Petition Appendix

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 5, 2020
Lyle W. Cayce
Clerk

No. 19-10168

UNITED STATES OF AMERICA,

Plaintiff — Appellee,

versus

ALVIN CHRISTOPHER PENN,

Defendant — Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CR-506-1

Before STEWART, CLEMENT, and COSTA, *Circuit Judges*.

EDITH BROWN CLEMENT, *Circuit Judge*:

Alvin Penn engaged in a shootout with a rival and then fled, crashing his car and tossing the gun a few minutes later. A jury convicted Penn of being a felon in possession of a firearm. At sentencing, the district court ordered Penn to pay restitution for property damaged during the melee. Penn argues that his brief possession of the gun was justified and the district court erred by not letting him present that defense to the jury. He also challenges the district court's authority to order him to pay restitution for losses that weren't caused by his possession of the gun. We reverse the district court's restitution order but otherwise affirm Penn's conviction and sentence.

I.

On the morning of July 6, 2017, Alvin Penn was serving out the remainder of a federal sentence at a halfway house. He left and was supposed to be on his way to work, but he went to his girlfriend's house instead. After spending the morning with his girlfriend, Penn asked her to drop him off at his family's apartment because his aunt, Carmela Harris, was cooking lunch for him. When Penn arrived at the entrance of the apartment complex, he saw Devante Scott and one of Scott's associates, Kareem Robinson, standing by a car in the parking lot yelling at someone.

Scott had a history with Penn's family. He fathered two children with one of Penn's cousins, Keuna Hancock, who lived at the apartment. Another one of Penn's cousins, Demodrick Anderson, allegedly witnessed Scott murder a man. Anderson told his family about what he witnessed and began to distance himself from Scott, which is when the tension between Scott and Penn's family began. Anderson was murdered a few months later, and Penn's family believed that Scott was involved. Scott also allegedly threatened to kill Penn. So Scott was not welcome at the apartment.

Penn's girlfriend stopped the car about twenty yards away from Scott and Robinson, and Penn got out to see what they were doing there. Penn's aunt screamed, "They got a gun." Scott then pulled a gun from his pocket. Penn told Scott to put the gun down and fight, so Scott put the gun on the roof of his car. While Penn and Scott argued, Robinson picked up Scott's gun, crouched behind the car, and said "I got him." Fearing for Penn's safety, Penn's aunt rushed over to him and handed him her gun. Penn's girlfriend ran for cover at that point. Moments later, Penn opened fire.

A shootout ensued. After Penn and Robinson exchanged fire, Penn got into the driver's seat of his girlfriend's car and fled. Scott and Robinson chased after him; Scott drove while Robinson continued to shoot at Penn

from the passenger-side window. As Penn exited the parking lot, he turned right onto a highway. Scott and Robinson followed. After making another turn, Penn drove through a residential neighborhood and "ended up losing" Scott and Robinson there. Once Scott and Robinson were no longer behind him, Penn returned to the highway and stopped at an intersection.

While Penn was waiting at the light, Oscar Garcia, an officer responding to the scene of the gunfight, noticed that Penn's car matched the description of one of the suspect vehicles. Garcia began following Penn. Although Garcia didn't have his lights or sirens on, Penn looked in his rear-view mirror and realized that a police officer was behind him. Garcia continued to follow directly behind Penn as he cut across a parking lot to another street. Penn admitted that he could have pulled over to talk to Garcia, but he didn't pull over because he was a convicted felon with a gun in the car. Last time Penn was arrested, he was allegedly beaten by officers. Penn "didn't want to go back" to jail, "get caught with that gun," or "get beat[en] again," so he decided to try to evade Garcia.

Penn took a sharp left turn in front of cars, and when he saw that Garcia had gotten caught in traffic, he sped up and turned into a neighborhood. Garcia activated his lights and gave chase. Penn began to lose control of his vehicle while running stop signs and accelerating rapidly through the neighborhood. He eventually hit a curb, ran through a wrought-iron fence, and crashed into an apartment building. Penn then jumped out of the car and grabbed the gun. After unsuccessfully trying to scale a fence behind the apartment building, Penn tossed the gun over the fence into a field and took off running. The entire chase—from the time Penn first saw Garcia until he wrecked his car and ditched the gun—lasted around five minutes.

Garcia never caught Penn. When he arrived about a minute later, Penn was gone. Penn remained on the run until his arrest nearly a month later.

Penn was charged with two federal crimes: escape from federal custody in violation of 18 U.S.C. §§ 751(a) and 4082(a), and possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Penn moved to dismiss the felon-in-possession charge on the basis that § 922(g) is unconstitutional, but the district court denied Penn's motion. Aside from that, Penn didn't seriously contest the elements of his offenses. Instead, he went to trial primarily to raise an affirmative defense: he argued that he was justified in briefly possessing the gun to defend himself against Scott and Robinson. But the district court didn't allow Penn to present that defense because Penn held on to the gun longer than necessary.

The jury found Penn guilty on both counts. The district court sentenced him to 168 months' imprisonment, followed by three years of supervised release. The district court also ordered Penn to pay restitution to two victims: first, the owner of a car that was struck by a bullet during the shootout between Penn and Robinson; and second, the owner of the apartment building and wrought-iron fence that Penn crashed into during the police chase. Penn timely appealed.[1]

II.

Penn raises four issues on appeal: *first*, that the district court erred by refusing to instruct the jury on his justification defense; *second*, that the district court erred by excluding evidence related to that defense; *third*, that the order of restitution for losses not caused by his possession of the firearm was illegal; and *fourth*, that his conviction must be vacated because the interstate-commerce element of § 922(g) is unconstitutional. We address each issue in turn.

---

[1] On appeal, Penn challenges his conviction and sentence only for the felon-in-possession charge; he does not challenge his escape conviction or sentence.

A.

First, Penn challenges the district court's refusal to submit a jury instruction on the justification defense. We review de novo a district court's refusal to provide an instruction on a defense that, if believed, would preclude a guilty verdict. *United States v. Theagene*, 565 F.3d 911, 917 (5th Cir. 2009). A criminal defendant is entitled to an instruction on a defense only if he presents sufficient evidence "for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). The defendant must produce evidence to sustain a finding on each element of the defense "before it may be presented to the jury." *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998). In determining whether the defendant has made this threshold showing, "we construe the evidence and make inferences in the light most favorable to the defendant." *Theagene*, 565 F.3d at 918.

We have recognized "justification" as a defense to a felon-in-possession charge. *See United States v. Harper*, 802 F.2d 115, 117 (5th Cir. 1986).[2] To establish that defense, a defendant must show that (1) he was under an imminent threat of death or serious injury; (2) he did not "recklessly or negligently" place himself in a situation where he would be forced to possess a firearm; (3) he had no "reasonable, legal alternative" to possessing the firearm; and (4) "a direct causal relationship" could be anticipated between possession of the firearm and abatement of the threat. *Id.* (quoting *United States v. Gant*, 691 F.2d 1159, 1162–63 (5th Cir. 1982)).

[2] "The proper name of this defense has . . . not been established." *Harper*, 802 F.2d at 117 n.1. Courts have referred to the defense using the terms "necessity," "duress," and "self-defense" interchangeably and often lump those terms together under the general rubric of "justification." *Id.*; *United States v. Leahy*, 473 F.3d 401, 406 (1st Cir. 2007). For simplicity, we refer to Penn's defense as justification.

The defendant must also prove a fifth element: that he possessed the firearm only during the time of danger. *See Gant*, 691 F.2d at 1163 n.9.

In the felon-in-possession context, courts construe the justification defense "very narrowly" and limit its application to the "rarest of occasions." *E.g.*, *United States v. Perrin*, 45 F.3d 869, 874–75 (4th Cir. 1995). The defense is often unavailable unless the defendant did nothing more than disarm someone "in the heat of a dangerous moment," and possess a gun briefly "to prevent injury to himself or to another." *United States v. Mahalick*, 498 F.3d 475, 479 (7th Cir. 2007) (citation omitted).

We have found sufficient evidence for an instruction on the justification defense only once. In *United States v. Panter*, 688 F.2d 268 (5th Cir. 1982), Lester Panter was tending bar when he was assaulted by a drunk patron. *Id.* at 269. After threatening to kill Panter, the patron pulled a knife and stabbed him in the abdomen. *Id.* Panter reached beneath the bar for a club, but his hand fell fortuitously on a pistol. *Id.* He shot the patron and then immediately placed the gun on the bar. *Id.* We held that Panter could raise the defense because he presented evidence showing that he reacted out of a reasonable fear for his life, in a conflict that he didn't provoke, and possessed the gun only for the short time necessary to defend himself. *Id.* at 270–72.

The few cases in which our sister circuits have held that a justification instruction was required are similarly extraordinary. *See, e.g.*, *United States v. Paolello*, 951 F.2d 537, 539–43 (3rd Cir. 1991) (holding justification defense available when defendant knocked a gun out of an attacker's hand, ran away with the gun, and then dropped it when police ordered him to stop); *United States v. Newcomb*, 6 F.3d 1129, 1137–38 (6th Cir. 1993) (holding justification defense available when defendant disarmed a dangerous individual in an "emergency situation that unfolded rapidly" and possessed ammunition for only "a few minutes" before police arrived).

The district court held that the justification defense was unavailable because Penn failed to present sufficient evidence that he possessed the gun "no longer than absolutely necessary." Penn argues that the district court's formulation of the fifth element was too strict. Under our precedent, Penn says, he need only show that he didn't possess the gun for "any significant period" after the alleged necessity. *Panter*, 688 F.2d at 272.

Penn misreads our precedent. To be sure, possession "before the danger or for any significant period after it remains a violation." *Id.* But the converse is not true. We've never held that the defense applies when a defendant maintains possession for only a brief period after the danger. Instead, we've emphasized that the defense protects a defendant "only for possession during the time" that the emergency exists. *Id.* If the defendant "kept the gun beyond [that] time," the defense is unavailable. *Id.* at 270–72; *accord Gant*, 691 F.2d at 1163 n.9.[3]

A defendant must act promptly to rid himself of the firearm once the circumstances giving rise to the justification subside. There is no bright-line rule that the defendant must turn the gun over to the police. *See Panter*, 688 F.2d at 269. But when "a police officer happens to find the defendant first, . . . the officer's presence gives the defendant an immediate chance to give up possession." *United States v. Moore*, 733 F.3d 171, 174 (6th Cir. 2013). A defendant can't assert a justification defense if he "fails to take advantage

[3] Many circuit courts require, like the district court required here, a showing that the defendant did not maintain possession of the firearm "longer than absolutely necessary." *See, e.g.*, *United States v. White*, 552 F.3d 240, 247 (2d Cir. 2009); *Paolello*, 951 F.2d at 542; *United States v. Singleton*, 902 F.2d 471, 473 (6th Cir. 1990). Other courts require proof that the defendant "relinquish[ed] the gun at the 'earliest possible opportunity.'" *United States v. Butler*, 485 F.3d 569, 573 (10th Cir. 2007) (quoting *United States v. Bailey*, 444 U.S. 394, 415 (1980)). We need not determine whether there is any difference between these formulations and what our precedent requires. Regardless of how we phrase it, Penn failed to make the minimum showing on the fifth element.

of that chance." *Id.*; *see also Paolello*, 951 F.2d at 542 (explaining that if the defendant ran from the police, then he "had an opportunity to dispose of the gun . . . earlier than he did"); *United States v. Hammons*, 566 F.2d 1301, 1302–04 (5th Cir.) (holding that a defendant who retained possession of a gun for only ten minutes couldn't raise a justification defense because he made no attempt to get rid of the gun until police arrived and "tried to conceal the [gun] from the officers"), *vacated on other grounds*, 439 U.S. 810 (1978).

We have little difficulty holding that Penn's effort to evade arrest and hide the firearm from police negates any possible satisfaction of the fifth element. Penn admitted that he fled because he didn't want to go back to jail. Garcia and Penn testified that no other cars were near them, so Scott and Robinson were no longer chasing Penn. By the time Penn saw Garcia, then, any imminent threat to Penn's safety was gone.[4] Thus, Penn's continued possession of the gun was prompted not by reasonable fear for his life but by a desire to avoid jail time.

