CASE NO. 06-1240

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CLEMMETH D. NEVELS,

Defendant-Appellant.

APPELLEE'S ANSWER BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
The Honorable Lewis T. Babcock
Chief District Court Judge
D.C. No. 04-cr-00417-LTB-1

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Oral Argument is requested.
January 26, 2007

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PRIOR OR RELATED APPEALS

There are no known prior or related appeals.

JURISDICTIONAL STATEMENT

Following a four-day trial to jury, defendant-appellant Clemmeth D. Nevels was convicted of one count of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. § 922(g)(1), and one count of possession of a firearm with an altered serial number, in violation of 18 U.S.C. § 922(k), on March 9, 2006. Vol. I, doc. no. 118. He was sentenced on May 26, 2006 and judgment was entered on June 1, 2006. Doc. nos. 134, 139. Notice of appeal was timely filed on June 1, 2006. Doc. no. 138. Jurisdiction in the district court was conferred by 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

ISSUES PRESENTED

I. Did the district court properly apply "categorical analysis" to defendant's prior juvenile convictions in determining that defendant was an armed career criminal?

II. Did the district court abuse its discretion in allowing the government to call a witness who was first discovered by the government and noticed to the defense just prior to trial?

III. Did the district court commit plain error in admitting evidence that the shooting victim died and allowing the government's crime-scene reconstruction expert to testify?

STATEMENT OF THE CASE

On September 27, 2004, defendant was charged in a two-count Second Superseding Indictment, which was the operating charging instrument at trial. Doc. no. 49. Following a four-day trial to jury, defendant was convicted of both counts: one count of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. § 922(g)(1), and one count of possession of a firearm with an altered serial number, in violation of 18 U.S.C. § 922(k), on March 9, 2006. Doc. no. 118. He was sentenced on May 26, 2006, to 300 months imprisonment on Count One and 60 months imprisonment on Count Two to run concurrently and judgment was entered on June 1, 2006. Doc. nos. 134, 139.

STATEMENT OF THE FACTS

On January 11, 2004, at about 4:13 a.m., officers of the Denver Police Department responded to a 911 call requesting assistance at 1426 E. 23rd Ave. in Denver. Vol. XIII (Trial Transcript) (hereinafter "Trl. Tr.") at 167-8. As officers Markell and Michael approached the townhome, they saw defendant leaning up against a car across the street from the address. Trl. Tr. at 168. At defendant's feet was a cup of Maruchan noodles with a spoon sticking out. Trl. Tr. at 180. When officers began talking to defendant, he was calm and matter of fact. Trl. Tr. at 173. He told them that when he came home there was an "intruder" on the couch in his living room with a gun, that "I did what I had to do, he was going to hurt me", that "there's a body inside", and that he did not know, and could not describe, the "intruder" on the couch in his living room. Trl. Tr. at 171-2, 212. Defendant stated that both he and his girlfriend stayed there. While waiting for backup to arrive, the two officers continued to question defendant about the situation, asking who else lived and perhaps might be inside the residence. Defendant became agitated, refusing to answer further questions. Trl. Tr. at 172-5. He was handcuffed. Trl. Tr. at 177. He then became angry, verbally abusing the police officers. Trl. Tr. at 177-8. He later stated "I'm the shooter, there will be gun powder on my hands, it's my house, and I had to do what I had to do." Trl. Tr. at 232.

When an entry team of officers eventually entered the residence, they saw the victim, Terrell McLamb, on the couch, slumped to one side. Trl. Tr. at 254. He had obviously been shot, sustaining a life-threatening wound to the head. Trl. Tr. at 251, 256. There was a Ruger P89 pistol with an extended magazine next to the victim. Trl. Tr. at 254-6, 258. There was another pistol on the floor. Trl. Tr. at 260. Paramedics removed the victim, who was still alive at that point, with a weak pulse and agonal breathing. Trl. Tr. at 274. Medical personnel were never able to resuscitate the victim. Trl. Tr. at 276-7. In the microwave of the kitchen was a cup of Maruchan soup noodles, the same as the one at defendant's feet outside. Trl. Tr. at 187, 457.

Detectives and others eventually secured a search warrant and processed and documented the crime scene. Trl. Tr. at 456-7. On the floor near the couch was a silver and black Ruger, model P95DC, 9mm semi-automatic pistol, with an obliterated serial number. Trl. Tr. at 464. It had a 10-round magazine with two rounds remaining – one round in the chamber and one round in the magazine – leaving a capacity for firing 9 rounds without reloading. On the couch next to the left-hand of the victim was a silver and black Ruger, model P89, 9mm semi-automatic pistol, serial number 310-92006. The Ruger contained a 33-round capacity extended magazine, which was fully loaded, and there was one round in the chamber as well, for a total of 34 rounds. At the end of the couch was a black

leather jacket belonging to the victim, which contained a fully-loaded 10-round magazine as well as an ammunition box with several rounds of ammunition. Trl. Tr. at 468. The Ruger P89 next to the victim had not been fired. Trl. Tr. at 495-6. Detectives found multiple bullet fragments and spent bullets. There were ten 9mm shell casings recovered in the living room. Trl. Tr. at 464-7, 469.

