

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-30165

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UNITED STATES of AMERICA,

Plaintiff-Appellee,

versus

MICHAEL A. BERNARD,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
(CR-93-316-MAG-M)

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(June 2, 1995)

Before WISDOM, DUHÉ and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:\*

Michael Anthony Bernard was found guilty of being a convicted felon in possession of a firearm. 18 U.S.C. § 922(g)(1). On appeal, he argues that the court erred in denying his requested jury instruction on the defense of justification. Finding the court did not abuse its discretion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

On the evening of August 2, 1993, agents for the Bureau of Alcohol, Tobacco, and Firearms were in the process of arresting

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

four individuals for possession of a substantial number of firearms and crack cocaine at the residence of Gary Ray in New Orleans when they observed Bernard enter the house. One of the agents noticed a bulge in Bernard's pants which turned out to be a large semi-automatic assault pistol with a thirty-round clip. The gun was loaded and in a ready-to-fire position. The agents took the gun from Bernard and, after learning he was a convicted felon, arrested him.

Previously, in January 1993, Bernard had pleaded guilty to manslaughter and received a suspended sentence and two years probation. At the arraignment, the decedent's mother shouted out in court "it's not over until [the mother] say[s] it's over." Some weeks later, Bernard was shot at by unknown individuals near Canal Street in New Orleans, Louisiana. Bernard called the police but they never arrived. He also was attacked by unknown assailants in July 1993 near Tchoupitoulas Street in New Orleans, Louisiana. Again, Bernard called the police, but they did not respond.

In July of 1993, Bernard and his family began receiving threatening phone calls detailing specific acts of violence against him and his family. On July 24, one caller warned that if they could not get Bernard, they would get his cousin, James Whittington. That evening, Bernard's cousin was shot outside a barroom in uptown New Orleans.

Two days later, Bernard gave Gary Ray \$150 for a gun. Bernard borrowed the gun for a week "just in case an emergency occur[red] at the house. . . ." He stored it in a safe on a shelf in his

closet, as he did not think it necessary to take the gun with him when he left the house. He was in the process of returning the gun when he was arrested.

Prior to trial, the government filed a motion in limine to preclude Bernard's anticipated attempt to raise the defense of coercion or duress.<sup>1</sup> The court declined to rule on the motion until the conclusion of the trial, at which time it refused to give Bernard's requested jury instruction on that defense. The jury found Bernard guilty of being a convicted felon in possession of a firearm, and the court sentenced him to 39 months of imprisonment.

## II. JUSTIFICATION DEFENSE INSTRUCTION

Bernard contends that the district court erred in denying his request for an instruction on his defense of justification.<sup>2</sup>

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<sup>1</sup> "The proper name of this defense has apparently not been established." United States v. Harper, 802 F.2d 115, 117 n.1 (5th Cir. 1986). Throughout this opinion, it will be referred to interchangeably as the defense of justification, coercion or duress.

<sup>2</sup> Bernard submitted a written proposed jury instruction on coercion or duress and also orally requested the following jury instruction conditionally submitted by the government:

The defendant contends that he was not acting willfully because he was acting under coercion or duress. In a court of law, the term coercion or duress has a very particular meaning. In order to provide a legal excuse, the claimed coercion or duress must meet all of the following requirements:

First: The defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury and the coercion or duress must be in operation at the time of the acts which you may find that the defendant committed;

Second: The defendant had not recklessly or

Bernard asserts that he needed the firearm for self-defense, because he was being stalked by the relatives of his manslaughter victim. Bernard further asserts that the firearm was necessary to protect his family.

This Court reviews the district court's refusal to give a requested jury instruction for an abuse of discretion. United States v. Pennington, 20 F.3d 593, 600 (5th Cir. 1994). "The refusal to give a jury instruction constitutes error only if the instruction (1) was substantially correct, (2) was not substantially covered in the charge delivered to the jury, and (3) concerned an important issue so that the failure to give it seriously impaired the defendant's ability to present a given defense." Pennington, 20 F.3d at 600 (citation omitted). As for

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negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;

Third: The defendant had no reasonable, legal alternative to violating the law, that is, a chance both to refuse to do the criminal act and also avoid the threatened harm; and

Fourth: That a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm.

