No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

DANIEL EDWARD GONZALEZ—PETITIONER

VS.

THE STATE OF CALIFORNIA—RESPONDENT

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TO THE CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION TWO

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PETITION FOR WRIT OF CERTIORARI

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL EDWARD GONZALEZ, Defendant and Appellant.	E073987 (Super.Ct.No. RIF1900678) OPINION

APPEAL from the Superior Court of Riverside County. Peter L. Spinetta, Judge. (Retired judge of the Contra Costa Super. Ct. assigned by the Chief Justice pursuant to art. VI, §6 of the Cal. Const.) Affirmed.

Steven S. Lubliner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Paige B. Hazard and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

After a police officer found him asleep in his car with a bag of methamphetamine and a loaded gun at his feet, a jury convicted Daniel Edward Gonzalez of possession of a controlled substance while armed (Health & Saf. Code, § 11370.1), being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1)), and being a felon in possession of ammunition (Pen. Code, § 30305, subd. (a)). On appeal, Gonzalez challenges the constitutionality of Health and Safety Code section 11370.1, arguing the provision violates the Second Amendment by restricting a nonviolent offender's right to possess firearms.[1] We conclude the argument lacks merit and affirm.

I

FACTS

Because this case involves a facial challenge to the constitutionality of a statute, the underlying facts of Gonzalez's crime are not relevant. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 (*Tobe*) ["A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual"].) For our purposes, it suffices to say Gonzalez was caught parked on the side of the road with about .6 grams of methamphetamine and a

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[1] Unlabeled statutory citations refer to the Health and Safety Code.

loaded, operable firearm. He was convicted of three firearm-related crimes (including the violation of section 11370.1 at issue here) and sentenced to six years in prison.[2]

II

ANALYSIS

Section 11370.1 makes it a felony to possess certain controlled substances "while armed with a loaded, operable firearm." (§ 11370.1, subd. (a).) Gonzalez argues this provision impermissibly infringes on the Second Amendment right to bear arms because it targets nonviolent criminals—i.e., those in possession of controlled substances. To pass constitutional scrutiny, Gonzalez argues, a restriction on gun possession must be limited to "preventing violent crime." We disagree. As the United States Supreme Court explained in *District of Columbia v. Heller* (2008) 554 U.S. 570 (*Heller*), the Second Amendment does not grant "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." (*Heller*, at p. 626.) Because "there is no constitutional problem with separating guns from drugs" (*United States v. Jackson* (7th Cir. 2009) 555 F.3d 635, 636 (*Jackson*)), we conclude section 11370.1 does not contravene the Second Amendment right to bear arms as interpreted in *Heller*.

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[2] After his jury trial, Gonzalez admitted having two prior strikes on his record. His six-year sentence consists of the three-year midterm for the section 11370.1 count, doubled under the Three Strikes law. The court imposed, but stayed under Penal Code section 654, sentences for the two felon-in-possession counts.

A. *Standard of Review*

"In determining a statute's constitutionality, we start from the premise that it is valid, we resolve all doubts in favor of its constitutionality, and we uphold it unless it is in clear and unquestionable conflict with the state or federal Constitutions." (*People v. Yarbrough* (2008) 169 Cal.App.4th 303, 311 (*Yarbrough*); see also *Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 593 [the starting point of our analysis is a "'strong presumption of . . . constitutionality'"].) If we can "conceive of a situation in which the statute can be applied without entailing an inevitable collision with constitutional provisions, the statute will prevail." (*Yarbrough*, at p. 311.)

B. *Section 11370.1 Does Not Violate the Second Amendment*

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

In *Heller*, the Supreme Court decided whether a series of Washington D.C. laws banning the possession of operable handguns in the home violated the Second Amendment. In answering that question in the affirmative, the Court held the right afforded by the Second Amendment is not limited to the context of militia service. Rather, the Court identified the "core" of the Second Amendment as protecting "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." (*Heller*, *supra*, 554 U.S. at pp. 634-635; see also *McDonald v. City of Chicago* (2010) 561 U.S.

742, 786 (*McDonald*) [the Second Amendment's right to bear arms also applies to states].)

But in striking down D.C.'s in-home ban, the Court emphasized that "the Second Amendment is not unlimited" and does not grant "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." (*Heller*, *supra*, 554 U.S. at p. 626.) "Nothing in our opinion," the Court cautioned, "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." (*Id.* at p. 626.) The Court described those types of prohibitions as "presumptively lawful regulatory measures" and said the list was intended to be exemplary, not exhaustive. (*Id.* at p. 627, fn. 26.) Two years later, in *McDonald*, the Court "repeat[ed] [its] assurances" that the Second Amendment "does not imperil every law regulating firearms" and that the kind of longstanding restrictions mentioned in *Heller* remain presumptively valid. (*McDonald*, *supra*, 561 U.S. at p. 786.)

After *Heller*, federal courts developed a two-step test for assessing Second Amendment challenges. First, the court asks "whether the challenged law burdens conduct that falls within the scope of the Second Amendment's guarantee" of protecting the right of responsible, law-abiding citizens to possess firearms to protect their home. (*Gould v. Morgan* (1st Cir. 2018) 907 F.3d 659, 668-669.) If the law doesn't burden protected conduct, then it doesn't implicate the Second Amendment and the inquiry ends. If, however, the law does infringe on a law-abiding citizen's right to possess firearms to

protect their home, then the court must inquire into "the strength of the government's justification" for the law by balancing—under the appropriate level of scrutiny—the statute's objectives against the means it employs to accomplish those ends. (*Ezell v. City of Chicago* (7th Cir. 2011) 651 F.3d 684, 703 [the rigor of the means-end review is dependent on "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right"].)