It makes no difference if Penn kept the gun only five minutes longer than necessary. That period might have been brief, but it wasn't insignificant. Penn passed up several chances to give up the gun. He chose not to pull over and explain the situation to Garcia. He also chose not to leave the gun at the scene of the wreck; he took it with him and threw it into a field where it would be harder for police to find. "Far from evincing a 'single-minded effort' to divest himself of the gun safely, return it to law enforcement officers, or even to report to authorities the circumstances necessitating his possession of it,"

[4] We reject Penn's argument that his continued possession was justified by his fear of police, based on the beating officers allegedly gave him years earlier. Even if Penn's generalized fear of police could satisfy the immediate-threat requirement, the question is whether that threat justified Penn's *possession of the gun*, not his failure to pull over. Penn didn't need a gun to flee from the police. So Penn cannot show that he could have avoided the threatened harm only by possessing the firearm. *See Gant*, 691 F.2d at 1164.

Penn's testimony shows just the opposite: a surreptitious effort to conceal his role in the shootout and unlawful firearm possession from the police. *Virgin Islands v. Lewis*, 620 F.3d 359, 370 (3d Cir. 2010).

On these facts, no reasonable jury could find that Penn possessed the firearm "only . . . during the time he [was] endangered." *Panter*, 688 F.2d at 272. We therefore hold that Penn failed to present sufficient evidence on the fifth element of his justification defense. For that reason, the district court properly refused to instruct the jury on the defense.

B.

Second, Penn contends the district court erred by excluding evidence of Scott's prior violent acts and threats against Penn's family. We review a district court's evidentiary rulings for abuse of discretion. *United States v. Daniels*, 930 F.3d 393, 404 (5th Cir. 2019). Even if the district court abused its discretion in excluding evidence, we will not vacate a conviction unless the error was harmful, meaning it affected a "substantial right" of the defendant. *Id.* The question "is whether the trier of fact would have found the defendant guilty beyond a reasonable doubt with the additional evidence inserted." *United States v. Willett*, 751 F.3d 335, 343 (5th Cir. 2014) (quoting *United States v. Wen Chyu Liu*, 716 F.3d 159, 169 (5th Cir. 2013)).

The evidence at issue pertains to Penn's defense of justification. Because Penn failed to make the threshold showing required to present that defense, the evidence was irrelevant. *See Bailey*, 444 U.S. at 416 (holding that if a defendant fails to support one element of a defense, "the trial court and jury need not be burdened with testimony supporting other elements"); *United States v. Ragsdale*, 426 F.3d 765, 778 (5th Cir. 2005) (concluding that evidence offered to support an unavailable defense is irrelevant). Thus, the district court did not abuse its discretion by excluding that evidence.

Penn asserts that even if the justification defense was unavailable, the district court should have allowed him to tell "his side of the story." For instance, the government asked Penn's aunt if it was fair to say she didn't like Scott. Rather than object to that line of questioning, Penn's counsel sought permission to ask Penn's aunt *why* she didn't like him. The government argued that the reason was "completely irrelevant." The court didn't allow Penn's counsel to ask that question, but the court warned the government that it was coming "dangerously close to opening the door."

Even if the district court abused its discretion by excluding evidence about Scott, that error was harmless. The excluded evidence had no bearing on any element of the charged offenses. Penn's argument that this evidence "would have informed the jury's moral judgment," suggests that the evidence would only inspire jury nullification. "Evidence admitted solely to encourage nullification is by definition irrelevant, and thus inadmissible, regardless of what other evidence might be introduced at trial." *United States v. Manzano*, 945 F.3d 616, 630 (2d Cir. 2019).

C.

Third, Penn contends that the district court lacked authority to order restitution for damages that occurred during the shootout and police chase because those losses weren't caused by his felon-in-possession conviction. A district court can order restitution only "when authorized by statute." *United States v. Espinoza*, 677 F.3d 730, 732 (5th Cir. 2012) (quoting *United States v. Love*, 431 F.3d 477, 479 (5th Cir. 2005)). Because a restitution order that exceeds the court's statutory authority is an illegal sentence, which always constitutes plain error, we review de novo the legality of a restitution order, regardless of whether the defendant raised this objection at sentencing. *United States v. Nolen*, 472 F.3d 362, 382 & n.52 (5th Cir. 2006); *United States v. Bevon*, 602 F. App'x 147, 151 (5th Cir. 2015) (unpublished).

The district court's judgment cited 18 U.S.C. § 3663 as the basis for restitution. Under § 3663, "a defendant convicted of an offense" may be ordered to "make restitution to any victim of such offense." *Id.* § 3663(a)(1)(A). Because that language links restitution to the offense of conviction, the Supreme Court held that the statute authorizes an award of restitution "only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Hughey v. United States*, 495 U.S. 411, 413 (1990). This is known as the *Hughey* rule.

Penn argues that § 3663 did not authorize the district court's restitution order because the victims' losses were not caused by the conduct underlying his felon-in-possession conviction.[5] We agree.

The district court ordered restitution for losses suffered when someone—it could have been Penn or Robinson—fired a bullet that struck a car during the shootout and when Penn crashed into a fence during the high-speed chase. The specific conduct underlying the elements of the felon-in-possession offense does not include use of a firearm or flight from police. As a result, neither the owner of the car nor the owner of the fence is a "victim" of Penn's conviction. *See Espinoza*, 677 F.3d at 733–34 (holding loss sustained by pawn shop that bought stolen firearms from defendant was not caused by conduct underlying defendant's felon-in-possession conviction); *United States v. West*, 646 F.3d 745, 751 (10th Cir. 2011) (holding damage caused to cars and store while defendant was fleeing from police was not caused by conduct underlying defendant's felon-in-possession conviction); *United*

[5] The district court ordered Penn to pay restitution based on his felon-in-possession conviction. That offense requires proof that (1) the defendant knowingly possessed a firearm; (2) before possessing that firearm, the defendant had been convicted of a felony; and (3) before the defendant possessed the firearm, it traveled in and affected interstate commerce. *United States v. Ortiz*, 927 F.3d 868, 874 (5th Cir. 2019).

States v. Reed, 80 F.3d 1419, 1421 (9th Cir. 1996) (holding damage caused to vehicles while defendant was fleeing from police was not caused by conduct underlying defendant's felon-in-possession conviction). Thus, § 3663 could not serve as the basis for the restitution order.

According to the government, however, the district court intended to order restitution under 18 U.S.C. § 3583(d). That statute allows a court to impose as a condition of supervised release any discretionary condition of probation found in § 3563(b), including "restitution to a victim of the offense under section 3556." *Id.* §§ 3583(d), 3563(b)(2). In turn, § 3556 provides that a court "shall order restitution in accordance with section 3663A, and may order restitution in accordance with section 3663." *Id.* § 3556. But restitution ordered as a condition of supervised release is "not subject to the limitation of section 3663(a) or 3663A(c)(1)(A)." *Id.* § 3563(b)(2).

The government argues that the inapplicable "limitation" to which § 3563(b) refers is the definition of "victim" in § 3663(a)(2), which more or less codifies the *Hughey* rule. We disagree. Sections 3663(a) and 3663A(c)(1)(A) limit restitution under those statutes to a list of enumerated offenses. *See id.* §§ 3663(a)(1)(A), 3663A(c)(1)(A). The "limitation" excluded by § 3563(b)(2) is that enumerated-crimes limitation, not the *Hughey* rule. *See Love*, 431 F.3d at 480 & n.11.

Applying the *Hughey* rule to § 3563(b)(2) makes sense. Restitution under that statute is limited to victims "of the offense," a phrase nearly identical to the one that the Court construed in *Hughey*, 495 U.S. at 413 n.1 Indeed, every circuit court that has considered this issue has held that the *Hughey* rule applies to § 3563(b)(2). *See, e.g.*, *United States v. Varrone*, 554 F.3d 327, 333–34 (2d Cir. 2009) (Sotomayor, J.); *United States v. Freeman*, 741 F.3d 426, 433–35 (4th Cir. 2014); *United States v. Batson*, 608 F.3d 630, 636–37 (9th Cir. 2010). We too have observed that restitution imposed under

§ 3563(b)(2) must be "limited to losses from the crime of conviction." *United States v. Nolen*, 523 F.3d 331, 333 (5th Cir. 2008).

In sum, restitution imposed as a condition of supervised release can compensate only for losses caused by the specific conduct that is the basis for the offense of conviction. *Hughey*, 495 U.S. at 413. For that reason, even if the district court intended to order restitution as a condition of supervised release, the court lacked authority to do so. *See Espinoza*, 677 F.3d at 733–34; *West*, 646 F.3d at 751. We thus reverse the district court's restitution order.

D.

Fourth, Penn contends that 18 U.S.C. § 922(g), as construed, is unconstitutional. Penn preserved this issue by raising it in his motion to dismiss the indictment. We review the constitutionality of a federal statute de novo. *United States v. Portillo-Munoz*, 643 F.3d 437, 439 (5th Cir. 2011).

Section 922(g) prohibits some people from possessing a firearm "in or affecting commerce." 18 U.S.C. § 922(g). We have held that the "in or affecting commerce" element is satisfied if the firearm had "a past connection to interstate commerce." *United States v. Fitzhugh*, 984 F.2d 143, 146 (5th Cir. 1993). Under that interpretation, Penn argues, § 922(g) exceeds Congress's power under the Commerce Clause.

As Penn properly concedes, our precedent forecloses this argument. *See, e.g.*, *United States v. Alcantar*, 733 F.3d 143, 145 (5th Cir. 2013). He contends, though, that we should reinterpret § 922(g) in light of the Supreme Court's decision in *Bond v. United States*, 572 U.S. 844 (2014). But *Bond* did not address § 922(g) or abrogate our precedent. *See United States v. Brooks*, 770 F. App'x 670, 670 (5th Cir. 2019) (unpublished). Accordingly, we are bound by our settled precedent and conclude that this issue is foreclosed.

III.

For the foregoing reasons, we reverse the district court's restitution order and affirm Penn's conviction and sentence in all other respects.

AFFIRMED IN PART; REVERSED IN PART.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

v.

