

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

ANTHONY EVANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Anthony Evans, a convicted felon, was the victim of a vicious shooting attack on his life. Mere seconds later, Evans shot his firearm at his assailant's accomplice, whom he reasonably believed was armed and ready to kill him. At Evans's sentencing for felon firearm possession in violation of 18 U.S.C. § 922(g)(1), the district court cross-referenced the Sentencing Guidelines for aggravated assault after finding that he used the firearm to commit assault under California law. Did the district court commit significant procedural error by cross-referencing the aggravated assault Guidelines where it failed to recognize that the government bore the burden of disproving self-defense and that the government failed to meet its burden?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are set forth in the caption to this Petition.

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PETITION FOR WRIT OF CERTIORARI

Anthony EVANS respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The Ninth Circuit's decision, *see* App. 1a-30a, is published at 883 F.3d 1154 (9th Cir. 2018).

JURISDICTION

The Ninth Circuit issued its decision on February 28, 2018. App. 1a. Mr. Evans did not file a petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

United States Sentencing Guidelines 2K2.1, "Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition," provides in pertinent part:

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

United States Sentencing Guidelines 2A2.2, “Aggravated Assault,” provides in pertinent part:

(a) Base Offense Level: 14

(b) Specific Offense Characteristics

...

(2) If (A) a firearm was discharged, increase by 5 levels

California Penal Code § 240, “Assault’ defined,” provides:

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

California Penal Code § 245, “Assault with deadly weapon or force likely to produce great bodily injury; punishment,” provides in pertinent part:

Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment.

STATEMENT OF THE CASE

I. The attempt on Evans’s life¹

On July 15, 2015, Evans, a convicted felon on supervised release, was the victim of a vicious attack while in the Bayview district of San Francisco. App. 4a-5a. A

¹ Not all the facts of this case were addressed in the Ninth Circuit’s decision. As a result, they are set forth at some length here and in Reasons for Granting the Writ, Section II.B. *See infra* at 17-18.

Where appropriate, Evans will cite to the Appellant’s Excerpts of Record (“ER”), which Ninth Circuit Rule 30-1 directs parties to compile instead of the appendix contemplated by Federal Rule of Appellate Procedure 30. *See* Ninth Cir. R. 30-1(a)-(b).

residential surveillance camera captured the incident. *See* Exs. A, B, C.² The footage does not have audio. *See id.*

The footage depicts Evans seated in the front passenger seat of a car driven by his girlfriend, Jamellah Ali-Suluki. *See id.* Ms. Ali-Suluki had double-parked the car alongside a blue car. *See id.* On the sidewalk, several men appear to be loitering in the proximity of the blue car. *See id.*

A man wearing a black sweatshirt approaches Evans at the passenger door. *See id.* Approximately 15 seconds later, he goes to the men on the sidewalk, where he confers with a man in a red shirt. *See id.* Immediately afterwards, the man in the red shirt reaches into the blue car through the front passenger side. *See id.* He then sprints around the car to the passenger side of Ms. Ali-Suluki's car, where he shoots Evans. *See id.* He runs back to the passenger side of the blue car, leans into the front passenger seat, and continues shooting. *See id.* Five of the shots struck Evans.

After stepping away from the blue car, the shooter turns around and appears to hand off his firearm to the man in the black sweatshirt, then flees. *See id.* The man in the black sweatshirt then returns to the blue car, pushes the door closed, and starts moving towards the back of the car while repeatedly looking in Evans' direction. *See id.*

Despite having just been shot five times, Evans manages to stand himself up. *See id.* As the man in the black sweatshirt approaches the back of the blue car,

² Exhibit A includes the original footage; Exhibit B is a brightened version of that footage; and Exhibit C is a zoomed-in version of that footage. As part of his appeal, Evans transmitted all three exhibits to the Ninth Circuit.

Evans starts shooting at him. *See id.* The man in the black sweatshirt then starts fleeing with his right hand in his coat pocket. *See id.* After firing three shots, Evans briefly stops while turning toward Ms. Ali-Suluki, who is approaching the car in a hurry. *See id.* He then fires two more shots. *See id.*

Ms. Ali-Suluki drove Evans to the San Francisco General Hospital. He was immediately taken to surgery to repair an abdomen injury. *See* ER 116-17. Two days later, he had surgery to his right knee and left tibia. *See* ER 113-14. He was discharged eight days after admission in a wheelchair and with a list of eight prescribed medications. *See* ER 130-35.