Gonzalez's constitutional challenge doesn't get past the first step and into means-end scrutiny. As noted, section 11370.1 makes it a felony to possess certain controlled substances (including methamphetamine) while "armed with" a loaded, operable firearm, meaning the gun is "available for immediate offensive or defensive use." (§ 11370.1, subd. (a).) Based on the provision's legislative history, California courts have concluded the purpose of section 11370.1 is "to protect *the public and law enforcement officers* and ""'stop the growing menace from a very deadly combination—illegal drugs and firearms.'"'" (*In re Ogea* (2004) 121 Cal.App.4th 974, 984 (*Ogea*), italics added, quoting *People v. Pena* (1999) 74 Cal.App.4th 1078, 1082.)

While the Supreme Court has not yet delineated the precise scope of the Second Amendment, it has made abundantly clear that its protections inure to the benefit of law-abiding citizens only. (See *Jackson* , *supra*, 555 F.3d at p. 636 ["The Court said in *Heller* that the Constitution entitles citizens to keep and bear arms for the purpose of *lawful* self-protection, not for *all* self-protection"].) We are aware of no court decision holding that

the United States Constitution protects a right to carry a gun while simultaneously engaging in criminal conduct, as Gonzalez was found guilty of here.

And though we are also aware of no court to have considered whether section 11370.1 violates the Second Amendment, the law in this area is clear. A large body of federal and out-of-state cases have upheld the constitutionality of similar drug-related firearm restrictions. For example, in *United States v. Greeno* (6th Cir. 2012) 679 F.3d 510, the Sixth Circuit upheld the constitutionality of a sentence enhancement penalizing carrying a dangerous weapon during the commission of a drug offense. The court concluded the enhancement was "consistent with the historical understanding of the right to keep and bear arms, which did not extend to possession of weapons for unlawful purposes," as any holding to the contrary "would suggest that the Second Amendment protects an individual's right to possess a weapon for criminal purposes." (*Id.* at p. 520; see also, e.g., *United States v. Bryant* (2d Cir. 2013) 711 F.3d 364, 369 (*per curiam*) [recognizing "an implicit limitation" on the exercise of the Second Amendment right to bear arms "for 'lawful purpose[s]'" in rejecting a Second Amendment challenge to a federal law criminalizing the possession of a firearm in furtherance of a drug trafficking crime]; *Jackson*, *supra*, 555 F.3d at p. 636 [same]; *United States v. Potter* (9th Cir. 2011) 630 F.3d 1260, 1261 [same].) In *People v. Cisneros* (Colo.Ct.App. 2014) 356 P.3d 877, the Colorado Court of Appeals upheld a similar enhancement in their penal code, reasoning that because the law penalizes possession of a firearm "in connection with a

person's commission of a felony drug offense," it "does not apply to law-abiding citizens and, thus, does not infringe on the Second Amendment right to bear arms." (*Id.* at p. 887.)

Chief Judge Easterbrook underscored the validity of drug-related firearm restrictions with the following hypothetical: "Suppose a federal statute said: 'Anyone who chooses to possess a firearm in the home for self-protection is forbidden to keep or distribute illegal drugs there.' Such a statute would be valid . . . . And if Congress may forbid people who possess guns to deal drugs, it may forbid people who deal drugs to possess guns. The statements 'if you have a gun, you can't sell cocaine' and 'if you sell cocaine, you can't have a gun' are identical." (*Jackson*, *supra*, 555 F.3d at p. 636.) This reasoning applies equally to section 11370.1.

Gonzalez urges us to depart from decades of well-settled Second Amendment precedent and apply the reasoning from the dissent in *Kanter v. Barr* (7th Cir. 2019) 919 F.3d 437 (*Kanter*) to our analysis of section 11370.1. *Kanter* involved a Second Amendment challenge to the federal and Wisconsin felon-in-possession laws. The defendant, who had been convicted of mail fraud for falsely representing that his company's therapeutic shoe inserts were Medicare-approved and billing Medicare accordingly, argued his status as a nonviolent offender with no other criminal record made the dispossession statutes unconstitutional as applied to him. The majority upheld the statutes, concluding felons are categorically excluded from the scope of the Second Amendment. Then-Judge (now Justice) Amy Coney Barrett dissented, arguing the historical record instead revealed that the Framers intended to restrict firearm possession

only when doing so was *necessary to protect the public safety*. (*Kanter*, at p. 452 (dis. opn. of Barrett, J.).) In her view, the dispossession statutes' categorical application to *all* felons was "wildly overinclusive" and, "[a]bsent evidence that Kanter would pose a risk to the public safety if he possessed a gun, the governments cannot permanently deprive him of his right to keep and bear arms." (*Id.* at pp. 466-469.)

We decline to apply this approach to dispossession laws to our analysis of section 11370.1. First of all, it represents a dissenting or minority view of the court. The majority view—which is consistent with California's approach—is that applying dispossession laws to a nonviolent felon does not violate the Second Amendment. (*Kanter*, *supra*, 919 F.3d at p. 451 (dis. opn. of Barrett, J.); *People v. Delacy* (2011) 192 Cal.App.4th 1481, 1486.)

