APPENDICES

APPENDIX A

United States Court of Appeals
for the Second Circuit

United States of America,
Appellee-Cross-Appellant,

v.

Lawrence Johnson,
Defendant-Appellant-Cross-Appellee.

Nos. 18-2358-cr, 18-2467-cr

Decided: June 17, 2020

Before Parker, Livingston, and Park, Circuit Judges.

SUMMARY ORDER

Defendant-Appellant-Cross-Appellee Lawrence Johnson ("Johnson") appeals from a judgment entered August 1, 2018, following jury trial, convicting Johnson of one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and sentencing him principally to 96 months' imprisonment and five years of supervised release. Johnson raises numerous challenges to his conviction, arguing (1) that the Supreme Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), requires that his conviction be vacated or an order of dismissal entered; (2) that the district court erred in instructing the jury with respect to scienter and the availability of an innocent possession defense; (3) that vacatur of the conviction is required due to prosecutorial misconduct; and (4) that the district court erred in its pretrial evidentiary ruling precluding cross-examination of a police officer witness regarding a Civilian Complaint Review Board ("CCRB") determination. The government cross-appeals, arguing that Johnson must be resentenced in light of this Court's

decision in *United States v. Thrower*, 914 F.3d 770 (2d Cir. 2019). For the reasons stated below, we are unpersuaded by Johnson's arguments and agree with the government that resentencing is necessary. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

1. Johnson's *Rehaif* Arguments

Johnson first contends that, because the indictment failed to allege the knowledge-of-status that *Rehaif* requires to be demonstrated at trial, the district court lacked subject matter jurisdiction over his case. Relatedly, he argues that the indictment's deficiencies amounted to a due process violation because he was never given notice of § 922(g)'s knowledge-of-status requirement.

Neither of these arguments has merit. As an initial matter, Johnson's jurisdictional argument has been squarely foreclosed by this Court's decision in *Balde*. *See United States v. Balde*, 943 F.3d 73, 92 (2d Cir. 2019) (holding that "the indictment's failure to allege that [the defendant] knew. . . [his § 922(g) status] was not a jurisdictional defect"); *see also United States v. Keith*, 797 F. App'x 649, 651 (2d Cir. 2020). Johnson's due process argument fares no better. "[A]s we have already repeatedly held, an indictment which charges a statutory crime by following substantially the language of the statute is amply sufficient, provided that its generality neither prejudices defendant in the preparation of his defense nor endangers his constitutional guarantee against double jeopardy." *United States v. Palmiotti*, 254 F.2d 491, 495 (2d Cir. 1958) (internal quotation marks omitted). Here, even on the dubious assumption that Johnson's due process argument would otherwise have any merit, he has identified no concrete prejudice stemming from any deficiency in the indictment. While

Johnson alludes to the possibility that he would have been better able to prepare for trial had he been made aware in the indictment that his own knowledge of his felon status would need to be shown by the government at trial, he points to no specific defense that he could have raised with respect to this requirement. Indeed, it is patently clear that he would have no such defense. According to the PSR, Johnson had at least four prior felony convictions for which he received lengthy sentences, each well exceeding one year. *See* PSR ¶ 26 (attempted robbery in the second degree; sentence of 18 to 54 months' custody); ¶ 28 (criminal sale of a controlled substance in the third degree; sentence of 6 to 12 years' custody); ¶ 30 (attempted robbery in the second degree; sentence of 42 months' custody); ¶ 31 (criminal possession of a controlled substance with the intent to sell in the fifth degree; sentence of 30 months' custody). On this record, it is unsurprising that Johnson cannot point to any concrete prejudice stemming from a lack of notice as to the need for his knowledge-of-status to be shown at trial, and his due process argument therefore fails.

Johnson next challenges the sufficiency of the evidence, arguing that the trial record lacks evidence that could have permitted a reasonable jury to find that the government proved his knowledge of his felon status. Johnson failed to argue in the district court that the evidence was insufficient with respect to his knowledge that he was a felon, and we therefore review his claim solely for plain error. *See United States v. Tagliaferri*, 648 F. App'x 99, 101 (2d Cir. 2016) ("The rule of our Circuit is that a Rule 29 motion that identifies specific grounds for a judgment of acquittal forfeits grounds not raised in that motion." (first citing *United States v. Delano*, 55 F.3d 720, 726 (2d Cir. 1995); then citing

United States v. Rivera, 388 F.2d 545, 548 (2d Cir. 1968)).

