

For Dockets See [08-4462](#)

United States Court of Appeals, Fourth Circuit.
UNITED STATES OF AMERICA, Plaintiff - Appellee,

v.

Michael L. GORE, Defendant - Appellant.

No. **08-4462**.

October 27, 2008.

On Appeal from the United States District Court for the Northern District of West Virginia at Clarksburg

Brief of Appellant

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SUBJECT MATTER AND JURISDICTION

This appeal is a criminal case which arose out of an altercation between Michael L. Gore and several

guards on July 8, 2007, at FCI Gilmer, in Gilmer County, West Virginia. Mr. Gore was before the district court on an indictment charging him with one count of knowingly and forcibly assaulting a federal prison guard in violation of [18 U.S.C. § 111\(a\)](#) and [\(b\)](#) and one count of knowingly and forcibly resisting, opposing and impeding a federal prison guard in violation of [18 U.S.C. § 11](#) l(a) and (b). At trial, counsel for Mr. Gore raised the issue of self-defense and introduced evidence in support of that defense. The district court denied Mr. Gore's requested jury instruction on self-defense, instead giving an instruction which permitted Mr. Gore to use self-defense only if he was under imminent threat of serious bodily injury or death from correctional officers at the prison. Mr. Gore was subsequently convicted on both counts under the indictment. Mr. Gore now appeals from a final decision of the United States District Court for the Northern District of West Virginia. The district court had jurisdiction pursuant to [18 U.S.C. § 3231](#), and this Court possesses jurisdiction pursuant to [28 U.S.C. § 1291](#).

STATEMENT OF ISSUE

This appeal, which is a case of first impression in the Fourth Circuit, presents a pure question of law: whether the right of self-defense for conduct charged under [18 U.S.C. § 111](#) is conditioned on the presence of an imminent threat of death or serious bodily harm, where the statute itself is silent on the requirement and where the accepted law of self-defense actually provides that one may repel a lesser threat with reasonable force.

STATEMENT OF THE CASE

On September 12, 2007, Michael L. Gore was indicted on one count of knowingly and forcibly assaulting a federal prison guard in violation of [18 U.S.C. § 111\(a\)](#) and [\(b\)](#) and one count of knowingly and forcibly resisting, opposing and impeding a federal prison guard in violation of [18 U.S.C. § 111\(a\)](#) and [\(b\)](#). J.A. 8-9.^[FN1] Mr. Gore pled not guilty to the charges in the indictment. The District Court refused the self-defense instruction proffered by the Appellant, *see* J.A. 112-14, and instead gave an instruction which required the Appellant to show that he was under an imminent threat of serious bodily injury or death. J.A. 510-12. Mr. Gore was convicted in the Northern District of West Virginia after a jury returned a verdict of

guilty on both charges. J.A. 517-20. Mr. Gore was sentenced to 87 months imprisonment on each count, concurrently, to run consecutively with his previous sentence. J.A. 537. Mr. Gore now appeals from his convictions on the basis that the district court erred in instructing the jury in order to successfully raise a defense of self-defense, Mr. Gore was required to be under imminent threat of serious bodily injury or death. A timely notice of appeal has been filed in this matter. J.A. 542-43.

FN1. Citations herein to “J.A. ____” refer to the contents of the Joint Appendix filed by the parties in this appeal.

STATEMENT OF FACTS

This appeal stems from an altercation on July 8, 2007 between Michael L. Gore and correctional officers employed by the Bureau of Prisons at FCI Gilmer, in Glenville, West Virginia, where Mr. Gore was an inmate. J.A. 521. The District Court denied Appellant's requested jury instruction on self-defense, which would have properly instructed the jury that “if the Correctional Officer uses more force than appears reasonably necessary, the person stopped may defend against the excessive force, using only the amount of force that appears reasonably necessary for his protection.” J.A. 113. Instead, the district court gave the jury an instruction which included, as an essential element of a defense of self-defense, that the inmate be “under an unlawful present or imminent threat of serious bodily injury or death.” J.A. 511. Mr. Gore was subsequently convicted of one count of knowingly and forcibly assaulting a federal prison guard in violation of [18 U.S.C. § 111](#) (a) and (b) and one count of knowingly and forcibly resisting, opposing and impeding a federal prison guard in violation of [18 U.S.C. § 111](#) (a) and (b).