Upstairs in the master bedroom detectives noted several boxes of ammunition as well as live ammunition in several locations, including on top of the bed, on the floor beneath the bed at the headboard, and in various dressers and nightstands. Notably, detectives also found a spent shell casing in one of the drawers. Trl. Tr. at 300-305. There was a power sander on the floor next to a dresser. Trl. Tr. at 470-71. A Wolf-brand 9mm shell casing was found near where defendant was standing outside, underneath the car and near to the cup of noodle soup. Trl. Tr. at 457.

Later analysis by Det. Kerber, a firearms examiner, showed that those bullet fragments and spent bullets which could be identified corresponded to the P95 pistol. Specifically, all 12 shell casings – the 10 in the living room, the one in the master bedroom, and the one outside near where defendant was standing – matched the P95 pistol. Trl. Tr. at 532-3; 536. Analysis of the powder patterns on the victim's clothing showed that most of the shots occurred from 6-12 inches away, muzzle to clothing. Trl. Tr. at 541-2. Det. Kerber was unable to recover the serial

number from the P95 firearm because it had been so thoroughly sanded down. Trl. Tr. 555-7.

Gunshot residue tests showed positive for both the victim and defendant. Trl. Tr. at 437, 439-40. Notably, the GSR tests revealed the presence of tin, a metal associated with Wolf brand ammunition. Trl. Tr. at 437-39, 469-70.

Several civilians testified as well. Shelly Barnett, defendant's ex-wife, said that she had seen defendant with a silver and black semi-automatic pistol on Christmas Eve 2003 when he pushed her outside a nightclub and kept the pistol in his lap as he talked to her. Trl. Tr. at 507-9, 516-7. Barnett also testified that defendant and Terrell McLamb were friends. Trl. Tr. at 507. Tamica Galloway also said that defendant and the victim were friends. Trl. Tr. at 416. She had last seen them together the day before the shooting when the defendant and victim were smoking together on the front porch of Rose Burton's home where defendant was living. Trl. Tr. at 420-21. Rodney Givens, the cousin of the victim, confirmed that defendant and victim were long-time close friends. Trl. Tr. at 427-8. Raymond Clemens also confirmed that defendant and the victim were best friends from a young age. Trl. Tr. at 425. He stated that the victim was right-handed. Trl. Tr.

Rose Burton, the then-girlfriend of defendant, testified at length. Vol. XIV, Trl. Tr. at 321-415. Defendant lived at the house with her in the master bedroom.

Trl. Tr. at 324-5. She stated that the P95 pistol belonged to defendant and that he had possessed the pistol for several months prior the shooting. Trl. Tr. at 328-30. She had seen him "sanding" on the pistol and ammunition clip. Trl. Tr. at 366. The ammunition in the bedroom she shared with defendant did not belong to her. Trl. Tr. at 330. The victim and defendant were friends. Trl. Tr. at 325-6. The victim would often spend the night at her townhome - the victim stayed over her objections at the insistence of defendant. Trl. Tr. at 327. Defendant and the victim had been armed in each others presence on previous occasions without incident. Trl. Tr. at 400-1.

Burton further testified that the night of the shooting she returned to the house and let the victim inside. Trl. Tr. at 334-5. She called defendant several times that night to discuss with him that the victim was present. Trl. Tr. at 379-84. Later that night, the victim borrowed a DVD from her that he watched downstairs, where he would sleep on the couch. Trl. Tr. at 337-8. She was upstairs in her room when she heard someone knock on the door. Trl. Tr. at 339-40. She heard two men briefly argue and then she heard a number of shots. Trl. Tr. at 341-2. She hid in the closet. Trl. Tr. at 343. Soon thereafter, defendant came up to the master bedroom with the gun in his hand and saw Burton in the closet. Trl. Tr. at 344-5. They both went downstairs, where she saw the victim slumped on the couch. Trl. Tr. at 346-8. Defendant went to the body and pushed the victim's

pistol with his own over to the side. Trl. Tr. at 402-7. Burton called her mother at the exact time of 3:28 a.m. from her residence. Trl. Tr. at 350. Both she and defendant drove to the home of defendant's mother, and then to the home of Burton's mother. Trl. Tr. at 353-4. Burton took defendant back to the apartment. Trl. Tr. at 355.

On cross-examination, defense counsel elicited testimony as to the victim's past dangerousness and past possession of firearms. Trl. Tr. at 374-8. She elicited the hearsay statement of defendant that "That nigger [McLamb] pulled that gun out on me and I shot him, I shot him." Trl. Tr. at 386-7.