Accordingly, Johnson must demonstrate that "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Balde*, 943 F.3d at 96 (internal quotation marks omitted). As this Court made plain in *United States v. Miller*, 954 F.3d 551 (2d Cir. 2020), on the record here, Johnson cannot satisfy the fourth prong of plain error review. Just as in *Miller*, the error did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings," as required in order to grant relief on plain error review; "[t]o the contrary ... accepting [Johnson's argument] would have that effect." *Id.* at 559 (internal quotation marks and alterations omitted). That is because, as in *Miller*, Johnson "stipulated to his § 922(g)(1) qualifying status," such that "at trial he likely would have sought to exclude, and would have been successful in excluding, the details pertaining to his prior offense as unnecessary and prejudicial embellishment on his stipulation." *Id.* (citing *Old Chief v. United States*, 519 U.S. 172, 192 (1997)). Here, too, this Court "will not penalize the government for its failure to introduce evidence that it had but that, prior to *Rehaif*, it would have been precluded from introducing." *Id.* at 559–60. The "reliable evidence in the record on appeal"—specifically, the PSR evidence of Johnson's extensive prior felony convictions and lengthy sentences discussed above—"removes any doubt that [Johnson] was aware of his membership in § 922(g)(1)'s class" and that Johnson "would have stipulated to knowledge of his felon status to prevent the jury from hearing evidence of his actual sentence." *Id.* at 560. The fourth-prong analysis is par-

ticularly clear on this record, where the government actually moved *in limine* to be permitted to question the defendant for impeachment purposes, should he choose to testify, regarding his two most recent felony convictions, and Johnson opposed that motion on the ground that his prior convictions were not proper impeachment evidence. Thus, Johnson cannot demonstrate plain error with respect to the sufficiency of the trial evidence.

Finally, to the extent Johnson also challenges the district court's failure to instruct the jury as to the knowledge-of-status requirement, that argument fails for the same reasons. In order to preserve a claim of instructional error, "[a] party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate.... Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b)." Fed. R. Crim. P. 30(d). Johnson's objections at trial with respect to the instructions on scienter as to the statute's *possession* element did nothing to "direct the trial court's attention to the contention" now "raised on appeal"—namely, a failure to instruct the jury as to scienter with respect to the *status* element. *United States v. Masotto*, 73 F.3d 1233, 1237 (2d Cir. 1996) (internal quotation marks omitted). Accordingly, we review Johnson's argument based on *Rehaif* instructional error for plain error which, as explained above, he cannot demonstrate. Accordingly, *Rehaif* offers no basis for this Court to vacate Johnson's conviction.

2. Johnson's Jury Instruction Arguments

Johnson next contends that his conviction must be vacated because, in a pretrial ruling, the district court refused to instruct the jury as to an innocent posses-

sion defense and because, at trial, the court affirmatively instructed the jury that "[w]ell-meaning possession is not a defense to the charge in this case." A. 212. We are unpersuaded.

As to the district court's pretrial ruling, even assuming that the issue was adequately preserved such that our review is *de novo*, we conclude that, in the circumstances of this case, the court did not err in refusing to instruct the jury as to an innocent possession defense. "A federal court may decline to instruct on an affirmative defense ... when the evidence in support of such a defense would be legally insufficient." *United States v. White*, 552 F.3d 240, 246 (2d Cir. 2009) (internal quotation marks omitted). While this Court has yet to rule definitively on the existence of an innocent possession defense to § 922(g), our prior cases have made clear that the defense is not available "where the possession was not momentary or only for as long as necessary to deal with a justifying necessity of some kind." *United States v. Miles*, 748 F.3d 485, 490 (2d Cir. 2014) (internal quotation marks, alterations, and citations omitted) (first citing *United States v. Paul*, 110 F.3d 869, 872 (2d Cir. 1997); then citing *White*, 552 F.3d at 249). As *Paul* makes clear, a "momentary" possession must be fleeting, such as picking up a weapon dropped by a police officer and immediately handing it back to the officer; it thus does not include, as here, carrying a gun down the street for purposes of taking it to a police precinct, particularly when the defendant was in possession of a working cell phone and could have contacted police. *Paul*, 110 F.3d at 872; *see also Miles*, 748 F.3d at 490. And *White* further clarifies that a "justifying necessity" must be one involving an imminent danger, such as a threat of serious physical injury or death. *White*, 552 F.3d at 247–48. Johnson points to no such circumstance in this case. Thus, even taking

into consideration the facts set forth in Johnson's affidavit, there would have been no evidentiary basis in this case for an innocent possession defense, and the district court's refusal to instruct the jury as to the defense was not error.

