

No. 23-_____

IN THE
Supreme Court of the United
States

MARDY D. MOLLETT, JR.
Petitioner,
V.

UNITED STATES OF AMERICA.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Does the inclusion of an fifth element of the justification defense for being a felon in possession of a firearm, requiring the Defendant to prove that he “did not maintain the illegal conduct any longer than absolutely necessary,” violate the precedents of this Court?

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PETITION FOR A WRIT OF CERTORARI

Mardy D. Mollett Jr., an inmate currently incarcerated for violation of federal law, by and through undersigned counsel, appointed pursuant to the Criminal Justice Act, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is not published in the Federal Reporter, but is available at 2023 WL 2401189. The Order Denying Rehearing En Banc is not published, and is available at 2023 U.S. App. LEXIS 11955. The District Court did not enter a written opinion on the issue raised herein.

JURISDICTION

The judgment of the Court of Appeals was entered on March 8, 2023. An Order Denying Rehearing En Banc was entered on May 15, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

No provision of the United States Constitution is directly raised as a ground for relief herein.

STATEMENT OF THE CASE

The Defendant was indicted in a four-count indictment, which included two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) and two counts of being an unlawful user in possession of a firearm pursuant to 18 U.S.C. § 922(g)(3).

The Defendant exercised his right to trial. At said trial, following presentation of the evidence, the District Court refused to permit the Defendant to argue the defense of “justification.” Based upon Sixth Circuit precedent, which is an outlier amongst federal and state law, the lower court found that the Defendant had failed to prove an essential element of the defense, namely that the Defendant had not possessed the firearm long than absolutely necessary. This extraneous element is drawn from the Sixth Circuit pattern jury instructions, and cases such as *United States v. Riffe*, 28 F.3d 565, 570 (6th Cir. 1994). The Defendant was not permitted to argue justification, was convicted by the jury, and sentenced to the statutory maximum of 120 months imprisonment.

REASONS FOR GRANTING THE PETITION

There is a significant divergence of opinion amongst the federal circuits as to the elements of the

justification defense. This results in the quite inequitable outcome that the availability of the defense, even upon identical facts, varies wildly from circuit to circuit.

In *Dixon v. United States*, 548 U.S. 1 (2006), this Honorable Court analyzed a four-element test that had been used by the district court below. Since *Dixon*, the Circuits remain extremely divergent in how they handle the justification defense within the context of felon in possession of firearm cases.

The First Circuit briefly utilized the four-part framework adopted by the Supreme Court in *Dixon*. See *United States v. Leahy*, 473 F.3d 401, 409 (1st Cir. 2007). It subsequently reverted to its traditional three-element test. See *United States v. Lebreault-Feliz*, 807 F.3d 1, 3-4 (1st Cir. 2015); First Circuit Pattern Criminal Instructions § 5.04.

The Second Circuit does not utilize published pattern jury instructions. Post-*Dixon* cases indicate that a four-element test is used within that Circuit, though there has been reference made to the fifth element added by the Sixth Circuit that is directly at issue in the case *sub judice*. *United States v. White*, 552 F.3d 240, 247 (2d Cir. 2009).

The Third Circuit uses a four-element test. See Third Circuit Pattern Instruction 8.04; *United States v. Dodd*, 225 F.3d 340, 342 (3d Cir. 2000).

The Fourth Circuit does not utilize published pattern jury instructions. Post-*Dixon* cases reflect that the four-element test is used within the Fourth

Circuit. *United States v. Ricks*, 572 F.3d 198, 202 (4th Cir. 2009).

The Fifth Circuit has opted to use the four-element test. Fifth Circuit Pattern Instruction 1.38; *United States v. Montes*, 602 F.3d 381, 389 (5th Cir. 2010).

As noted above, the Sixth Circuit has created a five-part test, with the extraneous fifth element being a specific requirement that the defendant prove that he did not maintain possession longer than absolutely necessary. Sixth Circuit Pattern Instruction 6.07; *United States v. Newcomb*, 6 F.3d 1129 (6th Cir. 1993); *United States v. Singleton*, 902 F.2d 471 (6th Cir. 1990).

The Seventh Circuit does not have a separate pattern instruction for “justification,” but addresses the issue under the same analytical framework as coercion/duress. *See* Seventh Circuit Pattern Instruction 6.08. The test utilized within the Seventh Circuit is generally treated as having only two separate elements, though admittedly the language is close to that of the traditional four-element test. *See e.g. United States v. Kilgore*, 591 F.3d 890, 893-94 (7th Cir. 2010).