Testimony at trial established that on July 8, 2007, while Mr. Gore was walking back from the dining facility to his housing unit after the evening meal, he was stopped by Officer Jimmy Wegman, a corrections officer employed at FCI Gilmer. J.A. 151. Mr. Gore was stopped as part of a random pat down search customarily conducted after meal times in order for officers to ensure that prisoners do not have contraband on their persons. J.A. 151. There was conflicting evidence presented at trial concerning the circumstances leading up to the altercation. *Compare* J.A. 153-155 *with* J.A. 375-377. According to Mr. Gore's

testimony, after Officer Wegman completed the pat down, Officer Wegman cursed at Mr. Gore. J.A. 376. Mr. Gore then accused Officer Wegman of abusing his authority in violation of prison rules by using disrespectful language to him, and Officer Wegman advised Mr. Gore to “write it up” and sent him to the lieutenant's office. J.A. 377. According to Officer Wegman's testimony, however, he conducted a pat-down search of Mr. Gore, and proceeded to ask Mr. Gore his name. J.A. 153. Mr. Gore did not initially provide Officer Wegman with his name, but after several inquiries, Mr. Gore identified himself to Officer Wegman. J.A. 153. At that time, Officer Wegman informed Mr. Gore that he was sending him to the lieutenant's office. J.A. 153-154. According to Officer Wegman, Mr. Gore subsequently cursed at Officer Wegman, and at no time did Officer Wegman use abusive language toward Mr. Gore. J.A. 154-155.

It is undisputed that after the verbal exchange between Officer Wegman and Mr. Gore, Mr. Gore proceeded towards the lieutenant's office as he was instructed to do by Officer Wegman. J.A. 144. When Mr. Gore approached Lieutenant Jensen, Mr. Gore attempted to explain what had occurred between him and Officer Wegman. J.A. 226-27, 381. According to Mr. Gore, after a verbal exchange between him and Lieutenant Jensen, Officer Gregory Feathers grabbed Mr. Gore around the waist or neck and fell backwards to the ground, pulling Mr. Gore on top of him, even though Mr. Gore had not been physical with Lieutenant Jensen up to that point. J.A. 392. Mr. Gore, believing he was going to be unnecessarily abused, subsequently struck Lieutenant Jensen, who had joined Officer Feathers in grabbing Mr. Gore, on his face and head repeatedly. J.A. 395-96. Mr. Gore was subsequently subdued, placed in restraints, and escorted to the Special Housing Unit without incident. A surveillance video, which captured the visual, but not audio, of the altercation between Mr. Gore and the correctional officers, was used extensively at trial.

The jury instruction proffered by Mr. Gore with regard to the defense of self-defense provided, in part, as follows:

If the Correctional Officer uses more force than appears reasonably necessary, the person stopped may defend against the excessive force, using only the amount of force that appears reasonably necessary for his protection. But if that person uses more force than

is reasonably necessary for his protection, he acts without justifiable or excusable cause.

J.A. 113.^[FN2] The district court refused the jury instruction on self-defense that was proffered by Mr. Gore at trial. Instead, the district court instructed the jury, in relevant part, as follows:

FN2. The entire jury instruction on the defense of self-defense proffered by Mr. Gore is located at J.A. 112-14.

In order for you to find that the defendant was justified to use force against Lt. Kevin Jensen or Senior Correctional Officer Gregory Feathers, he must establish every one of the following four factors: (1) He was under an unlawful present or imminent threat of serious bodily injury or death; (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) he had no reasonable legal alternative to both the criminal act and the avoidance of the threatened harm; and (4) there was a direct causal relationship between his criminal action and his need to avoid harm.

J.A. 511.^[FN3] The material difference between the instruction proffered by Mr. Gore and the one ultimately given by the district court is that the one proffered by Mr. Gore instructed that Mr. Gore could be justified if the officer used excessive force against him and if he used only that force reasonably necessary for his protection, while the final instruction instructed that Mr. Gore must have been faced with an imminent threat of serious bodily injury or death in order to have been justified in using self defense.