Johnson's objection to the court's instruction that "[w]ell-meaning possession is not a defense to the charge in this case" is likewise unavailing. A. 212. We agree with Johnson that his objection was adequately preserved, as defense counsel clearly objected to this language at the charge conference and, contrary to the government's position, did not abandon the objection at the sidebar following summations. While our review is therefore *de novo*, we "will not find reversible error unless the charge either failed to inform the jury adequately of the law or misled the jury as to the correct legal rule." *United States v. Henry*, 888 F.3d 589, 598 (2d Cir. 2018) (internal quotation marks omitted). "We do not review portions of jury instructions in isolation, but rather consider them in their entirety to determine whether, on the whole, they provided the jury with an intelligible and accurate portrayal of the applicable law." *United States v. Ford*, 435 F.3d 204, 210 (2d Cir. 2006) (internal quotation marks and alteration omitted).

Viewed in context, the "well-meaning possession" instruction, far from constituting error, was a necessary antidote to defense counsel's arguments with respect to innocent possession. The language was clearly situated within the district court's instructions as to the possession element of the statute, rather than the status element, and served as the culmination of several sentences explaining that an innocent possession defense was not available in this case. As explained above, the evidentiary record would have been insufficient to support the innocent possession defense even if

Johnson had testified at trial consistently with his affidavit; given his decision *not* to testify, the innocent possession defense was plainly without support.[1] Contrary to Johnson's contention, the challenged instruction did not vitiate the "knowing" *mens rea* requirement with respect to Johnson's conduct; rather, it made clear that, in this case, *motive* could not excuse the defendant's possession of a firearm. Accordingly, we reject Johnson's objections to the district court's jury instructions.

3. Johnson's Other Arguments

Johnson next contends that his trial was fundamentally unfair due to certain statements made by the prosecution in its opening and summations, including stating that it was illegal for a felon to possess a gun for any reason and referring to Johnson's statements to police as a "confession." He further asserts that the government obtained his conviction through perjured testimony. These arguments have no merit. As to the government's allegedly improper comments, Johnson cannot demonstrate, as he must, "(1) that the prosecutor's remarks were improper and (2) that the remarks, taken in the context of the entire trial, resulted in substantial prejudice." *United States v. Bautista*, 23 F.3d 726, 732 (2d Cir. 1994). The prosecutors' comments tracked the jury instructions given by the district court and were within the bounds of ordinary advocacy. Moreover, the supposedly perjured testimony to which Johnson points amounts to nothing more than inconsistencies in the police officer witness testimony which were fully explored in cross-examination and argued as

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[1] Indeed, absent any testimony by Johnson, the only evidence before the jury with respect to the duration of his possession was a police officer's testimony that Johnson had stated he had obtained the gun "a day or two ago." A. 80.

credibility issues to the jury and which, in any event, had no bearing on the jury's determination in light of the unavailability of the innocent possession defense in this case.

Equally unpersuasive is Johnson's contention that the district court abused its discretion in precluding cross-examination of a police officer witness regarding a CCRB finding of a false official statement in the course of a CCRB investigation. Federal Rule of Evidence 403 permits the district court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." "Under Rule 403, so long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational." *United States v. Awadallah*, 436 F.3d 125, 131 (2d Cir. 2006). Here, the district court diligently assessed the probative value of the evidence, found that probative value to be limited, and determined that the minimal probative value was substantially outweighed by a "real risk of distraction" and concerns regarding a potential "trial within a trial." A. 54, 56. This determination was well within the bounds of the court's discretion and therefore was not error.

