

For Dockets See [08-4462](#)

United States Court of Appeals, Fourth Circuit.
UNITED STATES OF AMERICA, Appellee,
v.
Michael L. GORE, Appellant.
No. **08-4462**.
November 19, 2008.

Appeal from the United States District Court for the
Northern District of West Virginia the Honorable
Irene M. Keeley, District Judge

Appellee's Brief

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from a Judgment and Commitment Order in a criminal case. A district court has original jurisdiction for the trial of criminal cases. [18 U.S.C. § 3231](#). Circuit courts of appeals have original jurisdiction of appeals from all final decisions of district courts. [28 U.S.C. § 1291](#). The Judgment and Commitment Order was entered on March 25, 2008. The appellant's Notice of Appeal was filed on April 3, 2008. This appeal is from a final judgment that disposes of all claims with respect to all parties.

RESTATEMENT OF THE ISSUE

I. WHETHER AN INMATE IN THE CUSTODY OF FEDERAL OFFICERS IS JUSTIFIED TO USE VIOLENCE IN SELF-DEFENSE AGAINST ANY

OFFICER UNLESS THE OFFICER IS USING UNLAWFUL FORCE AGAINST THE INMATE OF SUCH MAGNITUDE AS TO THREATEN THE INMATE WITH DEATH OR SERIOUS BODILY INJURY.

RESTATEMENT OF THE CASE

A. Procedural History

On September 12, 2007, a two-count indictment was returned in the Northern District of West Virginia charging the appellant, Michael L. Gore (defendant) with two offenses under [18 U.S.C. § 11](#) (a) and (b). Count One alleged that on July 8, 2007, the defendant forcibly assaulted Lt. Kevin Jensen, an employee of the U.S. Bureau of Prisons (BOP) while Lt. Jensen was engaged in his official duties on the staff of Federal Correctional Institution (FCI) Gilmer in Gilmer County, West Virginia. Joint Appendix (JA) 8. Count Two alleged that, on the same day as the conduct alleged in Count One, the defendant forcibly resisted and opposed Lt. Jensen and other BOP employees. JA 9.

Between the time of the indictment in September 12, 2007, and November 2007, the activity in the case was comprised of routine discovery, scheduling matters, and pretrial motions. JA 2 - 4 (see docket entries 1 through 28). The only issue of any significance to this appeal raised in any of these filings was the defendant's effort to obtain a self-defense instruction. JA 4 (see docket entries 18, and 29).

The defendant wanted a self-defense instruction informing the jury that the defendant had a right to use violence against the officers if the defendant "was under an unlawful and present danger of being the recipient of the imminent use of unlawful force." JA 16.

A jury was empaneled on November 28, 2007. During the course of the proceedings a charge conference was held by the court on November 30, 2007. JA 473 - 93. The court concluded that the defendant's proposed instruction did not correctly state the law and that the defendant was authorized to use force if "[h]e was under an unlawful, present or imminent threat of serious bodily injury or death." JA 511, 527 - 35.

On November 30, 2007, the jury returned guilty verdicts as to both counts. They also found that the defendant had inflicted bodily injury on the officers in relation to each of the counts. JA 517 - 20.

On March 24, 2008, the court conducted a sentencing hearing. JA 5 (docket entry 43). Using the advisory sentencing guidelines, the court determined that a reasonable sentence for the defendant was 87 months to be served consecutively to the life sentence he is currently serving. JA 544 - 45.

The court filed its Judgment and Commitment Order on March 25, 2008. JA 536 - 41. The defendant timely filed his Notice of Appeal on April 3, 2008. JA 542 - 43.

B. Restatement of the Facts

In the early evening of July 8, 2007, the defendant had a dispute with Corrections Officer (CO) Jimmy Wegman II. JA 152 - 56. As a result of the dispute the defendant was told to report to Lt. Kevin Jensen. CO Longwell, another corrections officer who was present, radioed Lt. Jensen to let him know that the defendant was enroute to the lieutenant's office. JA 156 - 57, 183 - 85. Lt. Jensen was outside near an area called the smoke shack when the defendant approached him. The defendant was angry, and after a brief conversation during which the lieutenant tried to find out what the problem was, the defendant became uncooperative and began yelling at Lt. Jensen. JA 226 - 28. Lt. Jensen made a radio call to clear the compound and ordered the defendant to submit to a pat down search and restraints so he could be taken to the Special Housing Unit (SHU). The defendant did not comply. JA 229 - 30. By this time Senior Corrections Officer Gregory Feathers had arrived. The defendant tensed up, faced-off to Lt. Jensen, and drew his hand into a fist. CO Feathers attempted to get control of the defendant's hand so that handcuffs could be used. The defendant began physically resisting the two officers. The three men went to the ground. The defendant's right arm was unrestrained and he began hitting Lt. Jensen in the face. JA 316 - 19. He hit the lieutenant approximately a dozen times in the head and face before enough officers arrived to subdue the defendant. JA 246 - 47. Lt. Jensen's face was swollen and bloodied. The inside of this lip was cut requiring stitches at the local hospital. JA 248 - 49. CO Feathers had multiple [abrasions on his head](#), arm, and knees,

