No. 22-

IN THE

Supreme Court of the United States

ISIAH DOZIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented for the Supreme Court concern the Constitutional right of a Criminal Defendant to call a witness in his own defense at trial and the elements that must be proven in order to convict an individual of possession of a "prohibited object" under 18 U.S.C. § 1791.

This case presents questions including:

1) Can a Trial Court prohibit a criminal Defendant from calling a witness in his own defense, by weighing the probative value of the expected witness testimony, or is such action an arbitrary exclusion of a witness in violation of the Sixth Amendment and the Supreme Court's Holding in *Rock v. Arkansas*?

   See *Rock v. Arkansas,* 483 U.S. 44, 54–55 (1987).

2) Does a conviction under 18 U.S.C. § 1791 require proof that the Defendant had knowledge that he possessed the "prohibited object" which he was charged with possessing?

LIST OF PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties to the proceedings.

LIST OF PROCEEDINGS

United States District Court (E.D. AR):

United States of America vs.
Isiah Dozier, Jr.,
Case No.: 4:18-cr-00603-BSM-1
(Judgment entered October 2, 2020).

United States Court of Appeals (Eighth Circuit):

United States of America v. Isiah Dozier
Case No. 20-3322
(Judgment entered April 13, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reproduced at Appendix A, at pages 1a through 12a, and cited in the Federal Reporter as 31 F.4th 624. Relevant trial transcript excerpts from the trial before the United States District Court are reproduced at pages 13a through 18a, at Appendix B. The District Court's pretrial ruling on the presentation of defense witness testimony is found at Appendix C, see pages 19a through 20a.

BASIS FOR JURISDICTION

The Petitioner was convicted after a trial by Jury of three (3) violations of 18 U.S.C. §1791(a)(2), possessing contraband in prison. The Honorable Brian Stacy Miller, United States District Judge for the Eastern District of Arkansas, presided at the Jury Trial and sentencing. The government invoked the jurisdiction of the District Court pursuant to 18 U.S.C. §3231. The District Court clerk entered judgment on the docket on October 2, 2020. Mr. Dozier timely filed a notice of appeal to the Eighth Circuit Court of Appeals on October 5, 2020. Mr. Dozier invoked the jurisdiction of the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. §1291. The Order of the Eighth Circuit Court of Appeals was entered on April 13, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISISIONS INVOLVED

The pertinent constitutional and statutory text involved in this case is as follows:

I. The Sixth Amendment to the United States Constitution

The relevant text provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. Amend. VI.

II. 18 U.S.C. 1791- Providing or Possessing Contraband in Prison

The relevant text follows:

(a) Offense.--Whoever--

> **(1)** in violation of a statute or a rule or order issued under a statute, provides to an inmate of a prison a prohibited object, or attempts to do so; or
>
> **(2)** being an inmate of a prison, makes, possesses, or obtains, or attempts to make or obtain, a prohibited object; shall be punished as provided in subsection (b) of this section.

(b) Punishment.--The punishment for an offense under this section is a fine under this title or--

(1) imprisonment for not more than 20 years, or both, if the object is specified in subsection (d)(1)(C) of this section;

(2) imprisonment for not more than 10 years, or both, if the object is specified in subsection (d)(1)(A) of this section;

(3) imprisonment for not more than 5 years, or both, if the object is specified in subsection (d)(1)(B) of this section;

(4) imprisonment for not more than one year, or both, if the object is specified in subsection (d)(1)(D), (d)(1)(E), or (d)(1)(F) of this section; and

(5) imprisonment for not more than 6 months, or both, if the object is specified in subsection (d)(1)(G) of this section.

(c) Consecutive punishment required in certain cases.--Any punishment imposed under subsection (b) for a violation of this section involving a controlled substance shall be consecutive to any other sentence imposed by any court for an offense involving such a controlled substance. Any punishment imposed under subsection (b) for a violation of this section by an inmate of a prison shall be consecutive to the sentence being served by such inmate at the time the inmate commits such violation.

(d) Definitions.--As used in this section--

(1) the term "prohibited object" means--

(A) a firearm or destructive device or a controlled substance in schedule I or II, other than marijuana or a controlled substance referred to in subparagraph (C) of this subsection;

(B) marijuana or a controlled substance in schedule III, other than a controlled substance referred to in subparagraph (C) of this subsection, ammunition, a weapon (other than a firearm or destructive device), or an object that is designed or intended to be used as a weapon or to facilitate escape from a prison;

(C) a narcotic drug, methamphetamine, its salts, isomers, and salts of its isomers, lysergic acid diethylamide, or phencyclidine;

(D) a controlled substance (other than a controlled substance referred to in subparagraph (A), (B), or (C) of this subsection) or an alcoholic beverage;

(E) any United States or foreign currency;

(F) a phone or other device used by a user of commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d))) in connection with such service; and

> **(G)** any other object that threatens the order, discipline, or security of a prison, or the life, health, or safety of an individual;
>
> **(2)** the terms "ammunition", "firearm", and "destructive device" have, respectively, the meanings given those terms in section 921 of this title;
>
> **(3)** the terms "controlled substance" and "narcotic drug" have, respectively, the meanings given those terms in section 102 of the Controlled Substances Act (21 U.S.C. 802); and
>
> **(4)** the term "prison" means a Federal correctional, detention, or penal facility or any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General.

