No. 20-6791

IN THE SUPREME COURT OF THE UNITED STATES

ALVIN CHRISTOPHER PENN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court's longstanding interpretation of language now codified in 18 U.S.C. 922(g)(1), which makes it unlawful for a convicted felon to possess a firearm that has traveled in interstate commerce, is correct and consistent with the Commerce Clause.

2. Whether the district court correctly denied petitioner's request to instruct the jury on the affirmative defense of justification for his Section 922(g)(1) charge.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 969 F.3d 450. The opinion and order of the district court (Pet. App. 22a-28a) is not published in the Federal Supplement but is available at 2018 WL 3207429.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2020. The petition for a writ of certiorari was filed on January 4, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of escaping from federal custody, in violation of 18 U.S.C. 751(a) and 4082(a), and possessing a firearm following a conviction for a felony, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. He was sentenced to 168 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-14a.

1. In July 2017, petitioner was serving a federal sentence at a halfway house. Pet. App. 2a. Petitioner was permitted to leave the halfway house for work, but on July 6, 2017, he instead went to his girlfriend's house, and his girlfriend then drove him to his family's apartment. Ibid. When petitioner and his girlfriend arrived at the apartment complex, petitioner saw Devante Scott and Kareem Robinson standing in the parking lot shouting at someone. Ibid. Petitioner's family believed that Scott had been involved in the murder of one of petitioner's cousins. Ibid.

Petitioner got out of his girlfriend's car to find out what Scott and Robinson were doing. Pet. App. 2a. Petitioner's aunt shouted, "They got a gun," and Scott then pulled a gun from his pocket. Ibid. Petitioner told Scott to put the gun down and fight; Scott then put the gun on the roof of his car and began to argue with petitioner. Ibid. During the argument, Robinson picked

up the gun and said, "I got him." Ibid. Petitioner's aunt then rushed over and handed petitioner her own gun. Ibid. Petitioner opened fire, and a shootout followed. Ibid.

After the exchange of gunfire, petitioner fled in his girlfriend's car, with Scott and Robinson pursuing him. Pet. App. 2a. Petitioner "ended up losing" Scott and Robinson in a residential neighborhood and then entered a highway. Id. at 3a. A police officer responding to the shootout spotted petitioner's car and began to follow it, but petitioner refused to pull over when the officer turned on his lights. Ibid. A high-speed chase ensued; petitioner eventually lost control of his vehicle, crashed into an apartment building, and grabbed the gun. Ibid. After an unsuccessful attempt to scale a fence, petitioner threw the gun over the fence into a field and took off running. Ibid. Petitioner remained a fugitive until his arrest nearly a month later. Ibid.

2. A federal grand jury in the Northern District of Texas indicted petitioner for escaping from federal custody, in violation of 18 U.S.C. 751(a) and 4082(a), and possessing a firearm in and affecting interstate commerce following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. 15a.

Petitioner moved to dismiss the firearm charge on the ground that Section 922(g) exceeded Congress's enumerated powers, but the district court denied the motion. Pet. App. 4a, 80a-83a. Petitioner also requested the court to instruct the jury on the

affirmative defense of justification, but the court denied that request as well. Id. at 22a-28a. The court explained that, under Fifth Circuit precedent, petitioner could invoke the defense of justification only if he "[did] not possess the firearm beyond the time that the emergency existed." Id. at 23a-24a. The court found that petitioner's proposed justification defense failed as a matter of law "because the undisputed evidence show[ed] [petitioner] continued to possess the firearm well beyond the time when he was in any imminent danger of death or serious bodily injury." Id. at 24a-25a. In particular, the court observed that petitioner continued to possess the gun after Scott and Robinson had ceased to pursue him, after the police tried to pull him over, and after his car crashed. Id. at 25a-26a.

The jury found petitioner guilty on both counts. Pet. App. 15a. The district court sentenced him to 168 months of imprisonment, to be followed by three years of supervised release. Id. at 16a-17a.