FN3. The entire jury instruction on the defense of self-defense ultimately given by the district court is located at J.A. 510-12.

There was extensive argument over the self-defense instruction at the Final Pretrial Conference held on November 27, 2007, *see* J.A. 28-69, during the Preliminary Hearing held before the commencement of trial on November 28, 2007, *see* J.A. 70-106, and during the Charge Conference held on November 29, 2007, *see* J.A. 93-111. During each conference, counsel for Mr. Gore objected to the district court's instruction, and the district court noted that Mr. Gore's objection was well-preserved. J.A. 106, 449.

In its Memorandum Opinion Following Pretrial Conference ("Memorandum Opinion"), the district court

rejected Mr. Gore's proposed instruction which asserted that he was justified to use reasonable force to defend himself if under "an unlawful and present danger of being the recipient of the imminent use of unlawful force." J.A. 528. Instead, the district court concluded that a necessary element of the defense of self-defense applicable to [18 U.S.C. § 111\(a\)](#) is that an inmate must be faced an "imminent threat of serious bodily injury or death." J.A. 534. Mr. Gore now appeals, and for the reasons set forth below, his conviction should be overturned and he should be granted a new trial.

SUMMARY OF ARGUMENT

The district court erroneously instructed the jury that in order for an inmate to be justified in using self-defense against excessive force by a correctional officer, he must have been under an imminent threat of serious bodily injury or death. The district court so concluded in spite of the Fourth Circuit's opinions in *United States v. Black* and *United States v. Stotts*, which held, albeit in the context of a different but materially similar statute, that an inmate is entitled to use reasonable force to repel a threat by a correctional officer less grave than serious bodily injury or death, so long as the force used by the officer is excessive. The purposes of the statute under which Mr. Gore was charged are adequately served by the standard for the use of self-defense applied by the Fourth Circuit in those opinions.

The district court, however, assigned no persuasive or guiding value to the Court's opinions in that regard, and instead applied Fourth Circuit precedent setting forth the requirement of a defense of justification in the context of a felon in possession of a firearm. Although the district court's application of that standard squared with the standards applied by other circuits in the context of self defense under the statute, the rationale does little to serve the purposes of the statute, and unnecessarily circumscribes long held principles of self-defense law and inmates' rights. Because the purposes of the statute under which Mr. Gore was charged are adequately met by the standards set forth by this Court in *Black* and *Stotts*, Mr. Gore's conviction should be overturned and he should be granted a new trial.

ARGUMENT

Standard of Review

A trial court's jury instructions are reviewed for abuse of discretion. See [Bouchat v. Baltimore Ravens Football Club, Inc.](#), 346 F.3d 514, 526 n. 11 (4th Cir. 2003). Because an error of law is necessarily an abuse of discretion, see [Koon v. United States](#), 518 U.S. 81, 100 (1996), it is well-settled that a claim that a jury instruction failed to correctly state the law is reviewed de novo. See [United States v. Cherry](#), 330 F.3d 658, 665 (4th Cir. 2003).

The district court erred in conditioning the right of self-defense applicable to an offense under [18 U.S.C. § 111](#) on the presence of an imminent threat of death or serious bodily harm, where the statute itself is silent on the requirement and where the accepted law of self-defense actually provides that one may repel a lesser threat with reasonable force.

The district court erred in giving a jury instruction which conditions the right of self-defense applicable to an offense under [18 U.S.C. § 111](#) on the presence of an imminent threat of death or serious bodily harm, even though the statute itself is silent on the requirement and even though the accepted law of self-defense actually provides that one may repel a lesser threat with reasonable force. The district court's decision in this regard ignores established Fourth Circuit law which considered the application of the defense of self-defense under a materially similar statute and therefore has, at least, persuasive and guiding value. See [United States v. Stotts](#), 113 F.3d 493 (4th Cir. 1997); [United States v. Black](#), 692 F.2d 314 (4th Cir. 1982). The district court's decision instead applies the four-prong test for the defense of justification discussed in [United States v. Perrin](#), 45 F.3d 869 (4th Cir. 1995), even though that opinion arose in the context of a felon in possession of a firearm and does not address the statute under which Mr. Gore was charged. Moreover, the district court's opinion relies on decisions issued by two other circuits, even though those cases are based on unsound reasoning and fail to consider an inmate's constitutional protections against cruel and unusual punishment. See [United States v. Gometz](#), 879 F.2d 256 (7th Cir. 1989); [United States v. Jones](#), 254 Fed. Appx. 711 (10th Cir. 2007) (unpublished). The district court's decision unnecessarily expands state authority at the expense of long-accepted principles of self-defense law, and at the expense of inmate's rights, even though the stan-