Second, even if Judge Barrett's approach were the majority view on the issue, that issue is meaningfully distinct from the one we face here. Unlike section 11370.1, dispossession laws prohibit individuals from possessing firearms in the future based on their *past* criminal conduct. Section 11370.1, in contrast, prohibits individuals from possessing firearms while *simultaneously* committing criminal activity. Kanter, the convicted nonviolent felon, could at least argue that if he were allowed to possess firearms, he would use them for a lawful purpose (e.g., defense of the home or certain military purposes). Gonzalez cannot make that argument. Instead he seeks to validate his possession of a gun for an unlawful purpose, something on which Second Amendment

jurisprudence, for all its murkiness, is quite clear. There is no constitutional right to carry a gun while committing a crime. (*Heller*, *supra*, 554 U.S. at p. 635.)

Plus, the type of challenge that was at issue in *Kanter* matters. Because Kanter brought an as-applied challenge, the court was required to consider the fact his crime of mail fraud involved no violence or threat to public safety. But here, because Gonzalez brings a facial challenge, we must consider all conceivable ways in which a person could violate section 11370.1. (*Yarbrough*, *supra*, 169 Cal.App.4th at p. 311; *Tobe*, *supra*, 9 Cal.4th at p. 1084.) Thus, the fact Gonzales's conviction did not involve violence is beside the point. We can easily imagine scenarios where someone who is armed with a gun while in the process of committing a drug offense is more likely to engage in gun violence than a person who committed mail fraud in the past.

This is because, as the People correctly point out, it is reasonable to assume a person armed with a loaded, operable firearm during the commission of *any* crime may be willing to resort to use of that weapon to avoid arrest and—in the case of section 11370.1, specifically—to maintain possession of their illicit stash. It is also reasonable to assume that some people who have controlled substances like methamphetamine also abuse those drugs, making their immediate access to a loaded, operable firearm more of a threat to public safety than someone like Kanter—who isn't in the process of committing a crime. (See generally *United States v. Yancey* (7th Cir. 2010) 621 F.3d 681, 686 [upholding the constitutional validity of a statute prohibiting drug abusers from possessing firearms based in part on "studies [that] amply demonstrate the connection

between chronic drug abuse and violent crime"].) Indeed, the potentially "deadly combination" of illegal drugs and firearms is precisely what the Legislature intended to address by enacting section 11370.1. (*People v. Pena*, *supra*, 74 Cal.App.4th at p. 1082 [observing proponents of section 11370.1 "noted that armed controlled substance abusers posed a threat to the public and to peace officers"]; see also *Ogea*, *supra*, 121 Cal.App.4th at p. 979 [concluding violations of section 11370.1 are excluded from the list of "nonviolent drug possession offenses" subject to treatment under Prop. 36].) As the Supreme Court has recognized, "drugs and guns are a dangerous combination." (*Smith v. United States* (1993) 508 U.S. 223, 240.)

And finally, even if Gonzalez could persuade us to follow the *Kanter* dissent, his challenge to section 11370.1 would still fail. Though Judge Barrett takes issue with disarming a person based solely on "their status as [a] felon[]," she *would* allow governments to disarm not just "those who have demonstrated a proclivity for violence" but also those "whose possession of guns would *otherwise threaten the public safety*." (*Kanter*, *supra*, 919 F.3d at pp. 454, 458 (dis. opn. of Barrett, J.), italics added.) The latter category encompasses those like Gonzalez who violate section 11370.1.

Simply put, nothing in the *Kanter* dissent's approach to dispossession laws suggests the Second Amendment prevents restrictions on being armed with a gun *while committing* a crime. But more importantly, nothing in *Heller*—the relevant binding precedent—suggests the Second Amendment limits a state's ability to separate guns and

drugs. We therefore reject Gonzalez's facial challenge to section 11370.1 and affirm his conviction.

III

DISPOSITION

We affirm the judgment.

CERTIFIED FOR PUBLICATION

SLOUGH
J.

We concur:

MILLER
Acting P. J.

MENETREZ
J.

Appellate Courts Case Information

Supreme Court

Change court

Docket (Register of Actions)

PEOPLE v. GONZALEZ
Division SF
Case Number S274024

Date	Description	Notes
04/12/2022	Petition for review filed	Defendant and Appellant: Daniel Edward Gonzalez Attorney: Steven S. Lubliner
04/12/2022	Record requested	Court of Appeal record imported and available electronically.
04/20/2022	Received Court of Appeal record	One doghouse
05/18/2022	Petition for review denied	
05/19/2022	Returned record	One doghouse.

Click here to request automatic e-mail notifications about this case.

S274024

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DANIEL EDWARD GONZALEZ, Defendant and Appellant	Court of Appeal No. E073987 Riverside County Superior Court No. RIF1900678

PETITION FOR REVIEW

Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

HONORABLE JAMES PETER SPINETTA, JUDGE

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Under Appellate Defenders Inc.'s
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ISSUE PRESENTED FOR REVIEW

Because drug possession is a nonviolent crime and because possessing a firearm is protected by the Second Amendment to the United States Constitution, does Health and Safety Code section 11370.1, which makes possessing certain drugs while armed a felony, violate the Second Amendment?

