

**In The
Supreme Court of the United States**

BARRY TERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

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

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether 18 U.S.C. § 922(g), as applied to the facts of this case, is unconstitutional, considering that Congress has no power under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) to prohibit the mere possession of weapons?
2. Whether the defense video recording should have been excluded?
3. Whether the District Court should have given Mr. Terry's requested instruction regarding reasonable doubt?
4. Whether the District Court should not have given the instruction captioned Law Enforcement Techniques; not Necessary to Call All Possible Witnesses or Present Every Conceivable Exhibit?
5. Whether the District Court should have modified the instruction that it gave regarding the Third Element – In or Affecting Commerce?
6. Whether the evidence of possession is insufficient?
7. Whether sentencing drug addicts to the Armed Career Criminal Act's (ACCA) (18 U.S.C. § 924(e)) severe punishments, but not recidivist violent offenders, is cruel and unusual punishment?

Parties to the Proceedings

The names of all parties appear in the caption of the case on the cover page.

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No. _____

In the Supreme Court of the United States

Barry Terry,
Petitioner

v.

United States of America,
Respondent

**On Petition for Writ of Certiorari to the United States Court of
Appeals for the Fourth Circuit**

Petition for Writ of Certiorari

Petitioner Barry Terry prays for the issuance of a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit.

Opinions Below

The Opinion of the United States Court of Appeals for the Fourth Circuit appears at *Appendix A* to this Petition. It is unpublished.

Jurisdiction

On February 27, 2018 the United States Court of Appeals for the Fourth Circuit issued its Judgment and Opinion. No petition for rehearing was filed.

Jurisdiction of the Supreme Court arises pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the Fourth Circuit was based upon 28 U.S.C. § 1291, the final judgment in a criminal case, entered against Mr. Terry on March 21, 2017 in the United States District Court for the District of Maryland, Northern Division. The District Court's Judgment appears at *Appendix B* to this Petition. Jurisdiction in the District Court was based upon 18 U.S.C. § 3231, because the United States prosecuted Mr. Terry for violation of the United States Code.

Constitutional, Statutory, Rule, and Jury Instruction Provisions Involved

The verbatim text of: the Commerce Clause (U.S. Const. art. I, § 8, cl. 3); U.S. Const. amend VIII; 18 U.S.C. § 922(g)(1); 18 U.S.C. § 924(e); Fed. R. Crim. P. 29(c); Fed. R. Crim. P. 30; Fed. R. Evid. 401; Fed. R. Evid. 403; Instruction 4-2 Reasonable Doubt from L. Sand, et al., Modern Federal Jury Instructions – Criminal, Filed through Release No. 68B, June 2016 appear at *Appendix D*.

Statement of the Case

Petitioner seeks review of his conviction. By Indictment the Grand Jury charged Mr. Barry Terry with possessing a regulated firearm and ammunition in and affecting interstate commerce after having been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. § 922(g). J.A. at 10.

Mr. Terry moved to dismiss the Indictment, because Congress has no power under the Commerce Clause to prohibit the mere possession of weapons, and accordingly, 18 U.S.C. § 922(g), as applied to the facts of this case, is unconstitutional. J.A. at 12. After a hearing (J.A. at 29), the District Court denied the Motion. J.A. at 32 – 33; Tr. July 22, 2016 at 4:20 – 5:1.

Mr. Terry proposed that the District Court instruct the jury regarding reasonable doubt. J.A. at 75. Specifically, he requested that the District Court give Instruction 4-2 Reasonable Doubt from L. Sand, *et al.*, Modern Federal Jury Instructions – Criminal, Filed through Release No. 68B, June 2016. Id. The District Court refused to give the proposed instruction. J.A. at 248; Tr. Oct. 17, 2016 at 114:8 – 114:9.

Mr. Terry objected the government's Proposed Jury Instruction No. 17 captioned Law Enforcement Techniques; not Necessary to Call All Possible Witnesses or Present Every Conceivable Exhibit. J.A. at 78 & 249; Tr. Oct. 17, 2016 at 115:11 – 115:17. After a hearing (J.A. at 249; Tr. Oct. 17, 2016 at

115:11 – 115:23), the District Court gave the proposed instruction. J.A. at 268; Tr. Oct. 18, 2016 at 14:25 – 15:13; J.A. at 329.

Mr. Terry objected to the second paragraph of the government's proposed Instruction No. 29 captioned Third Element – In or Affecting Commerce. J.A. at 78 & 250; Tr. Oct. 17, 2016 at 116:2 – 116:14. Instead, he proposed an alternative second paragraph. *Id.* After a hearing (J.A. at 250; Tr. Oct. 17, 2016 at 116:15.), the District Court gave the government's proposed instruction without Mr. Terry's proposed alternative. J.A. at 278 – 79; Tr. Oct. 18, 2016 at 24:15 – 25:3; J.A. at 335 – 36.

The government moved in limine to prohibit Mr. Terry from presenting a video recording of his arrest and to bar the testimony of two defense witnesses. J.A. at 125. Mr. Terry responded that the witnesses' testimony and the video recording are probative, relevant, and material to whether Mr. Terry possessed a gun. J.A. at 132. The District Court prohibited Mr. Terry from presenting a video recording of his arrest and allowed the testimony of a defense witnesses. J.A. at 256; Tr. Oct. 18, 2016 at 2:2 – 2:3.

Mr. Donte Arthur's testimony was that he operated a pole camera that recorded video. J.A. at 145 – 167; Tr. Oct. 17, 2016 at 11:22 – 33:3. He observed a man in the park, whom he believed to be armed. *Id.* He observed a bulge at the man's right hip area, and he continued watching, in order to satisfy himself whether or not what he saw was a cell phone or iPad. *Id.* Mr.

Arthur observed the man talking on a phone, and he claimed to have observed the man doing several ‘security checks.’ Id. Ultimately, he calls police, who go to the park. Id. During testimony, Mr. Arthur never identified Mr. Terry. Id.

Police officers went to the park, and eventually they arrest Mr. Terry.

Detective Jorge Bernardez-Ruiz’s testimony was that when he saw Mr. Terry, Det. Bernardez-Ruiz believed that Mr. Terry was armed. J.A. at 167 – 186; Tr. Oct. 17, 2016 at 33:11 – 52:7. When Det. Bernardez-Ruiz walked toward Mr. Terry, he was walking away from Det. Bernardez-Ruiz. Id. When Mr. Terry ran, they ran parallel to each other. Id.

Det. Bernardez-Ruiz said that he was a little more than an arm’s length away from Mr. Terry. Id. During the pursuit, Det. Bernardez-Ruiz had to climb the fence, and he lost sight of Mr. Terry for a brief moment. Id.

[Det.] Villados began a foot pursuit behind the suspect. Id. She took out her taser, and then they went back toward the playground. Id.

Det. Bernardez-Ruiz said that he saw Mr. Terry discard a metal object from his waistband, which Det. Bernardez-Ruiz believed was gun. Id. Then, Det. Bernardez-Ruiz said that he saw Mr. Terry holding a handgun the entire time. Id.

[Det.] Villados seized a gun, while Det. Bernardez-Ruiz continued his pursuit of Mr. Terry, until Det. Bernardez-Ruiz tackled him. Id. Det.

Bernardez-Ruiz went one way, and [Det.] Villados went another. Id. Det. Bernardez-Ruiz said that he saw [Det.] Villados stop and bee-line directly towards the handgun. Id. He said that he saw her kneel down and made sure that nobody touched the weapon. Id.

Det. Bernardez-Ruiz heard the call for an armed person. He did not draw his service weapon during the pursuit. He drew his weapon when he apprehended Mr. Terry, when he was trying to take control of Mr. Terry's hands. Id. Then, he said that he did draw his service weapon during the pursuit. Id. Then, when he was asked where during the pursuit, he drew his weapon, he responded "I don't believe I did." Id.