II. Criminal charges

At the time of the July 15, 2015 events, Evans was on federal supervision in case CR No. 08-00011 JSW. Evans had barely been discharged from the hospital when the Probation Office for the Northern District of California filed a Petition for Arrest Warrant for Offender under Supervision, commonly known as a “Form 12,” alleging, *inter alia*, that he violated his supervised release condition prohibiting him from committing another federal, state, or local crime. ER 217-19. More specifically, the Form 12 alleged that Evans possessed a firearm in violation of 18 U.S.C. § 922(g)(1) and committed assault in violation of California Penal Code § 245 in connection with the July 15, 2015 events. *Id.*

Days before the supervised release revocation hearing, Evans was charged, by indictment, with one count of being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1) in case CR No. 16-00012 JSW. ER

211-15. The indictment was predicated on the same events of July 15, 2015. *See id.* The two cases were related before the same district judge.

III. Guilty plea, admission of supervised release violation, and sentencing hearing

Evans pleaded guilty to the 18 U.S.C. § 922(g)(1) charge without a plea agreement. ER 210. He also admitted the corresponding supervised release violation. ER 211.

In anticipation of sentencing, the Probation Office prepared a presentence investigation report (PSR) in case CR No. 16-00012 JSW and a supervised release violation memorandum in case CR No. 08-00011 JSW.

The PSR noted that the base offense level for Evans's felon firearm possession offense was 14 pursuant to U.S.S.G. § 2K2.1. *See* PSR ¶ 12. Under the Sentencing Guidelines, however, if the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, the Guidelines for that offense applies if the resulting offense level is greater than that determined under section 2K2.1. U.S.S.G. §§ 2K2.1(c)(1)(A), 2X1.1. The PSR determined that because Evans "fired a weapon at another individual with the intent to cause bodily injury," he committed aggravated assault during which a firearm was discharged, and accordingly enhanced his base offense level from 14 under U.S.S.G. § 2K2.1 to 19 under U.S.S.G. §§ 2A2.2(a), (b)(2)(A). PSR ¶ 13. With a three-level adjustment for acceptance of responsibility, the PSR calculated a total offense level of 16. PSR ¶¶ 14-22. It also calculated a criminal history category of VI, which combined with offense level 16 resulted in a Guidelines range of 46-to-57 months. PSR ¶ 84. The

PSR recommended a sentence of 70 months imprisonment and 36 months supervised release, to be served consecutively to any term for the supervised release violation. *See* PSR, Sentencing Recommendation. The government concurred with the Probation Office's Guidelines calculations and its sentencing recommendations. *See* ER 49-53.

Evans objected to the PSR's description of the offense conduct and argued that because he discharged his firearm in self-defense, he did not commit aggravated assault. ER 59-63. Accordingly, he objected to the cross-reference to U.S.S.G. §§ 2A2.2(a), (b)(2)(A) and argued that his total offense level should be 11. ER 63.

At the joint sentencing hearing, the district court invited argument on the cross-reference to the aggravated assault Guidelines and Evans's argument that he acted in self-defense. ER 24-32. The court expressed "sympathy for Mr. Evans, that he was shot and almost killed," ER 31, but questioned the application of self-defense principles given that it "watched the video and taking it in the light most favorable to the defendant, the defendant got out of the car, pointed a – a loaded gun at somebody who was fleeing – pointed it at his back." *Id.* Defense counsel argued it was self-defense because "it comes on the heel of him being traumatized and shot five times as he's cowering in the car. He gets out of the car not knowing whether he's going to get shot some more." *Id.*

The district court commented that it was faced with

an interesting legal paradigm . . . because normally in a situation like this . . . involving self-defense where the government puts on its case, the defendant has a defense – affirmative defense of self-defense, and – and I believe under state law, he has the burden of proof of the affirmative defense.