STATEMENT OF THE CASE

A jury convicted appellant of three felonies: possession of methamphetamine while armed with a firearm (Health & Safety Code, § 11370.1); being a convicted felon in possession of a firearm (Pen. Code, § 29800); and being a convicted felon in possession of ammunition. (Pen. Code, § 30305, subd. (a).) Appellant admitted two prior strikes. The trial court sentenced him to six years in state prison. (Opinion at 2-3 & fn. 2.)

On appeal, appellant argued that because section 11370.1 made a crime out of possessing a firearm while committing a nonviolent crime, it violated the Second Amendment. Appellant relied heavily on the dissenting opinion of then-Judge Amy Coney Barrett[1] in *Kanter v. Barr* (7th Cir. 2019) 919 F.3d 437, where she wrote that felon-in-possession statutes violate the Second Amendment when they disarm individuals convicted of non-violent crimes that demonstrate no propensity for violence. On March 3, 2022, the Court of Appeal filed a published opinion[2] in which it rejected appellant's argument and affirmed the judgment. Appellant did not file a petition for rehearing.

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[1] Judge Barrett is now Justice Barrett of the United States Supreme Court.

[2] *People v. Gonzalez* (2022) 75 Cal. App. 5th 907.

STATEMENT OF FACTS

As the attached opinion recites, a deputy discovered appellant parked in a vehicle with a small amount of methamphetamine and a loaded, operable firearm. (Opinion at 2-3.) There was no evidence that appellant was selling drugs.

ARGUMENT

I. Appellant's Conviction on Count One must be Reversed Because Health and Safety Code Section 11370.1 is Facially Unconstitutional. In Punishing the Possession of a Firearm While Committing a Nonviolent Crime, the Statute Violates the Second Amendment.

A. Introduction

Since the U.S. Supreme Court held in *District of Columbia v. Heller* (2008) 554 U.S. 570 ("*Heller*") that the Second Amendment safeguards a personal right not dependent on the existence of a militia, courts have grappled with the extent of the right. The U.S. Supreme Court will soon issue its first major Second Amendment opinion since *McDonald v. City of Chicago* (2010) 561 U.S. 742, 791 held that the Second Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.

In *New York State Rifle & Pistol Association, Inc. et al. v. Bruen*, Supreme Court No. 20-843, the petitioners, who had been denied concealed carry licenses, presented the question, "Whether the Second Amendment allows the government to prohibit ordinary law-abiding citizens from carrying handguns outside the home for self-defense." The Court granted *certiorari* limited to the question, "Whether the state's denial of petitioners'

applications for concealed-carry licenses for self-defense violated the Second Amendment." Although this sounds like a narrowing of the question, news reports of the oral argument suggest that the Court will be answering the original question presented in the affirmative.[3]

It would not be the first to so hold. In *Moore v. Madigan* (7th Cir. 2012) 702 F.3d 933, the Seventh Circuit held that the language used in *Heller*, such as that the Second Amendment protects the right to "possess and carry weapons in case of confrontation," could not reasonably be construed as limiting Second Amendment protections to the home. *Moore v. Madigan*, *supra*, 702 F.3d at pp. 935-936.

> "The right to "bear" as distinct from the right to "keep" arms is unlikely to refer to the home. To speak of "bearing" arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home. And one doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home. Suppose one lived in what was then the wild west—the Ohio Valley for example (for until the Louisiana Purchase the Mississippi River was the western boundary of the United States), where there were hostile Indians. One would need from time to time to leave one's home to obtain supplies from the nearest trading post, and en route one would be as much (probably more) at risk if unarmed as one would be in one's home unarmed." *Id.* at p. 936.

It is no different today.

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[3] The case was argued on November 3, 2021.

> "Twenty-first century Illinois has no hostile Indians. But a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress." *Id.* at p. 937.

On that point, the U.S. Supreme Court has held that stun guns are permitted arms under the Second Amendment. (*Caetano v. Massachusetts* (2016) 577 U.S. 411 [*per curiam*].) The charges there arose when the defendant was found in possession of a stun gun she kept in her purse and had once used to threaten her abuser when he accosted her outside of her workplace. (*Id.* at pp. 413-416 [Alito, J., concurring in the judgment].) Although the issue of public vs. private possession was arguably not before the Court, nothing in the *per curiam* reversal suggests a concern with the public aspect of the case.

Justice Alito's concurrence is more definite on the subject. It noted the inability of law enforcement to prevent the ongoing threat from the defendant's ex-boyfriend. (*Id.* at pp. 412-422 [Alito, J., concurring in the judgment].) It noted the unfairness that would result if the defendant's conviction were upheld because it "likely bars her from ever bearing arms for self-defense." (*Id.* at p. 422 [Alito, J., concurring in the judgment].) Neither observation makes sense if Second Amendment rights are limited to the home.

Where felon-in-possession prosecutions are concerned, most courts adhere to the *Heller dicta* that disarming all felons is presumptively constitutional. (*Heller*, *supra*, 554 U.S. at pp. 626-627.) Some jurists, however, are of the view, supported by scholarship, that the founders did not envision disarming nonviolent felons. (*Kanter v. Barr* (7th Cir. 2019) 919 F.3d 437, 451-469 (Barrett, J., dissenting).[4] (*Id.* at pp. 454, 467, citing C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695 (2009).)

