05-2929-cr

To Be Argued By:
EDWARD CHANG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-2929-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

MYSHION CATO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

EDWARD CHANG
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

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STATEMENT OF JURISDICTION

The district court (Ellen Bree Burns, *J.*) exercised jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure, vesting this Court with appellate jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Did the district court err in refusing to instruct the jury that the jury could infer based on consciousness of guilt that "Walker was guilty," when Walker was not in fact on trial?

2. Did the district court abuse its discretion in admitting two letters written by the defendant, when the letters were relevant to show consciousness of guilt, their probative value was not substantially outweighed by the risk of unfair prejudice, and references to sentencing considerations were redacted?

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Preliminary Statement

At approximately midnight on the evening of Friday, May 1, 2004, defendant Myshion Cato was arrested after a gun was observed under his right foot during a traffic stop in Stamford, Connecticut. Before the gun was found, the defendant falsely denied that there was a gun in the car. The gun was fully loaded, with the safety off and the hammer cocked.

During the traffic stop, the driver of the car, Lamar Walker, produced the driver's license of another individual when asked for identification. Walker admitted that he did so because his own license was suspended.

Five months later, federal agents executed a search warrant at Walker's residence and seized a letter written by the defendant to Walker. In the letter, the defendant did not complain that he was being prosecuted for a gun belonging to Walker; instead, in conspiratorial fashion, he conveyed advice from his attorney that Walker had "a better chance with the gun charge" than the defendant. The Government later obtained a second letter written by the defendant to Walker, in which the defendant wrote: "We got to figer out something. Okay I fuck up. I was drunk. but I need to know if you can take the gun charge?"

On appeal, the defendant contends that he was entitled to a jury instruction allowing the jury to infer that "Walker was guilty" from Walker's use of a false ID. The defendant is mistaken, because Walker was not on trial, and the proposed instruction was incorrect and misleading.

The defendant further contends that the two letters were inadmissible. The defendant is mistaken again, because the letters were relevant to show the defendant's consciousness of guilt, their probative value was not substantially outweighed by the danger of unfair prejudice, and references to potential sentencing consequences were appropriately redacted.

Accordingly, the judgment below should be affirmed.

Statement of the Case

On September 8, 2004, a federal grand jury returned a one-count Indictment charging the defendant with possession of a firearm by a felon in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e)(1). (*See* Joint Appendix ("A") 4).

On January 11, 2005, the jury was selected. (*See* A 6). The evidence commenced on January 27, 2005, and the jury returned a guilty verdict on January 31, 2005. (*See* A 7).

On June 2, 2005, the district court sentenced the defendant to 15 years of imprisonment, 4 years of supervised release, and a $100 special assessment. (*See* A 182-84). Judgment was filed and entered on the docket sheet on June 3, 2005. (*See* A 10). On June 8, 2005, the defendant filed a timely notice of appeal. (*See* A 185).

In this appeal, the defendant claims that the district court (1) erred in rejecting a jury instruction as to the consciousness of guilt of an individual who was not on trial, and (2) abused its discretion in admitting two letters written by the defendant.

The defendant is presently serving his federal sentence.

Statement of Facts

During the trial, defendant Myshion Cato stipulated that he had been convicted of a felony, *see* Tr. at I/19,[*] and that the firearm in question had traveled in interstate commerce, *see id.* at 70-71. Accordingly, the only issue in dispute was whether the defendant possessed the firearm.

A. The Government's Case

Officer Faruk Yilmaz, of the Stamford Police Department, *see id.* at 20, testified that he and his partner arrested the defendant at approximately midnight on the evening of Friday, May 1, 2004, *see id.* at 24 & 32-33. The defendant was sitting in the front passenger seat of a car driven by Lamar Walker. *See id.* at 28 & 30-31.

Officer Yilmaz testified that when Walker was asked for his driver's license, he produced the driver's license of another individual, which had expired. *See id.* at 27-28 & 42. Walker admitted that he did so because his own license had been suspended. *See id.* at 42. Walker was asked to step out of the car. *See id.* at 28-29.

Up until that point, the defendant appeared calm. *See id.* at 30. But after Walker was asked to step out of the car, the defendant "became very nervous with his hands,

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[*] References to "Tr. at I/###" refer to page ### of volume I of the trial transcript. *See* Record on Appeal Doc. No. ("R. Doc.") 52. Likewise, references to "Tr. at II/###" and "Tr. at III/###" refer to pages in volumes II and III of the trial transcript, respectively. *See* R. Doc. 53 & 54.

. . . trembling and kind of rocking back and forth." *Id.* at 31. Officer Yilmaz asked whether there was "anything in the car," such as "guns or drugs." *Id.* at 32. The defendant answered no. *See id.* After Walker stepped out of the car, the defendant "motioned as if he was trying to grab something . . . by his thighs or his feet." *Id.* Officer Yilmaz ordered the defendant to return his hands to the dash. *See id.*

Officer Yilmaz then asked the defendant to step out of the car. *See id.* Officer Yilmaz, who was using a flashlight and who testified that the area was well lit, *see id.* at 26 & 33, observed: "As the door opened, I saw Mr. Cato lift his right foot and exit the vehicle. And underneath the foot, was a black handgun." *Id.* at 32-33. Officer Yilmaz identified both the defendant and the handgun found underneath the defendant's foot, *see id.* at 30-31 & 34-35, and he testified that his supervisor Sergeant Gary Perna was called to the scene, *see id.* at 34.