ER 32. The court, however, believed that “we’re not at a situation where – that situation.” *Id.* Rather,

[w]e’re at a situation where this court has to stand here or sit here as an adjudicatory body to determine all in, is this a – an aggravated assault or one that is legally excused by virtue of a self-defense – a self-defense defense being made out by the facts in the case.

Id.

After further hearing from defense counsel and then from Evans himself, ER 31-38, the court found that Evans “did not initiate the shooting,” but that self-defense did not apply:

[I]t’s quite clear to the court that the defendant get out of the car, did did point the gun at the – either assailant or one of his cohorts, one of his coconspirators, and shot at him.

And there was a – a time delay as well. And then immediately thereafter, as soon as the defendant fired the shots at the back of this person, he got in the car and he – his companion or the person he was with drove him away. He could have driven away a few minutes [sic] earlier without shooting.

So I find that the self-defense does not apply here....

ER 40. The court accordingly ruled that the cross-reference to the aggravated assault Guidelines applied and adopted the PSR’s Guidelines calculation of 46-to-57 months. ER 40-42. It then sentenced Evans to 57 months imprisonment, consecutive to the 24-month sentence for the supervised release violation, and three years of supervised release. ER 5-10, 42-45.

IV. Appellate Proceedings

Evans appealed his sentences to the United States Court of Appeals for the Ninth Circuit. As relevant here, he argued that the district court procedurally erred in enhancing the offense level for his felon firearm possession offense by cross-

referencing the aggravated assault sentencing Guidelines. *See* App. 7a-9a. First, he argued that the district court failed to recognize that *the government* bore the burden of proving by a preponderance of the evidence that he did not act in self-defense. Second, he argued that the government did not meet its burden of proof and, therefore, the district court’s finding that he did not act in self-defense was clearly erroneous.

A panel of the Ninth Circuit affirmed the district court’s offense level calculation in a published decision. *See* App. 1a-30a.³ The panel recognized that the district court “did misstate California law when it noted that ‘under state law, [the defendant] has the burden of proof of the affirmative defense.’” App. 8a. It also agreed with Evans that “California law places the burden on the state to disprove self-defense beyond a reasonable doubt at a criminal trial.” *Id.* Therefore, in Evans’s case, “the government’s burden was to disprove self-defense by a preponderance of the evidence, as is generally required when a party seeks to adjust the offense level at sentencing.” *Id.*

The panel acknowledged that “[i]t is not easy to discern where the court placed the burden of proof” and that “the court may have based its conclusion on an objective view of the record without allocating burdens to either side,” but declined to hold that the district court erred. *Id.* Instead, it found any potential error to be harmless because “[t]he surveillance video clearly showed that Evans opened fired on a fleeing man.” App. 9a. Therefore, “[u]nder the circumstances, any failure by

³ The Ninth Circuit vacated and remanded in part the sentence for the substantive offense for the district court to correct several conditions of supervised release. App. 19a. It also affirmed the supervised release revocation sentence. *Id.*

the district court to properly assign the burden of proof did not affect its finding that Evans did not act in self-defense.” *Id.*

REASONS FOR GRANTING THE WRIT

The interplay between federal and state law in federal criminal proceedings has been a fruitful source of litigation, including before this Court. The most notable example is the application of the categorical approach to prior state convictions for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), which prescribes a 15-year mandatory minimum sentence if a federal defendant is convicted of being a felon in possession of a firearm following three prior convictions for a “violent felony.” Due to the complexity of the categorical approach inquiry and the federal courts’ lack of familiarity with state law, this Court has been called to step in several times over the past five years to decide seemingly simple questions such as whether various state burglary convictions qualify as predicate offenses for ACCA purposes. *See Decamps v. United States*, 570 U.S. 254 (2013) (California burglary); *Mathis v. United States*, 136 S. Ct. 2243 (2016) (Iowa burglary); *United States v. Stitt*, – S. Ct. –, 2018 WL 1901589 (Apr. 23, 2018) (granting the writ of certiorari as to Tennessee burglary); *United States v. Sims*, – S. Ct. –, 2018 WL 1901590 (Apr. 23, 2018) (same as to Arkansas burglary).