To say that a nonviolent felon such as a fraudster or price fixer may not constitutionally be disarmed is to accept the reality that he or she previously committed, and could in the future commit, fraud and price fixing while in the same room as a gun. However seedy and sordid illegal drug possession may seem, it is a nonviolent crime. Where methamphetamine is concerned, it is a nonviolent misdemeanor.

While enhancements for personal use of a firearm during a crime are undeniably constitutional, there is no facilitative aspect to the challenged law. It manufactures a felony out of having your drugs in the same place as your gun. This is unconstitutional. Review should be granted to settle this important question of law. (California Rules of Court, Rule 8.500, subd. (b)(1).)

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[4] Then-Judge Barrett is current U.S. Supreme Court Justice Amy Coney Barrett.

B. <u>Standard of Review</u>

The constitutionality of a statute is a question of law that appellate courts review *de novo*. (*People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442, 445.) Because a facial challenge does not turn on the facts of a given case, it may be raised on appeal without the issue having first been raised in the trial court. (*In re Sheena K.* (2007) 40 Cal. 4th 875, 889; *In re J.C.* (2017) 13 Cal. App. 5th 1201, 1206.)

"A party challenging the constitutionality of a statute ordinarily must carry a heavy burden. Facial challenges to statutes … are disfavored. Because they often rest on speculation, they may lead to interpreting statutes prematurely, on the basis of a bare-bones record.… Accordingly, we start from 'the strong presumption that the [statute] is constitutionally valid. We resolve all doubts in favor of the validity of the [statute]. Unless conflict with a provision of the state or federal Constitution is clear and unmistakable, we must uphold the [statute]." (*People v. Superior Court* (*J.C. Penney Corp., Inc.*) (2019) 34 Cal. App. 5th 376, 387 [citations and quotes omitted].)

"A statute will be declared invalid in its entirety only when its scope cannot be limited to constitutionally applicable situations except by reading in numerous qualifications and exceptions, i.e., rewriting it, or if it is invalid in certain situations and cannot be enforced in others without danger of an uncertain or vague future application." (*Mounts v. Uyeda* (1991) 227 Cal. App. 3d 111, 121-122. [citation omitted].) "A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular

circumstances of an individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1084.)

C. <u>The Merits</u>

Health and Safety Code section 11370.1, subdivision (a) provides that anyone who possesses methamphetamine "while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years. As used in this subdivision, 'armed with' means having available for immediate offensive or defensive use." With exceptions not applicable here, simple possession of methamphetamine is only punished as a misdemeanor by up to one year in county jail. (Health & Safety Code, § 11377, subd. (a).)

To convict the defendant of simple drug possession, the jury must find:

1. The defendant [unlawfully] possessed a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. The controlled substance was a particular substance or analog thereof; and
5. The controlled substance was in a usable amount. (CALCRIM No. 2304.)

None of these elements involve acts of violence, either expressly or by implication. Thus, drug possession is a non-violent crime. Because gun possession is protected by the Second Amendment, and because restrictions on gun possession are limited to preventing violent crime, section 11370.1 is unconstitutional.

The Second Amendment to the U.S. Constitution provides, "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *Heller*, the U.S. Supreme Court held that District of Columbia laws prohibiting the possession of handguns in the home and requiring that lawful firearms such as long guns be kept unloaded and disassembled or, alternatively, rendered inoperable by trigger locks, violated the Second Amendment. In reaching this conclusion, the Court definitively construed the Second Amendment for the first time, holding that the right to keep and bear arms was a personal right that was not dependent on the existence of a state militia.

The protections of the Second Amendment apply to the states through the Due Process Clause of the Fourteenth Amendment. (*McDonald v. City of Chicago* (2010) 561 U.S. 742, 791. ["*McDonald*".) Thus, all federal and state laws regulating arms must pass muster under the Second Amendment.

Cases on felon-in-possession statutes are relevant to appellant's challenge to section 11370.1. *Dicta* from *Heller* posited certain limits to Second Amendment rights.

> "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and

qualifications on the commercial sale of arms." (*Id.* at pp. 626-627.)[5]

Cases have addressed whether and to what extent people convicted of nonviolent felonies may be prohibited from owning firearms. Pertinent here, in *Kanter v. Barr* (7th Cir. 2019) 919 F.3d 437, the defendant had been convicted of mail fraud for substantially defrauding Medicare, a crime that carried a maximum twenty-year prison term. He served a year and a day in prison. He then brought suit challenging the federal and Wisconsin felon-in-possession statutes. The district court granted summary judgment against him. (*Id.* at p. 440.)

On appeal, the *Kanter* majority noted that although several circuits had considered the possibility that nonviolent felons might not fall under the *Heller dicta*, only one court had so ruled, in a case involving defendants ultimately convicted of nonviolent misdemeanors. (*Id.* at pp. 443-444.) The majority then discussed competing theories of Second Amendment rights to assess whether or not at the founding nonviolent felons had or retained a right to keep and bear arms. Deeming the evidence inconclusive, the majority resolved Kanter's case by applying means-end scrutiny. (*Id.* at pp. 445-447.)