Sgt. Perna observed that the gun, a Smith & Wesson 9-mm semi-automatic handgun, *see id.* at 59, "was in a ready-to-go firing position," *id.* at 57. As Sgt. Perna explained, "[t]he magazine was in and the hammer was back ready to be fired -- safety was off." *Id.* at 62. One bullet was in the firing chamber, and seven bullets were in the magazine. *See id.* at 51 & 65.

The Government called Dawn Baldwin, who testified that she lent her car to Walker, her boyfriend, on the evening of May 1, 2004. *See id.* at 75-76. Baldwin testified that she did not keep a gun in the car, *see id.* at 76-77, and that her daughter had been in the front

passenger seat while shopping for a birthday party before the car was loaned to Walker, *see id.* at 75-76.

Baldwin's daughter testified that, after getting into the front seat, she reached under the seat to pull it forward. *See id.* at 85. She testified that she did not observe a gun in the car, *see id.* at 86, and that she did not feel any objects under the seat, *see id.*

Finally, the Government called Special Agent James Sullivan of the Bureau of Alcohol, Tobacco, and Firearms ("ATF"). Agent Sullivan testified that he participated in the execution of a search warrant at Walker's residence on October 12, 2004, approximately five months after the arrest. *See id.* at 142-44. The agents recovered a 9-mm bullet, *see id.* at 157, and a letter, *see id.* at 145. The parties stipulated that the letter was written to Walker by the defendant on or about July 19, 2004, before any federal criminal charge was filed against the defendant. *See id.* at 158-59. The letter was published to the jury in redacted form as follows:

> Peace Son
>
> What's good my [brother]? I know you was wondering why I haven't wrote you back yet but your boy been stressing this shit is starting to get to me plus I've been waiting for my sister to send me some money cause I ran out and I used my last envelope to send my sister a money form. Plus she was waiting for "Gee" to give her some money from the stuff I left. But back to what's going on. You see what their trying to give me I'm not taking shit I'm going to trail cause I'm not taking

[REDACTED] years for a gun nowing that the max for a gun is [REDACTED] so I'm going to take my chances with it. My attorney sand he talked to you but he did not tall me what he sand to you but he told me that three things can happen. #1 if you put in for a motion of discovery and win thin they got through out the case. #2 But if we lose thin I go to trail [REDACTED] #3 if you take the weight you got a better chance with the gun charge thin I do. But he sand he's going to see if he can get a better offer thin what their trying to give me. This holl case depends on what your going to do. He sand thay might try and give you a noly so you can't put in for a motion of discovery and they take me to trail [REDACTED] I'm going to end this letter ontill next time.

Peace son!!

Big

p.s Tell [brothers] I sand what's up and don't forget to send me some pictures Tell gee to bring meme some money and tell Rell to write me and that I've been trying to call him at Liz house but know body been picking up.

(A 66-67).

B. The Defense Case

The defendant called Detective Santiago Llanos, of the Bridgeport Police Department. Det. Llanos testified that he participated in the search at Walker's residence on October 12, 2004, and found the bullet that was recovered. *See* Tr. at I/162-63. Det. Llanos further testified that he was assigned to the ATF task force in Bridgeport and that he had participated in over one hundred gun investigations. *See id.* at 164-65. According to Det. Llanos, the most common type of semi-automatic handgun seized in Bridgeport is a 9-mm handgun. *See id.* at 165.

Next, the defendant called his cousin, Gerald James. *See* Tr. at II/69. James testified that in April, 2004, he and Walker had been "jumped" at a club in Stamford. *See id.* at 70. According to James, "It was a misunderstanding They thought [Walker] was someone else and they jumped him." *Id.* That night, after the incident, Walker was "hysterical," but he "joked about it" and "thought it was funny a few days later." *Id.* at 75-76.

The defendant then called his aunt, Susan Cato, and a childhood friend, Anthony Dickson. The defendant proffered their testimony with respect to hearsay statements made by Walker, who had invoked his Fifth Amendment privilege in refusing to testify. *See id.* at 61. After conducting an evidentiary hearing outside the presence of the jury, *see id.* at 4-41, the court held the proffered testimony admissible, *see id.* at 65-67.

Susan Cato testified that she was friends with Walker's mother, whom she had known all her life. *See id.* at 83. The morning after the arrest, Susan Cato was leaving

Walker's mother's home and encountered Walker. *See id.* at 85. Susan Cato asked Walker whose gun it was, and Walker said that it was his. *See id.* at 85-86. Walker also said that "he was going to do the right thing, take responsibility for it." *Id.* at 86.

Dickson testified that, approximately one month before the trial, Walker stopped Dickson and a cousin of the defendant. *See id.* at 103-04. Walker told them that the gun belonged to him, that he would take responsibility for it, and that the defendant had nothing to worry about. *See id.* at 105-06. According to Dickson, nobody else said anything, *see id.* at 106, and for fifteen or twenty minutes, Walker kept saying the same things, *see id.* at 110.

C. The Government's Rebuttal Case

On rebuttal, the Government introduced a second letter. The parties stipulated that the second letter had been obtained by Agent Sullivan from Walker's attorney one day earlier, *i.e.*, on the first day of trial. *See id.* at 124-25. The second letter was published to the jury in redacted form as follows:

> To: Mar
>
> Now that I got a chance to talk to you about what's going on with are case. We got to figer out something. Okay I fuck up. I was drunk. but I need to know if you can take the gun charge? Yo sand your going to fight the case so if you take the gun charge. [REDACTED] And if you bet the probale calse case then the charges we be droped but if you don't you got a better chanse with the gun charge then I do. If you can't take the charges

then let me know so I can try and get the best offer cause I'm looking at [REDACTED] years with this charge [REDACTED] So let me know about what I ask you so I can c [MISSING] Attorney and let him know. Know mat [MISSING] you say your all ways going to be my [MISSING] eep your head up.