Given ACCA’s drastic sentencing consequences for federal defendants, the Court has rightfully focused its attention on it. But in federal courts around the country, defendants are routinely subject to a less high-profile, but no less pernicious practice: the enhancement of their sentences due to cross-references, *i.e.*, instructions to apply another offense Guidelines than the ones for the offense of

conviction. *See* U.S.S.G. § 1B1.5. Cross-references are often triggered by conduct over which the federal courts would otherwise have no jurisdiction, and which could be prosecuted only under *state* law, as happened in Evans's case. *See, e.g.*, U.S.S.G. § 2K2.1(b)(6)(B), (c) & cmt. n.14(c) (stating that the cross-referenced offenses may be a federal, state, or local offense). Moreover, cross-references are often triggered by conduct that state authorities never prosecuted, as with Evans's case, presumably because of the insufficiency of the evidence to support a criminal conviction beyond a reasonable doubt. Yet federal courts punish the defendants for that very conduct, usually on a mere preponderance of the evidence showing.

Cross-references based on state offenses create a high risk that sentences may be improperly enhanced due to the federal courts' lack of familiarity with state law, including as it concerns the elements of the offense, defenses, and allocation of the burden of proof as to various defenses. This risk is further compounded due to the state law's interplay with federal law regarding the burden and quantum of proof at sentencing.

Evans's case is a perfect example of this problem. In order for the cross-reference to the aggravated assault Guidelines to apply, the government bore the burden of showing, by a preponderance of the evidence, that Evans's conduct met the elements of assault under California law. But the district court failed to recognize that, under California law, the state bears the burden of disproving self-defense beyond a reasonable doubt at a criminal trial. The two rules combined to require that the government bore the burden of disproving self-defense by a preponderance of the evidence at Evans's sentencing. But the district court relieved

the government of its burden and instead assessed the evidence “as an adjudicatory body.” Applying this undefined standard, the court found, despite clear evidence to the contrary, that Evans did not act in self-defense because he shot at a fleeing man. The Ninth Circuit then perpetuated these errors by refusing to critically assess the surveillance video and holding instead that “any failure by the district court to properly assign the burden of proof” was harmless. App. 9a.

Evans’s case therefore presents an important question of federal law that has not been, but should be, settled by this Court: whether a district court’s misallocation of the burden of proof at sentencing due to its misapprehension of the relevant state law is harmless where the evidence conclusively rebuts the court’s factual findings.

I. The Sentencing Guidelines play a central role at sentencing

“The Sentencing Guidelines provide the framework for the tens of thousands of federal sentencing proceedings that occur each year.” *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016). All sentencing proceedings are to begin by determining the applicable Guidelines range. *Gall v. United States*, 552 U.S. 38, 49 (2007). The range must be calculated correctly. *Id.* In this sense, the Guidelines are “the starting point and the initial benchmark,” *id.*, and are to be kept in mind throughout the process, *id.* at 49-50 & n.6.

“The Guidelines’ central role in sentencing means that an error related to the Guidelines is particularly serious.” *Molina-Martinez*, 136 S. Ct. at 1345. Thus, “[a] district court that ‘improperly calculat[es]’ a defendant’s Guidelines range has committed a ‘significant procedural error.’” *Id.* at 1345-46 (quoting *Gall*, 552 U.S. at

51). Even if a defendant did not object to the Guidelines calculation in district court and plain error applies on appeal, “a defendant sentenced under an incorrect Guidelines range [is] able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range. That probability is all that is needed to establish an effect on substantial rights for purposes of obtaining relief under Rule 52(b).” *Id.* at 1349.

The Ninth Circuit reviews a district court’s selection and interpretation of the correct Guidelines de novo. *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc). It reviews the district court’s factual findings for clear error. *Id.* Finally, it generally reviews a district court’s application of the Guidelines to the facts of a specific case for abuse of discretion. *Id.*

II. The district court committed significant procedural error at Evans’s sentencing

A. The district court erred in failing to recognize that the government bore the burden of disproving self-defense by a preponderance of the evidence

As a general rule, the party seeking to adjust an offense level must establish by a preponderance of the evidence that the adjustment is merited. *See United States v. Charlesworth*, 217 F.3d 1155, 1158 (9th Cir. 2000). Here, the district court increased Evans’s offense level from 14 to 19 pursuant to U.S.S.G. § 2K2.1(c)(1)(A) and U.S.S.G. §§ 2A2.2(a), (b)(2)(A), after rejecting his argument that he acted in self-defense and therefore finding that he committed aggravated assault. In so finding, the district court failed to hold the government to its burden of proving that the enhancement applied.