STATEMENT OF THE CASE

This is a case where Isiah Dozier was indicted for possession of contraband in prison. ECF Doc. No. 1. Petitioner Dozier was denied the right to call a subpoenaed witness in his own defense at trial, and the Trial Court refused to give the Eighth Circuit Model Jury Instruction as to the offenses charged. The Petitioner, Isiah Dozier, asserts that the Trial Court's refusal to allow him to present witness testimony in his defense was a violation of the Sixth Amendment to the United States Constitution and that the Trial Court's instructions as to the elements of the offense were erroneous. Certiorari is appropriate

as the Eighth Circuit's decision affirming the denial of Petitioner's right to compel testimony in his own defense not only violates the plain text of the Sixth Amendment but also contradicts this Court's holding in *Rock v. Arkansas. Rock v. Arkansas,* 483 U.S. 44, 54–55 (1987). Certiorari is also appropriate as the Eighth Circuit Court of Appeals has now affirmed an incorrect instruction as to the proof required to sustain a conviction of possession of a "prohibited object" in prison. Petitioner Isiah Dozier, Jr., referred to in the trial transcript as Isiah Dozier II, was specifically charged with possession contraband prohibited by Federal Statute- methamphetamine, marijuana, and a cellular telephone. At trial, Isiah Dozier was convicted of three counts of possessing contraband in prison, specifically possession of methamphetamine, marijuana, and a cellular telephone.

REASONS FOR ALLOWANCE OF THE WRIT

Certiorari is appropriate under Rule 10 of the Supreme Court Rules as the Eighth Circuit Court of Appeals has, in this case, decided an important question of federal law in a way that conflicts with relevant decisions of the United States Supreme Court. The Eighth Circuit's decision that a criminal defendant's Sixth Amendment right to call a witness in his own defense may be "Outweighed" by Rule 403 concerns flies in the face of this Court's holdings in *Rock v. Arkansas* and *Chambers v. Mississippi.* Certiorari is similarly appropriate as to the Eighth Circuit's ruling concerning the *mens rea* requirements for a conviction under 18 U.S.C. § 1791(a)(2). The Eighth Circuit's holding in this case that the Government does not have to prove that a Defendant "knowingly" possessed the object he was accused of possessing, for a conviction

under 18 U.S.C. § 1791(a)(2), contradicts this Court's Ruling in *Apprendi v. New Jersey* which held that facts which increase the maximum penalty for a crime must be proven beyond a reasonable doubt. The specific "prohibited object" possessed by an inmate has direct bearing on the maximum penalty for an offense under 18 U.S.C. § 1791(a)(2). For that reason, this Court should make clear that the government bears the burden of proving beyond a reasonable doubt that the Defendant possessed a specific "prohibited object" as defined at 18 U.S.C. § 1791(d), to sustain a conviction of "possessing contraband in prison" under this statutory provision.

I. A Trial Court Cannot Bar a Criminal Defendant from Calling a Witness in his Own Defense Solely Because the Court Finds That the Probative Value of the Expected Witness Testimony is Outweighed by the Risk of Jury Confusion or the Presentation of Cumulative Evidence.

This is a case where the Court of Appeals affirmed a trial court ruling that a criminal defendant, Isiah Dozier, could not call a witness in his defense because the trial court determined that none of the testimony offered by Petitioner Dozier was admissible, under Rule 403 of the Federal Rules of Evidence. There was no finding that the testimony was not relevant. There was no consideration of this Defendant's Sixth Amendment right to call a witness in his own defense. Even more troublesome to defense counsel was the fact that Rule 403 requires a "balancing" of the probative value of anticipated testimony. This is an undefined and arbitrary standard by which to deny a criminal defendant the right to present testimony in his own defense. The application of the Eighth Circuit's

holding in this case serves to deny a criminal defendant his constitutional right to compel testimony in his defense, an arbitrary act in violation of the Sixth Amendment to our Constitution.

In the case now before the Court, the trial Court held that the proposed testimony was inadmissible under Federal Rule of Evidence Rule 403 which permits a district court to exclude relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." The Court of Appeals agreed with the trial court that the probative value of the expected testimony was substantially outweighed by the danger that the testimony would be unfairly prejudicial, that it might mislead the jury, and that there was a danger such testimony would result in the needless presentation of cumulative evidence. Neither the trial court nor the Court of Appeals gave much attention, in their opinions, to the Sixth Amendment of the United States Constitution which provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. Amend. VI.

Nevertheless, the Supreme Court of the United States has repeatedly written that "few rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor v. Illinois,* 484 U.S. 400, 408 (1987). "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi,* 93 S.Ct. 1038 (1973). The question now presented is whether this fundamental right can be denied

a criminal defendant simply because the trial court finds that the probative value of anticipated testimony could be outweighed by the risk of jury confusion or the needless presentation of cumulative evidence. Is the risk of jury confusion a sufficient and legitimate basis upon which to deny a "fundamental" right?