One!

Big

(A 85).

Summary of Argument

I. The trial court properly rejected a jury instruction proposed by the defendant that would have permitted the jury to infer, based on Walker's "consciousness of guilt" from the use of false ID, that "Walker was guilty." *See* Point I., *infra*. The proposed instruction was incorrect and misleading, because Walker was not on trial. Indeed, the proposed instruction would have conflicted with the standard jury instruction, given by the trial court and to which the defendant did not object, directing the jurors to consider a verdict as to the defendant only.

The instruction proposed by the defendant was also misleading because, by focusing on Walker's "guilt," it could have led the jury to conclude mistakenly that Walker and the defendant could not both have possessed the gun. In fact, under the doctrine of joint possession, both Walker and the defendant could have been in possession of the gun. The trial court's instructions properly framed the dispositive issue, which was whether the defendant possessed the gun.

In any event, the trial court's ruling did not prejudice the defendant. Defense counsel elicited testimony about Walker's use of a false ID and argued at summation that the jury could infer Walker's guilty conscience. Accordingly, even without the proposed instruction, the defendant was able to marshal evidence and present the argument to the jury.

Although the defendant claims that Walker's use of a false ID would have helped establish Walker's physical possession of the weapon in the car on the night in question, it is hard to imagine that a reasonable juror would draw conclusions about when or where Walker possessed the gun, if ever, based solely on the proposed "consciousness of guilt" instruction. Moreover, there was substantial other evidence connecting Walker to the gun, including hearsay statements by Walker claiming ownership and "responsibility" for the gun. Therefore, the trial court's decision not to instruct the jury about Walker's "consciousness of guilt" did not prejudice the defendant.

II. The trial court also properly admitted, as redacted, two letters written by the defendant. *See* Point II., *infra*. The letters were relevant to show the defendant's knowing possession of the gun and his consciousness of guilt. *See* Point II.C.1., *infra*. In particular, the letters were written by the defendant to Walker, who was responsible for borrowing the car and was the only other person in the car that night. If the defendant had not knowingly possessed the gun, he could reasonably have been expected to express outrage, to blame Walker, or to demand that Walker exonerate him. Instead, the defendant wrote in a

conspiratorial tone, from which a reasonable juror could infer Walker's guilt.

In addition, the probative value of the letters was not substantially outweighed by the danger of unfair prejudice or confusion. *See* Point II.C.2., *infra*. The trial court balanced the probative value of the letters with the danger of unfair prejudice by, *inter alia*, redacting the portions of the letters that were identified by defense counsel as "the most problematic parts." The trial court's careful and deliberate balancing was not an abuse of discretion and should not be disturbed.

Although the defendant contends that he was unfairly prejudiced because the jury was allowed to hear that he was considering a guilty plea, the jury also heard the defendant's emphatic statement -- arguably consistent with his claim of innocence -- that he was going to trial. Furthermore, any prejudice to the defendant from his willingness to consider a guilty plea was not *unfair* prejudice. As the defendant concedes, evidence of consciousness of guilt is admissible. A defendant's willingness to consider a guilty plea is, short of a guilty plea itself, the most direct evidence of consciousness of guilt. Accordingly, such evidence is highly probative, not unfairly prejudicial.

The trial court also properly redacted the anticipated sentencing range from the defendant's statement in the second letter that he could be sentenced to "10-20" years if convicted. *See* Point II.C.3., *infra*. As this Court and the Supreme Court have observed, information about sentencing is largely irrelevant, invites the jury to consider

matters not within their province, and creates a strong possibility of confusion.

On the particular facts of this case, the danger of unfair prejudice and confusion was even greater than usual, because the defendant's letters were both internally inconsistent and inaccurate as a matter of law with respect to the potential sentence that the defendant faced.

On the other hand, the sentencing information was of marginal probative value. The defendant contends that the "10-20" year sentencing range would have helped explain to the jury why the defendant was considering a guilty plea, but the defendant was able to explain, without reference to specific sentencing information, that even innocent defendants will conduct a cost-benefit analysis in deciding how to plead. Accordingly, the sentencing information was properly redacted.

Finally, any error in admitting the letters was harmless. *See* Point II.C.4., *infra*. Even excluding the letters, the Government's evidence at trial fully established that the defendant possessed the firearm in question, the only issue in dispute at trial.

The district court's judgment should be affirmed.

ARGUMENT

I. The Trial Court Properly Rejected the Defendant's Proposed Jury Instruction

A. Relevant Facts

Before the trial court instructed the jury, the defendant requested the following instruction concerning Walker's consciousness of guilt:

> There has been evidence that Lamar Walker, the driver of the vehicle in which the firearm in question was found, may have used a false name when approached by police officers in this case. If you find that Mr. Walker knowingly used a name other than his own in order to conceal his identity and to avoid identification, you may, but are not required to, infer that Mr. Walker was guilty. Whether or not evidence of the use of a false name shows that Mr. Walker believed he was guilty and the significance, if any, to be attached to that evidence are matters for you to determine.

(A 87).

The trial court declined to give the proposed instruction, and the defendant took exception, *see* Tr. at III/97 (A 178).