ALVIN CHRISTOPHER PENN

JUDGMENT IN A CRIMINAL CASE

Case Number: **3:17-CR-00506-L(1)**
USM Number: **48435-177**
Erin Leigh Brennan
Defendant's Attorney

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☒	was found guilty on count(s) after a plea of not guilty	**Counts 1 and 2 of the Superseding Indictment filed June 13, 2018**

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18:751(a) and 4082(a) Escape From Federal Custody	08/03/2017	1
18:922(g)(1) and 924(a)(2) Convicted Felon In Possession Of A Firearm	07/06/2017	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) remaining of the original Indictment filed 10/11/2017. ☐ is ☒ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

February 5, 2019
Date of Imposition of Judgment

Sam A. Lindsay
Signature of Judge

Sam A. Lindsay, United States District Judge
Name and Title of Judge

February 7, 2019
Date

DEFENDANT: ALVIN CHRISTOPHER PENN
CASE NUMBER: 3:17-CR-00506-L(1)

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **Forty-eight (48) months as to Count 1, and one hundred twenty (120) months as to Count 2. The terms as to these counts shall be served consecutively, for a total term of one hundred sixty-eight (168) months. This sentence shall run concurrently with any sentences imposed in Case Nos. F-1731049 and F-1731050, pending in the 265th Judicial District Court of Dallas County, Texas.** ***Pursuant to United States Sentencing Commission Guidelines Manual, in particular, Section 5G1.3(c), the November 2016 Edition, the court intends for Alvin Christopher Penn to receive a sentence adjustment to account for any time that he has spent in custody beginning on August 3, 2017, that the Bureau of Prisons will not credit under Title 18 United States Code § 3585(b).***

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

The court recommends that Defendant be allowed to serve his sentence at the facility in Yazoo City, Mississippi, if he is eligible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ALVIN CHRISTOPHER PENN
CASE NUMBER: 3:17-CR-00506-L(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **Three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: ALVIN CHRISTOPHER PENN
CASE NUMBER: 3:17-CR-00506-L(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: ALVIN CHRISTOPHER PENN
CASE NUMBER: 3:17-CR-00506-L(1)

SPECIAL CONDITIONS OF SUPERVISION

Pursuant to the provisions of 18 U.S.C. § 3663, the defendant is ordered to pay restitution in the amount of **$1,677.55**, of which $680.55 is to be paid jointly and severally with Kareem Robinson, payable to the U.S. District Clerk, 1100 Commerce Street, Room 1452, Dallas, Texas 75242. Restitution shall be payable immediately and any unpaid balance shall be payable during incarceration. Restitution shall be disbursed to:

Corina Ortega
$680.55
Re: U.S. v. Alvin Christopher Penn

Clayton's Mark Apartments
$997.00
Re: U.S. v. Alvin Christopher Penn

If upon commencement of the term of supervised release any part of the restitution remains unpaid, the defendant shall make payments on such unpaid balance in monthly installments of not less than 10 percent of the defendant's gross monthly income, or at a rate of not less than $50 per month, whichever is greater. Payment shall begin no later than 60 days after the defendant's release from confinement and shall continue each month thereafter until the balance is paid in full. In addition, at least 50 percent of the receipts received from gifts, tax returns, inheritances, bonuses, lawsuit awards, and any other receipt of money shall be paid toward the unpaid balance within 15 days of receipt. This payment plan shall not affect the ability of the United States to immediately collect payment in full through garnishment, the Treasury Offset Program, the Inmate Financial Responsibility Program, the Federal Debt Collection Procedures Act of 1990 or any other means available under federal or state law. Furthermore, it is ordered that interest on the unpaid balance is waived pursuant to 18 U.S.C. § 3612(f)(3).

DEFENDANT: ALVIN CHRISTOPHER PENN
CASE NUMBER: 3:17-CR-00506-L(1)

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$200.00	$.00	$.00	$1,677.55

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution of $997.00 to:

CLAYTON'S MARK APARTMENTS
GRAND PRAIRIE, TX

Restitution of $680.55, jointly and severally with co-defendant Kareem Robinson (3:17-cr-00506-2), to:

CORINA ORTEGA
ARLINGTON, TX

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ALVIN CHRISTOPHER PENN
CASE NUMBER: 3:17-CR-00506-L(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payments of $ _____ due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☒ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☒ Payment in monthly installments of $ 50
to commence 60 days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $200.00 for Counts 1 and 2, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☒ Joint and Several
See pages five and six for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Criminal Action No. **3:17-CR-506-L**
	§	
ALVIN CHRISTOPHER PENN (01)	§	

MEMORANDUM OPINION AND ORDER

Count Two of the Superseding Indictment charges Defendant Penn with being a convicted felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Section 922(g)(1) provides, "It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm . . . ." Defendant Penn seeks to raise the justification defense to his felon-in-possession charge. Prior to commencement of trial, the court denied the Government's motion in limine seeking to prevent Penn from presenting evidence at the trial to support this defense, stating that at the close of evidence, the court would determine whether Penn successfully raised the defense as to each element so as to merit a jury instruction on his affirmative defense of justification. Having considered all of the evidence presented at this time, the court concludes that Penn has failed to successfully raise the defense as to each element and is, therefore, as a matter of law not entitled to a jury instruction on his affirmative defense of justification.

A defendant may pose a justification defense to the charge of being a felon in possession of a firearm. *United States v. Harvey*, 897 F.2d 1300, 1304 (5th Cir.) (1990), *overruled on other grounds*, *United States v. Lambert*, 984 F.2d 658, 661-62 (5th Cir. 1993) (en banc). The Government

does not contest that, if proved in the appropriate case, a defendant may present a justification defense to the charge of being a felon in possession of a firearm.

The *Fifth Circuit Pattern Jury Instruction Criminal* (2015) state that to avail himself of a justification defense, Penn must make a minimal showing:

> (1) That [he] was under an unlawful present, imminent, and impending threat of such a nature as to induce a well-grounded fear of death or serious bodily injury to himself [to a family member];
>
> (2) That [he] had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;
>
> (3) That [he] had no reasonable legal alternative to violating the law, that is, he had no reasonable opportunity to avoid the threatened harm; and
>
> (4) That a reasonable person would believe that by committing the criminal action he would directly avoid the threatened harm.

Id. § 1.36 at 64-65; *see also United States v. Bailey*, 444 U.S. 394, 415 (1980). While the *Fifth Circuit Pattern Jury Instructions* only lists these four elements, they do not have the force of law and do not tell the whole story. As the Fifth Circuit emphasized in *United States v. Gant*, "These four requisites are merely elements common to both duress and necessity and do not define the precise contours of either. *For example, continued possession beyond the time that the emergency exists will defeat the defenses*." 691 F.2d 1159, 1163 n.9 (5th Cir. 1982) (emphasis added) (citing *United States v. Panter*, 688 F.2d 268, 272 (5th Cir.1982)). The Fifth Circuit has adopted a restrictive view of the justification defense in the context of 18 U.S.C. § 922(g) charges and added what is essentially a precondition to the application of the justification defense, which this court considers to be a fifth

factor, namely, that an interdicted person may not possess the firearm beyond the time that the emergency existed. *See Gant*, 691 F.2d at 1163 n.9; *Panter*, 688 F.2d at 272. Other circuits have similarly so held. *See, e.g., United States v. Ridner*, 512 F.3d 846, 850 (6th Cir. 2008) (citation omitted) (recognizing as fifth factor that the defendant "did not maintain the illegal conduct any longer than absolutely necessary"); *United States v. Paolello*, 951 F.2d 537, 541-42, 543 (3d Cir. 1991) (recognizing the more restrictive view as "sound" and finding fifth factor satisfied when Defendant "did not maintain possession of the weapon any longer than absolutely necessary"); *United States v. Stover*, 822 F.2d 48, 50 (8th Cir. 1987) (holding that the defense of justification had no applicability when defendant continued to possess a gun once he was no longer in any imminent danger of death or serious bodily injury).[*]

In addressing the affirmative defense of duress or necessity, the Supreme Court explained the burden of proof placed upon a criminal defendant to raise successfully a justification defense:

> But precisely because a defendant is entitled to have the credibility of his testimony, or that of witnesses called on his behalf, judged by the jury, it is essential that the testimony given or proffered meet a *minimum standard* as to each element of the defense *so that, if a jury finds it to be true, it would support an affirmative defense—here that of duress or necessity*.

Bailey, 444 U.S. at 415.

Based on the evidence presented, including without limitation the videotape evidence and Carmela Harris's testimony, the court concludes that, as a matter of law, the justification defense has

[*] Although it is outside the scope of the court's ruling today, one likely reason for courts to take a restrictive approach to the use of a justification defense in the context of 18 U.S.C. § 922 is that Congress wrote section 922(g) in absolute terms and "sought to broadly keep firearms away from the persons Congress classified as potentially irresponsible and dangerous. These persons are comprehensively barred by the Act from acquiring firearms by any means." *Barrett v. United States*, 423 U.S. 212, 218 (1976).

no application in this case because the undisputed evidence shows Penn continued to possess the firearm well beyond the time when he was in any imminent danger of death or serious bodily injury. *See Gant*, 691 F.2d at 1163 n.9 ("[C]ontinued possession beyond the time that the emergency exists will defeat the defenses.") (citation omitted). Under these circumstances, the court need not reach whether Penn has satisfied the first, second, third, and fourth elements of the justification defense.

The evidence presented at trial shows that Penn left federal custody on the morning of July 6, 2017, went to an apartment complex in Grand Prairie, Texas, and took possession of a firearm. After a shootout involving Kareem Robinson, Devante Scott, and Penn at the apartment complex, Robinson and Scott briefly pursued Penn in a car chase and then ceased pursuit of him. Thereafter, a police officer began following Penn's vehicle. After following Penn's vehicle for a while, the police officer, who was in a marked police vehicle, turned on his siren and emergency lights. Rather than pulling over or attempting to flag the officer for assistance, Penn attempted to evade the police officer, and a chase ensued. Penn eventually crashed the vehicle.

His decision instead to attempt to evade police, as opposed to seek their assistance, renders any argument that he possessed the firearm no longer than absolutely necessary defeats his justification defense. *See Ridner*, 512 F.3d at 851-52 (justification defense unavailable where police chased defendant for a quarter mile before arresting him because defendant had the opportunity to dispose of the illegally possessed ammunition when they arrived instead of attempting to evade them). After Penn crashed the car into a gate and it came to rest against the building, he abandoned the car and, still in possession of the firearm, fled on foot at the Clayton Mark apartments, waved

the firearm at another person near the site of the crash, and eventually tossed the firearm in a field west of the apartment complex. Penn was apprehended several weeks later.

In two published opinions and one unpublished opinion after *Panter* and *Gant*, the Fifth Circuit has reaffirmed the fifth factor or precondition, and the court considers the fifth factor or precondition settled law. *See United States v. Bernard*, 58 F.3d 636, 636 (5th Cir. 1995); *United States v. Posada-Rios*, 158 F.3d 832, 874 (5th Cir. 1998); *United States v. Lee*, 208 F. App'x 352, 353 (5th Cir. 2006). In light of these cases, it is clear to this court that a defendant has to make a minimum showing that he did not possess the firearm once the imminent threat or danger ended.

Under these facts, the court concludes that, even accepting Penn's version of the facts, because Penn continued to possess the firearm well beyond the time that he was in any imminent danger of death or serious bodily injury at the hands of Scott and Robinson, the justification defense is unavailable to him. While Penn may have been under an unlawful and present, imminent, and impending threat that would induce a well-grounded apprehension of death or serious bodily injury when he first took possession of the firearm, and while he was being pursued by Scott and Robinson, once that threat subsided, he had multiple opportunities to dispose of the gun and stop fleeing much earlier than he did, any such possible justification ceased to exist and eviscerates his assertion that he possessed the firearm no longer than absolutely necessary.

In addition, the court rejects Penn's counsel's suggestion that there is a bright-line rule under which, as long as a defendant charged with a section 922(g) offense dispossesses the firearm in less than thirty minutes, he or she may assert the justification defense. Counsel was unable to provide the court any case law in support of this proposition, and the court's independent research has

produced no such authority. The court can only assume that Penn's counsel is seeking to extrapolate this bright-line rule from dicta in *United States v. Parker*, 566 F.2d 1304, 1306 (5th Cir. 1978). Dicta, of course, is not binding authority.

Further, while Penn's counsel argues that this is a question for the jury, the court disagrees. This is not a situation in which the court has found any witness's testimony to be unpersuasive or has judged the credibility of Penn. Indeed, the court has looked at the evidence in the light most favorable to Penn. Because justification is an affirmative defense, a defendant must present evidence of *each* of the elements of the defense before it may be presented to the jury. *See United States v. Bailey*, 444 U.S. at 415; *United States v. Posada-Rios*, 158 F.3d at 873 (citing *Gant*, 691 F.2d at 1165). In determining whether a defendant has made a threshold showing of the elements of the defense, a court must objectively evaluate the facts presented by the defendant. *See Gant*, 691 F.2d at 1163. An objective analysis of Penn's evidence, even accepting his version as true, convinces the court that he has failed to present evidence that he ceased possession of a gun once he was no longer in any imminent danger of death or serious bodily injury. The only way a fact issue could be raised, on the fifth factor potentially requiring the court to submit the justification defense to the jury, would be if Penn were to testify, as he is the only other person involved in the chase with Officer Garcia; however, if Penn testifies, this court will have to reconsider other evidentiary rulings that, up until this point, have resulted in the exclusion of certain evidence.

In light of the court's determination that the defense of justification has no applicability because Penn continued to possess a gun once he was no longer in any imminent danger of death or serious bodily injury, the alleged prior bad acts of Scott or others are quite beside the point, and will

not be allowed by the court. Penn has simply not made the minimum showing required regarding the fifth element, and, thus, at this juncture he, as a matter of law cannot establish that element.