He said that [Det.] Villados did not draw her service weapon at all. Id.

Detective Aileen Villados' testimony was that that Det. Bernardez-Ruiz heard the call for an armed person. J.A. at 186 – 215; Tr. Oct. 17, 2016 at 52:8 – 81:1. When she confronted Mr. Terry, she saw a gun in his waistband, but she responded with her taser instead of her gun. Id. She said that she saw Mr. Terry throw the gun when he passed the yellow donation box behind which she later recovers a gun. J.A. at 186 – 215; Tr. Oct. 17, 2016 at 52:8 – 81:1. The video did not show this. J.A. Vol. III; Gov't Ex. 1 at trial.

The video (J.A. Vol. III; Gov't Ex. 1 at trial) and Gov't Ex. 7N (J.A. at 347) clearly show Det. Aileen Villados holding a .45 caliber pistol. However,

neither the video (J.A. Vol. III; Gov't Ex. 1 at trial), nor Gov't Ex. 7K (J.A. at 348) show Mr. Terry holding it.

Special Agent Jonathan Vaccarelli testimony was that the pistol was designed to expel a projectile by means of an explosive. J.A. at 232 – 247; Tr. Oct. Oct. 17, 2016 at 98:18 – 113:11. The pistol was manufactured in California, and it would have travelled in interstate commerce before it was recovered in the park. Id. The ammunition was manufactured in Brazil and in Idaho. Id. The ammunition would have travelled in interstate commerce before it was recovered in the park. Id. Agent Vaccarelli admitted that he had no evidence that Mr. Terry caused the pistol to affect interstate commerce. Id.

Ms. Ruth Grant's testimony was that Mr. Terry is her brother, and she was in his company at most points on the day that he was arrested. J.A. at 256 – 260; Tr. Oct. 18, 2016 at 2:10 – 6:24. They had come to the park from a nearby funeral home after their brother's viewing. Id. At no point did she see Mr. Terry with a handgun. Id.

The parties stipulated that Mr. Terry is prohibited from possessing a firearm due to prior convictions for offenses punishable by a term of imprisonment greater than a year; his civil rights have not been restored. J.A. at 28 & 324; Gov't. Ex. 9. The parties also stipulated that a recorded call was made from an identification number assigned to Mr. Terry. J.A. at 323; Gov't. Ex. 11. The call was the played for the jury. J.A. at 232; Tr. Oct. 17,

2016 at 98:13. In the call the person, who identifies himself as “Barry” tells the caller that the only thing that will “f*** me up is my prints on the gun.” Id.

The jury convicted Mr. Barry Terry of violating 18 U.S.C. § 922(g)(1). J.A. at 341.

Mr. Terry moved for judgment of acquittal and for a new trial. J.A. at 251 – 52; Tr. Oct. 17, 2016 at 117:17 – 118:3; J.A. at 342. The District Court denied the Motions. J.A. at 252; Tr. Oct. 17, 2016 at 118:4 – 118:5; J.A. at 356.

The District Court sentenced Mr. Terry to imprisonment for a term of 180 months, supervised release for a term of three years, and a \$100.00 special assessment. J.A. at 342.

On Mar. 29, 2017 Mr. Terry noted this appeal. J.A. at 381.

Reasons for Granting the Petition

I. Two Decisions of the Supreme Court Conflict, and the Court Should Resolve the Conflict.

Although Mr. Terry recognizes the Supreme Court’s decision in *Scarborough v. United States*, 431 U.S. 563 (1977) (interpreting same statute to require only that gun passed “in interstate commerce” “at some time,” without questioning constitutionality); he believes that the Court should re-

examine the holding in *Scarborough*, considering its holding in *United States v. Lopez*, 115 S. Ct. 1624 (1995).

The Court should find that like section 922(q), section 922(g), as applied to mere possession, lies outside the reach of the Commerce Clause, as a matter of law. Section 922(g), as applied in Mr. Terry's case, does not regulate the use of channels of interstate commerce. *See, Lopez* at 1630.

A. Standard of Review.

When the Supreme Court reviews the invalidity of a law, it considers whether the law exceeded Congress' authority pursuant to the Constitution. *Gonzales v. Raich*, 545 U.S. 1, 16 – 17 (2005); *United States v. Hosford*, 843 F.3d 161 (4th Cir., 2016); *See also, United States v. Lopez*, 115 S. Ct. 1624 (1995).

B. Analysis:

1. Congress Has No Power under the Commerce Clause to Prohibit the Mere Possession of Weapons.

Although this statute requires proof of a nexus to interstate commerce, this statutory requirement fails to cure the threshold Constitutional defect. The United States Supreme Court's decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), eliminates any doubt about Congress' lack of power under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) to prohibit the mere

possession of handguns under the circumstances of Mr. Terry's case. It establishes that section 922(g), as applied to mere possession of a weapon, is unconstitutional.

Section 922(g) purports to derive from Congress' power under the Commerce Clause (*supra*). See 18 U.S.C. § 922(g) ("It shall be unlawful . . . to . . . possess in or affecting commerce any firearm . . ."). As applied to Mr. Terry, this statute is constitutional only if Congress has power under the Commerce Clause (*supra*) to prohibit Mr. Terry's mere possession of a firearm.

Pursuant to *Lopez*, the scope of this authority does not encompass the mere possession of weapons. *Lopez* held, as a matter of law, that mere possession of a firearm within 1,000 of a school does not substantially affect interstate commerce. *Id.* at 1631 – 34.

Congressional authority under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) is not a general police power of the sort retained by the States. *Lopez* at 1631 – 34. Concluding that they are the same would require concluding that Constitution's enumeration of powers presupposes something not enumerated, *cf. Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 6 L. Ed. 23 (1824); and that there never will be a distinction between what is truly national and what is truly local, *cf. NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

Although Mr. Terry recognizes the Supreme Court's decision in *Scarborough v. United States*, 431 U.S. 563 (1977) (interpreting same statute to require only that gun passed "in interstate commerce" "at some time," without questioning constitutionality); and he acknowledges that the Fourth Circuit has distinguished *Lopez* in a Commerce Clause (supra) challenged to the constitutionality of 18 U.S.C. § 922(g) (*United States v. Wells*, 98 F.3d 808, 809 (4th Cir. 1996), 514 U.S. 549, 559–68 (1995)), he believes that the Court should re-examine the holding in *Scarborough* and *Wells*.

18 U.S.C. § 922(q) like section 922(g) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922[(g)] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce. *Lopez* at 1630-31. There is nothing obvious about section 922(g)'s prohibition of the mere possession of a firearm that brings it within Congress' Commerce Clause (U.S. Const. art. I, § 8, cl. 3) power.

The Court's conclusion in *Lopez* that as a matter of law mere gun possession lies beyond the reach of Congress' power under the Commerce

Clause (supra) marks the Court's return to a Constitutional question it raised without resolving almost a quarter century ago. *United States v. Bass*, 404 U.S. 336, 339 n.4 (1971). *Bass* concerned section 922(g)'s predecessor, 18 U.S.C. App. 1202(a), and the question whether the statute's phrase "in commerce or affecting commerce" modified the verbs "possesses," "receives" and "transports." *Bass* at 337 – 38.

Although the Court questioned whether the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) permitted Congress to "punish the 'mere possession' of firearms," it chose not to resolve this issue. *Bass* at 339 n.4. Instead, it resolved the case on statutory interpretation grounds, holding that the statute required the government to prove a nexus between interstate commerce and the defendant's possession of a weapon. *Id.* at 347. Because the government failed to prove this nexus, the Court reversed *Bass*' conviction. *Id.*

In the quarter century since *Bass*, the Court has not resolved the Constitutional question it raised in footnote four. *See, United States v. Lopez*, 2 F.3d 1342, 1347 (5th Cir. 1993) (noting that the question raised about Congress' power to prohibit the mere possession of a firearm remained open), *aff'd* 115 S. Ct. 1624 (1995); Maloney, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 Fordham L. Rev. 1795, 1816 n.145 (1994).