Lt. Jonathyn Priest served as an expert in crime scene reconstruction. Trl. Tr. 588-669, 694-733. Without elaborating here his intermediate analysis, Lt. Priest demonstrated that the first shot was a missed shot that went through the window above the couch, causing the distinct stippling pattern at the victim's ear. The victim then recoiled and fell, hitting his head against the drywall bead at the corner of the window, which resulted in the laceration to the back of the victim's head. Defendant then fired a series of shots at the victim as he lay on the couch in a defensive posture, left arm upturned shieldig his face, while turning his left (i.e. non-dominant) side to defendant as he twisted away from the bullets. One shot hit the victim in the left cheek, four shots were to the body including a groin shot, and two shots were to the victim's left arm as it was held in a defensive posture.

Defendant fired all of the shots that hit the victim from a close range – each from less than 3 feet and most of them from a range of 6-12 inches. When defendant fired each and every shot that hit the victim, the victim was seated on the couch. No single shot that hit the victim would have had an immediate impact on his ability to move his arms and hands. *See* Trl. Tr. at 606-69, 723-33.

SUMMARY OF THE ARGUMENT

I. The case law clearly dictates that courts should use a "categorical analysis" to prior convictions, including juvenile adjudications, under the Armed Career Criminal Act. The district court properly applied this categorical analysis in concluding that defendant's two juvenile convictions for aggravated robbery, in which the charging instrument specified that defendant used a "gun" in both convictions, qualified as predicate convictions under the Act.

II. The trial court did not abuse its discretion in allowing a witness to testify whose identity the government did not disclose, because it did not know it, until three days prior to trial. Defendant was not entitled to any notice under Fed. R. Crim. P. 16 of the government's intended witnesses, the government provided notice within one hour of learning of the new witness regardless, and the government complied with the trial court's order that the defense be allowed to interview the witness immediately. Because the government had no obligation in

the first instance to disclose the witness' identity, there was no violation for the court to sanction. Furthermore, because defendant identifies no substantial prejudice, he is not entitled to any relief regardless.

III. Defendant does not demonstrate that the trial court committed plain error, much less abused its discretion under Fed. R. Ev. 403, in allowing unobjected evidence that the shooting victim died and in allowing the unobjected testimony of the government's crime scene reconstruction expert. Defendant stipulated to the coroner's report detailing the victim's autopsy. In opening statement, defendant conceded possessing the charged pistol on the night of the shooting and made his affirmative defense of justification, i.e. that the victim was the first aggressor, the central issue of the trial. Accordingly, the trial court did not commit plain error in allowing the testimony of the government's crime scene reconstruction expert, who opined on the likely positions of the defendant and victim during the shooting, including that the victim was retreating and in a defensive and vulnerable posture when defendant shot him seven times.

ARGUMENT

I. The District Court Properly Applied "Categorical Analysis" To Defendant's Prior Juvenile Convictions In Determining That Defendant Was An Armed Career Criminal.

A. Standard of Review

The defendant's challenge to his sentence under the Armed Career Criminal Act ("ACCA"), codified at 18 U.S.C. § 924(e), "is a legal issue subject to de novo review." *United States v. Moudy*, 132 F.2d 618, 619 (10th Cir. 1998).

B. Legal Standards Applicable to the ACCA

At sentencing, the district court held that defendant's criminal history included three prior convictions which qualified as predicate crimes of violence under the ACCA, thus triggering the Act's sentencing enhancement provisions. Vol. XVII, Sentencing Transcript ("Sent. Tr.") at 8-12. Two of defendant's predicate ACCA convictions were juvenile adjudications in the State of Colorado on distinct Aggravated Robbery charges. Vol. III, Presentence Report ("PSR") at pp. 12-13, ¶¶73-75 and pp. 14-16, ¶¶ 87-102; Sent. Tr. at 10. On appeal, defendant argues that the district court erred when it held that his two juvenile Aggravated Robbery adjudications qualified as predicate crimes of violence under the ACCA. Defendant specifically asserts that the district court should have conducted a factual inquiry of the evidence underlying his juvenile convictions "to determine if the defendant used or carried a firearm during the incident[s]."

Appellant's Opening Brief at 18. Defendant is wrong as a matter of law. In determining whether any conviction, juvenile or adult, is a predicate crime of violence under the ACCA, the courts "do not inquire into the particular factual circumstances surrounding the past offense," *United States v. King*, 979 F.2d 801, 802 (10th Cir. 1992), but rather must utilize a "categorical" approach as set forth by the Supreme Court in *United States v. Taylor*, 495 U.S. 575, 602 (1990) and *United States v. Shepard*, 544 U.S. 13, 19-21 (2005). The district court properly applied this *Taylor-Shepard* categorical analysis to defendant's juvenile convictions.