For the enhancement to apply, the government had to prove by a preponderance of the evidence that Evans used the firearm “in connection with the commission or attempted commission of another offense.” U.S.S.G. § 2K2.1(c)(1)(A). “Another offense’, for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.” U.S.S.G. § 2K2.1 cmt. n.14(C). The relevant offense in Evans’s case was assault under California law.

Under California law, assault is “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” Cal. Pen. Code § 240. Punishment for assault varies based on the location of the offense, the identity of the victim, and/or the means employed to commit the offense. *See id.* §§ 241-241.8, 244-245.5. For example, “[a]ny person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment.” *Id.* § 245(a)(2).

“Self defense negates culpability for assaultive crimes, whether or not the assault results in death.” *People v. Adrian*, 135 Cal. App. 3d 335, 340, 185 Cal. Rptr. 506 (Cal. Ct. App. 1982) (so holding in a case involving assault with a deadly weapon, Cal. Pen. Code § 245(a)). “In either event self defense goes directly to guilt or innocence.” *Id.* Therefore, at trial, “the burden of persuasion [that the defendant did not act in self-defense] is on the state.” *Id.* at 340-41.

The California Model Criminal Jury Instructions similarly place the burden of proving at trial that the defendant did not act in self-defense on the state. *See* CALCRIM No. 875 (“Assault with Deadly Weapon or Force Likely to Produce Great Bodily Injury (Pen. Code, §§ 240, 245(a)(1)-(4), (b))”) (“To prove that the defendant is guilty of this crime, the People must prove that: . . . 5. The defendant did not act in self-defense/[or] in defense of someone else.”); CALCRIM No. 3470 (“Right to Self-Defense or Defense of Another (Non-Homicide)”) (“The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful (self-defense/[or] defense of another). If the People have not met this burden, you must find the defendant not guilty of _____ <insert crime(s) charged>.”). In fact, even if the defendant fails to request it, California courts have a sua sponte duty to give the relevant jury instruction on self-defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant’s theory of the case. *See id.*, Bench Notes, Instructional Duty (citing *People v. Gonzalez*, 74 Cal. App. 4th 382, 389-90, 88 Cal. Rptr. 2d 111 (Cal. App. Ct. 1999); *People v. Breverman*, 19 Cal.4th 142, 157, 77 Cal. Rptr. 2d 870 (Cal. 1998)).

Because, under California law, it is the state’s burden, at trial, to prove that a defendant charged with assault did not act in lawful self-defense, it follows that it was the government’s burden to prove by a preponderance of the evidence that Evans did not act in self-defense at the time of the July 15, 2015 shooting. *See, e.g., United States v. Raglin*, 500 F.3d 675, 677 (8th Cir. 2007) (holding that where the defendant presented evidence “arguably supporting self-defense or a justification defense to the charge of aggravated assault” under Arkansas law, the government

had to negate that defense by a preponderance of the evidence for the sentencing enhancement under U.S.S.G. § 2K2.1(b)(6) to apply).

The Ninth Circuit agreed on the law with Evans. App. 8a. But, despite the unambiguos record of proceedings, it declined to hold that the distict court erred by misallocating the burden of proof on self-defense. Instead, it hedged and qualified its opinion, stating that the district court’s “remarks were somewhat ambiguous” and that the court “may have based its conclusion on an objective view of the record without allocating burdens to either side.” *Id.*

Given the Ninth Circuit’s unwillingness to acknowledge the district court’s flagrant legal error, it is unsurprising that it was also unwilling to critically assess the surveillance video to determine whether the government met its burden of disproving self-defense. That evidence, as explained in detail below, conclusively demonstrates that the government did not meet its burden.

B. The government did not meet its burden of proof and the district court’s finding that Evans did not act in self defense was clearly erroneous

Under California law, a defendant acts in lawful self-defense if:

1. The defendant reasonably believed that (he/she/ [or] someone else/ [or] <insert name of third party>) was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully];
2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;
- AND
3. The defendant used no more force than was reasonably necessary to defend against that danger.