The *Bass* Court's decision to avoid the Constitutional question and its disposition of the case on statutory grounds demonstrate that the threshold Constitutional question concerning Congress' power to prohibit the mere possession of firearms is distinct from the statutory question of the requisite nexus between possession and interstate commerce. That is, the mere inclusion of statutory language requiring proof of a nexus to interstate commerce does not resolve the threshold Constitutional question whether Congress has the power under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) to prohibit the mere possession of a firearm. *See, United States v. Mussari*, 912 F. Supp. 1248 (D. Ariz. 1995). If there was any doubt that the statutory-nexus issue is distinct from the Constitutional question about the Commerce Clause's (*supra*) scope, the Court's decision in *Lopez* eliminated it.

Lopez unambiguously holds that the regulated activity itself must substantially affect interstate commerce. However, section 922(g)'s nexus requirement fails to establish that mere possession of a firearm in the circumstances of Mr. Terry's case has any effect on interstate commerce, much less a substantial effect.

The Eighth Circuit has repeatedly held that the government may satisfy section 922(g)'s nexus requirement with proof that the weapon once in its existence crossed a state line. *See, e.g., United States v. Mosby*, 60 F.3d 454 (8th Cir. 1995). Indeed, *Mosby* further broadens this nexus element by

holding that the government may prove the necessary nexus if any of the component parts of ammunition once crossed a state line even if the completed ammunition never crossed a state line. *Id.* Construed this broadly, section 922(g)'s nexus requirement completely fails to “ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.” *Lopez* at 1631.

The issue before the *Mosby* panel involved only statutory interpretation, not the Constitutional question concerning the breadth of Congress's Commerce Clause (U.S. Const. art. I, § 8, cl. 3) power: “Because we find that the district court misconstrued § 922(g)(1) by imposing an unjustified limitation on the type of ‘commerce’ that Mosby’s possession must be ‘in or affecting,’ we reverse and remand.” Therefore, the Court’s later comments on *Lopez* and its possible application to Mosby’s case are pure dicta. *See Mosby, supra* at n.3 (8th Cir. 1995).

Regardless, whether a possessed weapon once crossed a state line, a person, felon or otherwise, no more affects interstate commerce by merely possessing a firearm on a public street than a person does by possessing a firearm within 1,000 of a school. Section 922(g)'s statutory requirement, is, therefore, so broad and encompassing, that it is not even conceptually possible for it to satisfy *Lopez*'s requirement that the nexus element “ensure, through case-by-case inquiry, that the firearm possession in question affects

interstate commerce.” *Id.* at 1631. Even if the Government’s allegations about Mr. Terry were true, they would have had no conceivable effect on commerce.

Lopez noted *Bass*’ reservation of the Constitutional question without even discussing the Court’s further clarification of the nexus issue in *Scarborough v. United States*, 431 U.S. 563 (1977). *Scarborough* held that proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the statutorily required nexus between the possession of a firearm by a convicted felon and commerce. *Id.* at 564.

The Constitutional question raised in *Bass*’ footnote 4 was not before the *Scarborough* Court, which resolved only the question concerning the type of proof necessary to satisfy the statutory requirement. *Id.* Indeed, of the five separate opinions in *Lopez*, none even cites to *Scarborough*. See *Lopez* at 1626 – 34 (majority opinion); 1634 – 42 (Kennedy, J., concurring); 1642 – 51 (Thomas, J., concurring); 1651 (Stevens, J., dissenting); 1651 – 57 (Souter, J., dissenting); 1657 – 64 (Breyer, J., dissenting). The *Lopez* Court’s utter silence about *Scarborough* demonstrates that Congress’ inclusion of a statutory nexus requirement is insufficient to establish that Congress acted within its Commerce Clause (U.S. Const. art. I, § 8, cl. 3) authority. See *Mussari*, 912 F. Supp. 1248 (D. Ariz. 1995). This last question can be answered only by analyzing whether the regulated activity itself substantially affects interstate commerce. See *Lopez* at 1630. Accordingly, section 922(g)’s inclusion of a

nexus requirement fails to rescue its unconstitutional application in Mr. Terry's case.

Congress exceeded its constitutionally enumerated power when it sought to prohibit the mere possession of firearms. *See*, 18 U.S.C. § 922(g).

2. Accordingly, 18 U.S.C. § 922(g), as Applied to the Facts of This Case, Is Unconstitutional.

The government's evidence was that a Baltimore City Watch operator described observing a bulge on a person's waist band. J.A. at 145 – 167; Tr. Oct. 17, 2016 at 11:22 – 33:3. Officers responded and saw Mr. Terry, whom they say ran away. J.A. at 145 – 215. Officers said that Mr. Terry took something from his waistband and tossed it against a donation box. *Id.*

The Government offered no evidence that Mr. Terry caused the pistol to affect interstate commerce. In fact, Agent Jonathan Vaccarelli testified to the contrary. J.A. at 246; Tr. Oct. 17, 2016 at 112:12 – 112:23.

Section 922(g)'s application to Mr. Terry's possession of a firearm constitutes neither the prohibition of the interstate transportation of a commodity, nor the protection of an instrumentality of interstate commerce nor the protection of a thing in interstate commerce. *See, Lopez supra* at 1630. Therefore, if section 922(g)'s application to Mr. Terry's mere possession of a firearm is constitutional, Congress' power must derive from its authority

to regulate activities substantially affecting interstate commerce. *See, Lopez supra* at 1630.

The Court should find that like section 922(q), section 922(g), as applied to mere possession, lies outside the reach of the Commerce Clause (U.S. Const. art. I, § 8, cl. 3), as a matter of law. Section 922(g), as applied in Mr. Terry's case, does not regulate the use of channels of interstate commerce. *See, Lopez supra* at 1630.

II. A United States Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings, or Sanctioned Such a Departure by a Lower Court, as to Call for an Exercise of this Court’s Supervisory Power.

A. The District Court Should Not Have Excluded the Defense Video Evidence.

1. Standard of Review.

While generally, evidentiary rulings are reviewed for an abuse of discretion (*United States v. Cloud*, 680 F.3d 396, 401 (4th Cir.), *cert. denied*, 133 S. Ct. 218 (2012)); this one should be reviewed de novo, because the exclusion impinged upon the right to present a defense (*United States v. Cropp*, 127 F.3d 354, 363 (4th Cir. 1997) (Exclusion of a defense witness impinges upon the right to present a defense), *cert. denied*, 522 U.S. 1098 (1998)).

2. Analysis:

a. Right to Present a Defense.

Regardless of whether a defendant testifies on his or her own behalf, a defendant has a similar constitutional right to “present a defense” through other evidence. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

However, like a defendant's right to testify on his or her own behalf, the right to present a defense is "subject to reasonable restrictions" if there is a sufficient countervailing governmental interest. *United States v. Scheffer*, 523 U.S. 303, 308 (1998). For example, the Supreme Court has held that the exclusion of a favorable polygraph examination did not violate the right to present a defense because polygraph tests have not yet been shown to be sufficiently reliable. *Id.* at 309 – 17.

Conversely, application of an evidence rule that excludes reliable exculpatory evidence would violate a defendant's right to present a defense where the rule "serve[s] no legitimate purpose or ... [is] disproportionate to the ends that they are asserted to promote." *Holmes*, 547 U.S. at 326; *see also Chambers*, 410 U.S. at 302 – 03; *United States v. Stever*, 603 F.3d 747, 755 – 56 (9th Cir. 2010) (the right to present a defense includes, inter alia, the right to present evidence to refute the government's theory of motive, to present evidence that contradicts the theory of prosecution, or to present evidence of third party culpability).

b. Ms. Yahnena Robinson's Cell Phone Video Recording of Mr. Terry's Arrest Is Probative, Relevant, and Material to Whether Mr. Terry Possessed a Gun.