The ACCA expressly provides that certain juvenile adjudications constitute predicate offenses:

> (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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.
>
> (C) the term "conviction" *includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.*

18 U.S.C. § 924(e)(2)(B) and (C) (emphases added).

In *Taylor* the Supreme Court held that sentencing courts must employ a formal "categorical approach" when determining if a prior conviction qualifies as a predicate violent felony under the ACCA. 495 U.S. at 600-602*; see also United States v. Kirby*, 157 Fed. Appx. 89, 2005 WL 3293978 (10th Cir. 2005) ("It is well established that under the ACCA, we utilize a formal categorical approach"). Under the categorical approach, a sentencing court will generally review "only the fact of conviction and the statutory definition of the prior offense." *Taylor*, 495 U.S. at 602. However, in a "narrow range" of cases (*id*.), such as those in which the statutory definition of the prior offense may include both crimes which are violent felonies under the ACCA and crimes which are not, the sentencing court may look beyond the fact of conviction and statutory definition of the crime to a "limited universe of evidence" to determine if the prior conviction qualifies as a predicate offense. *United States v. McCall*, 439 F.3d 967, 969 (8th Cir. 2006) (*en banc*).

In *Shepard*, the Supreme Court defined the limited universe of evidence a sentencing court may "generally" consider in the context of determining whether a plea-based prior conviction qualifies as an ACCA predicate: "the statutory definition, *charging document*, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which defendant assented." 544 U.S. at 16 (emphasis added); *see also United States v. Harris*, 447 F.3d 1300,

1305 (10th Cir. 2006). The *Shepard* Court also expressly held that sentencing courts could *not* rely upon other documents such as police reports and affidavits which contain factual accusations underlying the prior conviction. *Id.; see also United States v. Austin*, 426 F.3d 1266, 1267 at n. 1 (10th Cir. 2005) ("[W]e will not consider factual accusations underlying a prior conviction to which a defendant has not admitted").

Defendant argues that the district court "misread" *Taylor*, and that it "should have been guided by information before it in the Presentence Investigation Report indicating Nevels did not use or possess a weapon, especially in his first juvenile adjudication." *Appellant's Opening Brief* at 12. Defendant asserts that because *Taylor* involved the definition of burglary in the context of a prior adult conviction and did not specifically address the provisions of the ACCA relating to prior juvenile offenses, it is not controlling. However, as numerous decisions of this Court and other courts of appeal unequivocally demonstrate, the rules set forth in *Taylor* and *Shepard* are not limited to the facts of those cases or to the definition of burglary, but rather they are binding principals of statutory interpretation applicable to prior convictions under all subsections of the ACCA and to other statutes involving sentencing enhancements based on prior convictions. *See, e.g.*, *Harris*, 447 F.3d at 1305 (applying *Taylor-Shepard* to "separateness" requirement of the ACCA); *McCall*, 439 F.3d at 970 (applying *Taylor-Shepard* to the

"otherwise involves . . risk of physical injury" provision of § 924(e)(2)(B)(ii) of the ACCA; collecting cases at n.1); *Austin*, 447 F.3d at 1270-1271 (applying *Taylor-Shepard* to §4B1.2 of the United States Sentencing Guidelines in a non-ACCA case). Moreover, several courts of appeal have expressly held that the *Taylor-Shepard* "categorical approach" also applies when "examining the offense elements of a prior juvenile conviction" for purposes of applying the ACCA. *United States v. Jones*, 332 F.3d 688, 691-693 (3rd Cir. 2003); *United States v. Wells*, __ F.3d __, 2007 WL 51483 (6th Cir. Jan. 9, 2007); *United States v. Kirkland*, 450 F.3d 804, 807 (8th Cir. 2006); *United States v. Burge*, 407 F.3d 1183, 1187 (11th Cir. 2005).

B. The District Court Properly Applied The *Shepherd-Taylor* Categorical Analysis To Defendant's Juvenile Convictions.

Defendant's two juvenile convictions for Aggravated Robbery resulted from his participation in two separate robberies in 1989. PSR at p.14, ¶87. In February 1990, the defendant pled guilty in Denver County Colorado Juvenile Court to a consolidated delinquency petition charging both robberies. *Id.* at p. 16, ¶¶ 102-103. The defendant was represented by counsel during the juvenile proceedings, including the plea hearing. *Id.*

Both counts of the delinquency petition charged violations of Colorado Revised Statute § 18-4-302(1)(c), which defines the offense of Aggravated

Robbery. In 1989, the year defendant committed the offenses, § 18-4-302 provided:

> (1) A person who commits robbery is guilty of aggravated robbery if during the act of robbery or immediate flight therefrom:
>
> > (a) He is armed with a deadly weapon with intent, if resisted, to kill, maim, or wound the person robbed or any other person; or
> >
> > (b) He knowingly wounds or strikes the person robbed or any other person with a deadly weapon or by the use of force, threats, or intimidation with a deadly weapon knowingly puts the person robbed or any other person in reasonable fear of death or bodily injury; or
> >
> > (c) He has present a confederate, aiding or abetting the perpetration of the robbery, armed with a deadly weapon, with the intent, either on the part of the defendant or confederate, if resistance is offered, to kill, maim, or wound the person robbed or any other person, or by the use of force, threats, or intimidation puts the person robbed or any other person in reasonable fear of death or bodily injury; or
> >
> > (d) He possesses any article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or represents verbally or otherwise that he is then and there so armed.
>
> (2) Repealed by Laws 1989, S.B.246, § 156.
>
> (3) Aggravated robbery is a class 3 felony.
>
> (4) If a defendant is convicted of aggravated robbery pursuant to paragraph (b) of subsection (1) of this section, the court shall sentence the defendant in accordance with the provisions of section 16-11-309, C.R.S.

Colo. Rev. Stat. § 18-4-302 (West 1989).

Defendant does not dispute the fact of his aggravated robbery convictions, nor that the offense of aggravated robbery as defined under Colo. Rev. Stat. § 18-4-302 "has as an element the use, attempted use, or threatened use of physical force against the person of another" as required under § 924(e)(1)(B)(i).[1] Hence, the only issue before the district court was whether defendant's conviction for violating Colo. Rev. Stat. § 18-4-302 involved "the use or carrying of a firearm, knife, or destructive device." 18 U.S.C. § 924(e)(1)(B). In answering this question, the district court strictly adhered to the standards of *Taylor-Shepard*. Because the statutory elements of § 18-4-302 did not require the use of a "firearm, knife, or destructive device," the district court looked to a secondary source expressly authorized by the Supreme Court in *Shepard* and commonly relied upon by this Court in affirming determinations that a prior conviction satisfied the requirements of the ACCA and other enhancements – the "charging document."

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[1]On appeal, defendant asserts for the first time that because his juvenile adjudications are defined under Colorado state law to be "delinquent acts" rather than "crimes", his convictions fall outside the definition of the ACCA. *Appellant's Opening Brief* at 16. However, as noted, 18 U.S.C. § 924(e)(2)(B) expressly provides that acts of juvenile delinquency are included in the definition of "violent crimes" if the act of delinquency was punishable by a term of one year if "committed by an adult." In 1989, a violation of C.R.S. §18-4-302, if committed by an adult, was punishable by a term of imprisonment of between 4 and 16 years. *See* Colo. Rev. Stat. §§ 18-4-302(3) (aggravated robbery is a Class 3 felony) and 18-1-105(1)(a)(III)(A) (penalties for felony classes) (West 1989). The penalty provisions of Colo. Rev. Stat. § 18-1-105 are now codified at 18-1.3-401 (West 2006).

544 U.S. at 16; *see also Austin*, 426 F.3d at 1268; *Harris*, 447 F.3d 1306; *Kirby*, 2005 WL 3293978 at * n.1 ("the government provided charging documents . . . which eliminated any 'non-generic" issue for appeal."); *Burge*, 407 F.3d at 1187 (the district court properly "looked beyond the face of the statute to the [juvenile] petition and judgment . . .").

At sentencing the government presented copies of the delinquency petition to which defendant entered his guilty plea. Sent. Tr. at 5-6. Without objection from the defendant, the district court admitted the delinquency petition as Sentencing Exhibit 1. *Id.*[1] Both counts of the delinquency petition specified that the "deadly weapon" utilized by the defendant as required as an element for conviction under §18-4-302(C) was a "gun." *Id*. at 9 (Count One) and 10 (Count Two). After reading the charges of both counts into the record, the district court concluded: "In looking at the statute and Count 1 and Count 2 of the juvenile petition, I would find and conclude that the categorical requirements of *United States v. Taylor* have been satisfied categorically." *Id.* at 10.

Defendant's assertion that the district court should have looked to the PSR to review the purported factual allegations underlying defendant's juvenile

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[1] The delinquency petitions and other associated documents are also found at Exhibits 1-5 of doc. no. 45 (government's response to defendant's Motion to Strike/Dismiss Armed Career Criminal Act Enhancement).

adjudication – factual allegations clearly derived from investigative police reports (*see* PSR at p. 14-15, ¶¶88 to 99) – is directly contrary to the holding in *Shepard* and its progeny: "The court is *not* to consider the actual conduct in which the juvenile engaged and make a factual determination as to whether the juvenile committed the offense." *Jones*, 332 F.3d at 691. As this Court recently emphasized in *Austin*, conducting such factual inquiries about prior convictions is exactly the evil the categorical approach prohibits: "The categorical approach allows the sentencing court to examine sources of undisputed information rather than conduct a fact finding inquiry, thereby sparing it from conducting mini-trials on prior offenses which have already been adjudicated." 426 F.3d at 1270; *see also Wells*, 2007 WL 51483 at *7 ("[B]y adhering to the principles of *Taylor* and *Shepard*, even in the context of juvenile adjudications, district courts will eliminate the need to examine facts relating to crimes sometimes committed in the far distant past.").