CALCRIM 3470. There is no duty to retreat under California law and a defendant “is entitled to stand his or her ground and defend himself or herself and, if reasonably, necessary, to pursue an assailant until the danger . . . has passed.” *Id.*

Accordingly, in order to meet its burden of proof, the government had to show by a preponderance of the evidence any of the following: that at the time he discharged his firearm on July 15, 2015, Evans did not reasonably believe that he was in imminent danger of suffering great bodily injury; that he did not reasonably believe that the immediate use of force was necessary to defend against that danger; or that he used more force than was reasonably necessary to defend against that danger. *Cf. id.*

In the district court’s view, adopted by the Ninth Circuit, Evans did not act in self-defense because he allegedly “opened fire on a fleeing man.” App. 9a. The video evidence – the *only* evidence proffered by the government as to the issue of self-defense – belies this interpretation of the events. Those events spanned less than 70 seconds. *See* Exs. A, B, C. Fifty-six seconds into the surveillance video,⁴ Ms. Ali-Suluki’s gold car double-parks by the blue car. The man in the black sweatshirt, who had been standing in the street, immediately approaches the passenger side of Ms. Ali-Suluki’s car and can be seen standing there, interacting with Evans, from approximately 1:00 to 1:15. Meanwhile, several men, including Evans’s shooter, stand on the sidewalk by the blue car. At 1:16, the man in the black sweatshirt leaves Evans and heads to the men on the sidewalk. At approximately 1:25, Ms.

⁴ For ease of reference, Evans will use the relevant time stamps on the video recording to describe the events.

Ali-Suluki leaves the car, while a man in a white shirt approaches the right side of the car and starts talking to Evans.

Once on the sidewalk, the man in the black sweatshirt interacts briefly with the shooter from 1:21 to 1:23, then engages in close conversation with him from 1:28 to 1:35. Immediately thereafter, the shooter reaches inside the blue car through the front passage side door, which stands ajar, and rummages for several seconds. He then starts sprinting around the back of the blue car, toward Evans, with the right arm extended and holding a gun.

At 1:44, the man in the white shirt can be seen turning and covering his face, then running away between the cars. The men on the sidewalk duck and then start running as well, with the exception of the man in the black sweatshirt, who remains by the blue car. The shooter then runs back to the blue car, crouches by the front passenger door and leans into the front passenger seat with his right arm extended across the interior of the blue car toward Evans. While the video does not clearly show the shooter at every critical moment, it has been undisputed in this case that the video depicts his shooting of Evans. *See* ER 50 (the government stating that the man “shot at the defendant, ran to hide behind the sedan, shot at the defendant again, then ran away”).

At 1:49, the shooter backs away from the blue car and heads toward the man in the black sweatshirt. The man, who was unhurriedly walking away from the blue car while other people were hiding or running, turns towards the shooter. At 1:51, the video shows the shooter handing an object to the man in the black sweatshirt. The shooter then runs away, with both his hands free. Meanwhile, the man in the

sweatshirt returns to the blue car, looking repeatedly toward Evans was seated. After he pushes the door closed, he slowly makes his way towards the back of the blue car, all the while looking toward Evans.

At 1:58, despite his injuries, Evans manages to stand himself up. As Evans starts shooting at 1:59, the man in the black sweatshirt starts running towards the camera. As he comes close into the view of the camera, he can be seen tucking his right hand into his right coat pocket. At 2:01, Evans stops briefly and turns towards Ms. Ali-Suluki, who came running from the opposite direction, then turns back again and shoots twice more. He then gets back in the car and Ms. Ali-Suluki drives away.

Contrary to the view of the district court's and the Ninth Circuit, then, the video recording clearly shows that Evans did not "open[] fire on a fleeing man," App. 9a, but that *the man in the black sweatshirt fled in response to Evans's shooting at him*. This is a subtle, but crucial distinction. The courts' findings imply that the man in the black sweatshirt could not have posed a danger to Evans because he was already fleeing and, therefore, Evans could not have reasonably believed that he was in imminent danger and needed to defend himself. In contrast, if the man in the black sweatshirt only fled because Evans started shooting at him, Evans could claim self-defense, assuming all other requirements are met.