Applying intermediate scrutiny, the majority upheld the prohibitions. (*Id.* at pp. 447-451.) It noted the government's interest in keeping firearms away from persons likely to misuse

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[5] Several California cases have cited this language to reject Second Amendment challenges in cases involving "prohibited person" convictions. Although appellant disagrees, he is not challenging his felon-in-possession convictions as such a challenge is not supported by the authority he relies on here.

them. (*Id.* at p. 448.) It cited statistics produced by the governments about felons convicted of nonviolent crimes who later committed acts of violence. (*Id.* at pp. 448-449.) It rejected Kanter's argument that the government's showing must be tailored to him personally and his allegedly stable, nonviolent, and reformed circumstances. (*Id.* at p. 449.) It also disagreed with Kanter's self-assessment given the scope of his serious financial crime. (*Id.* at p. 450.) The majority concluded that the challenged felon dispossession statutes were "substantially related to the important governmental objective of keeping firearms away from those convicted of serious crimes." (*Id.* at p. 451.)

Then-Judge Amy Coney Barrett dissented. After surveying competing theories, Judge Barrett first held that, notwithstanding his status as a convicted felon, Kanter had Second Amendment rights. The question was whether Wisconsin and the federal government could nonetheless prevent him from possessing a gun. (*Id.* at p. 453.) Given that the *Heller* majority admitted it had not justified its assumptions about felon-in-possession laws, Judge Barrett agreed that the *Heller dicta* "does not settle the question" of which felons may constitutionally be barred from possessing firearms. (*Id.* at p. 454.)

Judge Barrett rejected the proffered rationales for felon-in-possession statutes.

> "Wisconsin and the United States advance three basic historical arguments in support of this categorical exclusion. First, they say that there is some evidence suggesting that founding-era legislatures deprived felons of the right. Second, they argue that because the states put felons to death at

> the time of the founding, no one would have questioned their authority to take felons' guns too. And third, they insist that founding-era legislatures permitted only virtuous citizens to have guns, and felons are not virtuous citizens.
>
> As I explain below, none of these rationales supports the proposition that the legislature can permanently deprive felons of the right to possess arms simply because of their status as felons. The historical evidence does, however, support a different proposition: that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety. This is a category simultaneously broader and narrower than 'felons'—it includes dangerous people who have not been convicted of felonies but not felons lacking indicia of dangerousness." (*Ibid*.)

Judge Barrett then proceeded to discuss each rejected theory. (*Id.* at pp. 454-458.) Addressing founding-era proposals and practices, she noted that Pennsylvania had proposed a guarantee of the right to arms "unless for crimes committed, or real danger of public injury from individuals." She did not interpret this in the conjunctive, but, rather, that the "real danger" part modified "crimes committed." (*Id.* at p. 456.) "The concern common to all three [state proposals] is not about felons in particular or even criminals in general; it is about threatened violence and the risk of public injury." (*Ibid*.) Judge Barrett then reviewed practices at common law and in the colonies of disarming people perceived as threats such as Catholics, Indians, and slaves. (*Id.* at pp. 456-458.) "In sum, founding-era legislatures categorically disarmed groups whom they judged to

be a threat to the public safety. But neither the convention proposals nor historical practice supports a legislative power to categorically disarm felons because of their status as felons." (*Id.* at p. 458.)[6]

Judge Barrett agreed that "the state can take the right to bear arms away from a category of people that it deems dangerous." It is not limited to case-by-case exclusions, and it may make "present-day judgments about categories of people whose possession of guns would endanger the public safety[.]" (*Id.* at p. 464.) However, "[t]he legislature must be able to justify its designation[.]" (*Id.* at p. 465.) The categorical bans for convicted felons were, however, "wildly overinclusive." (*Id.* at p. 466 [citation omitted].)

Where nonviolent felons are concerned, "the reasoning that supports the categorical disarmament of violent felons—that past violence is predictive of future violence—simply does not apply." (*Id.* at p. 467.) Judge Barrett was not persuaded by the governments' statistics about mail fraud recidivism and subsequent violent crimes. (*Id.* at p. 468.) "[W]hile both Wisconsin and the United States have an unquestionably strong interest in protecting the public from gun violence, they have failed to show, by either logic or data, that disarming Kanter

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[6] Judge Barrett then rebutted as historically inaccurate the assumptions that all felons could be disarmed because they all would have been put to death in the founding era and that Second Amendment rights are grounded in a civic virtue theory that permits forfeiture for any breach of civic virtue. (*Id.* at pp. 458-464.) The latter argument was inconsistent with *Heller*, which had held that the right to bear arms was a personal right not dependent on any civic connection. (*Id.* at p. 463.)

substantially advances that interest." (*Id.* at p. 469 [citation omitted]." The majority's holding treated the Second Amendment as "a second-class right[.]" (*Ibid.* [citation omitted].)

Judge Barrett's interpretation best accords with the principles underlying the Second Amendment. The fact that it entails some risk does not defeat it. *Heller* implies and *McDonald* confirms that illegal violence is a collateral consequence that must be borne if the Second Amendment is to have any meaning.