It is so ordered this 29th day of June, 2018.

Sam A. Lindsay
United States District Judge

we will be in recess until further notice of the Court.

(Jury deliberates.)

THE COURT: Counsel, the jury has submitted a question. Mr. Robbins, hand the Court's supplement instruction and the question submitted by the jury to the counsel in this case.

This is what happens when the parties inject things that shouldn't be injected to the trial after the Court has made a ruling.

All right. The question that the presiding juror signed reads as follows: "What is the law"--and I've added of in brackets justification/criteria--"for a felon to be in possession of a firearm?"

The Court's answer is: "The Court has determined that the law of justification does not apply in this case. I therefore instruct you that you may not consider justification during the course of your deliberations. I further instruct you that you are to follow this supplemental instruction and the Court's previous instructions given to you and to continue your deliberations."

Anything from the Government concerning the supplemental instruction?

MS. HOXIE: No, Your Honor.

THE COURT: Anything from the Defense?

MS. BRENNAN: No, Your Honor.

THE COURT: All right. Momentarily I'm going to bring the jury in. I --

MS. BRENNAN: Your Honor, is it possible -- Mr. Nicholson is on his way. If the Court could possibly just wait a couple of minutes so I can get his opinion.

THE COURT: I thought he said he wouldn't be available this afternoon.

MS. BRENNAN: He is leaving at 2:30. He's on his way back right now.

THE COURT: Where is he now? Is he in the office or that room on the 14th floor where you wait sometimes?

MS. BRENNAN: He is at the office on his way back now.

THE COURT: I've give him five to seven minutes. He stated that you could take care of things if something arose, that you would be available, but he would be returning tomorrow. So I've give him five to seven minutes.

MS. BRENNAN: Thank you, Your Honor.

(Brief recess.)

THE COURT: All right. Mr. Nicholson, you're here.

MR. NICHOLSON: Yes. Thank you, Your Honor.

Yes, Your Honor. At this time the Defense would respectfully submit two objections to the Court's proposed answer to the jury. The first objection is for the reasons previously submitted by the Defense as to why the Court has

not instructed the jury as to justification. Our second objection is, respectfully, Your Honor, the proposed answer would be non-responsive to the question asked by the jury.

THE COURT: How's it non-responsive if the Court has already determined that it's not relevant?

MR. NICHOLSON: Well, the question isn't, Are we allowed to apply the -- it's -- are we allowed to apply the defense of justification. They are asking what is the law of it.

THE COURT: Well, if the law doesn't apply, then I do not know any other way to answer the question. Because of whatever, somebody on the jury is under the impression because of what's been said in this case that justification comes into play, and I am simply informing the jury that justification, based upon the Court's previous ruling, has no part in this case. I know of no other way to answer that question, because if I start giving them the explanation, I am talking on the subject that I've already stated that does not apply. If I state something or explain something in detail, then I in effect am going against what I've already ruled.

Any further objections?

MR. NICHOLSON: No, Your Honor. Those are our only two.

THE COURT: Anything from the Government?

MS. HOXIE: No, Your Honor.

THE COURT: One final question. Mr. Nicholson, are you planning to be here for the rest of the afternoon?

MR. NICHOLSON: I plan to be here until 2:30, Your Honor.

THE COURT: All right.

MR. NICHOLSON: I apologize for the delay.

THE COURT: No. That's okay. That's why I said five to seven minutes. I believe that was fair. You stated your objections, your objections are duly noted, and they are overruled for the reasons stated by the Court. And further, the Court believes that its answer is responsive and it's letting the jury know that the law of justification does not apply. And the Court does not want the jury following some rabbit trail. If a juror thinks that some principle of law applies and they're incorrectly considering that, then it is the Court's duty to inform the jury that that theory does not apply to the case. That is simply all that the Court has done, and the Court believes that this instruction adequately informs them insofar as any inquiries regarding justification are concerned.

Mr. Travis, bring the jury in, please.

(Whereupon, the jury entered the courtroom.)

THE COURT: There has been a question asked by the jury. The Court will now give a supplemental instruction to the jury. This supplemental instruction is to be followed

just as the original instructions were given to you.

Supplemental instruction to the jury.

Members of the jury, you have submitted the following question to the Court: "What is the law [of justification/criteria] for a felon to be in possession of a firearm?"

Answer, "The Court has determined that the law of justification does not apply in this case. I therefore instruct you that you may not consider justification during the course of your deliberations. I further instruct you that you are to follow this supplemental instruction and the Court's previous instructions given to you and to continue your deliberations."

Signed by me the 2nd day of July, 2018.

Mr. Travis, take the jury out, please.

(Whereupon, the jury left the courtroom.)

(Deliberations continue.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	**§**	
Plaintiff,	**§**	
	§	
v.	**§**	**CASE NO. 3:17-CR-506-L (01)**
	§	
ALVIN CHRISTOPHER PENN,	**§**	
Defendant.	**§**	

DEFENDANT'S MOTION TO SUBMIT WRITTEN OFFER OF PROOF OR, ALTERNATIVELY, TO PROFFER THE EXCLUDED EVIDENCE ORALLY THROUGH COUNSEL

TO THE HONORABLE SAM A. LINDSAY, UNITED STATES DISTRICT JUDGE:

COMES NOW, ALVIN CHRISTOPHER PENN, defendant, by and through his counsel of record, Erin Brennan, Assistant Federal Public Defender, and respectfully moves that the Court accept the attached proposed offer of proof to show what evidence he wished to elicit, or alternatively, to permit counsel to proffer the same orally on the record. The defense files the instant motion to ensure that the record includes an adequate showing of what evidence the defense sought to introduce, as required by Federal Rule of Evidence 103.

As defense counsel understands the Court's June 29, 2018, ruling, it will not accept an offer of proof from the witnesses in question and answer form. Without waiving that request, counsel does not seek reconsideration of this ruling. Rather, counsel simply wishes to ensure that the record contains some showing of the expected evidence, in either written form or by oral proffer.[1]

[1] While the Court asked for an oral summary of the evidence the defense sought to introduce, on June 29, 2018, it indicated that such evidence would not be relevant. Accordingly, in the event that the Court declines to accept the written proposed offer of proof, this Motion asks that the Court reconsider any ruling it made forbidding an oral proffer by counsel on the record.

Federal Rule of Evidence 103 requires a party appealing the exclusion of evidence to "inform[] the court of its substance by an offer of proof, unless the substance was apparent from the context." FED. R. EVID. 103(a)(2). Cases refusing to consider evidentiary error on appeal for want of an offer of proof are legion. *See United States v. Winkle*, 587 F.2d 705, 710 (5th Cir. 1979); *United States v. Wen Chyu Liu*, 716 F.3d 159, 170-71 (5th Cir. 2013); *Stockstill v. Shell Oil Co.*, 3 F.3d 868, 872 (5th Cir. 1993); *United States v. Harrelson*, 754 F.2d 1153, 1178–1179 (5th Cir. 1985); *United States v. Morrison*, 833 F.3d 491, 505 (5th Cir. 2016). Accordingly, it is error for the Court to refuse a defendant's request to make an offer of proof, as the Fifth Circuit explained:

> The judge erred in refusing to allow James' counsel to make an offer of proof. Although there is no rule of criminal procedure analogous to Rule 43(c) of the Federal Rules of Civil Procedure, counsel should nevertheless be permitted to demonstrate what he intends to prove in order that the appellate court may pass most intelligently on the challenged ruling of the trial court. The trial judge was simply wrong when he told counsel he could make his offer of proof on appeal; clearly, the trial court is the proper place for such an offer. *Pennsylvania Lumbermens Mutual Fire Insurance Co. v. Nicholas*, 253 F.2d 504, 507 (5th Cir. 1958).

United States v. James, 510 F.2d 546 (5th Cir. 1975).

Counsel recalls three explanations for the Court's ruling precluding an offer of proof. First, the Court expressed concern about the use of judicial resources. This concern is not implicated by the proposed written submission, which will not delay the outcome of the trial. An oral proffer through counsel, moreover, would also be an efficient presentation.

Second, the Court suggested that if the defendant's legal theory were correct, he could obtain reversal without resorting to the evidentiary issue, by appealing the denial of a defensive instruction. But the denial of a defensive instruction is reversible only when the defendant offers a sufficient evidentiary foundation for the instruction. *See United States v. Young*, 464 F.2d 160,

164 (5th Cir. 1972) (error to refuse instruction "for which there is any foundation in the evidence"). All of the defendant's appellate issues thus depend on the right to make this offer of proof.

Finally, the Court has repeatedly expressed its view that the evidence is irrelevant. As counsel understands the Court's view, the defendant cannot be acquitted without evidence that he immediately disposed of the gun after the parking-lot confrontation. The defense respectfully disagrees. *United States v. Panter*, 688 F.2d 288 (5th Cir. 1982), says that a felon may not possess the gun "for any significant period after" the "time he is endangered." *Panter*, 688 F.2d at 272. *Panter* does not require immediate dispossession. The Sixth Amendment, moreover, entitles the defendant to a jury resolution of mixed questions of fact and law. S*ee United States v. Gaudin*, 515 U.S. 506, 512 (1995). It is thus up to the jury to decide when the defendant stopped being "endangered," and whether his continued possession of the gun was "for a significant period" beyond that point. The defendant's right to present a defense, *see Crane v. Kentucky*, 476 U.S. 683, 690 (1986), and to testify, *Rock v. Arkansas*, 483 U.S. 44 (1987), likewise guarantees him the right to develop defensive evidence even in doubtful cases. Further, the evidence may be admissible for purposes other than an affirmative defense, such as correcting the misimpressions created by the government on cross-examination as to the defendant's motive, credibility, and character.

But this is beside the point. The defendant's right to make an offer proof does not depend on the merits of the evidentiary issue he wishes to preserve, nor on the Court's view of the same. Indeed, in every case where an offer of proof is necessary, the district court has necessarily concluded that the evidence is inadmissible. The right to make an offer of proof is a simple corollary of the right to appeal, like the right to make objections, or to file a notice of appeal. It

does not depend on whether precluding an offer would be more efficient, whether the defendant has other options on appeal, or the perceived merits of the evidentiary claim.

Accordingly, the defendant respectfully moves this Court to accept the proposed written offer of proof, or, alternatively, to permit counsel to state the expected evidence on the record. Alternatively, he moves for such relief as to which he may be justly entitled.

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Erin Brennan
Erin Brennan
Assistant Federal Public Defender
Missouri Bar No. 61185
525 Griffin Street, Suite 629
Dallas, Texas 75202
214.767.2746
erin_brennan@fd.org
Attorney for defendant

CERTIFICATE OF SERVICE

I, Erin Brennan, hereby certify that on June 24, 2018, I electronically filed the foregoing motion to submit proposed written offer of proof with the clerk for the United States District Court, Northern District of Texas, using the electronic filing system for the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following parties who have consented in writing to accept this notice as service of this document by electronic means: Assistant United States Attorney, Jamie Hoxie.

/s/ Erin Brennan
Erin Brennan

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	**§**	
Plaintiff,	**§**	
	§	
v.	**§**	**CASE NO. 3:17-CR-506-L (01)**
	§	
ALVIN CHRISTOPHER PENN,	**§**	
Defendant.	**§**	

DEFENDANT'S PROPOSED OFFER OF PROOF

TO THE HONORABLE SAM A. LINDSAY, UNITED STATES DISTRICT JUDGE:

COMES NOW, ALVIN CHRISTOPHER PENN, defendant, by and through his counsel of record, Erin Brennan, Assistant Federal Public Defender, and hereby respectfully provides this proposed written offer of proof to demonstrate what evidence he wanted to provide during the trial but was precluded from offering by the Court's order. In the absence of this Court's challenged evidentiary rulings, Mr. Penn would have presented the following testimony and evidence:

ALVIN CHRISTOPHER PENN

Mr. Penn testified in this matter on June 29, 2018. Had his testimony not been limited, he would have additionally testified that he feared for his life on July 6, 2017, and he shot at Devante Scott because he had prior knowledge of Mr. Scott's involvement in two murders, one including his cousin; he had knowledge that Mr. Scott had pointed a firearm at several of his family members on separate occasions; and he had knowledge that Mr. Scott had been making numerous threats against his life in the months leading up to July 6, 2017, and after July 6, 2017.