Indeed, even a convicted felon such as Evans has "the right to defend himself, stand his ground, and use the amount of force reasonable under the circumstances." *People v. Rhodes*, 129 Cal. App. 4th 1339, 1346, 29 Cal. Rptr. 3d 226 (Cal. Ct. App.

2005)). Here, the government failed to disprove that Evans acted within his legal rights at the time he shot at the man in the black sweatshirt.

First, both courts below recognized that the man was not an innocent bystander who was trying to get away from a dangerous situation, but the accomplice of Evans's shooter. *See* App. 7a (acknowledging that "the surveillance video suggest that man he fired at was in league with the shooter"); ER 40 (stating that "it's pretty clear that the defendant did not initiate the shooting, it's quite clear to the court that the defendant get out of the car, did point the gun at the – either assailant or one of his cohorts, one of his coconspirators, and shot at him").

Second, the government failed to disprove that Evans reasonably believed that he was in imminent danger of suffering bodily injury or that he reasonably believed that the immediate use of force was necessary to defend against that danger. When deciding whether the defendant's beliefs were reasonable, California juries are instructed to "consider all the circumstances as they are known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed." CALCRIM 3470. "If the defendant's beliefs were reasonable, the danger does not need to have actually existed." *Id.* In fact, the defendant's belief that he "was threatened may be reasonable even if [he] relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true." *Id.*

A reasonable person in Evans's circumstances could have reasonably believed that the man in the black sweatshirt intended to kill him.⁵ Evans could have reasonably believed, based on the man's staying behind after the shooter ran away, all the while keeping an eye on Evans, that the man wanted to make sure that he was dead and, if not, to kill him himself. Evans could have also reasonably believed that the man was armed. The video itself appears to show the shooter handing off his gun to the man in the black sweatshirt immediately after the shooting, which is corroborated by the fact that the shooter is seen fleeing from the scene with both hands free, while the accomplice is seen fleeing with his right hand in his pocket. Furthermore, Evans could have reasonably believed that the man in the black sweatshirt was armed because of his role in his shooting, his complicity with an armed individual, and his apparent willingness to stay behind to finish off the job. Under these circumstances, having just been shot at numerous times and hit five times, Evans could have reasonably believed that his shooter's accomplice was ready to kill him and that he needed to shoot to defend against him.

Critically, Evans started shooting while he could have reasonably believed that he was in imminent danger of getting killed, not after the danger had passed. The man in the black sweatshirt kept Evans under surveillance after the shooting, appeared to move toward him, and only started fleeing once Evans got up from the car and started shooting at him. And having starting to shoot, Evans had no duty to drive away or otherwise retreat, as the district court suggested. *See* ER 40.

⁵ Evans uses conditional language because it was the government's burden to disprove, not his to prove, self-defense.

Rather, he had the legal right to shoot and even “pursue [his] assailant until the danger . . . has passed.” CALCRIM 3470. Evans had no way of knowing that the man in the black swatshirt would not turn and shoot at him while fleeing or hide behind a car or a garbage can and shoot at him. Thus, Evans could have reasonably believed that continuing to shoot was necessary to defend against the continuing danger the man in the black sweatshir posed to his life.

In conclusion, given the traumatic attempt on his life and the injuries that he had just suffered, and given the actions of the man in the black shirt immediately before and after his shooting, a reasonable person in Evans’s position could have reasonably believed that he was in immediate danger of being killed and needed to act immediately to defend against that danger. The government failed to meet its burden of disproving by a preponderance of the evidence that Evans acted in lawful self-defense.

Accordingly, the district court’s finding that Evans did not discharge his firearm in self-defense and the Ninth Circuit’s decision upholding that finding were clearly erroneous. Because the finding underlay the district court’s decision to apply the cross-reference to the aggravated assault Guidelines, the district court committed significant procedural error. Evans is therefore entitled to resentencing under the properly-calculated, felon firearm possession Guidelines.

CONCLUSION

For the aforementioned reasons, the Court should grant this petition for a writ of certiorari and reverse the Ninth Circuit.

Respectfully submitted,

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s/ Carmen A. Smarandoiu

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