Ms. Robinson's recording shows what the government's video recording omits when it pans away and after it stops. J.A. at Vol. III; Ex. 1 to Motion in

Limine by USA. Specifically, the officer's actions and words while arresting Mr. Terry are probative of whether the government's witnesses are biased against Mr. Terry. Their bias would explain why they claim to have seen Mr. Terry with a gun, even though the government's video recording does not show that, and Ms. Grant testified that she did not see a gun when she saw Mr. Terry prior to his arrest that day. J.A. at 256 – 260; Tr. Oct. 18, 2016 at 2:10 – 6:24.

Ms. Robinson's testimony would have authenticated the recording.

c. Ms. Robinson's Video is Relevant and Not Prejudicial.

While Fed. R. Evid. 403 does provide that otherwise admissible evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...,” a crude comment during an arrest is not prejudicial in this case. First, the comment itself is probative of whether the Government's witnesses are biased against Mr. Terry. Second, a crude comment during an arrest is not like the facts in *United States v. Ham*, 998 F.2d 1247 (4th Cir. 1993). In that case members of the Hare Krishna religion were charged with RICO and mail fraud violations. The trial court admitted evidence of child abuse, homosexuality, and subordination of women within the religious community over the defendants' Rule 403 objections. The Fourth Circuit reversed, finding in the contested evidence “a genuine risk that the

emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence.” *Id.* at 1252.

d. The District Court’s Decision to Prohibit Mr. Terry from Presenting Ms. Robinson’s Video Recording in His Defense Was an Abuse of Discretion.

Considering that Mr. Terry has a constitutional right to “present a defense” (*Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)), that the proffered evidence is probative, and that it was not prejudicial, this exclusion impinged upon the right to present a defense. *United States v. Cropp*, 127 F.3d 354, 363 (4th Cir. 1997).

The District Court should not have granted the government’s Motion in Limine. J.A. at 256; Tr. Oct. 18, 2016 at 2:2 – 2:3.

B. The District Court’s Jury Instructions Denied Mr. Terry a Fair Trial.

1. Standard of Review.

When reviewing trial courts’ jury instructions, appeals courts apply an abuse of discretion standard. *Stirone v. United States*, 361 U.S. 212, 218–19 (1960).

2. Analysis:

a. The District Court Should Have Instructed the Jury Regarding Reasonable Doubt.

Mr. Terry requested that the District Court give Instruction 4-2 Reasonable Doubt from L. Sand, *et al.*, Modern Federal Jury Instructions – Criminal, Filed through Release No. 68B, June 2016. J.A. at 75; Fed. R. Crim. P. 30(1); *United States v. Matzkin*, 14 F.3d 1014, 1018 (4th Cir. 1994); *United States v. Brewer*, 1 F.3d 1430, 1435 (4th Cir. 1993); and *United States v. Mark*, 943 F.2d 444, 449 (4th Cir. 1991).

Instruction 4-2 is a correct statement of the law. *United States v. Lewis*, 53 F.3d 29, 34 – 35 (4th Cir. 1995). What reasonable doubt means was not substantially covered by the court’s charge to the jury (*Id.*), and reasonable doubt was important to Mr. Terry’s defense that the video contradicted the police testimony that they saw him throw a gun. *Id.*

There is a foundation in the law and the evidence for Instruction 4-2. *Mathews v. United States*, 485 U.S. 58, 63 (1988); *United States v. Ricks*, 882 F.2d 885, 893 (4th Cir. 1989); and *United States v. Hicks*, 748 F.2d 854, 857 (4th Cir. 1984). Accordingly, Mr. Terry is entitled to an instruction.

The District Court refused to give the proposed instruction. J.A. at 248; Tr. Oct. 17, 2016 at 114:8 – 114:9.

Mr. Terry acknowledges that the Fourth Circuit has held that the District Court need not and should not define the term reasonable doubt.

United States v. Moss, 756 F.2d 329, 333 (4th Cir. 1985). Although the Supreme Court has rejected definition of reasonable doubt in terms of moral certainty instead of evidentiary certainty, and it has never required definition of reasonable doubt, it has approved use of the term “hesitate to act” in defining reasonable doubt. *Victor v. Nebraska*, 511 U.S. 1 (1994); *Holland v. United States*, 348 U.S. 121 (1954).

Seven other terms were defined for the jury. While the definition of some terms, such as evidence (J.A. at 265, 268 & 327 – 29; Tr. Oct. 18, 2016 at 11:19 – 11:23; 14:4 – 14:14), direct and circumstantial evidence (J.A. at 268 & 328 – 29; Tr. Oct. 18, 2016 at 14:4 – 14:8), and expert witness (J.A. at 271 – 72 & 331; Tr. Oct. 18, 2016 at 17:24 – 18:17) were neutral, the definition of some others, such as firearm (J.A. at 277 & 335; Tr. Oct. 18, 2016 at 23:14 – 23:18), possess (J.A. at 277 – 78 & 335; Tr. Oct. 18, 2016 at 23:19 – 24:14), and interstate commerce (J.A. at 278 – 79 & 335 – 36; Tr. Oct. 18, 2016 at 24:17 – 25:3) favored the prosecution by defining what was needed for the government’s case.

While the Fourth Circuit has held that the District Court need not and should not define the term reasonable doubt, even upon request (*United States v. Williams*, 152 F.3d 294, 298 (4th Cir. 1998)), considering that other terms were defined for the jury, that Mr. Terry requested Instruction 4-2, that it is a correct statement of the law, not covered elsewhere, and

important to Mr. Terry's defense, the District Court should have instructed the jury regarding reasonable doubt. Defining reasonable doubt would only have been fair, because it was needed for the defense case.

b. The District Court Should Not Have Given the Instruction Captioned Law Enforcement Techniques; not Necessary to Call All Possible Witnesses or Present Every Conceivable Exhibit.

Considering that the government's Proposed Jury Instruction No. 17 captioned Law Enforcement Techniques; not Necessary to Call All Possible Witnesses or Present Every Conceivable Exhibit was not generated by the evidence, and that Mr. Terry objected to it (Fed. R. Crim. P. 30(4); J.A. at 78 & 249; Tr. Oct. 17, 2016 at 115:11 – 115:17), the District Court should not have given the instruction. J.A. at 268; Tr. Oct. 18, 2016 at 14:25 – 15:13; J.A. at 329.

c. The District Court Should Have Given the Modified Instruction Regarding the Third Element – In or Affecting Commerce.

Mr. Terry objected to the second paragraph of the government's proposed Instruction No. 29 captioned Third Element – In or Affecting Commerce. Fed. R. Crim. P. 30(4); J.A. at 78 & 250; Tr. Oct. 17, 2016 at 116:2 – 116:14. In addition, he proposed an alternative second paragraph Id.

Considering that *United States v. Lopez*, 115 S. Ct. 1624 (1995) eliminates any doubt about Congress' lack of power pursuant to the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) to prohibit the mere possession of handguns, that the government offered no evidence that Mr. Terry caused the pistol to affect interstate commerce, and in fact, that Agent

Jonathan Vaccarelli admitted he had no evidence that Mr. Terry caused the pistol to affect interstate commerce (J.A. at 246; Tr. Oct. 17, 2016 at 112:12 – 112:23), the District Court should not have given the instruction. J.A. at 278 – 79; Tr. Oct. 18, 2016 at 24:15 – 25:3; J.A. at 335 – 36.

C. The District Court Should Have Granted Mr. Terry’s Motion for Judgment of Acquittal.

1. Standard of Review.

The Fourth Circuit reviews the district court’s denial of a Rule 29 motion de novo. *United States v. Lespier*, 725 F.3d 437, 447 (4th Cir. 2013).