4. Government's Cross-Appeal as to Sentencing

The government argues that vacatur of the sentence is required in light of this Court's decision in *United States v. Thrower*, 914 F.3d 770 (2019), which was issued approximately six months after sentencing in this case. *Thrower* held that "the New York offense of robbery in the third degree, which like every degree of robbery in New York requires the common law element of 'forcible stealing,' is a 'violent felony'" under

the Armed Career Criminal Act ("ACCA") and that "the New York attempted robbery statute, by its own terms, matches the ACCA definition of a 'violent felony.'" *Id.* at 776. Johnson essentially concedes that *Thrower* invalidates the district court's determination that Johnson was not subject to enhanced sentencing under ACCA, arguing only that this Court should reconsider *Thrower*.

This panel is bound by the Court's decision in *Thrower*, which, as explained in *Brown v. United States*, 752 F. App'x 108, 109 (2d Cir. 2019), dictates that Johnson's 1985 conviction for attempted second-degree robbery under New York law constitutes a predicate offense for ACCA purposes, rendering the district court's sentence procedurally unreasonable. *See United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc). Even if this panel were free to reconsider *Thrower*, Johnson's only argument as to why *Thrower* was wrongly decided was recently rejected by this Court in an analogous context. *See Kondjoua v. Barr*, 961 F.3d 83, 91 (2d Cir. May 28, 2020) (holding that "[u]sing the unique threat of authorized force in which police officers are cloaked" to exert physical control over a victim "rises to the level of force required to 'overcome a victim's resistance'" under *Stokeling v. United States*, 139 S. Ct. 544, 202 L.Ed.2d 512 (2019) (quoting *Stokeling*, 139 S. Ct. at 550)). Accordingly, we remand for resentencing under 18 U.S.C. § 924(e)(1).

* * *

We have considered Johnson's remaining arguments and find them to be without merit. Accordingly, we REMAND the case for resentencing, and AFFIRM the conviction in all other respects. The district court is instructed to vacate the judgment and resentence Johnson in accordance with this order.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -against- LAWRENCE JOHNSON, Defendant.	15-CR-603 (RRM) U.S. Courthouse Brooklyn, New York Thurs., May 18, 2018 10:00 A.M.

TRANSCRIPT OF CRIMINAL CAUSE
FOR PRE-TRIAL CONFERENCE

BEFORE THE HONORABLE
ROSLYNN R. MAUSKOPF
UNITED STATES DISTRICT JUDGE

* * *

[16] THE COURT: Hold off, because that is going to relate to the discussion—

MR. FREEMAN: Right.

THE COURT:—of the text messages, which is one of the pending issues in terms of the motion. That will go perfectly with what I will want to discuss with you about the text messages.

Okay. So just think about—I guess the best way to do this is get right to the heart of the issue that you are waiting to hear about, and that is the innocent posses-

sion defense. And so I really, really spent a lot of time again **[17]** thinking about innocent possession, how it is defined across the universe of cases and circuits and Courts, how Mr. Johnson wants me to charge the jury. I have the—two affidavits now in support. I am going to do—I am going to let Mr. Johnson testify. I worry—I am coming at this today from a little bit of a different angle. I worry about a pretrial ruling about innocent possession having a chilling effect on Mr. Johnson's right to testify and tell his side of—tell what happened to the jury because he has a right to tell his side of the story.

We talked last time a little bit about whether or not Mr. Johnson may have some other defense specifically focusing on the elements of possession and the elements of knowing possession. It was a concern of mine last time. I think my concern is exacerbated a little bit after reading the 3500 material. There is some evidence in the 3500 material that suggests that the officers may have thought somehow, some way that Defendant was intoxicated or under the influence of something. And Mr.—I did not press Mr. Freeman last time about whether or not there were some other types of defenses. Mr. Johnson has the absolute right to challenge this indictment and the elements of knowing possession in a way that he—that falls within the bounds of the law.

And another issue here is that the story of—I also—I will do it this way: I also worry about parsing the **[18]** evidence a little too narrowly, slicing things a little too thin. There is also a pending motion by the Government to preclude the defense from bringing out the statement of Mr. Johnson that, I intended to take this gun to the police station. It is not disputed by the par-

ties that he said something like that to the officers when they encountered him on the street, and I would find that statement admissible. I do not—I think it slices things too thinly to exclude that in describing the encounter between Mr. Johnson and the police officers on the street.