3. The court of appeals affirmed. Pet. App. 1a-14a.

The court of appeals rejected petitioner's contention that Section 922(g) exceeds Congress's power under the Commerce Clause. Pet. App. 13a. The court observed that its precedent foreclosed that contention. Ibid.

The court of appeals also rejected petitioner's contention that the district court had erred by refusing to instruct the jury on a justification defense. Pet. App. 5a-9a. The court explained

that a defendant is entitled to an instruction on an affirmative defense only if he presents sufficient evidence "for a reasonable jury to find in his favor." Id. at 5a (quoting Mathews v. United States, 485 U.S. 58, 63 (1988)). The court acknowledged that it had previously recognized a narrow "justification" defense to a felon-in-possession charge with the following elements: (1) the defendant faced 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; (4) "a direct causal relationship" could be anticipated between possession of the firearm and abatement of the threat; and (5) the defendant possessed the firearm only during the time of danger. Ibid. (quoting United States v. Gant, 691 F.2d 1159, 1162-1163 & n.9 (5th Cir. 1982)).

The court of appeals had "little difficulty" in agreeing with the district court that petitioner's effort to evade arrest and hide the gun from police precluded any finding that petitioner had possessed the gun no longer than necessary to fend off a threat to his life. Pet. App. 8a. The court of appeals accepted that "[t]here is no bright-line rule that the defendant must turn the gun over to the police." Ibid. (citing United States v. Panter, 688 F.2d 268, 269 (5th Cir. 1982)). The court observed, however, that petitioner had "passed up several chances to give up the gun" when he chose not to pull over and explain the situation to the

police officer, and then decided to take the gun with him as he fled on foot from the scene of the wreck before eventually tossing it over a fence "into a field where it would be harder for police to find." Id. at 8a. The court further observed that petitioner fled from the police only because he did not want to go back to jail, and that petitioner and the police officer pursuing him had both testified that Scott and Robinson had stopped chasing petitioner. Ibid.

ARGUMENT

Petitioner contends (Pet. 7-19) that this Court's longstanding interpretation of language in 18 U.S.C. 922(g)(1), which prohibits convicted felons from possessing firearms "in or affecting commerce," exceeds Congress's authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. The Court has recently and repeatedly denied certiorari on that issue, and the same result is warranted here. See, e.g., Johnson v. United States, 141 S. Ct. 137 (2020) (No. 19-7382); Bonet v. United States, 139 S. Ct. 1376 (2019) (No. 18-7152); Gardner v. United States, 139 S. Ct. 1323 (2019) (No. 18-6771); Garcia v. United States, 139 S. Ct. 791 (2019) (No. 18-5762); Robinson v. United States, 139 S. Ct. 638 (2018) (No. 17-9169); Dixon v. United States, 139 S. Ct. 473 (2018) (No. 18-6282); Vela v. United States, 139 S. Ct. 349 (2018) (No. 18-5882); Terry v.

United States, 139 S. Ct. 119 (2018) (No. 17-9136); Brice v. United States, 137 S. Ct. 812 (2017) (No. 16-5984); Gibson v. United States, 136 S. Ct. 2484 (2016) (No. 15-7475). This case would be a particularly inappropriate vehicle for considering that issue given the evidence that petitioner possessed a firearm on a highway.

Petitioner also contends (Pet. 25-26) that the district court erred in declining to instruct the jury on a justification defense based on the facts of this case. The court of appeals correctly rejected that argument, and its fact-bound decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Petitioner principally argues (Pet. 7-14) that Section 922(g)(1) exceeds Congress's power under the Commerce Clause. In particular, he argues that the fact that a firearm has previously traveled across state lines does not establish a constitutionally sufficient basis for prohibiting a felon from possessing it. That argument lacks merit.

a. In its current form, Section 922(g) identifies nine categories of persons -- including those who have previously been convicted of a felony, 18 U.S.C. 922(g)(1) -- to whom firearm restrictions attach. Section 922(g) makes it unlawful for such persons "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. 922(g).