Mr. Penn would have testified that he learned about Mr. Scott's involvement in the murder of Michael Hartley aka Lil Gucci, murdered on January 9, 2016, while he was in the federal

penitentiary. Mr. Penn would have testified that he knew of the following details: his cousin, Demodrick Anderson, witnessed the murder and told Mr. Penn's family that a fistfight was supposed to occur on the night of Mr. Hartley's murder but, instead, Mr. Scott and LaBraxton LNU ambushed Mr. Hartley and shot him to death. Mr. Scott threw up his hands like it was going to be a fistfight (similar to how he does in the surveillance video in the instant case) and then told LaBraxton to shoot him and, after LaBraxton fired the first shot, Mr. Scott fired the second shot. They then tossed Mr. Hartley over the fence in a random individual's backyard. Mr. Penn discussed this murder and Mr. Scott's involvement with Grand Prairie Police Department (GPPD) Detective Wester on August 3, 2017. Mr. Penn also specifically stated that Mr. Scott's actions on July 6, 2017, in putting down the gun and throwing up his hands, was similar to what he had done before he murdered Lil Gucci. *See* Exhibit 1 at 8, lines 5-13 ("He tried to play me, pulling like, hey, (inaudible). He tried to get me like they got my little cousin homeboy. We going to get out there and fight. He going to gun me down type shit. I'm like, man -- now I'm thinking, I'm like, man, you got Gucci like that. He ain't getting me like that. Hell, no. I'm not fixing to – no. I'm not going to jump out there with you and think we fixing to get a fair fight and he going to shoot").

Mr. Penn would have additionally testified that he learned that his cousin, Demodrick Anderson, was murdered in May 2016 from his counselor at the federal penitentiary. At the end of May, he learned that Mr. Scott may have been involved in setting up that murder because Mr. Scott was mad at Mr. Anderson because he distanced himself from Mr. Scott after the murder of Mr. Hartley and Mr. Scott picked up his two children and Keuna Hancock, sister of Mr. Anderson, from their home at 1333 Coffeyville Trail to ensure that they would not be present for the murder. This was unusual because Mr. Scott had not seen Ms. Hancock or his children in several months.

Mr. Penn discussed this murder and Mr. Scott's involvement with GPPD Detective Wester on August 3, 2017. Detective Wester confirmed "that's the word on the streets. Yeah." Exhibit 1 at 7, lines 13-14.

Additionally, Mr. Penn would have testified that he had knowledge that Mr. Scott had pulled out and pointed a firearm at his mother and Autumn Washington at a family gathering on May 12, 2016. His aunt, Carmela Harris, and sister, Kendra Singleterry, told Mr. Penn about this incident a few days after it occurred.

Further, Mr. Penn would have testified that he had knowledge that Mr. Scott pulled out a firearm and pointed it at his cousin, Keuna Hancock, on March 20, 2017. Mr. Penn's aunt discussed this incident with him a few days after it occurred. Ms. Hancock additionally told Mr. Penn about this incident on March 20, 2017, the day it occurred, and also told Mr. Penn that Mr. Scott told her "I'll smoke you and your cousin."

Moreover, Mr. Penn would have testified that he viewed a threat that Mr. Scott posted on his Facebook page, Skotty Rich, on June 3, 2017, that was directed at Mr. Penn that said "I got niggas thatll kill for me just to b in my presence." Exhibit 2. On July 6, 2017, Mr. Penn believed that Kareem Robinson was supposed to kill him for Mr. Scott. In addition, Mr. Penn would have testified that his sister, Ms. Singleterry, relayed numerous other threats from Mr. Scott including (1) posts on July 10, 2017, wherein Mr. Scott posted "Kan somebody tell GP detectives to stop kallin my friends #ImInnocent" and "I just send a picture to my hitta.. & watch that picture hit a shirt"; posts on July 4, 2017, wherein Mr. Scott posted "I run my city #facts I make da kalls #Imtopdog #Iwant war," "Beef with me you getting knocked off #facts," and "Dont mention my name if you aint gone hit me up nigga you pussy"; and posts on July 9, 2017, wherein Mr. Scott

posted "I aint gone sit & talk bout it ima pull up & do it" and "My name is Devante Scott and Im an alcoholic." Mr. Penn knows these threats were directed at him because Mr. Scott would make these statements to Ms. Hancock concerning Mr. Penn and then post the same statement on his Facebook page.

Mr. Penn would have additionally testified that Mr. Scott was absolutely not welcome in his grandmother's home and he had just told Ms. Hancock to tell Mr. Scott not to pick the kids up there anymore and to meet somewhere else because of all of these previously-mentioned prior bad acts. Mr. Penn would have additionally testified that Mr. Scott wanted him dead because he knew that Mr. Penn knew he was involved in his cousin's murder and Mr. Scott knew that Mr. Penn's cousin was like a brother to him.

CARMELA HARRIS

Ms. Harris testified in this matter on June 28 and 29, 2018. Had her testimony not been limited, she would have additionally testified that she gave Mr. Penn a firearm on July 6, 2017, because Mr. Scott had just assaulted her daughter, Keuna Hancock, by grabbing her hair and dragging her down a flight of stairs while also pointing a firearm at her. Ms. Harris would have testified that although when Mr. Scott throws his hands up in the air as seen on the surveillance video, which the government alleged to be a conciliatory gesture, he had just made the same gesture after he assaulted her daughter. Moreover, he made that same gesture right before he shot Michael Hartley aka Lil Gucci, 18 years old, on January 9, 2016, at a park in Arlington, Texas. Ms. Harris would have testified that she has knowledge of Mr. Scott's involvement in the murder of Mr. Hartley because (1) her son, Demodrick Anderson, witnessed the murder and (2) after the murder, Mr. Scott came back to her house and told her, along with other individuals, that "I murked

that nigga" (murked is slang for killed). She would have testified that a fistfight was supposed to occur on the night of Mr. Hartley's murder but, instead, Mr. Scott and LaBraxton LNU ambushed Mr. Hartley and shot him to death. Mr. Scott told LaBraxton to shoot him and after he fired the first shot, Mr. Scott fired the second shot. They then tossed Mr. Hartley over the fence in a random individual's backyard. Ms. Harris would have testified that she told Mr. Penn about Mr. Scott's involvement in this murder in February 2016, while he was in prison.

Ms. Harris would have additionally testified that after the murder of Mr. Hartley, her son, Mr. Anderson, began to distance himself from Mr. Scott because of his actions in this murder. This angered Mr. Scott and this is when tension between Mr. Scott and Mr. Penn's family began. Ms. Harris would have testified that her son, Mr. Anderson, 21 years old, was murdered on May 10, 2016, in front of her home at 1333 Coffeyville Trail in Grand Prairie, Texas. She believes that Mr. Scott was involved in setting up that murder because Mr. Scott picked up his two children and Keuna Hancock, sister of Mr. Anderson, from their home at 1333 Coffeyville Trail to ensure that they would not be present for the murder. This was unusual because Mr. Scott had not seen Ms. Hancock or his children in several months. Ms. Harris would testify that she told Mr. Penn about her belief that Mr. Scott was involved in her son's murder after they buried him on May 20, 2016.

Additionally, Ms. Harris would have testified that she held a candlelight vigil for her son on May 11, 2016, and she had family and friends over the subsequent day, May 12, 2016, to her home. Mr. Scott came over and he began to argue with Mr. Penn's mother, Candice Harris, after she stated her belief that he was involved in the murder of Mr. Anderson. A fistfight among numerous individuals ensued and then Mr. Scott returned to Ms. Harris' home with a firearm and pointed it at Candice Harris and Ms. Autumn Washington, mother of Mr. Anderson's child.

Carmela Harris, along with several other witnesses, witnessed this assault. Ms. Harris told Mr. Penn about this incident, along with Ms. Singleterry, a few days after it occurred.

Further, Ms. Harris would have testified that Mr. Scott pulled out a firearm and pointed it at her daughter, Keuna Hancock, on March 20, 2017. While Ms. Harris did not witness this incident, she discussed it with Mr. Penn a few days after it occurred.

Moreover, Ms. Harris would have testified that she viewed numerous threats that Mr. Scott posted on his Facebook page that were directed toward Mr. Penn. For example, on June 3, 2017, Mr. Scott aka Skotty Rich posted "I got niggas thatll kill for me just to b in my presence." On July 10, 2017, Mr. Scott posted "Kan somebody tell GP detectives to stop kallin my friends #ImInnocent" and "I just send a picture to my hitta.. & watch that picture hit a shirt." On July 4, 2017, Mr. Scott posted "I run my city #facts I make da kalls #Imtopdog #Iwant war," "Beef with me you getting knocked off #facts," and "Dont mention my name if you aint gone hit me up nigga you pussy." On July 9, 2017, he posted "I aint gone sit & talk bout it ima pull up & do it" and "My name is Devante Scott and Im an alcoholic." Ms. Harris knows these threats were directed at Mr. Penn because Mr. Scott would make these statements to her daughter, Ms. Hancock, concerning Mr. Penn and then post the same statement on Facebook.

The government claimed that Mr. Scott was welcome in her home because his two kids resided there. The defense was precluded from eliciting testimony in rebuttal but, if allowed, Ms. Harris would have testified that Mr. Scott was absolutely not welcome in her home because of all of these previously-mentioned prior bad acts he had done to her family. Ms. Harris would have testified that Mr. Scott wanted to kill Mr. Penn because he knew that Mr. Penn knew he was involved in his cousin's murder.

KENDRA SINGLETERRY

Kendra Singleterry, Mr. Penn's sister, would have testified that she had the exact same knowledge of Mr. Hartley's murder because Mr. Anderson witnessed the murder and told the family about it. She would have testified that a fistfight was supposed to occur on the night of Mr. Hartley's murder but, instead, Mr. Scott and LaBraxton LNU ambushed Mr. Hartley and shot him to death. Mr. Scott told LaBraxton to shoot him and after he fired the first shot, Mr. Scott fired the second shot. They then tossed Mr. Hartley over the fence in a random individual's backyard. She would additionally testify that she was present when Mr. Scott came back to Ms. Harris' house and told them "I murked that nigga" (murked is slang for killed). Ms. Singleterry would have testified that she told Mr. Penn about Mr. Scott's involvement in this murder in February 2016, along with Ms. Harris.

Ms. Singleterry would have additionally testified that after the murder of Mr. Hartley, Mr. Anderson began to distance himself from Mr. Scott because of his actions in this murder. This angered Mr. Scott and this is when tension between Mr. Scott and Mr. Penn's family began. Ms. Singleterry would have testified that she had knowledge concerning the circumstances of Mr. Anderson's murder on May 10, 2016, at 1333 Coffeyville Trail in Grand Prairie, Texas. She would have testified that she believed that Mr. Scott was involved in setting up that murder because Mr. Scott picked up his two children and Keuna Hancock, sister of Mr. Anderson, from their home at 1333 Coffeyville Trail to ensure that they would not be present for the murder. This was unusual because Mr. Scott had not seen Ms. Hancock or his children in several months. Ms. Harris would testify that she told Mr. Penn about her belief that Mr. Scott was involved in Mr. Anderson's murder at the end of May, 2016.

Additionally, Ms. Singleterry would have testified that she was present for Mr. Anderson's candlelight vigil on May 11, 2016, as well as the family gathering on May 12, 2016. Mr. Scott came over and he began to argue with Mr. Penn's mother, Candice Harris, after she stated her belief that he was involved in the murder of Mr. Anderson. A fistfight among numerous individuals ensued and then Mr. Scott returned to Carmela Harris' home with a firearm and pointed it at Candice Harris and Ms. Washington. Ms. Singleterry, along with several other witnesses, witnessed this assault. Ms. Singleterry would have testified that she heard Mr. Scott state "I'll smoke all your family and your brother when he gets out of jail on that bullshit." Ms. Singleterry told Mr. Penn about this incident, with Carmela Harris, a few days after it occurred.