If the Government were allowed only to introduce the, I have a gun—I am not sure how the officers are going to say—are going to testify to what he said and how he said it, but that—leaving it like that, without the complete version of what happens at the trial—in the encounter could leave a jury with the impression that Mr. Johnson's statement, I have a gun, was somehow—I would use the word "threatening," but that might overstate things. But I think there are inferences that could be drawn just from the statement, I have a gun, that a jury would not draw if the complete version of what Mr. Johnson said at the time of his encounter with the police were put in front of the jury. So I would let that statement come in. Whether you call it the rule of completeness; whether you call it—what the legal principle is underlying it, I think it—I think that needs **[19]** to come in.

There is another reason why that statement needs to come in. They put Mr. Johnson in the back of their police car. They did not handcuff him—this was according to the 3500 material, and I think the proffer that the Government has made in it motion. They put Mr. Johnson in the back of the police car. They did not arrest him at the scene. I think the statement as to his intent to take the gun to the police helps put that in context. The Government is still going to put in all of the other things that Mr. Johnson said at the time of the encounter with the police, what the Government

characterizes as inconsistent stories about how Mr. Johnson came into possession of the weapon, but all of the statements put in context the entire encounter. So that is why I would admit that statement.

Now, let me continue with innocent possession. That statement in and of itself I would find does not give rise to an innocent possession defense in and of itself if there were an innocent possession defense. Because even under the *Mason* version of the innocent possession defense, which the defense wants me to adopt, that statement in and of itself does not—and even in the context of everything else that Mr. Johnson said to the police, does not make out all of the other aspects of the *Mason* test.

So that having been said, I do not think that—I **[20]** would not adopt the *Mason* test. I do not think there is a basis in law for an innocent possession defense of the kind laid out in *Mason*. I subscribe to the view that Judge—I think it is Judge O'Scannlain articulates in *The United States versus William Johnson*, 459 F.3d 990d. It is the Ninth Circuit, 2006, beginning at page—let's see—I think it is Part B of the opinion. It begins right at the end of page 994, and it really begins on the top of 995. It starts with the sentence, Given the foregoing conclusion, you must consider whether the proposed instruction was, quote, supported by law.

And in the *William Johnson* in the Ninth Circuit, that Mr. Johnson asked that the Court adopt the innocent possession defenses articulated in the DC Circuit. And for all of the reasons that Judge O'Scannlain articulates in this case, I do not find that the *Mason* test is supported by the law.

And I am not going to get into all of it, but let me just kick off the reasons. First, that some—what I am going to call the *Mason* test, innocent possession as defined by *Mason*—is wholly absent from the statutory text. It is for the legislature to decide these types of exceptions and not a Court to craft a judicially—a judicial exception to 922(g) in particular. And not only is the proposed defense absent from the text, but Congress also explicitly adopted a **[21]** *mens rea* requirement that negates a *Mason*-type innocent possession defense. The knowledge requirement is the only requirement in 922(g). Knowledge refers only to the defendant's knowing possession of a gun, and it does not require knowledge that the defendant is violating the law. There is no willfulness requirement in 922(g), and it would be the—as Judge O'Scannlain puts it, only the willfully *mens rea* invites inquiry into whether the defendant had bad motive or intent.

Next, there is no clearly expressed legislative intent for the proposed defense to apply for the felon in possession statute. In here Judge O'Scannlain cites the First Circuit's case in *Teemer*, T-E-E-M-E-R. And no—and also notes that Congress knows how to fashion affirmative defenses of the kind outlined in *Mason* because they have done it in connection with other statutes, but they have not done it with respect to 922(g).

I also find very compelling the policy arguments that are set out in the Ninth Circuit *Johnson* case. In particular as the Ninth Circuit writes, The proposed defense would invite perjury, and thus, unduly increase the Government's burden in litigating these cases.

Citing *Gilbert* in the Fourth Circuit, the Ninth Circuit says, quote, If we were to accept the innocent possession defense, purpose would suddenly become an issue

in **[22]** a great number of cases. A felon caught possessing a firearm could force the Government to litigate motive simply by asserting that he had just found the weapon and was on his way to turn it into the police.

It is really only a defendant in many of these cases that knows the nature and extent of his possession. And as the Ninth Circuit writes, quote, We will not require the Government to contest motive in every 922 cases where the facts will bear an uncorroborated assertion by the defendant that he innocently came upon a firearm and was preparing to turn it over to the authorities, when, alas, he was arrested.