The Opinion appealed from in this case appears to contradict this Court's decision in *Rock v. Arkansas* where it was held that evidentiary restrictions on a Defendant's Sixth Amendment right to introduce testimony on his own behalf "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock v. Arkansas,* 483 U.S. 44, 55–56 (1987). In *Rock v. Arkansas*, this Court held that an evidentiary rule barring certain hypnotically refreshed testimony was in fact an infringement of a Defendant's Fourteenth, Fifth, and Sixth Amendment rights. The Supreme Court appears to have made clear, in *Rock,* that "when a state rule of evidence conflicts with the right to present witnesses, the rule may "not be applied mechanistically to defeat the ends of justice," *Rock v. Arkansas*, 483 U.S. 44, 55 (1987). This Court noted that a State similarly "may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand." Id. In the present case, the Eighth Circuit Court of Appeals has affirmed a district court's use of Federal Rule of Evidence Rule 403 to bar a defendant's right to compel testimony in his own defense. This opinion is a dangerous limitation on a Defendant's Sixth Amendment right to present a witness in his own defense. The decision is an uncertain precedent, as the application of Rule 403 follows no bright-line test. Rule 403 by its very wording requires an individual balancing or weighing of the value of testimony by the Trial Court.

In *Chambers v. Mississippi,* this Court also found error in the application of an evidentiary rule that served to bar a criminal defendant from cross-examining a witness. *Chambers v. Mississippi,* 93 S.Ct. 1038 (1973). In Chambers, the Court wrote that the right of a defendant to confront and cross-examine witnesses was not absolute but cautioned that "its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." Id. citing *Berger v. California*, 393 U.S. 314, 315 (1969).

In the case of *United States of America v. Isiah Dozier,* Defense Counsel proffered the testimony that it intended to offer through witness Tracy Holst as testimony including but not limited to "the investigation of the possession allegations against my client" and Mr. Holst's determination that "the evidence does not support the charge of possession of narcotics."[1] What legitimate judicial interest is served by disallowing a criminal defendant to present such testimony? This proffered testimony was clearly relevant to the central issue of the case and the exclusion of this witness' testimony was in error and violated Isiah Dozier's constitutional right to put on witnesses in his defense. The District Court's exclusion of Mr. Holst's testimony served no legitimate interest of the Court and was, in fact, constitutional error.

In the present case, the government put on witness testimony which was based on government witnesses' interpretation of video footage taken at the Federal Correctional Institution at Forrest City, where the

1. ECF Doc. No. 88, see page 388, lines 15-18.

Petitioner Dozier was an inmate.[2] These witnesses, who were employees of the Federal Bureau of Prisons (BOP), testified that, from their review of camera footage, the Petitioner Dozier was in possession of contraband items. Counsel for the Defendant, at trial, argued that the videos demonstrated no such detail. To provide an independent evidentiary basis for this defense, Petitioner's Counsel attempted to call BOP employee Tracy Holst as a witness in support of Dozier's defense. The District Court refused to allow this testimony based on Rule 403 of the Federal Rules of Evidence.

The Petitioner sought to present testimony from Tracy Holst regarding Mr. Holst's investigation of the facts alleged by the government in the relevant indictment. Isiah Dozier attempted to call this fact witness with personal knowledge of the Bureau of Prisons investigation into him. This fact witness also made the decision not to sanction or discipline Mr. Dozier. Consequently, his testimony was not based on hearsay or opinion. Instead, it is based on his personal action and involvement in the Bureau of Prisons administrative investigation of this Petitioner.

The Court of Appeals, below, held that the potential for jury confusion and cumulative evidence provided legitimate, competing interests which served to make the denial of Petitioner's constitutional right to present witness testimony in his own defense permissible. The Court of Appeals overlooks the fact that this was not a

2. See testimony of William Wright at ECF Doc. No. 87, testimony of Jeremy Lloyd at ECF Doc. No. 88, and testimony of Byron Flint at ECF Doc. No. 88.

complex or lengthy trial. It is a case involving possession of contraband in prison. Fairness requires that both sides of this case be allowed to present testimony. The Petitioner did not seek to introduce unreliable evidence and there was no finding by the trial court that such evidence could be considered unreliable. Instead, both the trial court and the Court of Appeals suggest that the Petitioner could have put on his proposed testimony through other means. The trial court and the Court of Appeals, of course, failed to identify exactly what other individual Petitioner could have called to present this testimony. The Courts below also fail to accept the fact that "in modern criminal trials, defendants are rarely able to select their witnesses: they must take them where they find them." *Chambers v. Mississippi,* 93 S.Ct. 1038, 1046 (1973).

More importantly, the analysis of the both the trial court and the Court of Appeals in this case failed to consider the issue of the Defendant's *right* to introduce a witness in his own defense. The First Circuit Court of Appeals summarized the law clearly when it wrote that "once a sixth amendment right is implicated, the state must offer a sufficiently compelling purpose to justify the practice. Various state evidentiary rules which advanced legitimate state interests have bowed to the defendant's right to let the jury hear relevant evidence." *Pettijohn v. Hall*, 599 F.2d 476, 481 (1st Cir. 1979). None of the goals of Federal Rule of Evidence 403 justifies the infringement of Isiah Dozier's right of compulsory process to call a witness in his own defense. There was no "compelling purpose" to justify the denial of Isiah Dozier's Sixth Amendment right to call a witness in his own defense. For these reasons, reversal of the Eighth Circuit Court of Appeals is appropriate on this issue.