B. Governing Law and Standard of Review

This Court reviews *de novo* a trial court's decision refusing to give a requested jury instruction. *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir. 2005). A trial court's decision not to include a requested jury instruction

may be overturned "only if the instruction that was sought accurately represented the law in every respect and only if viewing as a whole the charge actually given, the defendant was prejudiced." *Id.* (internal quotation marks omitted).

When the requested instruction describes a theory of defense, a conviction will be overturned only if "th[e] instruction is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge." *United States v. Vasquez*, 82 F.3d 574, 577 (2d Cir. 1996).

Defendants "are not necessarily entitled to have the exact language of the charge they submitted to the district court read to the jury," but "only to have instructions presented which adequately apprise the jury of the elements of the crime charged and their defense . . . ." *United States v. Evangelista*, 122 F.3d 112, 116 (2d Cir. 1997) (internal quotation marks omitted).

C. Discussion

The trial court properly rejected the defendant's requested instruction concerning Walker's "consciousness of guilt," because the instruction was incorrect and misleading. The instruction invited the jury to infer, based on Walker's presentation of false ID, that Walker was "guilty"; but, in fact, Walker was not on trial. The defendant also was not prejudiced by the trial court's ruling, because defense counsel was able to argue during summation that Walker demonstrated consciousness of guilt and because, in any event, the jury was presented

with substantially stronger proof of Walker's connection to the gun than mere consciousness of guilt.

The instruction proposed by the defendant stated, in pertinent part:

> If you find that Mr. Walker knowingly used a name other than his own in order to conceal his identity and to avoid identification, you may, but are not required to, infer that Mr. Walker was guilty.

(A 87). Because Walker was not on trial, the requested instruction was inaccurate and misleading. Indeed, the instruction requested by the defendant would have conflicted directly with the trial court's standard instruction charging the jury to consider only *the defendant's* innocence or guilt, an instruction to which the defendant did not object:

> You are about to be asked to decide whether or not the Government has proven beyond a reasonable doubt the guilt of this Defendant. You are not being asked whether any other person has been proven guilty. Your verdict should be based solely upon the evidence or lack of evidence as to this Defendant . . . without regard to whether the guilt of other people has or has not been proven.

Tr. at III/78 (A 159). *See generally* 1A K.F. O'Malley *et al.*, *Federal Jury Practice & Instructions: Criminal* § 12.11 (2000) ("Verdict as to Defendant Only"). The defendant has not cited, and the Government has not found, any cases that consider -- much less approve -- a "consciousness of guilt" instruction concerning an individual who is not a defendant.

The instruction requested by the defendant was also misleading on a more substantive level. The defendant focused at trial on attributing the gun to Walker, even though Walker's ownership or possession of the gun would not have absolved the defendant under the doctrine of joint possession. *See United States v. Dhinsa*, 243 F.3d 635, 677 (2d Cir. 2001) ("It is of no moment that other individuals also may have exercised control over the weapons."). Indeed, the jury was expressly instructed that it could find the defendant had possessed the gun "even if one or more other persons possessed it jointly with him," Tr. at III/88 (A 169), an instruction to which the defendant did not object. By focusing on whether Walker was "guilty," the requested instruction could have led the jury to conclude mistakenly that Walker and the defendant could not both have possessed the gun. *See United States v. Boonphakdee*, 40 F.3d 538, 541 (2d Cir. 1994) (holding that trial court properly declined to give instruction that could have misled jury to believe that outcomes were mutually exclusive).

In fact, the defendant makes that exact mistake on appeal, setting forth the competing "theories in this case" as a false dichotomy: "The government claimed Mr. Cato knowingly possessed the gun in the car on the night in question, and Mr. Cato claimed Mr. Walker knowingly possessed the gun." Brief for the Defendant-Appellant Myshion Cato ("Br.") at 12. In fact, both Walker and the defendant could have possessed the gun. More to the point, regardless of whether Walker possessed the gun, the dispositive issue was whether the defendant possessed the gun. That issue was properly framed by the trial court's charge to the jury.

Notably, the defendant does not claim that the trial court refused to instruct the jury as to a theory of defense. In other words, this is not a case where the trial court refused to instruct the jury on alibi, entrapment, or other defense "that would lead to acquittal." *Vasquez*, 82 F.3d at 577; *see also United States v. Kwong*, 69 F.3d 663, 666-67 (2d Cir. 1995) (holding that, because purported alibi was not defense to attempted murder, trial court properly exercised discretion in declining to instruct jury on alibi).

The defendant only claims that the requested instruction was "significant" to his theory of defense, Br. at 9-10, because Walker's use of a false ID "would have helped establish" Walker's "physical possession of the weapon in the car on the night in question," *id.* at 11. But it is difficult, if not impossible, to understand how Walker's use of false ID shows that Walker possessed the gun, that night, in that car, especially considering Walker's explanation that he provided false ID because his own driver's license was suspended. *See* Tr. at I/42. More to the point, the trial court was not required to instruct the jury with respect to so tenuous an inference.

The defendant expansively argues, without citing any support, that he is entitled to "*any instruction* that supports or furthers" his theory of defense, Br. at 9 (emphasis added), but this Court's decisions stand to the contrary. *See United States v. McCarthy*, 271 F.3d 387, 396 (2d Cir. 2001) ("Defendants are not necessarily entitled to have the exact language of the charge they submitted to the district court read to the jury.") (quoting *Evangelista*, 122 F.3d at 116); *United States v. Han*, 230 F.3d 560, 565 (2d Cir. 2000) (stating that defendant "cannot dictate the precise

language of the charge"); *United States v. Johnson*, 994 F.2d 980, 988 (2d Cir. 1993) ("While [the defendant] obviously would have preferred a more forcefully worded statement about his defense, the district court did not err in instructing the jury.").