2. Analysis:

a. Pictures Do Not Lie.

The government’s video (J.A. Vol. III; Gov’t Ex. 1 at trial) and Gov’t Ex. 7N (J.A. at 347) clearly show Det. Aileen Villados holding the .45 caliber pistol that she, Mr. Dante Arthur, and Det. Bernardez-Ruiz claimed Mr. Terry threw. If Mr. Terry had thrown it as they claimed, then the video (J.A. Vol. III; Gov’t Ex. 1 at trial), and Gov’t Ex. 7K (J.A. at 348) should likewise have shown it, but they do not. No reasonable juror could find that they do. *Id.*

Det. Bernardez-Ruiz claimed that when Mr. Terry ran, they ran parallel to each other. J.A. at 174 – 75; Tr. Oct. 17, 2016 at 40:25 – 41:1. The

video (J.A. Vol. III; Gov't Ex. 1 at trial) should likewise have shown this, but it does not. No reasonable juror could find that it does. Id.

Det. Bernardez-Ruiz said that he was a little more than an arm's length away from Mr. Terry during the pursuit. J.A. at 175; Tr. Oct. 17, 2016 at 41:5 – 41:7. The video (J.A. Vol. III; Gov't Ex. 1 at trial) should likewise have shown this, but it does not. No reasonable juror could find that it does. Id.

Det. Bernardez-Ruiz said that he saw Mr. Terry holding a handgun the entire time. J.A. at 179 – 80; Tr. Oct. 17, 2016 at 45:22 – 46:1. The video (J.A. Vol. III; Gov't Ex. 1 at trial) should likewise have shown this, but it does not. No reasonable juror could find that it does. Id.

Det. Bernardez-Ruiz said that while he continued his pursuit of Mr. Terry, until Det. Bernardez-Ruiz tackled him, he saw [Det.] Villados bee-line directly towards the handgun, kneel down and make sure that nobody touched the weapon. J.A. at 180 – 81; Tr. Oct. 17, 2016 at 46:10 – 47:24. The video (J.A. Vol. III; Gov't Ex. 1 at trial) should likewise have shown this, but it does not. No reasonable juror could find that it does. Id.

Even giving the government all *reasonable* inferences (*United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982)), no reasonable juror could find that the video shows what it would have to, in order for Mr. Dante

Arthur's, Det. Bernardez-Ruiz's, and Det. Aileen Villados' claims to have seen Mr. Terry possess and throw a gun to be accurate.

Considering that in this case the video (J.A. Vol. III; Gov't Ex. 1 at trial) contradicts their claims, the Fourth Circuit should apply the doctrine of inherent incredibility. *Jackson v. United States*, 353 F.2d 862, 867 (D.C. Cir. 1965). Mr. Dante Arthur's, Det. Bernardez-Ruiz's, and Det. Aileen Villados' testimony can be disproved as a matter of logic by the video's uncontradicted facts. *Jackson v. United States* at 867. They have made allegations which seem highly questionable in light of the video. *Id.*

In addition, Det. Bernardez-Ruiz and Det. Aileen Villados behaved in a way at odds with the way in which people would normally expect them to behave. They did not draw their service weapons despite believing that they were confronting an armed person. *Id.*

While ordinarily neither the district court nor the appellate court should consider witnesses' credibility (*United States v. Romer*, 148 F.3d 359, 364 (4th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999)), because ordinarily the credibility of witnesses is strictly a matter for the jury (*United States v. Taylor*, 659 F.3d 339, 342–43 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1817 (2012)), this is an extraordinary case. The contradiction in this case is not just within a witness' testimony or between witnesses' testimony. The video

recording contradicts them. Accordingly, the Court should apply the doctrine of inherent incredibility. *Jackson v. United States, supra*.

b. No Evidence that Mr. Terry Affected Interstate Commerce.

The government offered no evidence that Mr. Terry caused the pistol to affect interstate commerce either. In fact, Agent Jonathan Vaccarelli admitted he had no evidence that Mr. Terry caused the pistol to affect interstate commerce. J.A. at 246; Tr. Oct. 17, 2016 at 112:12 – 112:23.

c. No Reasonable Juror Could Have Found Mr. Terry Guilty Beyond a Reasonable Doubt.

The government failed to prove that Mr. Terry knowingly possessed a firearm or ammunition, and the government proved that he did not cause the pistol to affect interstate commerce. No reasonable juror could have found Mr. Terry guilty beyond a reasonable doubt. Accordingly, the District Court should have granted Mr. Terry's Motion for Judgment of Acquittal.

D. Sentencing Drug Addicts to the Armed Career Criminal Act's Severe Punishments, but not Recidivist Violent Offenders, Is Cruel and Unusual Punishment.

1. Standard of Review.

When the Supreme Court reviews the invalidity of a law, it considers whether the law exceeded Congress' authority pursuant to the Constitution. *Gonzales v. Raich*, 545 U.S. 1, 16 – 17 (2005); *United States v. Hosford*, 843

F.3d 161 (4th Cir., 2016); *See also, United States v. Lopez*, 115 S. Ct. 1624 (1995).

2. Analysis: Sentencing Drug Addicts to ACCA's Severe Punishments, but not Recidivist Violent Offenders Violates the Constitution.

A jury convicted Mr. Terry of violating 18 U.S.C. § 922(g)(1), possessing a firearm after having been convicted of a crime punishable by imprisonment for a term exceeding a year. J.A. at 341. Pursuant to 18 U.S.C. § 924(e), he is subject to imprisonment, which may not be less than fifteen years and none of which may the Court suspend.

ACCA (18 U.S.C. § 924(e)) is fantastically broad. It applies to prohibited people who include, dishonorably discharged veterans and recreational drug users. <http://famm.org/wp-content/uploads/2016/03/Issue-Brief-The-Case-for-Reforming-924-c-and-ACCA.pdf>.

Unlike 21 U.S.C. § 851, which has time limits on how old predicate offenses may be, ACCA (*supra*) has no time limits on how recent the three prior convictions have to be. A person who struggled with drug addiction and has three drug offenses from ten or fifteen years ago would still find himself facing an automatic fifteen year prison term if he or she later purchased a gun for hunting or self-defense. Mary Price, "A Case for Compassion,"

retrieved Feb. 5, 2016

<http://virginiacure.weebly.com/uploads/2/0/8/8/20882986/priceacaseforcompassion.pdf>.

Additionally, the Supreme Court has found that the residual clause part of the definition of what counts as a prior “violent felony” is unconstitutional, because it is so vague. *Johnson v. United States*, 135 S. Ct. 2551, 2559 (2015).

Justice Scalia has called the ACCA (18 U.S.C. § 924(e)) a “farce playing in federal courts throughout the nation.” Jonathan H. Adler, “Scalia Dissent from Denial in Four More ACCA Cases,” The Volokh Conspiracy, June 27, 2015 <http://volokh.com/2011/06/27/scalia--dissents--from--denial--in--four--more--acca--cases/>.

While violent offenders, especially recidivists, should be subject to severe punishments in order to protect our communities, many of them now are not. Perversely, drug addicts are the only ones to whom ACCA’s (supra) severe punishments now apply consistently. That is disproportionate. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). That is cruel and unusual punishment, and it violates the Constitution. U.S. Const. amend VIII; *Id.*

Ordinarily, violating 18 U.S.C. § 922(g)(1) would carry a maximum of a ten year term of imprisonment, any portion of which the Court may suspend, and no mandatory minimum. 18 U.S.C. § 924(a)(2). People who have three

prior convictions for assault and even second degree murder would not be subject to the fifteen year mandatory minimum in § 924(e).

