHARARA
United States Attorney

Form No. USA-33s-274 (Ed. 9-25-58)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JOSEPH STEELE,
a/k/a "Joseph M. Steele,"
a/k/a "Joseph Maurice Steele,"
a/k/a "Joshua Steele,"

Defendant.

INDICTMENT

S1 15 Cr. 836 (VM)

(18 U.S.C. §§ 922(g)(1), 924(e), and 2)

PREET BHARARA

United States Attorney


Foreperson

TRUE BILL & INDICTMENT

MJ. ELLIS  2-19-16