Now, I recognize that in this case there is some evidence that Mr. Johnson said something to the police about him turning over the firearm to the police. But in this case, there, at least on the affidavits that have been presented thus far, as the Government points out, the defendant's conduct would not give rise to the innocent—the *Mason* innocent possession defense because of other aspects of the test that the affidavit or the affirmation do not make out.

But again getting back to whether or not such a defense exists in law, the Ninth Circuit talks about the innocent possession defense thwarting congressional purpose because—and discredits the DC Circuit's belief that, quote, It is the retention of a firearm rather than the brief possession for disposal which poses the danger which is **[23]** criminalized.

As I mentioned last time, I think *Mason*—to the extent that there is any kind of innocent possession defense, I think the *Mason* test is broader than what the Second Circuit might recognize based on the Second Circuit's

opinions in *Williams, White*—and I am doing this off the top of my head, so I might miss a few—who else? *Miles, Paul*, the Second Circuit in *Miles* have said, We have repeatedly rejected efforts to assert such a defense where the possession was not momentary. Citing *Paul,* ...or only for as long as necessary to deal with a justifying necessity of some kind, citing *White*.

So the way I view all of these cases, there are really kind of three categories of what Courts have described variously as innocent possession. There is *Miles*, which I call transitory possession. It is with the intent to turn it over for a legitimate purpose. But the retention there is a little bit longer—is a little bit longer, maybe a lot longer. So that is Category 1, *Mason*, what I call transitory possession, which the DC Circuit has recognized and what the Court—what the defense wants me to adopt here.

There is transitory possession of the *Mason* test, I think is different than fleeting or momentary possession. And there are lines of cases, *Paul* makes reference to this where just quick possession, moving it off a sofa, passing it to **[24]** somebody with no intent to retain it, picking it up from the floor of a lunch counter and giving it back to the police officer from whom it fell, those types of cases push the outer bounds of the statute and push the outer bounds of the possessory element of 922(g). And so to me I understand why the Second Circuit would find that to be a defense, however, you call it—whatever you call it, however you characterize it.

And then there is the group of cases which you could category variously as falling in the category of necessity, duress, or justification. The classic duress or justification defenses where a defendant as an affirmative

defense has to prove that he was facing the risk of imminent harm and that he had no other—no other way to protect himself from that imminent harm, and that he was not the one who recklessly or somehow put himself in that situation. That is a different category of what some Courts have characterized as innocent possession. Mr. Johnson does not rely on that based on what we spoke about the last time. But those types of situations are more akin, I think, to what the Second Circuit was talking about in *White*, where possession was only for as long as necessary to deal with the justifying necessity of some kind.

Now, granted, there are lots of things that can fall in between the continuum of fleeting possession to transitory possession to that category of critical-justification type **[25]** cases. But as I said, I don't think *Mason,* transitory, a clear intent to evince possession, physical possession of a weapon—well, let me withdraw that.

I think *Mason* is broader than any formulation that the Second Circuit seems to be willing to adopt. And in any event based on the affidavits that have been submitted, I do not think they give rise to a jury instruction.

But as I started out saying, I am going to let—I am going to let Mr. Johnson testify in this case to whatever he wants to testify to, including all of those facts and circumstances, because I think they are inextricably intertwined into the story that Mr. Johnson has a right to tell in front of the jury. I am not precluding—although, if he were to testify consistently with the affidavits—the affirmations that he has already submitted and only to that which is in the affirmations, I would find that it does not give rise to a jury instruction along the lines that have been proposed by the defense in their proposed jury instruction. But I want to

emphasize, Mr. Johnson has the right to get up on the stand, tell his whole story, including his statements—or including his intention to return the gun to the police, including anything else he wants to talk about that is relevant and material.

I am not precluding any discussion of what we have been talking about in terms—well, what is contained in the **[26]** affirmation. But again, I find that even if there were an innocent possession defense along the lines of what the Second Circuit would reflect or even in *Mason,* I do not find that Mr. Johnson—that the statements in the affirmation, the evidence in the affirmation would give rise to any jury instruction.

We can talk about jury instructions at the charge conference after Mr. Johnson testifies. The Courts have handled things in different ways, but I do not know what Mr. Johnson is going to testify to. So questions, comments, confusion, clarification?