In United States v. Bass, 404 U.S. 336 (1971), this Court considered a predecessor criminal provision that applied to any person within specified categories (including convicted felons) who "receives, possesses, or transports in commerce or affecting commerce . . . any firearm." Id. at 337 (quoting 18 U.S.C. App. 1202(a) (1970)). The Court held that the statute's "in commerce or affecting commerce" requirement applied to the receipt and possession offenses as well as to the transportation offense, and that the government must prove a case-specific connection to interstate commerce for all three. Id. at 347-350. In particular, the Court held that the statute required proof that the firearm that a defendant had been charged with receiving had itself "previously traveled in interstate commerce." Id. at 350. The Court explained that such an element would ensure that the statute remained "consistent with * * * the sensitive relation between federal and state criminal jurisdiction." Id. at 351.

Then, in Scarborough v. United States, 431 U.S. 563 (1977), this Court specifically focused on the jurisdictional element in the context of a felon-in-possession offense and held that it is satisfied by proof that the relevant firearm previously traveled in interstate commerce. Id. at 568, 575, 578. The Court rejected the defendant's argument that "the possessor must be engaging in commerce" "at the time of the [possession] offense," explaining

that Congress's use of the phrase "affecting commerce" demonstrated its intent to assert "'its full Commerce Clause power.'" Id. at 568-569, 571 (citation omitted).

Scarborough forecloses petitioner's contention that the Commerce Clause requires the government to prove more than the prior movement of the firearm in interstate commerce in order to satisfy Section 922(g)(1)'s jurisdictional element. To the extent that petitioner suggests (Pet. 14-16) that the text itself imposes a more stringent requirement, it is belied by Congress's recodification in Section 922(g) of the same language that this Court had definitively construed in Scarborough. See Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); 18 U.S.C. 922(g)(1) (Supp. IV 1986). And consistent with Bass and Scarborough, the courts of appeals have uniformly held that Section 922(g)'s prohibition against possessing a firearm that has previously moved in interstate commerce falls within Congress's Commerce Clause authority. See, e.g., United States v. Torres-Colón, 790 F.3d 26, 34 (1st Cir.), cert. denied, 577 U.S. 882 (2015); United States v. Bogle, 522 Fed. Appx. 15, 22 (2d Cir. 2013); United States v. Brown, 765 F.3d 278, 284 n.1 (3d Cir. 2014); United States v. Lockamy, 613 Fed. Appx. 227, 228 (4th Cir. 2015) (per curiam), cert. denied, 577 U.S. 1085 (2016); United States v. Rendon, 720 Fed. Appx. 712, 713 (5th Cir.) (per curiam),

cert. denied, 139 S. Ct. 259 (2018); United States v. Conrad, 745 Fed. Appx. 60, 60 (9th Cir. 2018); United States v. Griffith, 928 F.3d 855, 865 (10th Cir. 2019); United States v. Vereen, 920 F.3d 1300, 1317 (11th Cir. 2019), cert. denied, 140 S. Ct. 1273 (2020).

b. Petitioner contends (Pet. 7-12) that Scarborough and the court of appeals decisions that follow it conflict with this Court's subsequent decisions in United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000). That contention is incorrect.

In Lopez, the Court held unconstitutional a federal prohibition against possessing a firearm in a school zone in 18 U.S.C. 922(q) (1988 & Supp. IV 1992), which "by its terms ha[d] nothing to do with 'commerce' * * * , however broadly one might define th[at] term[]." 514 U.S. at 561. The Court explained that Section 922(q), among other things, "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." Ibid. In Morrison, the Court concluded that Congress's creation of a private cause of action for gender-motived violence under the Violence Against Women Act of 1994, 42 U.S.C. 13981, exceeded Congress's Commerce Clause power. 529 U.S. at 605-606, 627. Among other things, the Court reasoned that, "[l]ike the Gun-Free School Zones Act at issue in Lopez, § 13981 contains no jurisdictional element establishing that the federal cause of action is in

pursuance of Congress' power to regulate interstate commerce." Id. at 613.