and a [laceration on the back](#) of his head. He received first-aid at the prison and did not go to the hospital. JA 322.

At trial, the defendant claimed that the officers did not give him any verbal commands. JA 392. The defendant claimed that he threw a punch because he was being "unnecessarily abused" by the officers. JA 396.

The United States produced the testimony of officers Wegman, Longwell, Feathers, and Jensen. Additionally, through the testimony of officer Furby, a video recording of the confrontation was introduced.

SUMMARY OF ARGUMENT

The circumstances in which an inmate is justified to use force against a custodian are very limited. An inmate can only use the force reasonably necessary to defend himself against an officer who is using unlawful force that threatens serious bodily injury or death. However, in this case, the officers merely attempted to maintain physical control of the defendant's hand for the purpose of applying restraints before the defendant reacted violently.

The defendant's assertion that only "unlawful" and "excessive" force by the officers is required to trigger his right to use violence in his defense is an incorrect statement of the law. This is not a matter of first impression as the defendant contends in his brief. "Self-defense" is a "justification" defense. The *Perrin* four-part test is the proper standard for the defense. Accordingly, the defendant must be in reasonable fear of death or serious bodily injury before he is justified in using violence against the officers.

The district court correctly applied the law and the defendant had a fair opportunity to advance his defense before the jury.

ARGUMENT

AN INMATE IN THE CUSTODY OF FEDERAL OFFICERS IS NOT JUSTIFIED IN USING VIOLENCE IN SELF-DEFENSE AGAINST ANY OFFICER UNLESS THE OFFICER IS USING UNLAWFUL FORCE AGAINST THE INMATE OF SUCH MAGNITUDE AS TO THREATEN THE INMATE WITH DEATH OR SERIOUS BODILY

INJURY.

Standard of Review

Just as a review of the district court's instructions to a jury on the elements of an offense is a legal question that the appellate court reviews *de novo*, [United States v. Horton](#), 321 F.3d 476, 479 (4th Cir. 2003), the proper definition of the elements of an affirmative defense is also a legal question that should be reviewed *de novo*. [United States v. Daughtrey](#), 874 F.2d 213, 217 (4th Cir. 1989).

Analysis

“Self-defense,” along with “necessity,” “duress,” and “justification,” are legal terms used to describe an affirmative defense that recognizes a person's right to survive dangers imposed upon him by forces he cannot otherwise control. These defenses allow a person to seek shelter from a violent storm by trespassing; or a convicted felon to take a firearm away from a person who is committing an unlawful, armed attack upon the felon; or a person to meet force with a reasonable level of force in defense. The First Circuit Court of Appeals concluded “that ease in administration favors treating these three defenses [necessity, duress, and self-defense] ... under a single unitary rubric: justification.” [United States v. Leahy](#), 473 F.3d 401, 406 (1st Cir. 2007). The Tenth Circuit recently noted that the defenses of duress, necessity, and justification originate in the common law and are often used interchangeably. [United States v. Butler](#), 485 F.3d 569, 572 (10th Cir. 2007).

This case involves an offense under [18 U.S.C. § 111](#) in which an inmate committed violent acts against his assigned custodians. Although [§ 111](#) does not provide for a justification defense,^[FN1] well-established Fourth Circuit caselaw requires a defendant to satisfy each and every one of the following or his defense fails:

FN1. It is an open question whether a federal court has the authority to recognize a common law defense when it is not provided in the statute. [United States v. Oakland Cannabis Buyers' Coop.](#), 532 U.S. 483, 491 (2001); [United States v. Crittendon](#), 883 F.2d 326, 330 (4th Cir. 1989), [United States v. Holt](#), 79 F.3d 14, 17 (4th Cir. 1996). In this case, the United States did not argue that a

common law, justification defense was never available to an inmate. Although the issue has not been well-defined by the courts, it appears that the Eighth Amendment to the U. S. Constitution would permit an inmate to avoid harm under extreme circumstances. JA 91.