II. A Conviction Under 18 U.S.C. § 1791 requires proof that the Defendant had knowledge that he possessed the "prohibited object" which he was charged with possessing.

In this same case, the Eight Circuit Court of Appeals also held that an individual could be convicted of *knowingly* possessing a specific object, in violation of 18 U.S.C. § 1791, even if the individual did not know he possessed the specific object. The Court specifically stated that "an inmate charged under 18 U.S.C. § 1791(a)(2) need not know specifically what prohibited item he has, so long as he knows that he possesses a prohibited object."

The Petitioner contends that the United States District Court erred in refusing to use the model jury instructions and in instructing the jury that the Petitioner Dozier could be convicted of "knowingly" possessing a specific prohibited object, for example methamphetamine, even if Mr. Dozier did not know he was in possession of methamphetamine. The District Court determined, and instructed the Jury, that a Defendant "need not know" what prohibited item the Defendant possessed so long as a Defendant knows he possessed a prohibited item. In the case at hand, the District Court instructed the Jury that Isiah Dozier could be convicted of the crime of possession of a prohibited objects- including methamphetamine – even if the Defendant did "not know what the prohibited object is if he knows he has possession of some prohibited object."[3] The Petitioner believes the District Court instruction and the Eighth Circuit ruling on this issue, below, constitutes legal error as it serves to omit an element of the offense

3. Trial Transcript at Volume II, page 410, lines 17-19.

and extinguish the mens rea requirement which is implied in 18 U.S.C. §1791(a)(2) and envisioned in the Eighth Circuit's Model Jury Instructions.

Per the decision of the United States Supreme Court in *Apprendi vs. New Jersey*, the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment require that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). The specific "prohibited object" possessed by an inmate has direct bearing on the maximum penalty for an offense under 18 U.S.C. § 1791(a)(2). For that reason, there is no genuine dispute that the government must prove beyond a reasonable doubt that the Defendant possessed a specific "prohibited object" as defined at18 U.S.C. § 1791(d), to sustain a conviction of "possessing contraband in prison." The question remains, however, whether the government must prove that a Defendant "knowingly" possessed the specific prohibited object, with which a Defendant has been accused of possessing.

Petitioner Isiah Dozier Jr. was charged under 18 U.S.C. §1791(a)(2) with three different offenses: 1) knowingly possessing a prohibited object to wit: methamphetamine; 2) knowingly possessing a prohibited object to wit: marijuana; and 3) knowingly possessing a prohibited object to wit: a cellular telephone.[4] While these offenses were charged under the same statute, the statute proscribes a different punishment and penalty for each offense. For

4. ECF Doc. No. 1

example, 18 U.S.C. § 1791 provides that the penalty for possession of methamphetamine in prison is punishable by a term of imprisonment of up to twenty (20) years. 18 U.S.C. § 1791(b)(1). The maximum penalty for possession of marijuana in a Federal Prison is imprisonment for not more than five (5) years. 18 U.S.C. § 1791(b)(3). The maximum penalty for possession of a cellular telephone in a Federal Prison is imprisonment for not more than one year. 18 U.S.C. § 1791(b)(4). Clearly, there is a significant difference in the applicable penalty, depending on the item of contraband that an inmate "knowingly" possessed. If an inmate is convicted of knowingly possessing a cell phone, he is looking at a potential one-year sentence. On the other hand, a conviction for the "knowing" possession of methamphetamine can result in a twenty (20) year term of imprisonment.

When instructing the Jury as to Count 1 of the Indictment, the Court noted that Count 1 (possession of a prohibited object-methamphetamine) had three elements including an element that required the jury to find "Isiah Dozier II knowingly possessed methamphetamine."[5] However, after listing the elements of the offense, the Court instructed the Jury that "Dozier II need not know what the prohibited object is if he knows he has possession of some prohibited object."[6] The obvious take-away from this instruction is that the Petitioner could be convicted of "knowingly" possessing a prohibited object-methamphetamine- if the Jury found that he "knowingly" possessed a different prohibited object such as a cellular telephone or even tobacco. The Court gave an identical

5. Trial Transcript at Volume II, page 410, lines 14-15.

6. Trial Transcript at Volume II, page 410, lines 17-19.

instruction in connection with Count 3 of the Indictment where the Court similarly instructed that, to convict Isiah Dozier II of this offense, the Jury must find he "knowingly possessed marijuana"[7] but then qualified this instruction with the statement that Petitioner Dozier "need not know what the prohibited object is if he knows he has possession of some prohibited object."[8] The instruction was again given in regard to Count 5 of the Indictment which charged Petitioner Dozier with the "knowing" possession of a cellular telephone and where the Court instructed the Jury that Dozier could be convicted even if he did not know he possessed a cellular telephone.[9]

The Court's instructions regarding the requisite "knowingly" *mens rea* requirement were conflicting and constituted legal error. The Eighth Circuit Court of Appeals has held that a Defendant acts "knowingly" "if the defendant is aware of the act and does not act . . . through ignorance, mistake, or accident." *United States v. Dockter*, 58 F.3d 1284, 1288 (8th Cir. 1995). In the present case, the Indictment charged Petitioner with knowingly possessing methamphetamine, marijuana, and a cellular telephone. However, the District Court instructed the jury that it didn't matter whether Dozier knew he actually had possession of these items so long as Dozier knew he had some undefined "prohibited object." This instruction constitutes error which should be corrected by this Court.