Neither Lopez nor Morrison casts doubt on Scarborough's continuing force or the constitutionality of 18 U.S.C. 922(g)(1) as applied to firearms that have previously moved in interstate commerce. Section 922(g), unlike the provisions at issue in Lopez and Morrison, requires proof of a connection to interstate commerce in each case. In fact, the Court in Lopez specifically distinguished the felon-in-possession statute from the school-zone provision, noting that the felon-in-possession statute contains "[an] express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." 514 U.S. at 562.

This Court recognized in Lopez that Congress has authority under the Commerce Clause to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." 514 U.S. at 558. In exercising that authority, Congress may address harmful consequences associated with particular classes of goods and transactions. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964); United States v. Darby, 312 U.S. 100, 112-115 (1941). Section 922(g)(1) regulates goods in interstate commerce -- firearms and ammunition -- by addressing a particular, harmful segment of the interstate market in those goods: the acquisition

by felons of firearms and ammunition that have been sold or offered for sale in interstate commerce.

In addition, contrary to petitioner's assertion (Pet. 12-14, 14-16), Section 922(g)(1)'s firearm-possession prohibition is a component of a larger scheme regulating the interstate market in firearms and ammunition to prevent felons from participating in that market. Section 922(g) not only bars felons from possessing firearms and ammunition that have traveled in interstate commerce, but also prohibits such individuals from "ship[ping] or transport[ing]" those items "in interstate or foreign commerce," and from "receiv[ing] any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. 922(g). As the Court reaffirmed in Gonzales v. Raich, 545 U.S. 1 (2005), "Congress can regulate purely intrastate activity that is not itself 'commercial' * * * if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." Id. at 18; see id. at 36 (Scalia, J., concurring in the judgment) ("Though the conduct in Lopez was not economic, the Court nevertheless recognized that it could be regulated as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'") (quoting Lopez, 514 U.S. at 561).

If the federal prohibition were limited to direct participation by felons in interstate transactions, it would often

be difficult to establish the precise circumstances under which a particular felon acquired his firearm or ammunition. That difficulty would be especially acute for transactions outside traditional retail channels, such as street-level and other informal transactions, or transactions using nominal or straw purchasers. Cf. Scarborough, 431 U.S. at 576 ("Those who do acquire guns after their conviction obviously do so surreptitiously."). Given those enforcement problems, Congress could have reasonably concluded that a ban on possession by felons of any firearm or ammunition that has previously moved in interstate commerce is a necessary and proper means of achieving its objectives. See Raich, 545 U.S. at 22. Indeed, "[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." Id. at 26.

c. In any event, this case would be a poor vehicle for considering the question presented, because the evidence indicates that petitioner possessed a firearm on a highway. Pet. App. 3a. This Court has held that Congress may regulate the "channels of interstate commerce" and "persons or things in interstate commerce." Lopez, 514 U.S. at 558. "[H]ighways" fall within that authority. Heart of Atlanta Motel, 379 U.S. at 271 (Black, J., concurring). Accordingly, Section 922(g)(1)'s requirement that a firearm be possessed "in or affecting commerce" would be constitutional as applied to petitioner, whether or not Congress's

authority under the Commerce Clause also extends to possession of a firearm based solely on its past movement in interstate commerce. Cf. McCullen v. Coakley, 573 U.S. 464, 485 n.4 (2014) (discussing the "uncontroversial principle of constitutional adjudication * * * that a plaintiff generally cannot prevail on an as-applied challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally applied to him") (emphases omitted).