In Maryland courts a person violating Md. Code, Pub. Safety Art. § 5-133(b)(1) is subject to imprisonment for not less than five years and not exceeding fifteen years. § 5-133(c)(2)(i). While a court may not suspend any portion of the five year mandatory minimum sentence (§ 5-133(c)(2)(ii)), the person is not eligible for parole during the five year mandatory minimum (§ 5-133(c)(2)(iii)), the court has discretion whether to impose more than five years, but less than fifteen years, and the court has discretion whether to suspend some or all of the additional time.

In addition, if at the time of the commission of the offense, more than five years has elapsed since the person completed serving the sentence for the most recent predicate conviction, including all imprisonment, mandatory supervision, probation, and parole, then the court has discretion whether to impose the mandatory minimum at all. Md. Code, Pub. Safety Art. § 5-133(c)(3).

If Mr. Terry did not have three prior narcotics convictions, but instead had three convictions for attempted second degree murder (*United States v. McCutcheon*, Case No. JFM-15-654 (D. Md. Aug. 24, 2016) (attempted second degree murder does not have element of violent physical force)), then he would only be facing a ten year maximum, instead of a fifteen year

mandatory minimum. When Mr. Terry was charged for the same conduct in the Circuit Court for Baltimore City (Crim. No. 115190017), he was only facing a fifteen year maximum and a five year mandatory minimum.

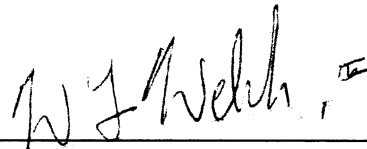
Conclusion

The Court should grant the petition for a writ of certiorari.

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**In The
Supreme Court of the United States**

BARRY TERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix A

No. 17-4180, *U.S. v. Barry Terry*

Judgment and Unpublished Opinion
of U.S. Court of Appeals for the Fourth Circuit

Decided February 27, 2018

FILED: February 27, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4180
(1:15-cr-00656-JFM-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BARRY TERRY

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

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

No. 17-4180

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BARRY TERRY,

Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
J. Frederick Motz, Senior District Judge. (1:15-cr-00656-JFM-1)

Submitted: December 28, 2017

Decided: February 27, 2018

Before WILKINSON and HARRIS, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

William L. Welch, III, Baltimore, Maryland, for Appellant. Stephen M. Schenning,
Acting United States Attorney, Patricia McLane, Assistant United States Attorney,
OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A jury convicted Barry Terry of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1) (2012). Deeming Terry an armed career criminal, the district court sentenced Terry to the statutory minimum term of 180 months' imprisonment. *See* 18 U.S.C. § 924(e) (2012). On appeal, Terry contends that: (1) 18 U.S.C. § 922(g)(1) is unconstitutional as applied to him, (2) the district court erred in excluding a cell phone video and corresponding witness testimony of his arrest, (3) the district court's jury instructions denied him a fair trial, (4) sufficient evidence did not exist to convict him, and (5) applying the Armed Career Criminal Act's (ACCA) enhanced sentences to criminal defendants based on prior drug offense convictions is cruel and unusual punishment. We affirm.

Terry first asserts that § 922(g)(1) is unconstitutional as applied to him because it exceeds Congress' authority under the Commerce Clause in light of *United States v. Lopez*, 514 U.S. 549 (1995). We review constitutional claims de novo. *United States v. Dowell*, 771 F.3d 162, 167 (4th Cir. 2014). We have consistently rejected Terry's argument, *see United States v. Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001), and a panel of this court may not overrule the precedent set by a prior panel, *United States v. Bullard*, 645 F.3d 237, 246 (4th Cir. 2011).

Terry next contends that the district court violated his right to present a defense by excluding a cell phone video of his arrest and testimony from the person who recorded the video. We review preserved evidentiary rulings, including the district court's decision to exclude evidence on Fed. R. Evid. 403 grounds, for abuse of discretion.

Huskey v. Ethicon, Inc., 848 F.3d 151, 159-60 (4th Cir.), *cert. denied*, 138 S. Ct. 107 (2017); *United States v. Davis*, 690 F.3d 226, 257 (4th Cir. 2012). “[E]rrors under Rule 403 are subject to the harmless error test: whether it is probable that the error could have affected the verdict reached by the particular jury in the particular circumstances of the trial.” *United States v. Simpson*, 910 F.2d 154, 158 (4th Cir. 1990) (internal quotation marks omitted). However, unpreserved evidentiary errors are reviewed only for plain error. *United States v. Wilkerson*, 84 F.3d 692, 694-95 (4th Cir. 1996).

Terry opposed the Government’s motion in limine to exclude the video and testimony. *See United States v. Ruhe*, 191 F.3d 376, 383 n.4 (4th Cir. 1999) (holding filing of motion in limine sufficiently preserves issue for appeal once court denies motion). But rather than explicitly ruling on the Government’s motion, the district court told Terry he could present his sister as a witness, without mentioning the video or the recorder’s testimony, and Terry did not renew an offer of proof. *See Fed. R. Evid. 103(b)* (“Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.”). Thus, it is unclear whether abuse of discretion or plain error review applies to Terry’s claim.

We need not determine which standard applies, because Terry does not prevail even under the more favorable abuse of discretion review. While Terry contends that exclusion of the cell phone video and testimony violated his right to present a defense, “well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.” *Holmes v. South Carolina*, 547 U.S. 319, 326

(2006). We conclude that the district court did not abuse its discretion in excluding the video and corresponding testimony, as the video shows only events after Terry disposed of the gun, and viewing Terry's arrest may have inflamed the jury against the Government's witnesses.* *See* Fed. R. Evid. 403. Further, any error is harmless due to the significant evidence of Terry's guilt. *See Simpson*, 910 F.2d at 158.

Terry further claims that the district court erred by (1) refusing to give his requested jury instruction on the definition of reasonable doubt, (2) giving an instruction on law enforcement techniques, and (3) giving the Government's, rather than his, requested instruction regarding "in or affecting commerce." We review challenges to jury instructions for abuse of discretion, determining "whether, taken as a whole, the instruction fairly states the controlling law." *United States v. Moye*, 454 F.3d 390, 398 (4th Cir. 2006) (en banc). A trial "court abuses its discretion when it makes an error of law." *Id.* (internal quotation marks omitted).

We conclude that the district court did not abuse its discretion in refusing to define reasonable doubt. *United States v. Hornsby*, 666 F.3d 296, 310-11 (4th Cir. 2012) ("[D]istrict court[s] [are] not required to define reasonable doubt to the jury so long as the jury was instructed that the defendant's guilt must be proven beyond a reasonable doubt. . . ."). We also conclude that Terry fails to show that the law enforcement techniques instruction was improper, as his vague claim that it was not generated by the evidence

* While the district court did not specifically rule on the issue of the cell phone video and corresponding testimony, both parties argued the admissibility of the evidence on relevancy and Fed. R. Evid. 403 grounds.

does not address the district court's reasoning that Terry's cross-examination of the Government's latent print expert gave rise to the instruction. Further, the court's instruction on "in or affecting commerce" was proper because it correctly stated the controlling law. *See Gallimore*, 247 F.3d at 138.

Terry also contends that the evidence was insufficient to convict him because it did not show that he possessed a firearm or ammunition or that he caused the firearm to affect interstate commerce. We review the denial of a Fed. R. Crim. P. 29 motion and other "challenge[s] to the sufficiency of the evidence de novo." *United States v. Palomino-Coronado*, 805 F.3d 127, 130 (4th Cir. 2015). In assessing the sufficiency of the evidence, we determine whether there is substantial evidence to support the conviction when "viewed in the light most favorable to the government." *Id.* "Substantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.* (internal quotation marks omitted). "Determinations of credibility lie within the sole province of the fact finder." *United States v. Palin*, 874 F.3d 418, 424 (4th Cir. 2017). Thus, "reversal for insufficiency must be confined to cases where the prosecution's failure is clear." *Palomino-Coronado*, 805 F.3d at 130 (internal quotation marks omitted). To convict a defendant under 18 U.S.C. § 922(g)(1), the Government must establish that: (1) the defendant was a felon; (2) he voluntarily and intentionally possessed a firearm; and (3) the firearm had traveled in interstate commerce. *Gallimore*, 247 F.3d at 136. Our review of the trial transcript convinces us that the evidence was clearly sufficient to sustain the jury's verdict.