The defendant's arguments on appeal are incorrect as a matter of law. The district court properly applied "categorical" analysis to defendant's juvenile convictions in determining that defendant was an armed career criminal, and this Court should affirm the district court's findings and sentence.

II. The Trial Court Did Not Abuse Its Discretion By Allowing Shelly Barnett To Testify.

Defendant contends that the court abused its discretion by not excluding the testimony of Shelly Barnett because the disclosure of her identity was late in violation of Fed. R. Crim. P. 16. *Appellant's Opening Brief* at 19-24.

A. Issue Below

The government witness Shelly Barnett testified on the third day of trial, Wednesday, March 8, 2006. Trl. Tr. 505-520. Her name was not listed on the government's witness list submitted at the pretrial conference on February 23, 2006. Doc. no. 104. The government did not learn of the existence of Barnett until it interviewed Tamica Galloway on the morning of March 3, 2006, the Friday before the beginning of trial on Monday, March 6. Doc. no. 111; Trl. Tr. at 519. Galloway had been previously listed on the government's witness list. Doc. no. 104. The government had made repeated efforts to locate Galloway in the weeks prior to trial but such efforts were unavailing. Doc. no. 111, Ex. 1 (agent's report of government efforts to find Galloway). The government that very morning, within the hour, disclosed the identity of Barnett, her expected testimony, and known impeachment information in an email to defense counsel. *Id*., Ex. 2 (Email

of March 3, 2006). The government also filed a formal notice with the district court later that weekend with this same information. *Id.* [2]

On the first day of trial the following Monday, March 6, defendant contended that the government's disclosure of Barnett was late in violation of Fed. R. Crim. P. 16. Trl. Tr. at 137-39. The trial court overruled defendant's objection. Trl. Tr. at 139-143. However, in a desire to be "as fair as possible", the trial court ordered that the government make Barnett available for interview by defendant. Trl. Tr. at 142-43. The government complied and defendant interviewed Barnett that very night of Monday, March 6. Trl. Tr. at 244, 359. The trial court delayed the testimony of Barnett at the urging of defense counsel to allow her more time to prepare. Trl. Tr. at 359. Barnett testified on Wednesday, March 8. Trl. Tr. at 505-520. Defendant conducted a vigorous cross-examination of Barnett, including questioning about a prior felony conviction and a different arrest, both of which Barnett admitted. Trl. Tr. at 510-518.

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[2] Defendant mistakes the time of the electronic filing of the notice to the court (Sunday, March 5) for the time of the actual email to defense counsel (morning of Friday, March 3). *Appellant's Opening Brief* at 19; doc. no. 111, Ex. 2 (email to defense counsel).

B. Standard of Review

The issue of whether a trial court has properly admitted or excluded the testimony of a witness is reviewed under an abuse of discretion standard. *United States v. Nichols*, 169 F.2d 1255, 1267 (10th Cir. 1999).

C. Defendant Has Failed To Show That The District Court Abused Its Discretion In Allowing Ms. Barnett To Testify.

Defendant contends that the court abused its discretion by not excluding Barnett, contending that the disclosure of her identity was late in violation of Fed. R. Crim. P. 16. Defendant contends that the government failed to exercise due diligence in discovering the existence and identity of Barnett earlier. *Appellant's Opening Brief* at 23-24. Defendant contends that he therefore did not have adequate time to investigate other potential witnesses or uncover physical evidence that would contradict Barnett's expected testimony. *Id*. at 20-21.

In non-capital cases, the government need not disclose the existence or identity of its witnesses prior to trial. Fed. R. Crim. P. 16(a)(2); *United States v. Russell*, 109 F.3d 1503, 1510 (10th Cir. 1997). This was a deliberate decision by Congress so that government witnesses would be shielded from potential tampering or danger. H.R. Conf. Rep. No. 414, 94th Cong., 1st Sess. 11-12 (1975). In essence, defendant wants this Court to find that the district court abused its discretion in failing to sanction the government for not disclosing a witness prior to trial when the government had no legal duty in the first instance to do so.