2. Petitioner alternatively contends (Pet. 25-26) that the district court should have instructed the jury on a justification defense for his Section 922(g) charge. That fact-bound contention is incorrect and does not warrant further review.

a. A defendant is entitled to present an affirmative defense if "there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63 (1988). Where the evidence would not permit a reasonable jury to find one or more of the elements of the defense, however, the defense should not be submitted to the jury. See United States v. Bailey, 444 U.S. 394, 414 (1980). The "requirement of a threshold showing on the part of those who assert an affirmative defense to a crime is by no means a derogation of the importance of the jury as a judge of credibility." Id. at 416. "On the contrary, it is a testament to the importance of trial by jury and the need to husband the resources necessary for that process." Ibid. If "an affirmative defense consists of several elements and testimony

supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense." Ibid.

The court of appeals correctly applied those principles in this case. To the extent that Section 922(g)(1) permits nonstatutory affirmative defenses such as justification, a defendant may prevail on a claim of justification, and the defense may be submitted to the jury, only if, among other requirements, the evidence shows that the defendant possessed the firearm only during the time he was in danger. Pet. App. 5a (citing United States v. Gant, 691 F.2d 1159, 1162-1163 & n.9 (5th Cir. 1982)); see also Pet. 25 ("Everyone agrees that a felon, even if initially justified, must stop committing the crime once the threat subsides"). Petitioner did not make that showing here. The court of appeals correctly observed that, by the time the police officer encountered petitioner on the road, the threat from Scott and Robinson had subsided. Pet. App. 8a. Petitioner nevertheless "passed up several chances to give up the gun": he chose not to pull over and explain the situation to the police officer; he took the gun with him as he fled on foot from the scene of the car crash; and he then threw it over a fence "into a field where it would be harder for police to find." Id. at 8a. And the court correctly determined that petitioner's alleged fear of police could not justify possession of a firearm to defend himself against the pursuing police officer. Id. at 8a & n.4.

Petitioner contends (Pet. 25-26) that the court of appeals usurped the jury's role by deciding for itself that petitioner's life was no longer threatened, and that instead the jury should have decided whether petitioner's fear of police rendered it reasonable for him to possess the firearm for five extra minutes instead of pulling over. But a defendant is only entitled to present a defense to the jury if "there exists evidence sufficient for a reasonable jury to find in his favor," Mathews, 485 U.S. at 63, and both the district court and the court of appeals correctly determined that, on these facts, petitioner's generalized fear of police did not justify continued possession of a firearm, Pet. App. 8a n.4; id. at 26a-27a. A court's ruling on whether the defendant has made the required threshold showing does not usurp the jury's role. See Bailey, 444 U.S. at 416.

The court of appeals' fact-bound decision does not warrant further review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). That is particularly so given that the court of appeals and district court reached the same conclusion. See Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [against reviewing fact-bound decisions] has been

applied with particular rigor when [the] district court and court of appeals are in agreement as to what conclusion the record requires.") (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)).

b. The decision below is consistent with the decisions of other courts of appeals. See United States v. White, 552 F.3d 240, 243-245, 247-248 (2d. Cir. 2009) (justification instruction not warranted where defendant knocked gun out of an assailant's hand and, after the assailant left, carried the gun into another room and spent time dislodging shells, which he was still doing when police arrived); United States v. Ridner, 512 F.3d 846, 848 (6th Cir. 2008) (justification instruction not warranted where defendant took shotgun shells from his suicidal brother, but then fled with the ammunition when police arrived and therefore held onto the ammunition for longer than necessary); Government of the Virgin Islands v. Lewis, 620 F.3d 359, 369 (3d Cir. 2010) (defendant must make a prompt and appropriate effort to dispossess himself of a firearm to justify a justification instruction).

Petitioner contends (Pet. 20) that the court of appeals' decision conflicts with decisions of the Fourth and Ninth Circuits, which he asserts to have held that a defendant is permitted to present a justification defense to the jury if he "proffer[s] evidence that he discarded the gun when he believed it was safe to do so." Petitioner argues (ibid.) that, in those circuits, the jury gets to decide whether a convicted felon possessed a weapon

for an unreasonable amount of time after the threat to his life subsided. The cases that petitioner cites do not support that argument.