Finally, Terry argues that the ACCA's mandatory minimum sentence, as applied to defendants with predicate drug offense convictions, constitutes cruel and unusual punishment by imposing disproportionate punishment, in violation of the Eighth Amendment. "We review de novo . . . whether a sentence is proportional under the Eighth Amendment." *Dowell*, 771 F.3d at 167. The Eighth Amendment prohibits cruel and unusual punishment, which includes both "inherently barbaric" punishment and punishment that "is disproportionate to the crime for which it is imposed." *United States v. Cobler*, 748 F.3d 570, 575 (4th Cir. 2014). A defendant can raise two kinds of Eighth Amendment challenges to his sentence: an as-applied challenge based on all the circumstances in his case, and a categorical challenge challenging an entire class of sentences. *Id.* "[C]ategorical challenges to whole classes of prison sentences . . . have had very limited success in the Supreme Court," as "the only two contexts in which the Supreme Court categorically has deemed sentences unconstitutionally disproportionate" have involved death sentences or "life imprisonment without parole for . . . juvenile offender[s]." *Id.* at 577, 580-81.

We conclude that Terry fails to make a showing of categorical disproportionality, as Terry was not sentenced to death or life without parole as a juvenile offender. *See id.* at 580-81. We have also held that "a fifteen-year sentence under ACCA is neither disproportionate to the offense nor cruel and unusual punishment, and thus does not violate the Eighth Amendment." *United States v. Presley*, 52 F.3d 64, 68 (4th Cir. 1995), *abrogated on other grounds by Johnson v. United States*, 559 U.S. 133 (2010). Further, the Supreme Court has recognized that "[s]evere, mandatory penalties may be cruel, but

they are not unusual in the constitutional sense.” *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991).

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Appendix B

1:15-cr-00656-JFM-1, *U.S. v. Barry Terry*

Judgment of U.S. District Court for the District of Maryland

Filed March 21, 2017

MDS

United States District Court

District of Maryland

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed on or After November 1, 1987)

v.

Case Number: JFM-1-15-CR-00656-001

BARRY TERRY

Defendant's Attorney: William Lawrence Welch, CJA

Assistant U.S. Attorney: Patricia McLane & Zachary Stendig

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) 1 after a plea of not guilty.

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18.922(g)(1)	Possession Of A Firearm and Ammunition By A Felon.	06/19/2015	1

The defendant is adjudged guilty of the offenses listed above and sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 as modified by U.S. v. Booker, 543 U.S. 220 (2005).

- ☐ The defendant has been found not guilty on count(s) ____
- ☐ Counts ____ is/are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall 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.

March 16, 2017
Date of Imposition of Judgment

J. Frederick Motz
J. Frederick Motz
United States District Judge

FILED
 U.S. DISTRICT COURT
 DISTRICT OF MARYLAND
 2017 MAR 21 PM 12:51
 CLERK'S OFFICE
 AT BALTIMORE
 DEPUTY

Name of Court Reporter: Nadine Gazic

DEFENDANT: Barry Terry

CASE NUMBER: JFM-1-15-CR-00656-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 180 months.

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

1. That the defendant participate in any substance abuse program including the RDAP.
2. That the defendant be designated to the FCI at Fairton or Ft. Dix, New Jersey for service of his sentence.
3. That the defendant be given credit for time served since June 19, 2015.

☒ 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, at his/her own expense, to the institution designated by the Bureau of Prisons at the date and time specified in a written notice to be sent to the defendant by the United States Marshal. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal:

☐ before 2pm on _____.

A defendant who fails to report either to the designated institution or to the United States Marshal as directed shall be subject to the penalties of Title 18 U.S.C. §3146. If convicted of an offense while on release, the defendant shall be subject to the penalties set forth in 18 U.S.C. §3147. For violation of a condition of release, the defendant shall be subject to the sanctions set forth in Title 18 U.S.C. §3148. Any bond or property posted may be forfeited and judgment entered against the defendant and the surety in the full amount of the bond.

RETURN

I have executed this judgment as follows:

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

UNITED STATES MARSHAL

By: _____
DEPUTY U.S. MARSHAL

DEFENDANT: Barry Terry**CASE NUMBER: JFM-15-CR-00656-001****SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall comply with all of the following conditions:

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

A. STATUTORY CONDITIONS OF SUPERVISED RELEASE

- 1) The defendant shall not commit any federal, state or local crime.
- 2) In any felony case, the defendant shall not possess a firearm or ammunition as defined in 18 U.S.C. §921.
- 3) The defendant shall not illegally use or possess a controlled substance.
- 4) The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.
- ☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- 5) Pursuant to Pub. Law 108-405, Revised DNA Collection Requirements Under the Justice for All Act of 2004, if applicable, the defendant shall cooperate in the collection of DNA while incarcerated in the Bureau of Prisons, or as directed by the probation officer.
- 6) If this judgment imposes any criminal monetary penalty, including special assessment, fine, or restitution, it shall be a condition of supervised release that the defendant pay any such monetary penalty that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

B. STANDARD CONDITIONS OF SUPERVISION

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) The defendant shall support his or her dependents and meet other family responsibilities;
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) The defendant shall notify the probation officer ten days prior to any change in residence or employment;
- 7) The defendant shall refrain from excessive use of alcohol;
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted permission to do so by the probation officer;
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
- 12) The defendant shall notify the probation officer within 72 hours of being charged with any offense, including a traffic offense;
- 13) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court;
- 14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Barry Terry**CASE NUMBER: JFM-1-15-CR-00656-001****C. SUPERVISED RELEASE
ADDITIONAL CONDITIONS**

1. The defendant shall satisfactorily participate in a treatment program approved by the probation officer relating to substance and/or alcohol abuse, which may include evaluation, counseling, and testing as deemed necessary by the probation officer.

DEFENDANT: Barry Terry

CASE NUMBER: JFM-1-15-CR-00656-001

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$0.00	\$0.00
☐ CVB Processing Fee \$30.00			

☐ 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>
		\$0.00	

TOTALS	\$ _____	\$ _____	\$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:

* 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: Barry Terry

CASE NUMBER: JFM-1-15-CR-00656-001

SCHEDULE OF PAYMENTS

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) penalties, and (8) costs, including cost of prosecution and court costs.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

- A ☒ In full immediately; or
- B ☐ \$_____ immediately, balance due (in accordance with C, D, or E); or
- C ☐ Not later than _____; or
- D ☐ Installments to commence _____ day(s) after the date of this judgment.
- E ☐ In _____ (e.g. *equal weekly, monthly, quarterly*) installments of \$_____ over a period of _____ year(s) to commence when the defendant is placed on supervised release.

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

Unless the court expressly orders otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Bureau of Prisons Inmate Financial Responsibility Program, are to be made to the Clerk of the Court.

If the entire amount of criminal monetary penalties is not paid prior to the commencement of supervision, the balance shall be paid:

- ☐ in equal monthly installments during the term of supervision; or
- ☐ on a nominal payment schedule of \$_____ per month during the term of supervision.

The U.S. probation officer may recommend a modification of the payment schedule depending on the defendant's financial circumstances.

Special instructions regarding the payment of criminal monetary penalties:

- ☐ 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:

Appendix C

1:15-cr-00656-JFM-1, *U.S. v. Barry Terry*

Transcript of Motions Hearing on July 22, 2016
Reflecting Order and Opinion of U.S. District Court
For the District of Maryland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA

v.