A general fear, or an apprehension of danger that is vague or imprecise or that is not a fear of immediate harm or death, is not sufficient to substantiate a defense of coercion.

Finally, even when an initial step in a criminal venture is the product of duress or coercion, if the defendant of his own volition decides to continue with the criminal enterprise after there is no reason to be afraid, then he cannot raise the defense of coercion or duress.

the first and second requirements, the government does not contend that the proposed instruction is substantially incorrect or that the proposed instruction is covered in the submitted charge. Therefore, the only question is whether Bernard was entitled to present this defensive theory to the jury.

A district court's refusal to charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to render the accused innocent, is reversible error. United States v Stowell, 953 F.2d 188, 189 (5th Cir.), cert. denied, 503 U.S. 908, 112 S.Ct. 1269 (1992); United States v. Schmick, 904 F.2d 936, 942 (5th Cir. 1990), cert. denied, 498 U.S. 1067, 111 S.Ct. 782 (1991). A defendant may pose a justification defense to the charge of being a felon in possession of a firearm. United States v. Harvey, 897 F.2d 1300, 1304 (5th Cir.), cert. denied, 498 U.S. 1003, 111 S.Ct. 568 (1990), overruled on other grounds, United States v. Lambert, 984 F.2d 658, 661-62 (5th Cir. 1993) (en banc).

To prevail on such a defense, Bernard had to show that (1) he or a member of his family was under an unlawful, present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or seriously body injury; (2) he had not recklessly or negligently placed himself in a situation in which it was probable that he was forced to choose the criminal conduct (possession of the firearm); (3) he had no reasonable legal alternative to violating the law, that is, no chance to refuse to do the criminal act and to avoid the threatened harm; and (4) a

direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm. Harvey, 897 F.2d at 1304-05; United States v. Liu, 960 F.2d 449, 454 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 113 S.Ct. 418 (1992).

For a felon to be justified in arming himself, he must be under a "present, immediate, and impending threat . . . of death or serious bodily injury." Liu, 960 F.2d at 453 (internal quotation marks and parentheses omitted). The immediacy element has been described as allowing for possession of a firearm "only . . . during the time he is endangered. Possession either before the danger or for any significant period after it remains a violation." United States v. Panter, 688 F.2d 268, 272 (5th Cir. 1982); United States v. Harper, 802 F.2d 115, 118 (5th Cir. 1986). In Panter, the defendant (Panter) had a brief argument with an intoxicated man in a bar. 688 F.2d at 269. The man stabbed Panter in the abdomen with a pocketknife. Panter alleged that he reached under "the bar for a club that he knew was kept there." Id. However, instead of finding a club, his hand fell upon a pistol. Panter then shot and killed his assailant. We held "that where a convicted felon, reacting out of a reasonable fear for the life or safety of himself, in the actual, physical course of a conflict that he did not provoke, takes temporary possession of a firearm for the purpose or in the course of defending himself, he is not guilty of violating [18 U.S.C.] § 1202(a)(1)."<sup>3</sup> 688 F.2d at 272 (emphasis

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<sup>3</sup> Although 18 U.S.C. § 922(g)(1) is the statute at issue in this case, both statutes involve prohibiting a convicted felon from possession a gun.

added).

We must view the facts in the light most favorable to Bernard. Panter, 688 F.2d at 269. Bernard introduced the following evidence to show that an emergency existed: the statement made by the mother of his manslaughter victim in court in January of 1993, threats over the phone; being shot at on the streets of New Orleans during 1993, and his cousin being shot while outside a bar on July 24, 1993. Bernard stated that he armed himself, "just in case" he needed a firearm, for approximately one week, from July 26, 1993, until he was apprehended on August 2, 1993 (he testified he was in the process of returning the weapon), and that for this time he did not take the weapon out of his house but kept it in a safe on a shelf in his closet.

The immediacy factor is a key factor in analyzing this issue. The question is whether there was an immediate emergency justifying Bernard arming himself and remaining armed for eight days. Again, viewing the evidence in the light most favorable to Bernard, while he demonstrated that he had been in danger while walking on the streets of New Orleans over a seven-month period, the circumstances did not show that for the week after July 26, he was "in the actual physical course of a conflict" as described in Panter, supra. There was no particular immediate danger that justified possession of the weapon two days after the attack on his cousin. Accordingly, answering this question affirmatively would be an expansion of the immediacy requirement. We decline to do so.