Moreover, Ms. Singletery would have testified that she viewed numerous threats that Mr. Scott posted on his Facebook page that were directed toward Mr. Penn. For example, on June 3, 2017, Mr. Scott aka Skotty Rich posted "I got niggas thatll kill for me just to b in my presence." On July 10, 2017, Mr. Scott posted "Kan somebody tell GP detectives to stop kallin my friends #ImInnocent" and "I just send a picture to my hitta.. & watch that picture hit a shirt." On July 4, 2017, Mr. Scott posted "I run my city #facts I make da kalls #Imtopdog #Iwant war," "Beef with me you getting knocked off #facts," and "Dont mention my name if you aint gone hit me up nigga you pussy." On July 9, 2017, he posted "I aint gone sit & talk bout it ima pull up & do it" and "My name is Devante Scott and Im an alcoholic." Ms. Singleterry knows these threats were directed at Mr. Penn because Mr. Scott would make these statements to Ms. Hancock concerning Mr. Penn and then post the same statement on Facebook. For example, the statement made on July 10, 2017 that "I just send a picture to my hitta.. & watch that picture hit a shirt," Mr. Scott told Ms. Hancock that is what he was doing at their apartment complex on July 6, 2017. This phrase means that Mr.

Robinson was his "hitta" and he was going to kill Mr. Penn so he would be on a t-shirt, which is commonly done for deceased individuals, including Mr. Anderson. The post on July 4, 2017, that "Don't mention my name if you aint gone hit me up nigga you pussy" was directed at Mr. Penn because Ms. Hancock had just told Mr. Scott that Mr. Penn said he was not welcome at Ms. Hancock's home. Ms. Singleterry would additionally testify that she discussed each and every Facebook post with Mr. Penn immediately after it was posted and Mr. Penn told her that he viewed the June 3, 2017, post himself. She would also testify that she screenshotted these posts and forwarded them to defense counsel.

Ms. Singleterry would have testified that although she was not present for the incident on July 6, 2017, she came to the house afterward and heard Mr. Scott on speakerphone with Ms. Hancock and state that he thought that he shot Mr. Penn and "if he goes back to the halfway house, we have somebody at the halfway house waiting on him."

Ms. Singleterry's testimony was entirely precluded from the Court's evidentiary ruling but, had it been allowed, she would have testified to the aforementioned acts.

KEUNA HANCOCK

Keuna Hancock, Mr. Penn's cousin and the mother of Mr. Scott's children, would have testified that on July 6, 2017, Mr. Scott had just assaulted her by grabbing her hair and dragging her down a flight of stairs while also pointing a firearm at her. Ms. Hancock would have testified that although when Mr. Scott throws his hands up in the air as seen on the surveillance video, which the government alleged to be a conciliatory gesture, he had just made the same gesture after he assaulted her.

Additionally, Ms. Hancock would have testified that on March 20, 2017, Mr. Scott stole her cellphone and later pulled out a firearm and pointed it at her. Mr. Scott also told Ms. Hancock that "I'll smoke you and your cousin." Ms. Hancock called the police and filed an incident report in this matter. Ms. Hancock told Mr. Penn about this incident and this threat the day it occurred.

Moreover, Ms. Hancock would have testified that she viewed numerous threats that Mr. Scott posted on his Facebook page that were directed toward Mr. Penn. For example, on June 3, 2017, Mr. Scott aka Skotty Rich posted "I got niggas thatll kill for me just to b in my presence." On July 10, 2017, Mr. Scott posted "Kan somebody tell GP detectives to stop kallin my friends #ImInnocent" and "I just send a picture to my hitta.. & watch that picture hit a shirt." On July 4, 2017, Mr. Scott posted "I run my city #facts I make da kalls #Imtopdog #Iwant war," "Beef with me you getting knocked off #facts," and "Dont mention my name if you aint gone hit me up nigga you pussy." On July 9, 2017, he posted "I aint gone sit & talk bout it ima pull up & do it" and "My name is Devante Scott and Im an alcoholic." Ms. Hancock knows these threats were directed at Mr. Penn because Mr. Scott would make these statements to her and then post the same statement on Facebook. For example, the statement made on July 10, 2017 that "I just send a picture to my hitta.. & watch that picture hit a shirt," Mr. Scott told Ms. Hancock that is what he was doing at their apartment complex on July 6, 2017. This phrase means that Mr. Robinson was his "hitta" and he was going to kill Mr. Penn so he would be on a t-shirt, which is commonly done for deceased individuals, including Mr. Anderson. The post on July 4, 2017, that "Don't mention my name if you aint gone hit me up nigga you pussy" was directed at Mr. Penn because Ms. Hancock had just told Mr. Scott that Mr. Penn said he was not welcome at Ms. Hancock's home.

Ms. Hancock would have testified that after the shooting incident on July 6, 2017, Mr. Scott called her and accused her of being a snitch because she called the police and that he thought that he shot Mr. Penn and "if he goes back to the halfway house, we have somebody at the halfway house waiting on him."

Ms. Hancock's testimony was precluded by this Court's evidentiary rulings but, had it been allowed, she would have testified to the aforementioned acts.

KARMOLYNE FREEMAN

Karmolyne Freeman, friend of Keuna Hancock, would have testified that on July 6, 2017, she witnessed Mr. Scott assaulting Ms. Hancock by grabbing her hair and dragging her down a flight of stairs while also pointing a firearm at her. Ms. Freeman would have testified that although when Mr. Scott throws his hands up in the air as seen on the surveillance video, which the government alleged to be a conciliatory gesture, he had just made the same gesture after he assaulted her friend.

Moreover, Ms. Freeman would have testified that she viewed numerous threats that Mr. Scott posted on his Facebook page that were directed toward Mr. Penn. For example, on June 3, 2017, Mr. Scott aka Skotty Rich posted "I got niggas thatll kill for me just to b in my presence." On July 10, 2017, Mr. Scott posted "Kan somebody tell GP detectives to stop kallin my friends #ImInnocent" and "I just send a picture to my hitta.. & watch that picture hit a shirt." On July 4, 2017, Mr. Scott posted "I run my city #facts I make da kalls #Imtopdog #Iwant war," "Beef with me you getting knocked off #facts," and "Dont mention my name if you aint gone hit me up nigga you pussy." On July 9, 2017, he posted "I aint gone sit & talk bout it ima pull up & do it" and "My name is Devante Scott and Im an alcoholic." Ms. Freeman knows these threats were directed at

Mr. Penn because Mr. Scott would make these statements to Ms. Hancock and then post the same statement on Facebook. For example, the statement made on July 10, 2017 that "I just send a picture to my hitta.. & watch that picture hit a shirt," Mr. Scott told Ms. Hancock that is what he was doing at their apartment complex on July 6, 2017. The post on July 4, 2017, that "Don't mention my name if you aint gone hit me up nigga you pussy" was directed at Mr. Penn because Ms. Hancock had just told Mr. Scott that Mr. Penn said he was not welcome at Ms. Hancock's home.

Ms. Freeman's testimony was precluded by this Court's rulings but, had it been allowed, she would have testified to the aforementioned acts and threats.

AUTUMN WASHINGTON

Ms. Washington, mother of Mr. Anderson's child, would have testified that on May 12, 2016, she was at the family gathering to honor Mr. Anderson. Mr. Scott came over and he began to argue with Mr. Penn's mother, Candice Harris, after she stated her belief that he was involved in the murder of Mr. Anderson. A fistfight among numerous individuals ensued and then Mr. Scott returned to Carmela Harris' home with a firearm and pointed it at her. She called the police and filed a police report concerning this incident, however, she didn't press charges for fear of retaliation from Mr. Scott. Ms. Washington would also testify that she has received Facebook threats from Mr. Scott for her testimony in this case, including a threat to "break her jaw."

COOTER SMITH

Ms. Smith, the grandmother of Mr. Penn, would have testified that she left for work on the morning of July 6, 2017, around 11:30 a.m. and she believes Mr. Scott was waiting for her to leave because he knew better than to come around when she was home because he was not welcome in

her home. Ms. Smith would have testified that Mr. Scott has brought a firearm to her home on several occasions and the police have told her she could shoot him the next time he did.

Ms. Smith would have testified that she has the same knowledge concerning the murder of Mr. Hartley because Mr. Anderson witnessed the murder and told her about it. She would have testified that a fistfight was supposed to occur on the night of Mr. Hartley's murder but, instead, Mr. Scott and Braxton LNU ambushed Mr. Hartley and shot him to death. Mr. Scott told Braxton to shoot him and after he fired the first shot, Mr. Scott fired the second shot. They then tossed Mr. Hartley over the fence in a random individual's backyard. Further, Ms. Smith was present when Mr. Scott came back to her house and told her, along with other individuals, that "I murked that nigga" (murked is slang for killed).

Ms. Smith would have additionally testified that after the murder of Mr. Hartley, Mr. Anderson began to distance himself from Mr. Scott because of his actions in this murder. This angered Mr. Scott and this is when tension between Mr. Scott and Mr. Penn's family began. Ms. Smith would have testified that Mr. Anderson was murdered on May 10, 2016, in front of his home at 1333 Coffeyville Trail in Grand Prairie, Texas. She believes that Mr. Scott was involved in setting up that murder because Mr. Scott picked up his two children and Keuna Hancock, sister of Mr. Anderson, from their home at 1333 Coffeyville Trail to ensure that they would not be present for the murder. This was unusual because Mr. Scott had not seen Ms. Hancock or his children in several months.

Additionally, Ms. Smith would have testified that she was present for the family gathering on May 12, 2016. Mr. Scott came over and he began to argue with Mr. Penn's mother, Candice Harris, after she stated her belief that he was involved in the murder of Mr. Anderson. A fistfight

among numerous individuals ensued and then Mr. Scott returned to Carmela Harris' home with a firearm and pointed it at Candice Harris and Ms. Washington. Ms. Smith, along with several other witnesses, witnessed this assault.

Moreover, Ms. Smith would have testified that she saw the bruises and injuries on Mr. Penn's back and arms, including a black eye, after his beating by police officers on May 30, 2014. In addition, she would have testified that she filed a complaint with Internal Affairs in June, 2014.

The government claimed that Mr. Scott was welcome in her home because his two kids resided there. The defense was precluded from eliciting testimony in rebuttal but, if allowed, Ms. Smith would have testified that Mr. Scott was absolutely not welcome in her home because of all of these previously-mentioned prior bad acts he had done to her family. In addition, she would have testified that law enforcement officers told her she could shoot Mr. Scott if he came back to her home with a firearm, which is precisely what he did on July 6, 2017.

CHARLIE SANCHEZ

Mr. Sanchez, a neighbor, would have testified that he witnessed some of the incident on July 6, 2017, and that when he looked out the window, he saw an individual in all black clothing (Devante Scott) with a firearm as he was backing up and going back to his vehicle. Mr. Sanchez would have additionally testified that he believed this was the same man who was at the apartment complex a few days prior when he was yelling and screaming at his girlfriend for cheating on him. Mr. Sanchez is one of the many individuals that placed a call to 911 on July 6, 2017.

CHAD WOODS

Mr. Woods, a longtime friend of Mr. Penn, would have testified that he was present for the family gathering on May 12, 2016. Mr. Scott came over and he began to argue with Mr. Penn's mother, Candice Harris, after she stated her belief that he was involved in the murder of Mr. Anderson. A fistfight among numerous individuals ensued and then Mr. Scott returned to Carmela Harris' home with a firearm and pointed it at Candice Harris and Ms. Washington. Mr. Woods, along with several other witnesses, witnessed this assault.

In addition, Mr. Woods would have testified that Mr. Penn came to his house after the incident on July 6, 2017, and he heard Mr. Scott on speakerphone state that he had people at the halfway house who could "get" to Mr. Penn.

WHEREFORE, Mr. Penn respectfully submits this written proposed offer of proof.