In United States v. Ricks, 573 F.3d 198 (4th Cir. 2009), the defendant's partner returned to their shared apartment holding a gun and acting erratically. Id. at 199. The defendant knocked the gun out of the partner's hand, picked it up, removed the clip, and threw the gun and clip in different directions. Ibid. After the partner ran out the door, the defendant picked up the gun and clip, placed them on a dresser in their shared bedroom, and then watched television in the living room. Id. at 200. Fifteen to thirty minutes later, the partner returned to the apartment with police officers, who asked if there was a gun in the house. Ibid. Although the defendant did not respond immediately, he acknowledged the gun, took the officers to the bedroom, and gave the gun and clip to them. Ibid. The defendant was charged with possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). Id. at 199.

The Fourth Circuit expressly recognized that "a defendant seeking a justification instruction must produce evidence that he took reasonable steps to dispossess himself of the weapon once the threat entitling him to possess it abated." Ricks, 573 F.3d at 203 (citation omitted). The court simply determined that, on the facts of that case, the defendant had made that threshold showing, because "[t]he evidence presented permit[ted] the conclusion that,

after [the defendant] disarmed [his partner], he took immediate steps to dispossess himself of the gun by placing it on the bedroom dresser." Id. at 203-204. Importantly, the court viewed the defendant's knocking the gun out of his partner's hand, removing the clip, and placing the gun and clip on the dresser as the extent of the defendant's possession. Id. at 203. It rejected the government's contention that the defendant had continued to constructively possess the gun while he watched television up until he turned it over to the police. Ibid. Petitioner, in contrast, retained possession of the firearm as he fled from the police officer and after he exited his vehicle, up until he threw the gun over a fence. Pet. App. 3a, 8a. Ricks does not demonstrate that the Fourth Circuit would allow a justification defense in such circumstances.

In United States v. Gomez, 92 F.3d 770 (9th Cir. 1996), the defendant obtained a firearm after receiving numerous death threats after his true name was revealed in an indictment in a case where he had been assisting as a confidential informant. Id. at 772-774. The defendant sought assistance from law enforcement, the parole office, and churches, but to no avail, and finally resorted to obtaining a shotgun. Ibid. When federal agents arrived at a house where the defendant was staying for further assistance with the case, he was carrying the shotgun, which he had obtained two days earlier. Id. at 773. The defendant ran into the house, threw away the firearm, and fled. Ibid. The

agents retrieved the firearm, and the defendant was later charged under Section 922(g)(1). Id. at 773-774.

The Ninth Circuit determined that the evidence was sufficient to warrant a jury instruction on justification. Gomez, 92 F.3d at 778. The Ninth Circuit acknowledged, as the Fourth Circuit did in petitioner's case, that a felon who is justified in possessing a firearm must "discard it as soon as he may safely do so." Id. at 778. But the Ninth Circuit determined, on the facts of that case, that "if [the defendant's] story is to be believed, there was no time before his arrest when he could have safely dumped the shotgun, as there was no clear cessation in the string of threats he received." Ibid. The facts of Gomez are dissimilar to the facts of this case. The defendant in Gomez had sought protection from a variety of sources before he obtained a firearm, and he was under specific threats to his life at the time he threw away the firearm when agents arrived. Id. at 772-774. In petitioner's case, by contrast, the threat from Scott and Richardson had ceased, yet petitioner continued to retain possession of the firearm even when presented with an opportunity to relinquish it. Pet. App. 8a. Moreover, the Ninth Circuit has made clear that Gomez is "limited to extraordinary cases," where a defendant's life is threatened and he reasonably resorts to arming himself as a last resort after attempts at obtaining protection from law enforcement have failed. United States v. Wofford, 122 F.3d 787, 797 (9th Cir.), cert. denied, 522 U.S. 893 (1997); see United States v.

Beasley, 346 F.3d 930, 935 (9th Cir. 2003) ("The facts in Gomez are 'extraordinary' and do not support the general proposition that a felon is entitled to a reasonable time period to dispose of [a] firearm."), cert. denied, 542 U.S. 921 (2004). No similar circumstance is present here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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