dard previously applied in *Black* and *Stotts* adequately serve the purposes of the statute under which Mr. Gore was charged and ultimately convicted. As set forth more fully below, Mr. Gore's convictions should be overturned and he should be granted a new trial.

- a. The district court's decision is counter to Fourth Circuit opinions recognizing the application of traditional self-defense principles to a materially similar statute.

The statute under which Mr. Gore was charged makes it a crime to assault a corrections officer while that officer is performing his official duties. See [18 U.S.C. § 111](#) (hereinafter "[Section 111](#)");^[FN4] see also [18 U.S.C. § 1114](#) (defining persons protected by [18 U.S.C. § 111](#)). Although [Section 111](#) itself does not explicitly provide for a right to self-defense, it has generally been assumed that such a right exists. See [United States v. Jones](#), 254 Fed. Appx. 711, 717-18 (10th Cir. 2007) (unpublished) (“[B]oth the Supreme Court and this Court have discussed the possibility of self-defense as justification for a charge under [§ 111](#)... [t]herefore, we merely assume without deciding that such a defense exists.”); see also J.A. 529 (“Because both the government and Gore do not dispute that a self-defense justification may exist under [18 U.S.C. § 111](#) in certain circumstances, this Court will assume the availability of the defense and analyze the necessary elements of such a defense.”).

FN4. The statute provides:

[§ 111](#). Assaulting, resisting, or impeding certain officers or employees

(a) In general. Whoever--

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in [section 1 1 14](#) of this title [[18 U.S.C.S. § 1114](#)] while engaged in or on account of the performance of official duties; or

(2) forcibly assaults or intimidates any person who formerly served as a person designated in [section 1114](#) [[18 U.S.C.S. § 1114](#)] on account of the performance of official duties during such person's term of service, shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that

assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced penalty. Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

[18 U.S.C. § 111.](#)

Although there is no case directly on point in the Fourth Circuit, this Court has held, with respect to a similar statute enacted in the District of Columbia, that a jury instruction which implies that a defendant could not justifiably act in self-defense against a threat less grave than death or serious injury is improper. *See United States v. Black*, 692 F.2d 314 (4th Cir. 1982). In *Black*, an inmate who was charged under D.C. Code § 22-505 (the “D.C. Statute”), which prohibits assault against a correctional officer employed by the District of Columbia, appealed his conviction under that statute after the district court refused to give the requested self-defense instruction to the jury.^[FN5] *See id.* at 317. The defendant requested that the jury be instructed that it would have to acquit him if it found that the corrections officer employed excessive force and the defendant responded with an amount of force he reasonably deemed necessary to avoid bodily harm to himself. *Id.* The district court refused the defendant’s instruction, and instead gave a charge to the effect that the defendant was entitled to defend himself with deadly force if he reasonably believed that such force was necessary to escape imminent death or serious bodily harm. *Id.* The defendant argued that the instruction was erroneous because it conditioned his right of self-defense on the presence of an imminent threat of death or serious bodily harm. *Id.* at 317-18. The Fourth Circuit agreed with the defendant, holding that the district court erred in its instruction because “the instruction implied that the lesser force which defendant actually employed could not justifiably have been directed at a threat less grave than death or serious injury. In this respect, the instruction misstated the law.” *Id.* at 318. In so concluding, the Court observed that the traditional rules of self-defense provide that “the quantum of force which one may use in self-defense is proportional to the threat which he reasonably apprehends.” *Id.* at 318 (citing W. LaFave & A. Scott, *Handbook on Criminal Law* 392-93

(1972)). The Court thus rejected the notion that a defendant suffered a heightened burden in asserting a right to self-defense in circumstances involving an altercation with an officer, and affirmed the notion that traditional rules of self-defense apply. *See id.*

FN5. The D.C. Statute provides, in relevant part, as follows:

(a) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia, or any officer or member of any fire department operating in the District of Columbia, or any officer or employee of any penal or correctional institution of the District of Columbia, or any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia, whether such institution or facility is located within the District of Columbia or elsewhere, while engaged in or on account of the performance of his official duties, shall be fined not more than \$5,000 or imprisoned not more than 5 years or both. It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such arrest is made by an individual he has reason to believe is a law enforcement officer, whether or not such arrest is lawful.