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Erin Brennan
Erin Brennan
Assistant Federal Public Defender
Missouri Bar No. 61185
525 Griffin Street, Suite 629
Dallas, Texas 75202
214.767.2746
erin_brennan@fd.org
Attorney for defendant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	**CRIMINAL DOCKET NO:**
v.	§	**3:17-CR-506-L**
	§	
ALVIN CHRISTOPHER PENN	§	

DEFENDANTS REQUESTED JURY INSTRUCTIONS

TO THE HONORABLE JUDGE SAM A. LINDSAY:

Comes now defendant, Alvin Christopher Penn, by and through his counsel of record, Erin Brennan, Assistant Federal Public Defender, and hereby submits the following requested Jury Instructions, which have all been taken from the United States Fifth Circuit District Judges Association, Pattern Jury Instructions Criminal Cases, 2015 edition.

The defense requests the instructions attached below.

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender

/s/ *Erin Brennan*
ERIN BRENNAN
Assistant Federal Public Defender
Northern District of Texas
Missouri Bar #61185
525 Griffin, Suite 629
Dallas, TX 75202
(214) 767-2746
(214) 767-2886 Fax
Attorney for Mr. Penn

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2018 I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this notice as service of this document by electronic means: Assistant U.S. Attorney Jamie Hoxie at Jamie.hoxie@usdoj.gov.

/s/ *Erin Brennan*
ERIN BRENNAN

1.01

PRELIMINARY INSTRUCTION

Members of the Jury:

You are now the jury in this case. I want to take a few minutes to tell you something about your duties as jurors and to give you some instructions. At the end of the trial I will give you more detailed instructions. You must follow all of my instructions in doing your job as jurors. This criminal case has been brought by the United States government. I may sometimes refer to the government as the prosecution. The government is represented at this trial by Assistant United States Attorneys, Jamie Lynn Hoxie and _____. The defendant, Alvin Christopher Penn, is represented by Assistant Federal Public Defenders, Erin Brennan and John Nicholson. The defendant has been charged by the government with criminal violation of a federal law: "escape from federal custody" and "felon in possession of a firearm." The charges against the defendant are contained in the indictment. The indictment is simply the description of the charges made by the government against the defendant, but it is not evidence that the defendant committed a crime. The defendant pleaded not guilty to the charge. A defendant is presumed innocent and may not be found guilty by you unless all twelve of you unanimously find that the government has proved defendant's guilt beyond a reasonable doubt.

The first step in the trial will be the opening statements. The government in its opening statement will tell you about the evidence which it intends to put before you, so that you will have an idea of what the government's case is going to be. Just as the indictment is not evidence, neither is the opening statement evidence. Its purpose is only to help you understand what the evidence will be and what the government will try to prove.

After the government's opening statement, the defendant's attorney may make an opening

statement. [Change if the defendant reserves his statement until later or omit if the defendant has decided not to make an opening statement.] At this point in the trial, no evidence has been offered by either side.

Next, the government will offer evidence that it claims will support the charge against the defendant. The government's evidence may consist of the testimony of witnesses as well as documents and exhibits. Some of you have probably heard the terms "circumstantial evidence" and "direct evidence." Do not be concerned with these terms. You are to consider all the evidence given in this trial.

After the government's evidence, the defendant's lawyer may [make an opening statement and] present evidence in the defendant's behalf, but the lawyer is not required to do so. I remind you that the defendant is presumed innocent and that the government must prove the guilt of the defendant beyond a reasonable doubt. The defendant does not have to prove his innocence. If the defendant decides to present evidence, the government may introduce rebuttal evidence.

After you have heard all the evidence on both sides, the government and the defense will each be given time for their final arguments. I just told you that the opening statements by the lawyers are not evidence. The same applies to closing arguments. They are not evidence either, but you should pay close attention to them.

The final part of the trial occurs when I instruct you about the rules of law which you are to use in reaching your verdict. After hearing my instructions, you will leave the courtroom together to make your decision. Your deliberations will be secret. You will never have to explain your verdict to anyone.

Now that I have described the trial itself, let me explain the jobs that you and I are to perform during the trial.

I will decide which rules of law apply to this case, in response to questions or objections raised by the attorneys as we go along, and also in the final instructions given to you after the evidence and arguments are completed. You must follow the law as I explain it to you whether you agree with it or not.

You, and you alone, are judges of the facts. Therefore, you should give careful attention to the testimony and exhibits, because based upon this evidence you will decide whether the government has proved, beyond a reasonable doubt, that the defendant has committed the crime charged in the indictment. You must base that decision only on the evidence in the case and my instructions about the law. You will have the exhibits with you when you deliberate.

[If desired, insert here instruction entitled "Note-Taking by Jurors."]

It will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness's testimony to accept or reject. I will give you some guidelines for determining the credibility of witnesses at the end of the case.

The defendant is charged with "escape from federal custody" and "felon in possession of a firearm." I will give you detailed instructions on the law at the end of the case, and those instructions will control your deliberations and decision. But in order to help you follow the evidence I will now give you a brief summary of the elements of the offense which the government must prove to make its case. The government must prove that the defendant was in federal custody, that the defendant was in federal custody due to a lawful arrest on a felony charge, that the defendant left federal custody without permission and that the defendant knew leaving would result in his absence from custody without permission. The government must also prove that the defendant knowingly possessed a firearm as charged, that before the defendant possessed the firearm, the defendant had been convicted in a court of a crime punishable by imprisonment for a

term in excess of one year, and that the firearm possessed traveled in and affecting interstate commerce; that is, before the defendant possessed the firearm it had traveled at some time from one state to another.

During the course of the trial, do not talk with any witness, or with the defendant, or with any of the lawyers in the case. Please do not talk with them about any subject at all. You may be unaware of the identity of everyone connected with the case. Therefore, in order to avoid even the appearance of impropriety, do not engage in any conversation with anyone in or about the courtroom or courthouse. It is best that you remain in the jury room during breaks in the trial and not linger in the halls. In addition, during the course of the trial do not talk about the trial with anyone else- not your family, not your friends, not the people with whom you work. Also, do not discuss this case among yourselves until I have instructed you on the law and you have gone to the jury room to make your decision at the end of the trial. Otherwise, without realizing it, you may start forming opinions before the trial is over. It is important that you wait until all the evidence is received and you have heard my instructions on rules of law before you deliberate among yourselves. Let me add that during the course of the trial you will receive all the evidence you properly may consider to decide the case. Because of this, do not attempt to gather any information on your own which you think might be helpful. Do not engage in any outside reading on this case, do not attempt to visit any places mentioned in the case, and do not in any other way try to learn about the case outside the courtroom.

Now that the trial has begun, you must not read about it in the newspapers or watch or listen to television or radio reports of what is happening here. The reason for these rules, as I am certain you will understand, is that your decision in this case must be made solely on the evidence presented at the trial.

At times during the trial, a lawyer may make an objection to a question asked by another lawyer, or to an answer by a witness. This simply means that the lawyer is requesting that I make a decision on a particular rule of law. Do not draw any conclusion from such objections or from my rulings on the objections. These relate only to the legal questions that I must determine and should not influence your thinking. If I sustain an objection to a question, the witness may not answer it. Do not attempt to guess what answer might have been given had I allowed the question to be answered. Similarly, if I tell you not to consider a particular statement, you should put that statement out of your mind, and you may not refer to that statement in your later deliberations. If an objection is overruled, treat the answer like any other.

During the course of the trial I may ask a question of a witness. If I do, that does not indicate that I have any opinion about the facts in the case. Nothing I say or do should lead you to believe that I have any opinion about the facts, nor be taken as indicating what your verdict should be.

During the trial I may have to interrupt the proceedings to confer with the attorneys about the rules of law which should apply here. Sometimes we will talk here, at the bench. Some of these conferences may take time. So, as a convenience to you, I will excuse you from the courtroom. I will try to avoid such interruptions as much as possible and will try to keep them short, but please be patient, even if the trial seems to be moving slowly. Conferences outside your presence are sometimes unavoidable.

Finally, there are three basic rules about a criminal case which you should keep in mind. First, the defendant is presumed innocent until proven guilty. The indictment against the defendant brought by the government is only an accusation, nothing more. It is not proof of guilt or anything else. The defendant therefore starts out with a clean slate.

Second, the burden of proof is on the government until the very end of the case. The defendant has no burden to prove his innocence, or to present any evidence, or to testify. Since the defendant has the right to remain silent, the law prohibits you in arriving at your verdict from considering that the defendant may not have testified.

Third, the government must prove the defendant's guilt beyond a reasonable doubt. I will give you further instructions on this point later, but bear in mind that in this respect a criminal case is different from a civil case.

Thank you for your attention.

1.03

INTRODUCTION TO FINAL INSTRUCTIONS

Members of the Jury:

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to decide what evidence is proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

1.04

DUTY TO FOLLOW INSTRUCTIONS

You, as jurors, are the judges of the facts. But in determining what actually happened--that is, in reaching your decision as to the facts--it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors, and they have the right to expect nothing less.

1.05

PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, REASONABLE DOUBT

The indictment or formal charge against a defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all [and no inference whatever may be drawn from the election of a defendant not to testify].

The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant.

While the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

1.06

EVIDENCE--EXCLUDING WHAT IS NOT EVIDENCE

As I told you earlier, it is your duty to determine the facts. In doing so, you must consider only the evidence presented during the trial, including the sworn testimony of the witnesses and the exhibits. Remember that any statements, objections, or arguments made by the lawyers are not evidence.

The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

During the trial I sustained objections to certain questions and exhibits. You must disregard those questions and exhibits entirely. Do not speculate as to what the witness would have said if permitted to answer the question or as to the contents of an exhibit. Also, certain testimony or other evidence has been ordered stricken from the record and you have been instructed to disregard this evidence. Do not consider any testimony or other evidence which has been stricken in reaching your decision. Your verdict must be based solely on the legally admissible evidence and testimony.

Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

1.08

CREDIBILITY OF WITNESSES

I remind you that it is your job to decide whether the government has proved the guilt of the defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate. You are the sole judges of the credibility or "believability" of each witness and the weight to be given the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses [including the defendant] who testified in this case. You should decide whether you believe all or any part of what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness clearly see or hear the things about which he testified? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said. [The testimony of the defendant should be weighed and his credibility evaluated in the same way as that of any other witness.] Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say. In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point.

1.17

EXPERT WITNESS

During the trial you heard the testimony of _____, who has expressed opinions concerning _____. If scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified by knowledge, skill, experience, training, or education may testify and state an opinion concerning such matters.

Merely because such a witness has expressed an opinion does not mean, however, that you must accept this opinion. You should judge such testimony like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, and all other evidence in the case.

1.19

CAUTION-CONSIDER ONLY CRIME CHARGED

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any other person or persons not on trial as a defendant in this case, except as you are otherwise instructed.

1.21

SINGLE DEFENDANT – MULTIPLE COUNTS

A separate crime is charged in each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the crimes charged should not control your verdict as to any other.

1.24

DUTY TO DELIBERATE--VERDICT FORM

To reach a verdict, whether it is guilty or not guilty, all of you must agree. Your verdict must be unanimous on each count of the indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges--judges of the facts. Your duty is to decide whether the government has proved the defendant guilty beyond a reasonable doubt.

When you go to the jury room, the first thing that you should do is select one of your number as your foreperson, who will help to guide your deliberations and will speak for you here in the courtroom.

A form of verdict has been prepared for your convenience. [Explain verdict form.]

The foreperson will write the unanimous answer of the jury in the space provided for each count of the indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the marshal [or Court Security Officer]. I will either reply in writing or bring you back into the court to answer your message.

Bear in mind that you are never to reveal to any person, not even to the court, how the jury stands, numerically or otherwise, on any count of the indictment, until after you have reached a unanimous verdict.

1.30[1]

SIMILAR ACTS

You have heard evidence of acts of the defendant which may be similar to that charged in the indictment, but which were committed on other occasions. You must not consider any of this evidence in deciding if the defendant committed the act charged in the indictment. However, you may consider this evidence for other, very limited, purposes.