The Eighth Circuit “has not recognized an affirmative defense of legal justification to a violation of 18 U.S.C. § 922(g).” *United States v. Still*, 6 F.4th 812, 816 (8th Cir. 2021).

The Ninth Circuit utilizes a four-element test for justification in cases of felon in possession cases. *See* Ninth Circuit Pattern Instruction 5.9; *United States v. Gomez*, 92 F.3d 770, 775 (9th Cir. 1996).

The Tenth Circuit does not have a separate pattern instruction for the justification defense. Tenth Circuit precedent indicates that, like the Sixth Circuit, a five-element test is utilized to determine whether a justification instruction is warranted. *See United States v. Griffith*, 928 F.3d 855, 868 (10th Cir. 2019); *United States v. Nevels*, 490 F.3d 800, 805 n.3 (10th Cir. 2007).

The Eleventh Circuit utilizes the traditional four-element test. *See* Eleventh Circuit Pattern Instruction S16; *United States v. Deleveaux*, 205 F.3d 1292, 1297-98 (11th Cir. 2000).

Pre-*Dixon* cases within the D.C. Circuit appear to recognize the justification defense, and utilize the four-element test. *See United States v. Mason*, 233 F.3d 619, 622-23 (D.C. Cir. 2000).

By way of summary: one Circuit does not recognize a justification defense for 18 U.S.C. § 922(g) charges (Eighth); one Circuit uses a two-element test (Seventh); one Circuit uses a three-element test (First); one Circuit uses a four-element test, though reference is commonly made to a fifth element (Second); six Circuits use a four-element test (Third, Fourth, Fifth, Ninth, Eleventh, D.C.); and, two Circuits use a five-element test (Sixth and Tenth).

Though not dispositive from a federal standpoint, it is worth noting that the five-element test is also an outlier amongst state criminal jury instructions, and is not commonly used. *See e.g.* State Bar of Arizona, Revised Arizona Jury Instructions (Criminal) § 4.12

(5th Ed. 2019); Judicial Council of California, California Criminal Jury Instructions § 3402 (2021); Colorado Criminal Jury Instructions – Criminal H:30; Connecticut Criminal Jury Instructions 2.7-2 Duress - § 53a-14 (2014); Hawaii Jury Instructions – Criminal - § 7.10; Illinois Model Criminal Jury Instruction 24-25.21 (Compulsion); Illinois Model Criminal Jury Instruction 24-25.22 (Necessity); New Jersey Model Criminal Jury Charges 2C:2-9; New York Criminal Jury Instructions, CJI2nd § 40.00 (NY 2020); North Carolina Pattern Instruction – Criminal 310.10 (June 2019); North Dakota Jury Instructions – Criminal, § K–4.05 (2022 Edition); Massachusetts Model Jury Instructions 9.230 (Rev. 2017); Michigan Model Criminal Jury Instructions, 7.6; Oklahoma Uniform Jury Instructions – Criminal 2nd Ed, §§ 8-19 – 8-23; Virginia Model Jury Instructions – Criminal, 52.300 (Sept. 2019); 11 Wash. Prac. Pattern Jury Instr. Crim. WPIC 18.01 (5th Ed.); Public Defender Services, *Criminal Law Instructions Manual for the State of West Virginia*, § 8.12 (7th Ed. 2018). Cases out of at least two states do indicate that a five-element test may be utilized within their respective jurisdictions. *Flowers v. State*, 922 So. 2d 938, 957 (Ala. Crim. App. 2005); *Marrero v. State*, 516 So.2d 1052, 1054 (Fla 3d DCA 1987).

The United States Sentencing Commission reflects that in 2021, “firearms cases represented the third most common federal offense in fiscal year 2021. There were 8,151 firearms cases reported to the

Commission, accounting for 14.2 percent of all cases.” U.S. Sentencing Commission, *Overview of Federal Criminal Cases – Fiscal Year 2021* (April, 2022).

The wide variance in the availability and elements of the justification defense requires the intervention of this Honorable Court. Thousands of federal offenders are charged with firearms offenses on a yearly basis. A long-standing and pivotal aspect of federal law is to assure that there are not unwarranted disparities in the treatment of similarly-situated offenders from district to district. *See e.g.* 18 U.S.C § 3553(a)(6).

The fact that some Circuits do not even recognize a justification defense, while others require a defendant to prove two, three, four, or five elements, inevitably results in unwarranted disparities of similar individuals, based merely upon the accident of geographic location of the offender.

This Honorable Court should issue a writ of certiorari to address this issue of vital importance to criminal defendants nationwide.

CONCLUSION

For the foregoing reasons, Mr. Mollett respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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