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7. Trial Transcript at Volume II, page 412, line 9.

8. Trial Transcript at Volume II, page 412, lines 11-13.

9. Trial Transcript at Volume II, page 414, lines 2-7.

CONCLUSION

For all the foregoing reasons, the Petitioner requests that the Supreme Court grant review of this matter. The Petitioner specifically requests a summary reversal of the Eighth Circuit's unprecedented opinion and, should the Court not approve a summary disposition on the merits, this Court should grant certiorari.

Respectfully submitted

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED APRIL 13, 2022

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20-3322

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ISIAH DOZIER,

Defendant-Appellant.

Appeal from United States District Court for
the Eastern District of Arkansas - Central.

September 24, 2021, Submitted
April 13, 2022, Filed

Before SHEPHERD, WOLLMAN, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

A jury convicted Isiah Dozier, Jr. of possessing prohibited objects in prison, 18 U.S.C. § 1791(a)(2). On

appeal, he challenges: (1) the district court's[1] evidentiary rulings; (2) a jury instruction; and (3) the sufficiency of the evidence. We affirm.

I.

When Dozier's family visited him in prison, Dozier went to the restroom. The supervising corrections officer, Jimmy Skinner, checked the bathroom after Dozier left and found a capful of petroleum jelly. He suspected that Dozier's family had given him contraband, and that Dozier had hidden it in his rectum. After the visit, Skinner strip searched Dozier, but didn't find contraband. Skinner went to get the code for the body scanner from the lieutenant's office, bringing Dozier along and telling him to wait outside. When Skinner came out of the office, he noticed another inmate, Larry Jones, walking away from Dozier. He also saw Dozier fidgeting around his legs. Skinner told Jones to come back. As he turned, Jones dropped two objects from his hand. Skinner retrieved both—two bundles later found to contain meth, marijuana, and a cell phone. Dozier was taken to a special housing unit, where he was not allowed to wear his own clothes or shoes.

Corrections staff reviewed surveillance footage, which showed Dozier taking the bundles out of his shoes and giving them to Jones. Bureau of Prisons employee William Wright got Dozier's shoes from the special housing unit property room and noticed a compartment

1. The Honorable Brian S. Miller, United States District Judge for the Eastern District of Arkansas.

cut into the sole of the left shoe. Based on the video, their own observations, and the shoes, BOP staff believed that Dozier's father gave him the contraband, which he hid in his shoe and then passed off to Jones.

Dozier was charged with three counts of possessing a prohibited object in prison. Before trial, the government filed a motion *in limine* to exclude testimony by BOP employee Tracy Holst about the BOP administrative investigation and hearing on the incident because it was irrelevant and unduly prejudicial. The district court granted the motion over Dozier's objection. At trial, Dozier objected to the shoes being admitted into evidence, arguing that the government couldn't lay a proper foundation that they were in substantially the same condition as they were on the date of the incident. He also objected to the jury instruction that the jury need not find that Dozier knew specifically what prohibited objects he possessed, so long as he knew that he possessed some prohibited object. Finally, he renewed his objection to the exclusion of Holst's testimony. The district court overruled all three objections, and the jury convicted Dozier on all three counts. Dozier moved for a judgment of acquittal, which the district court denied. Dozier appeals.

II.

The district court excluded testimony from BOP employee Tracy Holst about the prison administrative hearing. Dozier claims that excluding his sole witness violated his Fifth and Sixth Amendment right to put on a complete defense. "We review evidentiary rulings for

an abuse of discretion, but our review is de novo when the challenge implicates a constitutional right." *United States v. Espejo*, 912 F.3d 469, 472 (8th Cir. 2019) (citation omitted). A criminal defendant's "right to present relevant testimony is not without limitation." *United States v. Petters*, 663 F.3d 375, 381 (8th Cir. 2011) (citation omitted). A defendant "does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Id.* (citation omitted). "[T]he Constitution leaves to the [district court] wide latitude to exclude evidence that is repetitive, only marginally relevant or poses an undue risk of harassment, prejudice, or confusion of the issues." *Id.* (citation omitted) (cleaned up). "Even where an evidentiary ruling is an abuse of discretion or violates a constitutional proscription, however, we will not reverse unless the error is more than harmless in that it affected a substantial right or had more than a slight influence on the verdict." *Espejo*, 912 F.3d at 472 (citation omitted).

Tracy Holst is the BOP Division Hearing Officer who made the administrative decision not to discipline Dozier. According to Dozier, Holst would have testified (1) that the BOP conducted an administrative investigation into the incident, and (2) that he had decided that there wasn't enough evidence to discipline Dozier for possession of prohibited items. He also would have (3) described the evidence presented at the administrative hearing, as well as (4) his interpretation of what happened in the surveillance video.