The defendant also argues that the requested instruction was necessary to provide a balanced charge, given the trial court's instruction that the jury could infer consciousness of guilt from the defendant's false exculpatory statement. *See* Tr. at III/80 (A 161). The trial court's instruction was based on the testimony of Officer Yilmaz, who testified that the defendant answered "no" when asked if "guns or drugs" were in the car. *See* Tr. at I/32.

The defendant's argument should be rejected, because a trial court need not, and should not, adopt an incorrect and misleading instruction merely to provide "balance." In addition, the inference based on the defendant's false exculpatory was plausible: the defendant falsely denied that there was a gun in the car, *even though the gun was under his foot*, because he knew the gun was his. If, as the defendant claims, Walker had "moved the gun towards a surprised Mr. Cato, who was essentially 'left holding the bag' when the officers approached," Br. at 6, the defendant could have informed Officer Yilmaz that Walker had a gun in the car. Instead, the defendant bluffed, strongly supporting the inference that he knew the gun was his. In short, the inference to be drawn from the defendant's false exculpatory was plausible, whereas the inference sought by the defendant from Walker's use of a false ID was not. The trial court was not required to

instruct the jury as to both inferences to achieve an illusory, *pro forma* "balance."

Finally, the defendant suffered no prejudice from the trial court's ruling. The defendant's theory at trial was that Walker, and not the defendant, possessed the gun in question. Viewed as a whole, the court's charge properly instructed the jury on possession, *see* Tr. at III/86-88 (A 167-69), and the defendant does not suggest otherwise. The court instructed the jury, for example, that mere proximity to the gun and mere association with another person who controlled the gun are insufficient to support a finding of possession. *See id.* at 87 (A 168). These instructions, taken as a whole, adequately presented the defendant's theory of the case to the jury.

In any event, counsel for the defendant was able to elicit testimony that Walker presented false ID during the traffic stop, *see* Tr. at I/41-42, and to argue at summation that the jury "[could] infer a guilty conscience," Tr. at III/24 (A 105). Considering the marginal value of the evidence, the defendant cannot show prejudice from the absence of the requested instruction. *See United States v. Smith*, 198 F.3d 377, 386 (2d Cir. 1999) (holding that absence of requested instruction on "consciousness of innocence" did not prejudice defendant where defense counsel had ample opportunity to elicit testimony and to argue theory to jury during summation).

Indeed, the defendant's proposed instruction on Walker's "consciousness of guilt" concerned evidence of extremely limited probative value when compared to other evidence introduced by the defendant. Ample evidence connected Walker to the gun, including hearsay statements

by Walker claiming ownership and "responsibility" for the gun, *see* Tr. at II/86, and a bullet of matching caliber found in Walker's bedroom, *see* Tr. at I/157 & 163-64. Although the defendant claims that Walker's use of a false ID would have helped establish Walker's "physical possession of the weapon in the car on the night in question," Br. at 11, it is hard to imagine that a reasonable juror would draw conclusions about when or where Walker possessed the gun (if ever), based solely on the proposed "consciousness of guilt" instruction.

II. The Trial Court Properly Admitted the Defendant's Letters, As Redacted

A. Relevant Facts

During the Government's case-in-chief, the trial court admitted into evidence a letter written by the defendant, overruling objections by the defendant based on relevance and Rule 403 of the Federal Rules of Evidence, *see* Tr. at I/90-106 (A 13-29). With respect to Rule 403, the defendant argued that the letters would be prejudicial in three respects: (1) the letters repeated statements by the defendant's prior attorney that the defendant could not win at trial, *see* Tr. at I/101 (A 24); (2) the statements by the defendant's prior attorney could be mis-attributed to his trial counsel, *see id.*; and (3) the letters revealed that the defendant was considering a guilty plea, *see id.* at I/104 (A 27).

To address the first issue, the trial court redacted all references to the evaluation by the defendant's prior attorney concerning the defendant's likelihood of success

at trial. Specifically, the trial court redacted the defendant's statements "most likely I'll loss" (*compare* A 66 *with* A 64) and "knowing that I can't beat it" (*compare* A 67 *with* A 65) -- statements specifically identified by defense counsel as "the two most problematic parts" of the letter, Tr. at I/130 (A 53).

On the second issue, the parties stipulated that the attorney referenced in the letter was not either of the attorneys representing the defendant at trial, nor an attorney from their office. *See id.* at 149. To further "distance" the advice described in the letter from the advice of the defendant's trial counsel, *id.* at 137-38 (A 60-61), the parties also stipulated that the letter was written before the initiation of any federal charge, *see id.* at 149.

The trial court also redacted references to the sentence anticipated by the defendant, by agreement of both parties. (*See* A 66 ("I'm not taking [REDACTED] years for a gun nowing that the max for a gun is [REDACTED] . . . .")).

The letter, as redacted, was admitted as exhibit 6A (*see* A 66-67), and another copy of the letter, distinguishing redactions made by the parties from corrections made by the defendant, was admitted as exhibit 6B (*see* A 68-69). The original letter, without redactions, was marked for identification purposes as exhibit 6 (*see* A 64-65).