1. The defendant must show that he was under an unlawful and present threat of death or serious bodily injury; and
2. He must show that he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; and
3. He must show that he had no reasonable, legal alternative to both the criminal act and the avoidance of the threatened harm; and
4. He must show a direct causal relationship between the criminal action and the avoidance of the threatened harm.

[United States v. Perrin](#), 45 F.3d 869, 873 - 74 (4th Cir. 1995); [Crittendon](#), 883 F.2d at 330

The defendant incorrectly asserts that [United States v. Stotts](#), 113 F.3d 494 (4th Cir. 1997), defines an inmate's right to defend himself. That opinion is not applicable to this case and is not helpful in resolving the issue raised by the defendant. [Stotts](#) was a prison assault case charged under [D.C. Code §22-405\(a\)](#)^[FN2], in which this court held that an inmate could not invoke self-defense to justify an assault on a correctional officer unless the officer first used excessive force against the inmate. Accordingly, [Stotts](#) applied statutory language that is not applicable to this case.

FN2. The statute, in pertinent part, states: [§ 22-405](#). Assault on member of police force, campus or university special police, or fire department.

(a) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with ... any officer or employee of any penal or correctional institution 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 or her 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 or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.

(b) Whoever in the commission of any such acts uses a deadly or dangerous weapon shall be imprisoned not more than 10 years.

Congress had a dual purpose in enacting [18 U.S.C. § 111](#): “to protect both federal officers and federal functions.” *United States v. Feola*, [420 U.S. 671, 679 \(1975\)](#). Therefore any justification defense to a prosecution under [§ 111](#) must further these congressional purposes while meeting the requirements established by the Fourth Circuit. Accordingly, District of Columbia law is largely irrelevant: the *Perrin* test applies in this case.

The district court properly rejected the lower justification standard of unlawful and excessive force advocated by the defendant. In its written opinion, JA 527 - 35, the district court relied upon the reasoning of the Tenth Circuit in *United States v. Jones*, [254 Fed. Appx. 711 \(10th Cir. 2007\)](#) and the Seventh Circuit in *United States v. Gometz*, [879 F.2d 256 \(7th Cir. 1989\)](#). Both of these cases recognized the implausibility of applying the standard advocated by the defendant in this case. Each required that the inmate be faced with a reasonable fear of serious bodily injury or death before a defense of self-defense could be considered. As the Tenth Circuit observed “assuming there is a self-defense justification to a charge under [§ 111](#), limiting the defense in cases involving inmate assaults on guards to only those situations where the inmate reasonably fears imminent serious bodily harm or death is a pragmatic approach to balancing the purposes of [§ 111](#) with the rights of the inmates.” *Jones*, [254 Fed. Appx. at 723](#).

The defendant did not and cannot explain why an inmate should be entitled to a more lenient standard in the prison setting than that required for the defense generally. He advocates the dangerous position that an inmate should be allowed to use violence against his custodian when the inmate believes the custodian has used more force than is necessary for the occasion. Such a standard will have a chilling effect on prison staffs and will encourage more aggressive behavior by inmates toward staff members. This is not compatible with reason or with the purposes of [§ 111](#) of protecting

the staff and protecting the functions of the prison system.

Conclusion of analysis.

Inmates should not be able to rely on a justification argument after assaulting a correctional officer unless the officer was using unlawful and excessive force that is likely to cause serious bodily injury or death. No force was used against the defendant that justified his violent attack of Lt. Jensen or his violent resistance of the officers who responded to assist Lt. Jensen.

Prisons are inherently dangerous places, and inmates should not be able to use a justification defense to thwart the Congressional intent of protecting prison employees and the government function of administering prisons. Granting an inmate the right to assert self-defense to justify violence against his custodians under the circumstances of this case^[FN3] will make the prison an even more dangerous place for the employees and the inmates than it already is.

FN3. While the United States believes that the defense in this case would fail under each part of the four part test, only the definition of the first part of the *Perrin* test is properly before the appellate court.

CONCLUSION

Based upon the foregoing argument, the United States moves that the judgment of the district court and the defendant's conviction and sentence be affirmed.

STATEMENT REGARDING THE NEED FOR ORAL ARGUMENT

Pursuant to Local Rule 34(a) of the Fourth Circuit Court of Appeals, the United States believes that oral argument may be of benefit to this Court in deciding the issues raised herein for the reason that the issues raised in this case are of sufficient importance that the court may find it prudent to provide a precedent for future cases.

UNITED STATES OF AMERICA, Appellee, v. Michael L. GORE, Appellant.
2008 WL 4948166 (C.A.4) (Appellate Brief)

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