None of this testimony was admissible. The administrative investigation and its outcome are

inadmissible under Federal Rule of Evidence 403, which permits the district court to exclude relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." The fact that Dozier wasn't subjected to administrative discipline is of little probative value at trial, since the procedures, protections, and standards of proof at play in an administrative context are different from those in a criminal trial. And whatever probative value it might have is substantially outweighed by the danger that the testimony would be unfairly prejudicial or mislead the jury. As the district court put it,

> [T]he decisions of the administrative hearing officer does not in any way impact what this jury should do. If the administrative officer found you guilty, then the jury can't listen to that because that means they would come in here and listen to that and find you guilty because they heard somebody else found you guilty. . . . [T]he same thing happens if the administrative officer finds you not guilty. Then you come in here and put it before the jury and the jury says: Why are we here? He was found not guilty, he's not guilty, [even though] the standards [at the hearing] are different [from trial]."

D. Ct. Dkt. 88, at 389.[2]

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2. Dozier argues that testimony that an administrative investigation occurred was appropriate to contradict a government witness's incorrect statement on cross examination that there

Testimony about evidence presented at the administrative hearing is also inadmissible under Rule 403. There was no evidence presented at the hearing that couldn't be presented at trial. What little probative value testimony describing that evidence had would be substantially outweighed by the danger of needlessly presenting cumulative evidence.

We also note that Dozier never told the district court that he wanted Holst to testify about his interpretation of the surveillance video. When a party fails to timely and clearly state the grounds for the objection, the argument is forfeited, and we review only for plain error. *United States v. Pirani*, 406 F.3d 543, 549 (8th Cir. 2005). Dozier "must show that there is (1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Ford*, 888 F.3d 922, 926 (8th Cir. 2018) (citations omitted). Dozier fails on the first prong because the proposed testimony was inadmissible. Opinion testimony by a lay witness is only admissible if it is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge . . . ." Federal Rule of Evidence 701. Holst's testimony fails under Rule 701(b)—Holst, who was not involved in the incident and who only watched the video during the administrative proceeding, was in no better position to know what was going on than the jury, which could watch the surveillance video for itself.

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was no administrative investigation. But the district court had already excluded that entire line of inquiry when it granted the government's motion *in limine*, so it was not admissible for this purpose.

III.

Dozier next challenges the admission of the shoes. He argues that the government did not lay the necessary foundation because there was no testimony that the shoes presented at trial were in the same condition as day of the offense. Before physical evidence is offered in a criminal prosecution, there must be testimony that the object is the same one that was involved in the alleged incident, and that its condition is substantially unchanged. *United States v. Robinson*, 617 F.3d 984, 990 (8th Cir. 2010). The district court can admit evidence if it is satisfied that there is a reasonable probability that it hasn't been altered. *Id.* (citation omitted). We presume that evidence is unchanged unless there is "a showing of bad faith, ill will, or proof that the evidence has been tampered with." *Id.* (citation omitted).

Dozier turned over his shoes when he was taken to the special housing unit. Lieutenant Andrews testified that he watched as the shoes were secured in a property bag, and that the bag would have been kept in a secure area. William Wright, the BOP employee who discovered the compartment in the shoes, testified that he retrieved the shoes from a property bag that was marked with Dozier's identification. Because Dozier didn't present any evidence that would rebut the presumption that the shoes were unchanged, the district court didn't abuse its discretion in finding that there was a reasonable probability that the shoes were not altered.

IV.

Dozier also says that the district court gave an incorrect jury instruction. The district court told the jury that Dozier "need not know what the prohibited object is if he knows that he has possession of some prohibited object." "Although we generally review jury instructions for abuse of discretion, if as here statutory interpretation is required, it is an issue of law that we consider *de novo*." *United States v. Krause*, 914 F.3d 1122, 1127 (8th Cir. 2019) (citation omitted). 18 U.S.C. § 1791(a)(2) says: "Whoever being an inmate of a prison, makes, possesses, or obtains, or attempts to make or obtain, a prohibited object shall be punished as provided in subsection (b) of this section." Subsection (b) outlines punishment schemes that differ depending on what the prohibited object was.

Dozier challenges the district court's interpretation of the *mens rea* requirement. The statute is silent on the mental state required to commit the offense, but neither party disputes that we read in a "knowing" *mens rea* when we're interpreting § 1791. *See Staples v. United States*, 511 U.S. 600, 605-06, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994). The question is whether the government had to prove that Dozier knew he possessed the *specific* prohibited objects (meth, marijuana, and a cell phone), rather than just that he had to know that he possessed *some* prohibited object, even if he didn't know exactly what he had.