While the government had no legal duty to disclose the existence or identity of Barnett, it in fact did so and did so promptly – within an hour via email to defendant's counsel. Doc. no. 111. Furthermore, the government disclosed the expected testimony of Barnett at the same time despite no legal duty to do so. *See* 18 U.S.C. § 3500 ("Jencks Act") (no duty to disclose witness statement until after witness has testified on direct examination); Fed. R. Crim. P. 26.2 (same); *see also United States v. Bencs*, 28 F.3d 555, 561 (6th Cir. 1994) (no duty to disclose witness statements prior to direct examination even if the statements of the witness constitute exculpatory evidence otherwise disclosable).

Defendant contends that he was prejudiced by short notice. But such prejudice is inherent in a system where a defendant is not entitled to any notice prior to the witness testifying. Not only was defendant given pretrial notice, the government made Barnett available for an interview at the government's offices and defendant took full advantage of this opportunity.

Furthermore, defendant offers only speculation that additional time would have yielded evidence to contradict Barnett's testimony. *Appellant's Opening Brief* at 20-21. Such speculation does not entitle a defendant to a continuance or other legal remedies. *Cf. United States v. Sneed*, 34 F.3d 1570, 1580-81 (10th Cir. 1994) (in context of request for discovery of potentially exculpatory physical

evidence, speculation as to contents of sealed tape-recorded conversations was insufficient to require further inquiry).

III. The Trial Court Did Not Commit Plain Error In Allowing The Testimony Of The Government's Crime Scene Reconstruction Expert.

Defendant contends that the district court abused its discretion by failing to exclude evidence that the victim of the shooting died and by failing to exclude the testimony of the government's crime scene reconstruction expert Lt. Jonathyn Priest as unduly and unfairly prejudicial under Fed. R. Ev. 403. *Appellant's Opening Brief* at 31.

A. Issue Below

Prior to trial the defense moved in limine to preclude evidence of the death of the shooting victim as irrelevant under Fed. R. Ev. 401 and unduly prejudicial under Rule 403. Doc. no. 66 (defendant's motion). The government responded that the death of the victim was inextricably intertwined with the events of the case. Doc. no. 68 (government's response) at 3-5. Defendant further moved in limine to preclude the testimony of Lt. Priest on the ground that he was not qualified as a crime scene reconstruction expert and that his testimony would be irrelevant. Doc. no. 64 (defendant's motion). In that motion, defendant indicated that he would be raising a necessity (justification) defense. *Id*. at 5. The

government responded. Doc. no. 70. At the hearing on these two motions, both parties before trial represented to the district court that the government's case-in-chief would provide sufficient grounds for a justification defense without the affirmative presentation of evidence by defendant. Vol. XI (transcript of Jan. 25, 2006 motions hearing) at 3-4, 6-8.[3] As to the death of the victim, the court ruled that the death was probative under Rule 401, particularly given defendant's justification defense. *Id*. at 11. On the Rule 403 ground, the court denied the motion in limine without prejudice to await the fuller evidentiary context of trial. *Id*. at 11-12. As to defendant's motion in limine regarding Lt. Priest, the court found that Lt. Priest had sufficient qualifications to opine on reconstructing the crime scene and that such testimony would be relevant and helpful to the jury in light of defendant's justification defense. *Id*. at 16-20.

At trial, the only non-stipulated element of both counts of conviction was defendant's possession of the pistol and ammunition. Trl. Tr. at 8-10. Defendant did not make any specific objections at trial to introduction of evidence that the victim died. Defendant did not renew his motion to exclude the testimony of Lt. Priest. Relying on *United States v. Vigil*, 743 F.2d 751, 755 (10th Cir. 1984), the

[3] The contours of defendant's affirmative defense of justification had been previously litigated. *See* doc. no. 41 (defendant's motion re justification defense), doc. no. 45 (government's response), doc. no. 54 (court's order)

trial court instructed the jury on defendant's affirmative defense of justification, with the following four elements:

> (1) The defendant was under an unlawful and present threat of death or serious bodily injury;
>
> (2) The defendant did not recklessly or negligently place himself in a situation where he would be forced to engage in the criminal conduct;
>
> (3) The defendant had no reasonable legal alternative; and
>
> (4) There was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Doc. no. 116 (jury instruction no. 33).

B. Standard of Review

A trial court's ruling pursuant to Fed. R. Ev. 403 is reviewed for abuse of discretion. *United States v. Rodriguez*, 192 F.3d 946, 949 (10th Cir. 1999). However, because defendant did not make a timely Rule 403 objection at trial to evidence that the victim died and to the testimony of Lt. Priest, the decisions of the trial court should be reviewed for plain error. Fed. R. Ev. 103(a); Fed. R. Crim. P. 52(b); *United States v. Norman*, 129 F.3d 1099, 1106 (10th Cir. 1997) (defendant must make timely objection and specific ground on appeal must be same as that raised at trial). Defendant's motions in limine which were denied without prejudice prior to trial (with explicit invitation to revisit the issue at trial) do not constitute timely objection. "Only by specific, timely *trial* objection can the trial court entertain reconsideration of the grounds of the motion in light of the actual

trial testimony and the surrounding circumstances developed at trial." *McEwen v. City of Norman, Oklahoma*, 926 F.2d 1539, 1544 (10th Cir. 1991) (emphasis added).