> "Municipal respondents maintain that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety. Brief for Municipal Respondents 11. And they note that there is intense disagreement on the question whether the private possession of guns in the home increases or decreases gun deaths and injuries. *Id.*, at 11, 13-17. The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category. See, *e.g.*, *Hudson* v. *Michigan*, 547 U.S. 586, 591, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006) ("The exclusionary rule generates 'substantial social costs,' *United States* v. *Leon*, 468 U.S. 897, 907, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), which sometimes include setting the guilty free and the dangerous at large"); *Barker* v. *Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (reflecting on the serious consequences of dismissal for a speedy trial violation, which means "a defendant who may be guilty of a serious crime will go free"); *Miranda* v. *Arizona*, 384 U.S. 436, 517, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (Harlan, J., dissenting); *id.*, at 542, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (White, J., dissenting) (objecting that the Court's rule "[i]n some

> unknown number of cases . . . will return a killer, a rapist or other criminal to the streets . . . to repeat his crime"); *Mapp*, 367 U.S., at 659, 81 S. Ct. 1684, 6 L. Ed. 2d 1081. Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications." (*McDonald*, *supra*, 561 U.S. at pp. 782-783.)

To the point that constitutional protections are not without cost may be added the observation that under the First Amendment, much that is culturally damaging, dangerous, cruel, borderline obscene or simply idiotic enjoys constitutional protection to safeguard the dignity interest in free speech and to protect open debate. Indeed, the Court acknowledged this in *Heller*.

> "The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people[.]" (*Heller*, *supra*, 554 U.S. at p. 635.)

The Court acknowledged the widespread problem of handgun violence but stated that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." (*Id.* at p. 636.)

Although *Kanter* did not involve an arming enhancement, it seems undeniable that Kanter committed mail fraud while he possessed the gun or guns that he was forced to surrender. He may even have been in the same room with the gun or guns when

he committed the fraud, but no one suggested that his mail fraud was worse because of this. The logical implication of the dissent's holding that nonviolent felons do not automatically lose Second Amendment rights is that Kanter could commit major fraud *again* with a gun in the house and his gun possession would still be irrelevant to his culpability and future Second Amendment rights.

Here, possession of methamphetamine, like possession of alcohol, marijuana, automobiles, or anything else, is, without more, a nonviolent activity and, it follows, a nonviolent crime. Because section 11370.1 builds a crime around exercising Second Amendment rights while committing this nonviolent crime, it is unconstitutional.

The Court of Appeal's rejection of this argument does not withstand scrutiny. Adopting a means-end scrutiny test, it first holds that appellant had no Second Amendment rights to offend because he violated a statute prohibiting being armed while possessing drugs and the Second Amendment applies only to law-abiding citizens. (Opinion at 5-7.) The defendant in *Kanter*, of course, was not a law-abiding citizen. Further, this reasoning begs the question because the issue here is whether the state may constitutionally create a felony defined as committing a nonviolent crime while your gun is around. The fact that it has done so does not answer the question.

The Court then cites a number of cases holding it is constitutional to punish the possession of firearms for unlawful "purposes." (Opinion at 7-8.) This case is not about facilitative

use. To convict appellant of violating section 11370.1, the prosecution just had to prove appellant possessed his drugs while he knew, however vaguely, his gun was around. (CALCRIM No. 2303.) Anyone committing a nonviolent crime at home, be it drug possession or mail fraud, is going to know that his gun is around. That does not mean the gun is possessed for the criminal purpose of committing the nonviolent crime.

Citing *United States v. Yancey* (7th Cir. 2010) 621 F.3d 681, 686, the Court envisions a constitutional application of section 11370.1 because it keeps guns out of the hands of illegal drug users. The defendant in *Yancey* was not just an illegal drug user. He convicted under a statute that applied to habitual users and addicts. (*Id.* at p. 683.) In rejecting the Second Amendment challenge, the Seventh Circuit analogized habitual users and addicts to the mentally ill, who, according to the *Heller dicta*, may be disarmed. (*Id.* at pp. 685-686.) This has nothing to do with a simple possession offense. Further, California disarms addicts under a different statute. (Pen. Code, § 29800, subd. (a)(1).) Appellant's challenge to section 11370.1 should not be rejected because one can conceivably shoehorn the prohibitions of section 29800 into it.

Similarly, the Court of Appeal cites *In re Ogea* (2004) 121 Cal. App. 4th 974, 979, noting that a violation of section 11370.1 is not considered a nonviolent drug possession offense for purposes of Proposition 36 treatment. (Opinion at 11.) It is hardly surprising that a gun possession crime is not considered nonviolent. Guns are instruments of violence. The question here

is whether the Second Amendment permits such a crime to exist. *Ogea* involved no Second Amendment challenge and is irrelevant to this issue.

Finally, the Court of Appeal suggests that even under the *Kanter* dissent, criminalizing drug possession in the vicinity of gun possession is constitutional because the combination threatens the public safety. (Opinion at 11-12.) *All* gun possession threatens the public safety. As stated above, the U.S. Supreme Court recognized that the risk of illegal gun violence is one that must be borne if the Second Amendment is to have any meaning. There are undoubtedly limits to Second Amendment rights. However, creating new felonies by tethering nonviolent crimes to incidental gun possession is not one of them.

CONCLUSION

For the foregoing reasons, the petition for review should be granted.

Dated: April 12, 2022

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CERTIFICATION

Pursuant to Rule 8.504(d)(1) of the California Rules of Court, I hereby certify that the foregoing brief is produced in a proportional font (Century Schoolbook) of 13-point type and utilizes 1.5 line spacing, except in footnotes and extended quotations which are single-spaced. I further certify that, according to the word count of the word processing system used to prepare the brief, the brief includes 4,315 words (exclusive of the table of contents, the table of authorities, the proof of service and this certificate.