[D.C. Code § 22-505 \(1981\).](#)

The D.C. Statute differs from [Section 111](#) in that the D.C. Statute explicitly recognizes that there may be circumstances where assault or resistance may be justified, while [Section 111](#) contains no such language. Compare [D.C. Code § 22-505 \(1981\)](#) (Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer ...) with [18 U.S.C. § 111](#) (“Whoever-- (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with an [officer]...”). This difference, however, is immaterial. The D.C. Statute does not articulate the scope of the defense of self-defense, and thus any difference is relevant only to whether the right to self-defense is applicable to an offense under [Section 111](#). As noted above, that issue is not in dispute here. *See supra* at 7-8.

The Fourth Circuit most recently cited *Black* in an unpublished opinion which also related to the D.C. Statute. See *United States v. Harris*, 1996 U.S. App. LEXIS 22040. In *Harris*, two inmates appealed their convictions under the D.C. Statute for assaulting a correctional officer after the district court refused to give a self-defense instruction to the jury. *Id.* at *1. The inmates requested an instruction which read, in material part, as follows:

There has been evidence that the defendant acted in self-defense. The law recognizes the right of a person who is not the aggressor to stand his ground and use force to defend himself. However, he may use only such force as is reasonably necessary to defend himself or another person against the imminent use of unlawful force.

Id. at *4. The district court refused the instruction, however, after determining that there was an insufficient evidentiary basis for a self-defense instruction. *Id.* at *3-4. The Fourth Circuit affirmed the convictions after concluding that the lower court did not err in determining that there was an insufficient evidentiary basis for a self-defense instruction. *Id.* at *6. In so doing, however, the Fourth Circuit, citing the *Black* opinion, observed that the instruction was in proper form. *Id.* at *5 (“The government agrees that this instruction was proper in form.”).^[FN6]

FN6. Unpublished decisions, of course, lack precedential value, and Appellant references *Harris* simply to illustrate that the jury instruction Mr. Gore proffered on the self-defense issue has been accepted by the Fourth Circuit in relation to a materially similar statute. See 4th Cir. R. 32.

After the *Black* decision, the Fourth Circuit had an additional opportunity to address the defense of self-defense in the context of the D.C. Statute. The Court held that a defendant charged under the D.C. Statute is entitled to a limited right of self-defense if he presents evidence that the officer used excessive force in carrying out his duties. See *United States v. Stotts*, 113 F.3d 493 (4th Cir. 1997). In *Stotts*, the Court rejected the defendant's argument that he was entitled to a standard self-defense instruction regardless of the excessiveness of the force used against him by the officer. *Id.* at 496. Instead, the Court held that the right to a self-defense instruction arose only once

the defendant presented evidence of excessive force by the officer. *Id.* Thus, the instruction proffered by the defendant, which did not limit the self-defense right of the defendant to a defense against excessive force only, was an erroneous statement of the law. *Id.* The Court held that the district court's instruction, which is identical to the instruction proffered by Mr. Gore in the case at hand, was proper. *Id.* at 496-97.

Applying the rationale of *Black* and *Stotts* to the circumstances of this case, Mr. Gore is entitled to a self-defense instruction which recognizes his right to defend himself against a threat less grave than death or serious injury. The jury should have been instructed that it would have to acquit Mr. Gore if it found that Lieutenant Jensen and Officer Feathers employed excessive force and Mr. Gore responded with an amount of force he reasonably deemed necessary to avoid bodily harm to himself. On the basis of the conflicting testimony presented at trial, the jury may have believed that Lieutenant Jensen and Officer Feathers used excessive force by dragging him to the ground even though Mr. Gore had not acted physically toward any correctional officer up until that point, and that Mr. Gore reasonably feared bodily injury. Under a proper instruction, the jury might have concluded that Mr. Gore responded with an amount of force he reasonably deemed necessary to avoid bodily harm to himself by Lieutenant Jensen and Officer Feathers. The instruction given, however, foreclosed that conclusion. It permitted acquittal only if Mr. Gore reasonably feared death or serious bodily harm.