C. Fed. R. Ev. 403 Legal Standards.

"Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403." *United States v. Naranjo*, 710 F.2d 1465, 1469 (10th Cir. 1983) (case involving gruesome photographs). "Evidence is unfairly prejudicial if it makes a conviction more likely because it evokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant *wholly apart* from its judgment as to his guilt or innocence of the crime charged." *Rodriguez*, 192 F.3d at 951 (internal quotation omitted) (emphasis added). In performing the balancing test required by Rule 403, a trial court should "give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Deters v. Equifax Credit Information Services, Inc.*, 202 F.3d 1262, 1274 (10th Cir. 2000). The use of Rule 403 to exclude evidence is "an extraordinary remedy and should be used sparingly." *Rodriguez*, 192 F.3d at 949.

D. By Conceding Possession of the Pistol and Raising the Affirmative Defense of Justification, Defendant Made the Specific Circumstances of How the Shooting Occurred the Central Issue of the Case

In her opening statement, defense counsel admitted that her client possessed the charged firearm on the night of the shooting and raised the justification defense. Trl. Tr. at 160. However, she disputed that defendant was armed with the gun *prior* to entering the apartment before the shooting, thus implying that defendant acquired the pistol in the course of his confrontation with the victim. Trl. Tr. at 161. She promised the jury that defendant himself would testify because "[h]e's the only one who is going to be able to tell you what happened in that living room . . .." Trl. Tr. at 162-3. The defendant's case would rest upon a theory of self-defense: "even felons have a right to protect themselves with a gun if they feel threatened." Trl. Tr. at 165. She talked in detail about what defendant knew of the victim's violent disposition, setting up the justification defense – "his [defendant's] knowledge on the evening of January 11th, and before that, that's what's key to this case." Trl. Tr. at 160. She told the jury that the victim had been shot 7 times. Trl. Tr. at 164-5. Defendant did not object at trial to the testimony of other witnesses which indicated that the victim had died. *E.g.* Trl. Tr. at 273-4, 276-7 (testimony of paramedic that victim died). In the course of trial, prior to the testimony of Lt. Priest, defense counsel stipulated to the admission of the coroner's autopsy report. Trl. Tr. at 361.

As to the issue of introduction of evidence that the victim died, defendant does not point to any specific prejudice. Given that defendant stipulated to admission of the autopsy report and did not object to other witnesses' discussion of the death of the victim, it is difficult to discern that the trial court committed plain error or even abused its discretion. By raising the justification defense, defendant made the shooting a central issue and one cannot envision how to disentangle the death of the victim from the shooting of him.

Because defense counsel admitted that Defendant possessed the pistol on the night of the shooting and raised the justification defense before the testimony of a single witness, the expertise of Lt. Priest in reconstructing the shooting became not just highly probative but essential – how the shooting occurred and thus whether it was justified was the key to both the prosecution and defense. Only two possible witnesses were present at the actual shooting; at the time of trial, one had a constitutional right not to testify (defendant) and the other was dead (victim). As defense counsel pointed out in opening statements, the government had no other way to establish what happened in that living room: "He's [Defendant's] the only one who is going to be able to tell you what happened in that living room . . . even felons have a right to protect themselves with a gun if they feel threatened." Trl. Tr. at 162-3, 165.

Moreover, the judge gave repeated cautionary limiting instructions that defendant was not on trial for the death of the victim and that evidence connected to the death of the victim was being admitted for the limited purpose of showing whether and under what circumstances defendant may have possessed the pistol and ammunition charged in the indictment. Trl. Tr. at 606. Juries are presumed to follow the trial court's instructions. *United States v. Carter*, 973 F.2d 1509, 1513 (10th Cir. 1992).

CONCLUSION

Defendant's convictions and sentence should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Because the first issue raised by appellant-defendant concerning the use of juvenile adjudications is one of first impression in the Tenth Circuit, the United States believes that oral argument would be helpful to the determination of this appeal. Oral argument is not currently set.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that this answer brief is proportionally spaced and contains 6968 words, including footnotes, according to the Microsoft Word software used in preparing the brief.

_____

S/: Joshua Stein
Assistant United States Attorney

CERTIFICATE OF DIGITAL SUBMISSION

All required privacy redactions, if any, have been made and, with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Clerk.

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I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

S/: Joshua Stein
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that on this 26th day of January, 2007, I emailed a true and correct PDF format brief to:

Neil MacFarlane at neil_macfarlane_law@yahoo.com.

Additionally, I shall ensure that two true and correct paper copies are mailed first class, postage prepaid, on January 29, 2007 to:

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