During the Government's rebuttal case, the trial court admitted into evidence a second letter, also apparently written by the defendant. The defendant objected to the second letter on the ground that it was not timely provided to the defense and on the ground that a reference in the

letter to the defendant's anticipated "10-20" year sentencing range should not be redacted. *See* Tr. at II/118-19 (A 71-72; *see also* A 85 ("[L]et me know so I can try and get the best offer cause I'm looking at [REDACTED] years with this charge . . . .")). The defendant also incorporated the same objections that he made to the first letter. *See id.* at 120 (A 73).

The second letter, as redacted, was admitted as exhibit 17A (*see* A 85), and another copy of the letter, distinguishing redactions made by the parties from corrections made by the defendant, was admitted as exhibit 17B (*see* A 86). The original letter, without redactions, was marked for identification purposes as exhibit 17 (*see* A 84).

B. Governing Law and Standard of Review

Generally, evidence that is relevant is admissible under the Federal Rules of Evidence unless specifically excluded. *See United States v. Perez*, 387 F.3d 201, 209 (2d Cir. 2004). Evidence of a defendant's consciousness of guilt may be relevant "if reasonable inferences can be drawn from it and if the evidence is probative of guilt." *Id.* Such evidence is admissible if the district court "(1) determines that the evidence is offered for a purpose other than to prove the defendant's bad character or criminal propensity, (2) decides that the evidence is relevant and satisfies Rule 403, and (3) provides an appropriate instruction to the jury as to the limited purposes for which the evidence is introduced, if a limiting instruction is requested." *Id.*

The Court reviews the district court's evidentiary rulings for abuse of discretion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 141-43 (1997); *United States v. Schultz*, 333 F.3d 393, 415 (2d Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004). "Unless a district court's determination of relevance is arbitrary or irrational, it will not be overturned." *Id.* (internal quotation marks omitted).

Under Rule 403 of the Federal Rules of Evidence, the district court must "balance the probative value of evidence and its potential prejudicial effect," *United States v. Gelzer*, 50 F.3d 1133, 1139 (2d Cir. 1995), excluding evidence whose probative value is substantially outweighed by the danger of unfair prejudice, confusion, or waste of time, *see* Fed. R. Evid. 403. Of course, "any proof highly probative of guilt is prejudicial" to the defendant. *Gelzer*, 50 F.3d at 1139. "The prejudice that Rule 403 is concerned with involves some adverse effect beyond tending to prove the fact or issue that justified its admission into evidence." *Id.* (internal quotation marks omitted).

The district court has "broad discretion" under Rule 403. *See United States v. LaFlam*, 369 F.3d 153, 155 (2d Cir.), *cert. denied*, 125 S. Ct. 363 (2004). Accordingly, when the admission of evidence is challenged under Rule 403, this Court will "generally maximize its probative value and minimize its prejudicial effect." *Id.* (internal quotation marks omitted).

C. Discussion

1. The Letters Written by the Defendant Were Relevant to Show Possession of the Gun

The letters written by the defendant to Walker were relevant to show the defendant's knowing possession of the gun and his consciousness of guilt. In the letters, the defendant complained that he was "stressing" but did not complain of being prosecuted for a gun that was not his. Instead, he told Walker that he intended "to take [his] chances" at trial, he discussed legal stratagems, and he asked Walker to "take the weight" because Walker had "a better chance with the gun charge." (A 66). A reasonable juror could view the defendant's failure to complain -- either that the gun belonged to Walker, or at a minimum, that the gun did not belong to the defendant -- as "'the dog that did not bark.'" *Cf. Aetna Cas. & Surety Co. v. Clerk, U.S. Bankruptcy Court (In re Chateaugay Corp.)*, 89 F.3d 942, 953 n.1 (2d Cir. 1996) (quoting Arthur Conan Doyle, *Silver Blaze*, in 1 *The Complete Sherlock Holmes* 335 (1930)). In other words, a reasonable juror could infer that the defendant did not complain because the defendant knew the gun was his.

Indeed, the letters were powerfully probative evidence that the defendant possessed the gun. The letters were written by the defendant to Walker, who was responsible for borrowing the car and was the only other person in the car that night. If the defendant had not knowingly possessed the gun, he could reasonably have been expected to express outrage, to blame Walker, or to demand that Walker exonerate him. *Cf.* Tr. at III/26

(A 107) (arguing to jury that defendant had been "thrown under the bus by his seemingly good friend"). Instead, the defendant wrote in conspiratorial fashion, calculating his options and imploring Walker to help him:

> . . . I'm going to trail cause I'm not taking [REDACTED] years for a gun nowing that the max for a gun is [REDACTED] so I'm going to take my chances with it. My attorney . . . told me that three things can happen. #1 if you put in for a motion of discovery and win thin they got through out the case. #2 But if we lose thin I go to trail [REDACTED] #3 if you take the weight you got a better chance with the gun charge thin I do. . . . This holl case depends on what your going to do.

(A 66-67; *see also* A 85 ("We got to figer out something. Okay I fuck up. I was drunk. but I need to know if you can take the gun charge?")). The tenor of the defendant's letters alone is strong evidence of the defendant's guilt.

Furthermore, the defendant's specific suggestion that Walker file "a motion of discovery" (A 66; *see also* A 85), *i.e.*, a motion to suppress, *see* Tr. at I/92, is "plainly relevant," because an attempt to suppress evidence shows consciousness of guilt. *United States v. Roldan-Zapata*, 916 F.2d 795, 803-04 (2d Cir. 1990); *see also United States v. Shorter*, 54 F.3d 1248, 1260 (7th Cir. 1995); *United States v. Broadwell*, 870 F.2d 594, 606 (11th Cir. 1989).