The district court should have given the instruction sanctioned by the Court in *Stotts* to the case at hand so that the jury could decide first if the force used by Officer Feathers and Lieutenant Jensen was excessive and second, if the force used by Mr. Gore in response was reasonable. Instead, the district court dismissed *Stotts*, concluding that it is not persuasive authority in this case because “the Fourth Circuit construed an explicit statutory defense and did not engage in a common law or policy analysis of the kind required here where the statute is silent on the availability of the defense.” J.A. 530. However, the distinction cited by the district court is of little relevance here, since there is no issue in this case that the right to self-defense is applicable to an offense charged under [Section 111](#). See J.A. 529. And while [Section 111](#) must be viewed in the context in which it was enacted, its purposes cannot be deemed so different from the

obvious purposes of the D.C. Statute that the Fourth Circuit's interpretation of one is entirely unpersuasive as to the other. Moreover, the Fourth Circuit construed the proper elements of the defense of self-defense which was the issue before the district court.

- b. The district court's decision to limit an inmate's right to self defense to situations where the inmate faces serious bodily injury or death is not compelled by the law of this Circuit or by sound policy.

Instead of using Fourth Circuit opinions interpreting the application of the defense of self-defense under an analogous statute dealing with assault against a correctional officer, the district court instead relied on a Fourth Circuit opinion which considered the defense of justification in the context of a felon in possession of a firearm. J.A. 530-34 (citing *United States v. Perrin*, 45 F.3d 869 (4th Cir. 1995)). In *Perrin*, the defendant appealed his conviction under 18 U.S.C. § 922(g)(1) for possession of a firearm by a felon on the basis that the district court refused to instruct the jury on the defense of justification because he was afraid for his safety after receiving threats by a known drug dealer. 45 F.3d at 871. The Court observed that in order to warrant a justification instruction, a defendant must show that he “(1) was under unlawful and present threat of death or serious bodily injury; (2) did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and (4) a direct causal relationship between the criminal act and the avoidance of the threatened harm.” *Id.* at 874 (citing *United States v. Crittendon*, 883 F.2d 326 (4th Cir. 1989)).

The district court's application of the four-prong test for the defense of justification set forth in *Perrin* to the context of self-defense for an offense under Section 111 is inappropriate, because the Fourth Circuit has never applied the *Perrin* test - a test for the defense of justification - to the context of self-defense for an offense under Section 111, and there was far more analogous precedent in the *Black* and *Stotts* opinions.

Moreover, in applying the *Perrin* standard to this context, the district court seeks to justify an unwarranted expansion of state authority at the expense of a legal tradition which affords at least a modicum of respect for inmates' rights, and in so doing relies on the

unsound reasoning of the Tenth Circuit's unpublished opinion in *United States v. Jones*, 254 Fed. Appx. 711 (2007).^[FN7] The rationale for denigrating reasonable self-defense against the unlawful use of state power simply does not support the district court's conclusion. In *Jones*, the court rejected the defendant's assertion that a threat of death or serious bodily injury is not an element of a self-defense justification under Section 111. *Id.* at 718. The court based its decision on the rationale that to require only a threat of bodily harm would “poorly serve the congressional concerns and the dual purpose of § 111,” those being to protect federal employees and to protect federal functions. *Id.* at 722. The *Jones* court stated its concerns as follows:

FN7. The Seventh Circuit opinion relied on by the district court in further support of its decision does little to bolster the district court's position. J.A. 533 (citing *United States v. Gometz*, 879 F.2d 256 (7th Cir. 1989)). *Gometz* contains no analysis of the issue of the gravity of force required to raise the right of self-defense, but instead focused on the given instruction's emphasis on the immediacy of harm. 879 F.2d at 259-60. There, the defendant objected to the instruction's emphasis on the proximity of time of the threat to him and his assault on the officer, and not the gravity of the threat. 879 F.2d at 259. Moreover, the court's entire analysis was limited to a mere two paragraphs which never addressed the propriety of an instruction requiring a heightened showing of “serious bodily harm or death” rather than an instruction that one may repel a lesser threat with reasonable force. *See id.* at 259-60.