MR. RICHARDSON: All right. So a couple of questions, Your Honor.

THE COURT: Yes.

MR. RICHARDSON: So assuming Mr. Johnson testified consistent with the affidavit, obviously, the Government has sought an opportunity to rebut some of the arguments he's made and—and—and that was in the context of rebutting an innocent possession defense. Now, as I understand it, the Court is not going to give an innocent possession jury instruction because the Court has concluded it is not a defense as a matter of law. That is my understanding. And -and further, the defendant has not raised—has not—on the facts put forth in the affidavit has not raised the possibility

of such defense under—as the Court has read the **[27]** law.

If—if—if I've got that wrong, let me—let me know. I may have missed it.

THE COURT: Well, let me just tweak that a tiny little bit. I don't know what Mr. Johnson is going to get up on the stand and say. I guess your question was predicated on his testimony being wholly consistent with what is in the two affirmations?

MR. RICHARDSON: That's correct.

THE COURT: I would not give an innocent possession defense—I would not give an innocent possession instruction to the jury if the testimony is wholly consistent with the two affirmations.

MR. RICHARDSON: Understood.

* * *

APPENDIX C

United States Court of Appeals
for the Second Circuit

United States of America,
Appellee-Cross-Appellant,

v.

Lawrence Johnson,
Defendant-Appellant-Cross-Appellee.

Nos. 18-2358, 18-2467

Decided: August 27, 2020

ON PETITION FOR PANEL REHEARING
OR REHEARING EN BANC

Appellant-Cross-Appellee, Lawrence Johnson, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
[signature]

APPENDIX D

United States District Court
for the Eastern District of New York

United States of America

v.

Lawrence Johnson,
Defendant.

No. 15-cr-00603

(Filed: April 17, 2017)

DEFENDANT'S AFFIDAVIT IN SUPPORT OF MOTION FOR TRANSITORY POSSESSION DEFENSE

Lawrence Johnson, the defendant herein, swears to the truth of the following under the penalty of perjury:

1. On November 4, 2015, I left my house around mid-day to take a walk. When I did I accidently left my keys in the house.

2. I called my roommate Russell and asked him to come back to the house to let me in, which he did, but not immediately. While waiting for Russell to return from Long Island I walked around the area for approximately 45 minutes.

3. Near the end of that 45 minute time span I went near some bushes to urinate and found a bag which had in it a hard shell case. I picked the bag up and took it with me however I did not look inside the case. I did not know what was in the case.

4. A few minutes later, I went back to my apartment carrying the bag containing the case. The walk to my apartment only took a few minutes.

5. When I got to the apartment l put the bag down. I did not open the case at that time.

6. By the time I got home Russell was in the house and urged me to get my medicine right away because I had run out of it and he could drive me to pick it up, which we did.

7. I am supposed to take this medication every day.

8. Russell insisted we take care of filling the prescription right away so he drove me to the pharmacy to pick up the medication.

9. After returning from picking up the medication Russell left and I went to the apartment.

10. I looked inside the case and discovered there was a gun in it.

11. As soon as I realized that there was a gun inside the case I decided to bring the gun to the nearest precinct, the 75th.

12. I was aware from attending an anti-gun initiative in approximately 2011, where representatives from NYPD's 73 Precinct, ATF, the Kings County District Attorney's Office, and the US Attorney's Office were present, that the NYPD had "no questions asked" gun programs where people could bring guns to turn in at precincts. This was in my mind as I decided to turn the gun in to the precinct for my own safety and the safety of others.

13. The meeting I had attended took place at the library located at Dumont and Mother Gaston; I was required to attend at the direction of my parole officer.

14. I left my house right after entering it and finding the gun.

15. When I left the house I immediately started walking towards the 75 Precinct to turn in the gun.

16. 1 was walking to the precinct when I saw a police car and flagged it down.

17. I wanted the police to know I had a gun which I was taking to the precinct to turn in so I made that clear to the officers by stating: I have a gun that I found and want to turn it in.

18. The police asked me to turn over the gun case which I did.

19. The interchange was cordial and respectful. I was not handcuffed. I was not under arrest.

20. The police officers asked me where I obtained the weapon and I told them in the bushes on Hegeman.

21. This is what happened the day I was arrested for possession a gun. It is what I remember to the best of my recollection. lt does not contain everything that happened.

[signature]