In *Roldan-Zapata*, a defendant told a potential cooperator that he would try to help the cooperator obtain

a lawyer and that the Government had no case against them if the cooperator did not talk. *See* 916 F.2d at 800. The Court held that the cooperator's testimony with respect to both statements was admissible. The offer to obtain a lawyer was "probative of their joint endeavor and [Roldan-Zapata's] leadership role." *Id.* at 803. The statement that the Government would have no case if the cooperator did not talk was "an apparent attempt to suppress evidence . . . and plainly relevant to show Roldan-Zapata's consciousness of guilt." *Id.* at 803-04.

The defendant seeks to distinguish *Roldan-Zapata* as a case involving an attempt to influence a witness's testimony through bribery, *see* Br. at 14; Tr. at I/117, but the defendant is mistaken. This Court did not rely on the offer of assistance to obtain a lawyer when it held that the attempt to suppress evidence itself reflected consciousness of guilt. *See Roldan-Zapata*, 916 F.2d at 803-04. As in *Roldan-Zapata*, the defendant's attempt to suppress evidence here, though not unlawful in itself, was "plainly relevant" to show consciousness of guilt. Specifically, the defendant did not assert his innocence; instead, he elected to take his "chances" at gaming the system, suggesting that Walker file a motion to suppress that he lacked standing to file himself.

The defendant also contends that consciousness of guilt requires affirmative conduct by the defendant, *see* Br. at 14, but the defendant's view of the law is unduly constricted and unsupported. To the contrary, such evidence may be relevant "if reasonable inferences can be drawn from it and if the evidence is probative of guilt." *Perez*, 387 F.3d at 209. Courts have held that a

defendant's silence alone can show consciousness of guilt, *see United States v. Palma-Ruedas*, 121 F.3d 841, 856 (3rd Cir. 1997), *rev'd on other grounds*, 526 U.S. 275 (1999), and that conduct of a defendant's associates can be attributed to the defendant to show consciousness of guilt, *see United States v. Miller*, 276 F.3d 370, 373-74 (7th Cir. 2002) (threat by defendant's ex-husband); *United States v. Gatto*, 995 F.2d 449, 455 (3d Cir. 1993) (threatening presence of defendant's associate).

In sum, the letters were relevant to show the defendant's possession of the gun and his consciousness of guilt.

2. The Probative Value of the Letters Was Not Substantially Outweighed by Their Prejudicial Effect, if Any

Next, the trial court properly concluded that the probative value of the letters, as redacted, was not substantially outweighed by the danger of unfair prejudice or confusion. The trial court addressed concerns expressed by the defendant through a combination of redactions and stipulations between the parties. The trial court's careful and deliberate balancing under Rule 403 should not be disturbed.

The defendant argued below that the letters would be unfairly prejudicial in three respects: (1) the letters repeated statements by the defendant's prior attorney that the defendant could not win at trial, *see* Tr. at I/101 (A 24); (2) the statements by the defendant's prior attorney could be mis-attributed to his trial counsel, *see id.*; and

(3) the letters revealed that the defendant was considering a guilty plea, *see id.* at I/104 (A 27).

On the first issue, the trial court redacted all references to the evaluation by the defendant's prior attorney of the defendant's likelihood of success at trial. Specifically, the trial court redacted the defendant's statements "most likely I'll loss" (*compare* A 66 *with* A 64) and "knowing that I can't beat it" (*compare* A 67 *with* A 65) -- statements specifically identified by defense counsel as "the two most problematic parts" of the letter, Tr. at I/130 (A 53).

On the second issue, the parties stipulated that the attorney referenced in the letter was not either of the attorneys representing the defendant at trial, nor an attorney from their office. *See id.* at 149. To further "distance" the advice described in the letter from the advice of the defendant's trial counsel, *id.* at 137-38 (A 60-61), the parties also stipulated that the letter was written before the initiation of any federal charge, *see id.* at 149.

The third issue, and the only issue pressed by the defendant on appeal, *see* Br. at 16-17 & 21-22, is the purported danger of juror confusion stemming from the defendant's willingness to consider a guilty plea. The trial court did not err in admitting the letters despite the purported danger of confusion, because the letters were highly probative and accompanied by, at most, a marginal and uncertain risk of confusion.

As an initial matter, the Government did not refer during summation to the defendant's willingness to consider a guilty plea, other than briefly and indirectly on

rebuttal in response to an argument made by defense counsel. *See* Tr. at III/33-34 & 54 (A 114-15 & 135).

Moreover, any prejudice to the defendant was not *unfair* prejudice. As the defendant correctly concedes, it is well-established that evidence of consciousness of guilt is admissible. *See* Br. at 14. A defendant's willingness to consider a guilty plea is, short of a guilty plea itself, the most direct evidence of consciousness of guilt. Accordingly, such evidence is highly probative, and not unfairly prejudicial under Rule 403. *See United States v. Medina*, 755 F.2d 1269, 1274-75 (7th Cir. 1985) (holding that defendant's statement to officer "I'll beat you on the next one" could be implied admission of guilt and was not prejudicial under Rule 403); *cf. United States v. O'Brien*, 618 F.2d 1234, 1240-41 (7th Cir. 1980) (holding that trial court properly admitted defendant's conversation with co-conspirator about cutting "deal"); *United States v. Castillo*, 615 F.2d 878, 885 (9th Cir. 1980) (holding that trial court properly admitted defendant's statement to counselor that he would "cop" to manslaughter charge).