Dated: April 12, 2022

/s/Steven S. Lubliner
STEVEN S. LUBLINER
Attorney for Appellant
Daniel Edward Gonzalez

PROOF OF SERVICE BY ELECTRONIC SERVICE
(Cal. Rules of Court, rules 2.251(i)(1)(A)-(D) & 8.71(f)(1)(A)-(D)

(People v. Daniel Edward Gonzalez, Court of Appeal No. E073987)

I, Steven S. Lubliner, declare I electronically served from my electronic service address of sslubliner@comcast.net the following document:

PETITION FOR REVIEW

on April 12, 2022 at 1:30 p.m. to the following persons and entities:

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(Cal. Rules of Court, rules 1.21, 8.50.)
(People v. Daniel Edward Gonzalez, Court of Appeal No. E073987)

I, the undersigned, declare that I am over 18 years of age and am not a party to the within cause. My business address is P.O. Box 750639, Petaluma, CA 94975.

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Executed on April 12, 2022 at Petaluma, California.

/s/Steven S. Lubliner

Appellate Courts Case Information

4th Appellate District Division 2

Change court

Docket (Register of Actions)

The People v. Daniel Gonzalez
Case Number E073987

Date	Description	Notes
10/31/2019	Notice of appeal lodged/received (criminal).	dtd Oct 28, 2019; Daniel Edward Gonzales
10/31/2019	Notice to reporter to prepare transcript.	dtd Oct 29, 2019
11/20/2019	Counsel appointment order filed.	Atty Steven Lubliner for Applnt Daniel Gonzalez.
11/20/2019	Email sent to:	Counsel with Exhibit Form attached
01/24/2020	Record on appeal filed.	C-1, R-1, R-1 Marsden dtd Feb 25, 2019 (445 pgs)
01/24/2020	Letter sent advising record on appeal has been filed.	
03/04/2020	Motion/application to augment record filed.	and request for extn of time to file AOB
03/04/2020	To court.	Applnt's mtn to augment/extn rqst
03/05/2020	Augmentation granted. (See order.)	Augment record due on or before 45 days from the date of this order; AOB due 30 days thereafter.
03/09/2020	Notice to reporter to prepare transcript.	Augment dtd Mar 6, 2020
06/09/2020	Augmented record filed.	R-1 (122 pgs)
06/09/2020	Letter sent advising that augmented record has been filed.	
06/10/2020	Record omission letter received.	by appellant dtd Jun 10, 2020
06/19/2020	Notice to reporter to prepare transcript.	Augment dtd Jun 15, 2020
07/09/2020	Granted - extension of time.	Appellant's opening brief. Due on 08/10/2020 By 32 Day(s)
07/14/2020	Filed augmented record pursuant to rule 8.340.	R-1 per letter rec'd Jun 10, 2020. (7 pgs)
07/14/2020	Letter sent advising that augmented record has been filed.	
08/07/2020	Granted - extension of time.	Appellant's opening brief. Due on 09/09/2020 By 30 Day(s)
09/09/2020	Granted - extension of time.	Appellant's opening brief. Due on 10/09/2020 By 30 Day(s) w/no further extn
10/13/2020	Denied - extension of time.	
10/13/2020	Appellant notified re failure to timely file opening brief.	Defendant and Appellant: Daniel Edward Gonzalez Attorney: Steven S. Lubliner
11/12/2020	Appellant's opening brief.	Defendant and Appellant: Daniel Edward Gonzalez Attorney: Steven S. Lubliner
12/15/2020	Respondent notified re failure to file respondent's brief.	Plaintiff and Respondent: The People Attorney: Steven Taylor Oetting
12/21/2020	Respondent's brief.	Plaintiff and Respondent: The People Attorney: Steven Taylor Oetting
01/12/2021	Granted - extension of time.	Appellant's reply brief. Due on 02/01/2021 By 21 Day(s)

02/02/2021 Granted - extension of time.	Appellant's reply brief. Due on 02/22/2021 By 21 Day(s)
02/22/2021 Appellant's reply brief.	w/no further extns Defendant and Appellant: Daniel Edward Gonzalez Attorney: Steven S. Lubliner
02/23/2021 Case fully briefed.	
03/11/2021 Case briefed and on assignment panel.	
01/11/2022 Issued tentative opinion or disputed issued memo	
01/11/2022 Oral argument waiver notice sent.	
01/11/2022 Request for oral argument filed by:	appellant
01/19/2022 Filed letter from:	Appellant, who is unavailable for oral argument on Apr 5, 2022, May 3, 2022 and May 4, 2022
01/28/2022 Calendar notice sent. Calendar date:	Mar 1, 2022 @ 1:30 p.m.
03/01/2022 Cause argued and submitted.	
03/03/2022 Opinion filed.	(Signed Published)
03/03/2022 Opinion filed.	(Signed Published)
04/12/2022 Service copy of petition for review received.	by appellant
04/12/2022 Record transmitted to Supreme Court.	1 Vol (S274024)
05/25/2022 Petition for review denied in Supreme Court.	dtd May 18, 2022 (appellant) S274024
05/25/2022 Remittitur issued.	
05/25/2022 Case complete.	

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