If you find beyond a reasonable doubt from other evidence in this case that the defendant did commit the act charged in the indictment, then you may consider evidence of the similar acts allegedly committed on other occasions to determine:

Whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment;

or

whether the defendant had a motive or the opportunity to commit the act charged in the indictment;

or

whether the defendant acted according to a plan or in preparation for commission of a crime;

or

whether the defendant committed the act for which he is on trial by accident or mistake.

These are the limited purposes for which any evidence of other similar acts may be considered.

[1]The defense opposes the introduction of the type of evidence to which this instruction would correspond. The defense will only request this instruction if the Court allows this type of evidence above the defense's objection. By requesting this potential instruction, the defense does not intend to waive or forfeit its objection to the admission of the contested evidence.

1.31

POSSESSION

Possession, as that term is used in this case, may be of two kinds: actual possession and constructive possession.[2] A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint. You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

[2]The defense would object to the Court instructing the jury as to constructive possession as that theory of criminal liability is not applicable to the alleged facts of the case. *See United States v. Houston*, 481 Fed. Appx. 188, 191 (5th Cir. 2012) (unpublished) ("[g]iving a construction possession instruction when the evidence supports only an actual possession instruction constitutes error.")

1.36

JUSTIFICATION, DURESS, OR COERCION

The defendant claims that if he committed the acts charged in the indictment, he did so only because he was forced to commit the crime. If you conclude that the government has proved beyond a reasonable doubt that the defendant committed the crime as charged, you must then consider whether the defendant should nevertheless be found "not guilty" because his actions were justified by duress or coercion.

The defendant's actions were justified, and therefore he is not guilty, only if the defendant has shown by a preponderance of evidence that each of the following four elements is true. To prove a fact by a preponderance of the evidence means to prove that the fact is more likely so than not so. This is a lesser burden of proof than to prove a fact beyond a reasonable doubt.

The four elements which the defendant mush prove by a preponderance of the evidence are as follows:

First: That the defendant was under an unlawful present, imminent, and impending threat of such a nature as to induce a well-grounded fear of death or serious bodily injury to himself or a family member;

Second: That the defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;

Third: That the defendant had no reasonable legal alternative to violating the law, that is, he had no reasonable opportunity to avoid the threatened harm; and

Fourth: That a reasonable person would believe that by committing the criminal action he would directly avoid the threatened harm.

1.36A

SELF-DEFENSE – DEFENSE OF THIRD PERSON

The defendant has offered evidence that he acted in self-defense and defense of another. The use of force is justified when a person reasonable believes that force is necessary for the defense of oneself or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonable necessary under the circumstances.

Force likely to cause death or great bodily injury is justified in self-defense or defense of another only if a person reasonably believes such force is necessary to prevent death or great bodily harm.

The government must prove beyond a reasonable doubt that the defendant did not act in [reasonable] self-defense or defense of another. [3]

[3] The defense would object to the Court utilizing the word [reasonable] as it pertains to self-defense or defense of another in the third paragraph. *See United States v. Branch,* 91 F.3d 699, 714 n.1 (5th Cir. 1996) (stating that the government's burden was to "negate self-defense beyond a reasonable doubt" and not to negate reasonable self-defense beyond a reasonable doubt).

1.37

"KNOWINGLY"--TO ACT

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident.

1.39

INTERSTATE COMMERCE – DEFINED

Interstate commerce means commerce or travel between one state, territory or possession of the United States and another state, territory or possession of the United States, including the District of Columbia.

COUNT ONE

ESCAPE
18 U.S.C. §751 (a)

Title 18, United States Code, Section 751(a), makes it a crime for anyone to escape from federal custody. For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt.

First: That the defendant was in federal custody;

Second: That the defendant was in federal custody due to a lawful arrest on a felony charge or due to a conviction for any offense;

Third: That the defendant left federal custody without permission; and

Fourth: That the defendant knew leaving would result in his absence from custody without permission.

To be "in federal custody" within the meaning of this statue, an individual must be detained by the Attorney General of his authorized representative or confined in an institution or facility by direction of the Attorney General or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge, or by lawful arrest by an officer or employee of the United States.

COUNT TWO

FELON IN POSSESSION OF FIREARM
18 U.S.C. §922(g)(1)

Title 18, United States Code, Section 922(g)(l), makes it a crime for a convicted felon to possess a firearm in and affecting interstate commerce. For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly possessed a firearm, as charged.

Second: That before the defendant possessed the firearm, the defendant had been convicted in a court of a crime, punishable by imprisonment for a term in excess of one year, that is, a felony offense.

Third: That the firearm was possessed in and affecting interstate commerce; that is, before the defendant possessed the firearm it had traveled at some time from one state to another.[4]

[4] Defendant respectfully objects to any instruction that mere passage of a firearm across state lines at some unspecified point in the past satisfies the commerce requirement of 18 U.S.C. §922(g). There are three grounds for this objection. First, such construction of the statute would contravene Bond v. United States, 134 S.Ct. 2077 (2014), which demands that federal courts "refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." Bond, 134 S.Ct. at 2090. The notion that every firearm remains "in interstate commerce," and "affects interstate commerce" because it passed a state line many years ago is hardly an obvious or inevitable interpretation of the statute. Such construction, moreover, would significantly displace state control over crime control. See id. at 2089 ("Perhaps the clearest example of traditional state authority is the punishment of local criminal activity.") The Fifth Circuit has previously construed the statute to require nothing more than past movement over state lines (United States v. Rawls, 85 F.3d 240, 242 (5th Cir. 1996)), but this authority pre-dates Bond.

Second, Defendant submits that conviction upon evidence that the defendant possessed a firearm that has previously crossed state lines, without evidence of purchase, sale, or more recent movement, would exceed Congress's power to "regulate commerce," both facially and as applied

to him. See U.S. Const. Art. I, Sec. 8. Mere possession is not commerce, and does not realistically affect commerce. A firearm's travel over state lines many years ago does not place a current possessor in active commerce, still less active interstate commerce. Possession under these circumstances accordingly is thus not a proper subject for federal regulation. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2587-2590 (2012) (Roberts, J., concurring). Defendant concedes that this contention has been resolved against him. See United States v. Alcantar, 733 F.3d 143 (5th Cir. 2013).

Third, even if the statute may be reasonably and constitutionally construed to criminalize mere possession of a firearm that has previously traveled in interstate commerce many years ago, Defendant possesses a Sixth Amendment right to have a jury determine whether his conduct is "in and affecting commerce." The question of whether a particular fact pattern satisfies the terms of a statute is a mixed question of law and fact, and thus lies within the province of the jury to resolve. See United States v. Gaudin, 515 U.S. 506, 514 (1995) (cautioning that "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence.")

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff,	§	
	§	
v.	§	**CASE NO. 3:17-CR-506-L (01)**
	§	
ALVIN CHRISTOPHER PENN,	§	
Defendant.	§	

DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

TO THE HONORABLE SAM A. LINDSAY, UNITED STATES DISTRICT JUDGE:

COMES NOW, defendant, ALVIN CHRISTOPHER PENN, by and through counsel, Erin Brennan, Assistant Federal Public Defender, and hereby respectfully moves this Court to dismiss count two of his indictment for failure to state a constitutional offense. Specifically, he submits that the indictment alleges conduct that is beyond the power of the federal government to prosecute under the commerce clause. He concedes that the issue is foreclosed by circuit precedent but advances the claim to preserve it for further review. *See United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013). Alternatively, 18 U.S.C. §922(g) should be construed to require more than mere movement across state lines at some remote time.

Summary of Argument

The Supreme Court's recent decision in *Bond v. United States*, 134 S. Ct. 2077 (2014), cautions against construing criminal statutes in a manner that effectively asserts a federal police power. Section 922(g) of Title 18 should therefore not be construed to reach every instance of a firearm that has ever crossed state lines. Rather, the term "in and affecting commerce," 18 U.S.C. §922(g), should be construed to reach only those firearms that move in response to the defendant's

conduct, or in the relatively recent past. Because the government's indictment makes no allegation satisfying these standards, it must be dismissed.

Argument and Authorities

Section 922(g) of Title 18 authorizes conviction when certain people possess a firearm "in or affecting commerce." 18 U.S.C. §922(g). The Fifth Circuit has held that possession of a firearm that has at any time moved across state lines violates the statute. *See United States v. Fitzhugh*, 984 F.2d 143, 146 (5th Cir. 1993). Under this view of the statute, the government's alleged conduct represents a federal offense. But the Supreme Court's recent opinion in *Bond*, 134 S. Ct. 2077 (2014), suggests that this is not the proper reading.

Bond was convicted of violating 18 U.S.C. §229, a statute that criminalized the knowing possession or use of "any chemical weapon." *Bond,* 134 S.Ct. at 2085-86; 18 U.S.C. §229(a). She placed toxic chemicals – an arsenic compound and potassium dichromate – on the doorknob of a romantic rival. *See id.* The Supreme Court reversed her conviction, holding that any construction of the statute capable of reaching such conduct would compromise the chief role of states and localities in the suppression of crime. *See id.* at 2093. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id.* at 2090-91.

Notably, §229 defined the critical term "chemical weapon" broadly as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." 18 U.S.C. §229F(8)(A). Further, it criminalized the use or possession of "any" such weapon, not of a named subset. 18 U.S.C. §229(a). The Court nonetheless applied

a more limited construction of the statute, reasoning that statutes should not be read in a way that sweeps in purely local activity:

> The Government's reading of section 229 would 'alter sensitive federal-state relationships,' convert an astonishing amount of 'traditionally local criminal conduct' into 'a matter for federal enforcement,' and 'involve a substantial extension of federal police resources.' [*United States v.*]*Bass*, 404 U.S. [336] 349-350, 92 S. Ct. 515, 30 L. Ed. 2d 488 [(1971)]. It would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. As the Government reads section 229, 'hardly' a poisoning 'in the land would fall outside the federal statute's domain.' *Jones* [*v. United States*], 529 U.S. [848,] 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 [(2000)]. Of course Bond's conduct is serious and unacceptable—and against the laws of Pennsylvania. But the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack.

Bond, 134 S. Ct. at 2091-92.

As in *Bond*, it is possible to read §922(g) to reach the conduct admitted here: possession of a firearm that has moved across state lines at some point in the distant past. But to do so would intrude deeply on the traditional state responsibility for crime control. Such a reading would assert the federal government's power to criminalize virtually any conduct anywhere in the country, with little or no relationship to commerce, or to the interstate movement of commodities. Accordingly, nearly all instances of this criminal conduct would fall within the scope of federal criminal law enforcement, whether or not they were readily prosecuted by the state. This would intrude deeply on the traditional state responsibility for crime control.

Counsel must concede that *Bond* does not plainly overrule *Fitzhugh*. She submits for further review, however, that *Fitzhugh* is incorrect in light of *Bond*, and that the statute should be read to exclude possession of all firearms by felons that have ever moved in interstate commerce

at some point in the distant past. Alternatively, conceding that the issue is foreclosed, Mr. Penn submits that criminal prohibitions on such possession would amount to a federal police power, forbidden by the constitution. *See United States v. Morrison*, 529 U.S. 598, 618-619 (2000).

Conclusion

Defendant Alvin Penn respectfully moves this Court to dismiss count two of his indictment, or for such relief as to which he may be justly entitled.

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Erin Brennan
Erin Brennan
Assistant Federal Public Defender
Missouri Bar No. 61185
525 Griffin Street, Suite 629
Dallas, Texas 75202
214.767.2746
erin_brennan@fd.org
Attorney for defendant

CERTIFICATE OF SERVICE

I, Erin Brennan, hereby certify that on January 22, 2018, I electronically filed the foregoing motion to dismiss indictment with the clerk for the United States District Court, Northern District of Texas, using the electronic filing system for the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following parties who have consented in writing to accept this notice as service of this document by electronic means: Assistant United States Attorney, Jamie Hoxie.

/s/ Erin Brennan
Erin Brennan
Assistant Federal Public Defender