This is an issue of first impression in this circuit. We find the Third Circuit's reasoning in *United States v. Holmes*, 607 F.3d 332 (3d Cir. 2010), persuasive. There, an

inmate was convicted under the same statute as Dozier for possessing a utility knife blade. *Id.* at 334. On appeal, he argued that the government had to prove he knew that the blade was a weapon, not just that he knew he possessed the blade. *Id.* at 336. The Third Circuit disagreed. *Id.* Finding no guidance in the statute's text or structure, the court cited prisons' strong needs to ensure safety and security as evidence that the statute should properly be read to criminalize possessing a blade, even if the defendant didn't know the item fit within the statutory definition of "weapon." *Id.* It also rejected the defendant's argument that this reading criminalizes otherwise innocent conduct, since § 1791 applies only in federal prisons, and inmates are well aware that the items they can possess are strictly regulated. *Id.* at 337.

We agree with the Third Circuit. Introducing drugs and cell phones into prison is a serious security threat. Controlled substance use endangers both inmates and prison staff, and cell phones can be used to arrange delivery of drugs and weapons, order hits, and coordinate escapes. Even if a prisoner sincerely believes that he possesses a less dangerous prohibited object—only marijuana, for example, instead of meth—it doesn't change the nature of the danger presented in the prison. And there's nothing "otherwise innocent" about smuggling contraband into a prison, be it a cell phone or methamphetamine.

Dozier argues that we should read in a knowing *mens rea* as to the specific identity of the prohibited item possessed, because different prohibited objects carry different maximum penalties under 18 U.S.C. § 1791(b).

For instance, the maximum penalty for possessing meth is 20 years in prison; only five years for marijuana; and just one year for a cell phone. *Id.* Without this *mens rea* requirement, Dozier says, we violate the rule that any fact that increases the maximum penalty must be proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). But there is no *Apprendi* violation here because the jury found that Dozier did, in fact, possess each item charged. And we are not required to attach the same *mens rea* requirement to each element of a crime. *Staples v. United States*, 511 U.S. 600, 609, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994).

Accepting Dozier's interpretation would allow inmates to make an end-run around the statute by claiming that they didn't know exactly what prohibited item they possessed. We have rejected interpretations this outcome in the context of other federal criminal statutes. For example, in *United States v. Martin*, 274 F.3d 1208, 1210 (8th Cir. 2001), we held that possession with intent to distribute meth under the Controlled Substances Act, 21 U.S.C. § 802, did not require that the defendant know "the exact nature of the substance in his possession, only that it was a controlled substance of some kind." *See also United States v. Noibi*, 780 F.2d 1419, 1421 (8th Cir. 1986) ("The 'knowingly' element of [21 U.S.C. § 841] refers to a general criminal intent, i.e., awareness that the substance possessed was a controlled substance of some kind.").

Because an inmate charged under 18 U.S.C. § 1791(a)(2) need not know specifically what prohibited item he has,

so long as he knows that he possesses a prohibited object, the district court's jury instructions were proper.

V.

Finally, Dozier argues that the evidence was insufficient to support the finding that he "knowingly" possessed drugs and a cell phone. As discussed in Part III, *supra*, an inmate does not need to know specifically what he possesses, so long as he knows that it's prohibited. So the question on appeal is whether there was sufficient evidence for the jury to find that Dozier knew he possessed contraband. "We review the sufficiency of the evidence *de novo*, viewing evidence in the light most favorable to the government, resolving conflicts in the government's favor, and accepting all reasonable inferences that support the verdict." *United States v. Parks*, 902 F.3d 805, 814 (8th Cir. 2018) (citation omitted). We will only reverse if no reasonable jury could find guilt beyond a reasonable doubt. *United States v. Honarvar*, 477 F.3d 999, 1000 (8th Cir. 2007). "Our role is not to reweigh the evidence or to test the credibility of the witnesses, because questions of credibility are the province of the jury." *Parks*, 902 F.3d at 814-15 (citation omitted).

A reasonable jury could weigh this evidence and infer based on Dozier's efforts to conceal the packages that he knew they were prohibited. The jury watched the surveillance video that showed Dozier's entering the visitation room. He appeared to cup something in his hand when he greeted his son with a handshake and a hug—indicative of a surreptitious handoff. Skinner and

Wright testified that they saw Dozier fiddling with his shoes before handing the bundles to Jones, and that the shoes had compartments cut into the soles. Jones testified that he was aware when Dozier handed him the packages that they contained contraband, although he didn't know exactly what was inside. And the government's expert testified that the packaging—tightly-wrapped electrical tape—was commonly used when smuggling contraband into prisons. The jury also had the benefit of seeing photos of the packages, surveillance video of the handoff to Jones, and the shoes themselves. All together, this was sufficient evidence.

VI.

We affirm.

APPENDIX B — TRANSCRIPT EXCERPTS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, CENTRAL DIVISION, DATED OCTOBER 2, 2019

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ISIAH DOZIER JR. (01), and
ISIAH DOZIER SR. (02),

Defendant.

No. 4:18CR00603-01-02 BSM

Wednesday, October 2, 2019
Little Rock, Arkansas
8:34 a.m.

TRANSCRIPT OF TRIAL - VOLUME 2
BEFORE THE HONORABLE BRIAN S. MILLER,
UNITED STATES DISTRICT JUDGE, AND A JURY

***

[388]we need to do that.

But let's do this first, Mr. Ballard. Present your stipulation. Do you want to provide it, or do you want to read it into the record?

MR. BALLARD: I want to just give a little summary of testimony and then provide the proffer.