CRIMINAL CASE NO.
JFM-15-656

BARRY TERRY,

Defendant

(Motions Hearing)
Friday, July 22, 2016
Baltimore, Maryland

Before: Honorable J. Frederick Motz, Judge

Appearances:

On Behalf of the Government:
Patricia C. McLane, Esquire

On Behalf of the Defendant:
William L. Welch, III, Esquire

Reported by:
Mary M. Zajac, RPR, FCRR
Fourth Floor, U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

1 (Proceedings at 2:31 p.m.)

2 THE COURT: We are here for a motions hearing in United
3 States versus Barry Terry, Criminal Number 15-0656.

4 MS. MCLANE: Thank you. Good afternoon, Your Honor.
5 Patricia McLane on behalf of the United States government. I'm
6 joined at counsel table by Special Agent Brendan Plasha from the
7 ATF.

8 MR. WELCH: Good afternoon, Your Honor. My name is
9 William Welch. That's spelled W-E-L-C-H. I represent Mr. Terry,
10 who's standing to my left.

11 THE COURT: Okay. I've reviewed the memoranda. But
12 Mr. Welch, let me hear from you briefly.

13 MR. WELCH: Certainly, Your Honor. Your Honor, on the
14 second motion, the Old Chief motion, we've reached an agreement
15 with the government. We've got an Old Chief stipulation, so that
16 motion is now moot.

17 THE COURT: Okay.

18 MR. WELCH: The only one that remains is my motion to
19 dismiss, given that 922(g) would be unconstitutional as applied
20 to Mr. Terry. Now, I realize that you are bound by precedent
21 that's directly on point, Scarborough v. United States, 431 US
22 563. In 1977 the Supreme Court affirmed the Fourth Circuit's
23 opinion that any connection with interstate commerce at all is
24 sufficient under the Commerce Clause so that Congress would have
25 the authority to regulate possession, or really mere possession,

1 of a firearm. I realize you're bound by that.

2 But my point in this situation is that I believe that
3 there is a conflicting Supreme Court precedent, more recent than
4 the Scarborough case. It's United States v. Lopez, 514 US 549,
5 in which the Supreme Court said that Congress did not have the
6 authority to regulate mere possession of a firearm. Granted,
7 that was 922(q), possession of a firearm within a thousand feet
8 of a school, not a felon in possession case. But given that
9 Lopez is decided more recently, 18 years after Scarborough, I
10 believe that there's a conflict there.

11 I mean, it's all whether Congress has the authority to
12 regulate mere possession of a firearm. I don't believe that
13 other than the fact that this firearm was manufactured in
14 California at some point and made its way to Maryland, I don't
15 believe that the government has any evidence in discovery that
16 I've seen that Mr. Terry went out of state to acquire it or that
17 he asked someone out of state to send it to him in Maryland.

18 Essentially, his only nexus with this firearm, under
19 the government's version of the evidence, lasts for a few minutes
20 on one day. Basically, he's seen on a camera. The person
21 looking at the CitiWatch camera believes that he might be armed
22 and so sends Baltimore police officers to approach Mr. Terry.

23 When Mr. Terry, when the police get there, they say
24 that Mr. Terry takes off running, that he throws something. They
25 arrest him, come back, and find a firearm, which is what they

1 believe he threw.

2 That would be something that would be traditionally
3 left to the state. And indeed, Mr. Terry was initially charged
4 by the State of Maryland with being a felon in possession of a
5 firearm. So that's the argument that we want to make.

6 I'd like to preserve the issue. I understand that
7 you're bound by precedent that is directly on point. But we
8 would like to make an issue of this and we would like to see if
9 we can persuade the Supreme Court to take a look at this.

10 THE COURT: Thank you.

11 MS. MCLANE: Well, Your Honor, I must apologize. I
12 misunderstood Mr. Welch's argument when I initially filed that
13 response. But certainly, we stand by that Scarborough is binding
14 precedent.

15 We do believe that there's a distinction, at least with
16 Lopez. It's my recollection that it was more of a factual issue,
17 that the government could not prove the actual nexus to the gun.
18 And so I think that those cases are distinguishable and that
19 they're not conflicting.

20 THE COURT: Well, I appreciate Mr. Welch raising the
21 issue and preserving the issue in the case. But I think
22 Scarborough governs and that United States v. Moore, Fourth
23 Circuit case which did not deal with Lopez, but it, but it noted
24 that other courts have uniformly rejected, that 922(g) was
25 affirmed under District of Columbia v. Heller. So the issue is

1 preserved, but I am bound by the precedent. Thank you.

2 MR. WELCH: Your Honor, I also wanted to inquire. Mr.
3 Terry had written to the Court. Your Honor had asked me to
4 respond. And I am prepared to do that. But I wanted to inquire,
5 would you prefer that I respond in writing to the Court or, if
6 Your Honor would like, we're prepared to address it this
7 afternoon. I would just ask that the government be excused.

8 THE COURT: Yeah. Why don't you do it early and I'll
9 ask the government to be excused?

10 MR. WELCH: Okay.

11 MS. MCLANE: Your Honor, should I remain outside?

12 MR. WELCH: I don't anticipate --

13 THE COURT: Why don't you wait outside?

14 MR. WELCH: -- requiring anything further.

15 MS. MCLANE: I don't have anything else to do except
16 for some fun later. So I'll be right outside, Your Honor, if you
17 need me back.

18 (Government counsel and agent leave the courtroom.)

19 (Sealed Proceedings were held. Conclusion of
20 Proceedings at 2:39 p.m.)
21
22
23
24
25

REPORTER'S CERTIFICATE

I, Mary M. Zajac, do hereby certify that I recorded stenographically the proceedings in the matter of USA v. Barry Terry, Case Number(s) JFM-15-656, on July 22, 2016.

I further certify that the foregoing pages constitute the official transcript of proceedings as transcribed by me to the within matter in a complete and accurate manner.

In Witness Whereof, I have hereunto affixed my signature this _____ day of _____, 2017.

Mary M. Zajac,
Official Court Reporter

Appendix D

Verbatim text of Constitutional, Statutory, Rule,
and Jury Instruction involved in the case

Appendix D

Verbatim text of:

Commerce Clause (U.S. Const. art. I, § 8, cl. 3)

The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. amend VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. § 922(g)(1)

It shall be unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(e)

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term “serious drug offense” means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Fed. R. Crim. P. 29(c)

After Jury Verdict or Discharge.

(1) *Time for a Motion.* A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) *Ruling on the Motion.* If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) *No Prior Motion Required.* A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

Fed. R. Crim. P. 30

Jury Instructions

(a) *In General.* Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the

close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.

(b) Ruling on a Request. The court must inform the parties before closing arguments how it intends to rule on the requested instructions.

(c) Time for Giving Instructions. The court may instruct the jury before or after the arguments are completed, or at both times.

(d) Objections to Instructions. A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

Fed. R. Evid. 401

Test for Relevant Evidence

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

Fed. R. Evid. 403

Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Instruction 4-2 Reasonable Doubt from L. Sand, et al., Modern Federal Jury Instructions – Criminal, Filed through Release No. 68B, June 2016

Since, in order to convict the defendant of a given charge, the government is required to prove that charge beyond a reasonable doubt, the question then

is: What is a reasonable doubt? The words almost define themselves. It is a doubt based upon reason. It is doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of a convincing character that a reasonable person would not hesitate to rely upon in making an important decision.

A reasonable doubt is not caprice or whim. It is not speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. The law does not require that the government prove guilt beyond all possible doubt: proof beyond a reasonable doubt is sufficient to convict.

If, after fair and impartial consideration of the evidence, you have a reasonable doubt as to the defendant's guilt with respect to a particular charge against him, you must find the defendant not guilty of that charge. On the other hand, if after fair and impartial consideration of all the evidence, you are satisfied beyond a reasonable doubt of the defendant's guilt with respect to a particular charge against him, you should find the defendant guilty of that charge.