Additionally, prior caselaw indicates that Bernard has failed to show that he had no reasonable, legal alternative to violating the law.<sup>4</sup> In United States v. Gant, 691 F.2d 1159, 1162-63 (5th Cir. 1982), two undercover officers entered the business offices of a transportation company owned by the defendant (Gant), a convicted felon. The officers attempted to sell Gant a machine gun, but he refused and summoned an employee from the storage area. That employee also refused to purchase the gun. Nevertheless, the officers continued to press them to buy the gun. Gant and his employee excused themselves and conferred in the storage area. A few weeks earlier, there had been a robbery attempt at the office, and they thought that this was another one. They agreed to try to stop this one by scaring off the men. The employee was carrying a pistol, and he suggested to Gant that he should retrieve a gun from the filing cabinet. Gant did so and reentered the office with the pistol protruding from his pocket. The officers then placed them under arrest. This Court opined that "[t]he most obvious legal remedy was simply to call the police." 691 F.2d at 1164. Similar to the instant case, Gant testified that he previously had called the police but they were slow to respond. We found that one contact did not establish that such an option was illusory. Likewise, Bernard has not shown that calling the police would have

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<sup>4</sup> In regard to whether Bernard was responsible for placing himself in the threatening situation, the government contends that Bernard's drug-dealing activity before and after his manslaughter offense created the dangerous situation. However, assuming Bernard's allegations to be true, his vendetta scenario does not embrace a continuing provocation on his part.



been futile.<sup>5</sup> Bernard's evidence fails to establish that he did not have the time or opportunity to make any choice other than to use a weapon to defend himself.

Given the above-cited precedent (Panter and Gant) established by this Court, we are constrained to find that the evidence is insufficient to warrant the justification defense instruction. The district court thus did not abuse its discretion in denying the requested instruction.

In a related argument, Bernard contends that the district court not only erred when it refused to give his requested jury charge on his justification defense, but that it essentially charged the jury that he was guilty when it gave its reasons for denying the charge. Specifically, Bernard challenges the following statement made by the court when explaining why it would not give a charge on the justification defense: "I've decided that it doesn't measure up and that I should not send to the jury the notion that there is a defensive contention worthy of their deliberation in the course of this criminal trial."<sup>6</sup>

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<sup>5</sup> Although Bernard testified that the police did not respond when he phoned regarding the shooting near Broad and Canal streets, he did testify that on another occasion he talked to the police about his situation and was assured that if the assailant came to his house and he called, they would respond.

<sup>6</sup> The government contends that this issue should be reviewed for "plain error" because Bernard did not articulate the grounds for his objection to the court's ruling. The record reflects, however, that counsel objected immediately after the court's ruling as follows:

[COUNSEL] "Your Honor, may I, before the United States attorney begins [his closing argument], object to the ruling of the Court?"

A claim of judicial misconduct is reviewed, not by focusing on isolated statements, but by focusing on "the totality of the circumstances, considering factors such as the context of the remark, the person to whom it is directed, and the presence of curative instructions." United States v. Lance, 853 F.2d 1177, 1182 (5th Cir. 1988). "As a general rule," to show judicial bias, a defendant must demonstrate that the error was substantial and that it prejudiced his case. Id. Because Bernard was not entitled to the requested justification instruction, the court's explanation of the same did not amount to judicial misconduct.<sup>7</sup>

#### CONCLUSION

For the above stated reasons, the judgment of the district court is AFFIRMED.

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THE COURT: Yes, sir.

[COUNSEL] May I object to the curtailment of my closing argument which that ruling implies?

THE COURT: Well, I think that your objection is certainly noted and entered on the record. . . .

Id. at 242. Counsel's grounds for objecting are clear from the record, and he preserved the issue for full appellate review.

<sup>7</sup> At oral argument, counsel for Bernard abandoned the claim that the district court committed reversible error when it permitted evidence of his having received an other than honorable discharge from the Navy.