To require less than the threat of substantial bodily injury in a prison environment... would allow a prisoner to physically resist prison guards any time he ‘reasonably’ believed the guard was exceeding the force necessary to maintain prison or personal security. For example, such a rule would allow any prisoner to physically resist if the prisoner reasonably believed his handcuffs were too tight causing momentary interruption of his circulation.

Id. The court's rationale, however, ignores not one, or two, but *three* safeguards against the unjustified use of force by an inmate in reaction to the kind of minor

discomforts upon which the *Jones* court based its decision. Under the *Stotts* standard, before the jury even hears an instruction on self-defense, there must be some evidence that the force used by the officer against an inmate was excessive. [113 F.3d at 496](#). Defendants would be hard-pressed to find a court that would allow a self-defense instruction where the only evidence of excessive force was that an officer put an inmate's handcuffs on too tight. Even if a jury received such an instruction, a defendant would likewise be hard pressed to find a reasonable jury that would conclude that an officer who applies handcuffs too tightly exercised excessive force. And in the unlikely event that the jury even gets that far, it still must determine whether the force of the inmate's reaction to a lesser threat than death or serious bodily injury was reasonable.

Finally, limiting an inmate's right to self defense to only those occasions where he may suffer seriously bodily harm or death would contravene the Eighth Amendment's protection against the infliction of "cruel and unusual punishments." [U.S. CONST. amend. VIII](#). The protection against cruel and unusual punishment protects inmates against the application of excessive force by correctional officers. See [Whitley v. Albers](#), 475 U.S. 312, 318-19 (1986). As the Fourth Circuit has recognized, in the context of incarcerated individuals, "the unnecessary and wanton infliction of pain constitutes ... cruel and unusual punishment forbidden by the Eighth Amendment." [Stanley v. Herjirika](#), 134 F.3d 629, 633-34 (4th Cir. 1998) (internal citations omitted). It is of no consequence that an inmate could potentially pursue complaints for excessive force that results in injury less grave than serious bodily injury or death through prison administrative or legal processes. An inmate should not have to await the results of a correctional officer's brutal or life-threatening assault before he can act with confidence in his lawful right to defend himself, and Mr. Gore was entitled to an instruction to that effect.

CONCLUSION

The district court's erroneous instruction that in order for an inmate to be justified in using self-defense against excessive force by a correctional officer, he must have been under imminent threat of serious bodily injury or death is an error of law which requires reversal of Mr. Gore's convictions under [18 U.S.C. § 111](#). In rejecting Mr. Gore's proffered instruction that

an inmate may repel excessive force by a correctional officer with reasonable force, the district court dismissed highly relevant and persuasive Fourth Circuit opinions holding, in the context of a different but materially similar statute, that an inmate is entitled to use reasonable force to repel a threat by a correctional officer less grave than serious bodily injury or death, so long as the force used by the officer is excessive. The Fourth Circuit's holdings in this regard adequately serve the purposes of the statute under which Mr. Gore was charged while preserving an inmate's constitutional right to be free of cruel and unusual punishment at the hands of prison guards who would gratuitously inflict physical harm on those in their custody.

The district court's refusal to assign any persuasive value to those opinions in favor of precedent setting forth the requirement of a defense of justification in an entirely unrelated context was inappropriate, even though that standard has been applied in other circuits in the context of self defense under the statute. The rationale underlying those opinions, and the district court's decision in this case, does little to serve the purposes of the statute, and unnecessarily circumscribes long held principles of self-defense law and inmates' rights. Because the purposes of the statute under which Mr. Gore was charged are adequately met by the standards set forth by this Court in *Black* and *Stotts*, Mr. Gore's conviction should be overturned and he should be granted a new trial.

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. Michael L. GORE, Defendant - Appellant.
2008 WL 4905271 (C.A.4) (Appellate Brief)

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