On the other hand, there was little danger of unfair prejudice or confusion in this case. The defendant's willingness to consider a guilty plea was fairly balanced by his emphatic declaration, "I'm not taking shit I'm going to trail." (A 66). As defense counsel argued below, the defendant's avowed refusal to plead guilty could have been used to support his claim of innocence. *See* Tr. at I/91 (A 14). In addition, the defendant could have called an expert witness to testify that even innocent defendants may perform a cost-benefit analysis in deciding how to plead, as defense counsel twice suggested she would do.

See id. at 94 & 104 (A 17 & 27). Finally, although the defendant ultimately elected not to call an expert witness, defense counsel argued at summation that even innocent defendants will consider a plea bargain after weighing the evidence and the consequences of going to trial. *See* Tr. at III/33-34. Under the circumstances, the danger of unfair prejudice and confusion, if any, was minimal, so the trial court did not err in admitting the defendant's highly probative letters.

3. The District Court Properly Redacted the Reference to the Sentencing Range Anticipated by the Defendant

Finally, the trial court properly redacted the potential term of imprisonment from the defendant's statement in the second letter that he could be sentenced to "10-20" years if convicted. (*Compare* A 85 *with* A 84). The trial court's ruling should be upheld, because the omitted sentencing range offered little probative value but carried a substantial danger of unfair prejudice and confusion.

Information about a defendant's potential sentence is largely irrelevant at trial because responsibility for sentencing rests with the court, not the jury. *See Shannon v. United States*, 512 U.S. 573, 579 (1994); *see also United States v. Pabon-Cruz*, 391 F.3d 86, 94 (2d Cir. 2004). "Information regarding the consequences of a verdict is therefore irrelevant to the jury's task." *Shannon*, 512 U.S. at 579. "Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." *Id.*

Under the specific circumstances of this case, the danger of unfair prejudice or confusion was even greater than usual, because of unexplained inconsistencies between the defendant's two letters. In the first letter, the defendant referred to a plea offer of five years' imprisonment and a maximum sentence of five years' imprisonment (*see* A 64); in the second letter, the defendant referred to a "10-20" year sentencing range (A 84). It would have been inconsistent to include references to sentencing in one letter but not the other, and it would have been confusing to include both references without some explanation for the inconsistency. There is also nothing in the record to show how the defendant came to believe that he faced a "10-20" year term of imprisonment. In particular, it appears to be inaccurate with respect to both the federal and state gun charges faced by the defendant. *See* 18 U.S.C. § 924(e) (2000) (establishing 15-year mandatory minimum term of imprisonment); Conn. Gen. Stat. Ann. §§ 53a-35a & 53a-217 (West 2001) (providing for 2 to 5-year term of imprisonment).

Furthermore, including any reference to the potential sentence would have been confusing and inconsistent with the trial court's instruction that the jury should not consider sentencing issues, *see* Tr. at III/91 (A 172), an instruction to which the defendant did not object.

The defendant purports to distinguish *Shannon* on the ground that "the sentencing information in question was not related to the federal charge for which he was on trial," Br. at 20, but there is nothing in the record to show when the second letter was written. *Compare* Tr. at I/149

(stipulating that *first* letter was written before initiation of federal charge). The defendant further claims that the reference to "10-20" years' imprisonment was relevant to explain the defendant's willingness to consider a guilty plea, essentially repeating the argument he made in opposition to the admission of the letters. But, as previously observed, *see supra* at 30, the defendant could and did argue (without reference to the "10-20" year term of imprisonment) that innocent people sometimes perform a cost-benefit analysis in deciding how to plead. Whatever marginal probative value would have been added by allowing the jury to consider inconsistent and inaccurate sentencing information was substantially outweighed by the danger of unfair prejudice and confusion.

Finally, the defendant's invocation of the "rule of completeness," Fed. R. Evid. 106, is unavailing. First, "Rule 106 does not render admissible evidence that is otherwise inadmissible." *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983). Second, "that rule is violated only where admission of the statement in redacted form distorts its meaning or excludes information substantially exculpatory of the defendant." *United States v. Benitez*, 920 F.2d 1080, 1086-87 (2d Cir. 1990) (internal quotation marks omitted). Here, the redaction of "10-20" did not distort the defendant's statement: "If you can't take the charges then let me know so I can try and get the best offer cause I'm looking at [REDACTED] years with this charge . . . ." Nor was the sentencing range anticipated by the defendant substantially exculpatory. Accordingly, under Rules 106 and 403, the sentencing information was properly redacted.

4. Any Error in Admitting The Letters Was Harmless in Any Event

Even if the district court erred in admitting the letters, any such error was harmless. *See* Fed. R. Crim. P. 52(a). Aside from the defendant's letters, the Government presented conclusive evidence that the defendant possessed the firearm in question. Law enforcement witnesses testified that the gun was found -- fully loaded and ready to fire -- underneath the defendant's right foot during a traffic stop. Furthermore, the defendant's behavior and statements during the traffic stop, including his nervous reaction when the police asked the driver to step out of the car and his false statement that there were no guns in the car, demonstrated his consciousness of guilt. This evidence, taken alone, demonstrates beyond a reasonable doubt that the defendant possessed the gun. The letters, which demonstrate the defendant's consciousness of guilt, were merely cumulative of evidence already presented and thus likely had no "substantial and injurious effect on the jury's decision." *United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005) (internal quotations omitted).

Conclusion

The judgment of the district court should be affirmed.

Dated: September 14, 2005

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

EDWARD CHANG
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(a)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,548 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

EDWARD CHANG
ASSISTANT U.S. ATTORNEY

Addendum

Fed. R. Evid. 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.