THE COURT: You can do that.

MR. BALLARD: I'm going to call it Defendants' Proffer 3 if that's okay.

THE COURT: That's good.

MR. BALLARD: Thank you. My proffer of testimony, which has been disallowed, would have been by witness Tracy Holst. He would have testified that he was a division hearing officer within the Bureau of Prisons, specifically FCC Forrest City Medium. DHO Tracy Holst, I believe, heard the facts originating from the investigation of the possession allegations against my client, Isiah Dozier, and found the evidence does not support the charge of possession of narcotics not prescribed, and possession, introduction of a cell phone. I believe that this testimony also would have contradicted the government's witness, Mr. Lloyd, who testified that these administrative hearings only occur if a criminal case is deferred. And I'll offer number 3.

THE COURT: I'll receive it. And just so you know -- and I'm sure, Mr. Dozier, you've been communicating with Mr. [389]Ballard about your case. Mr. Ballard argued pretrial that he should be allowed to put on evidence of the administrative hearing regarding this issue in the prison. And I overruled him, and here's the reason why I did, and this is the explanation I gave him. Had you been found guilty, and the government wanted to present to the jury that you had gone before and had an administrative hearing and somebody in the prison had found you guilty, then I would have not allowed them to put that on either.

And my point of view is that administrative hearings -- the evidence that was put on at the administrative hearing, you can put that evidence on here. But the decisions of the administrative hearing officer does not in any way impact what this jury should do. If the administrative officer found you guilty, then the jury can't listen to that because that means they would come in here and listen to that and find you guilty because they heard somebody else found you guilty. I don't know that they would, but it could happen.

But the same thing happens if the administrative officer finds you not guilty. Then you come in here and put it before the jury and the jury says: Why are we here? He was found not guilty, he's not guilty, when the standards are different. And so that's the reason I did what I did or what I ordered. And Mr. Ballard disagrees with me and he's been consistent: You know, Judge, this is the information you need to let in. It [390]contradicts the government's case. It's evidence for my client showing he didn't do it.

I got on to him in the middle of the trial because I had ruled on it, and he started asking about it just a little bit.

I didn't mean to get on you, Mr. Ballard, but I did. Forgive me. But I did.

And the point being is that I made the ruling. And it's like I say with everything, I can be wrong, but I'm making the best judgment I can with the facts I have. And I have to stick with my rulings and then we'll see what the Eighth Circuit does. I don't think the Eighth Circuit will reverse me on this one, though, but they could. They could say that: Judge Miller, you should have let that information in and you didn't, and we're going to reverse you. Or maybe the jury doesn't find you guilty anyway and then it's a moot point.

MR. BALLARD: That's what we're going for.

THE COURT: But I'll receive the proffer.

MR. BALLARD: Can I hand this to you, Judge?

THE COURT: Yes, sir.

MR. BALLARD: Thank you.

THE COURT: Let me ask this. With our -- with our record, normally the lawyers maintain the record, and then when there's an appeal, they are the ones who compile everything and send it to the Court of Appeals. Do we need to keep this, or do we let Mr. Ballard keep this?

Appendix B

[391](Off the record.)

THE COURT: I will make the proffers Court exhibits. So we have three proffers, so I'll make those Court exhibits.

MR. BALLARD: Thank you.

THE COURT: We'll put those in the record.

(Court's Proffered Exhibits 1, 2, and 3 received in evidence.)

(Off the record.)

THE COURT: All right. Now, are there -- do y'all need a couple of minutes to look at the jury instructions to make sure? Have you had a chance to take a look at them?

MR. BALLARD: I've had a chance to take a look at them.

THE COURT: We did not have a theory of the defense from the defendant, and so we don't have it, and so we're just going to strike that --

MR. BALLARD: That's right.

THE COURT: -- in the final set.

MR. BALLARD: That's right.

THE COURT: Here's what I'm going to do. I'm going to have Mr. Mallick print up a final set for everybody without that in it, and we'll circulate them and we'll come back and we're going to move. Are y'all ready to do closing arguments?

MR. GORDON: Judge, I do have one objection or correction to Instruction Nos. 10, 12, and 14.

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APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION, DATED SEPTEMBER 27, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CASE NO. 4:18-CR-00603 BSM

UNITED STATES OF AMERICA,

Plaintiff,

v.

ISIAH DOZIER, *et al.*,

Defendants.

ORDER

The United States's motion in limine to exclude evidence regarding inmate discipline and sanctions [Doc. No. 27] is granted.

The defendant's motion in limine to exclude the introduction of shoes as evidence [Doc. No. 30] is denied. The defendant's motion in limine as to ultimate issues [Doc. No. 31] is denied without prejudice because the testimony's admissibility cannot be determined until it is heard in context at trial.

Appendix C

The objection to Byron Flint's "expert testimony" [Doc. No. 33] is overruled. *See United States v. Schwarck*, 719 F.3d 921, 924 (8th Cir. 2013) (Expert testimony concerning the *modus operandi* of drug dealers is admissible because most jurors are not familiar with the drug trade.).

IT IS SO ORDERED this 27th day of September 2019.

/s/_____
UNITED STATES DISTRICT JUDGE