No. 13-7120

IN THE

Supreme Court of the United States

SAMUEL JAMES JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

KATHERIAN D. ROE
Federal Defender
KATHERINE M. MENENDEZ*
Assistant Federal Defender
DOUGLAS H. R. OLSON
Assistant Federal Defender
District of Minnesota
300 South Fourth Street
107 U.S. Courthouse
Minneapolis, MN 55415
(612) 664-5858
kate_menendez@fd.org

Counsel for Petitioner

* *Counsel of Record*

253761

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

SHOULD MERE POSSESSION OF A SHORT-BARRELED SHOTGUN BE TREATED AS A VIOLENT FELONY UNDER THE ARMED CAREER CRIMINAL ACT?

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Page

Page

Page

Page

Statutory and Legislative Materials

Page

Page

Page

Page

U.S. Sentencing Guidelines and Sentencing Commission Materials

Other Sources

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was not published in the Federal Reporter, but is available at 2013 WL 3924353. It was issued on July 31, 2013. The judgment of the United States District Court for the District of Minnesota was not published. Both were attached as Appendices to the petition for a writ of certiorari. *See* Pet. App. A-1 - A-7 (appellate decision); Pet. App. B-1 - B-4 (district court judgment).

JURISDICTION

Petitioner Samuel Johnson pleaded guilty to a violation of 18 U.S.C. § 922(g). He was sentenced to 180 months' imprisonment by the Honorable Richard H. Kyle, Senior United States District Judge.

The Eighth Circuit affirmed Mr. Johnson's sentence in an unpublished, per curiam opinion on July 31, 2013. Mr. Johnson did not seek rehearing. His petition for a writ of certiorari was filed on October 28, 2013. This Court granted the writ on April 21, 2014.

This Court has jurisdiction to review Mr. Johnson's case pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §§ 924(e)(1) and (e)(2)(B) (Armed Career Criminal Act):

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)
>
> . . .
>
> (e)(2)(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that —
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;. . .

Minnesota Statute § 609.67

Sub. 1. Definitions.

. . .

(b) "Shotgun" means a weapon designed, redesigned, made or remade which is intended to be fired from the shoulder and uses the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

(c) "Short-barreled shotgun" means a shotgun having one or more barrels less than 18 inches in length and any weapon made from a shotgun if such weapon as modified has an overall length less than 26 inches.

. . .

Sub. 2. Acts prohibited.

Except as otherwise provided herein, whoever owns, possesses, or operates a . . . short-barreled shotgun may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

STATEMENT

1. Samuel Johnson was charged by Indictment with several offenses related to the possession of firearms. (Dist. Ct. No. 12-0104, D. Minn.) On June 6, 2012, he pleaded guilty to one count of being a felon in possession

of a firearm pursuant to 18 U.S.C. § 922(g)(1). In his written plea agreement, Mr. Johnson acknowledged that the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), might apply, raising the available penalties from no more than ten years in prison to a term of fifteen years to life imprisonment. (Plea Agreement, docket number 15.) However, Mr. Johnson reserved the right to challenge the application of the ACCA to his case.

2. The presentence investigation report (PSR) concluded that Mr. Johnson's criminal history contained three prior convictions that qualified as "violent felonies" under 18 U.S.C. § 924(e)(2)(B). (PSR ¶ 34.) Mr. Johnson had been convicted of simple robbery in 2007 and attempted simple robbery in 1999, and received stayed sentences for both offenses. (PSR ¶¶ 43, 41.) These convictions are not at issue in the instant petition.

3. The PSR also counted as an ACCA predicate offense Mr. Johnson's 2007 conviction for possession of a short-barreled shotgun in violation of Minn. Stat. § 609.67, subd. 2, an offense for which he also received a stayed sentence. (PSR ¶ 45.)

4. Mr. Johnson objected to his treatment as an armed career criminal in his sentencing filings to the district court. (Deft's Sent. Pos., dckt. no. 25.) Relevant to the present petition, he argued that mere possession of a short-barreled shotgun should not count as a violent felony. If that conviction were determined not to be a "violent felony," Mr. Johnson would not be an armed career criminal. However, Mr. Johnson acknowledged before the district court that the Eighth Circuit had ruled against his claim in previous decisions.

5. At sentencing, the district court rejected Mr. Johnson's arguments and ruled that all three of the prior convictions relied on by the government to enhance his sentence were violent felonies within the meaning of the ACCA. The district court sentenced Mr. Johnson to 180 months in prison, the statutory mandatory minimum. The court emphasized, however, that it would have imposed a lower sentence if it could. The court noted:

> For whatever it's worth, and it's probably worth nothing, I think 180 months is too heavy of a sentence in this case. But I take an oath to follow the law as I see it and I've made my decision in that regard. But, as I say, I impose the sentence reluctantly because I think a sentence of half that or two-thirds of that would be more than sufficient to qualify. But as I say, I do not have any choice in the matter, at least as I view it.

(Sentencing Hearing, September 5, 2012, Transcript at page 22, dckt. no. 39.)

6. Mr. Johnson appealed his sentence to the Eighth Circuit. (Case no. 12-3123.) He again argued that his prior conviction for possession of a short-barreled shotgun is not a "violent felony" under the ACCA. However, he acknowledged the court's prior contrary rulings in *United States v. Vincent*, 575 F.3d 820 (8th Cir. 2009), and *United States v. Lillard*, 685 F.3d 773 (8th Cir. 2012).

7. On July 31, 2013, the Eighth Circuit issued an unpublished per curiam opinion affirming Mr. Johnson's fifteen-year sentence. *United States v. Johnson*, 2013 WL 3924353 (8th Cir. 2013). The court relied on its precedent

to hold that possession of a short-barreled shotgun qualified as a violent felony under the "residual clause" to the ACCA:

> Our Circuit addressed the sentencing implications of possessing a short-barreled shotgun in *United States v. Lillard*:
>
> > Possession of a short shotgun presents a serious potential risk of physical injury to another because it is roughly similar to the listed offenses within the ACCA, both in kind as well as the degree of risk for harm posed. Lillard's possession of a short shotgun is a violent felony.
>
> Johnson's offense is not meaningfully distinguishable from the one in *Lillard*.

Johnson, slip op. at 6 (quoting *Lillard*, 685 F.3d at 777 (8th Cir. 2012)).

SUMMARY OF ARGUMENT

Samuel Johnson's punishment for being a felon in possession of a firearm was enhanced under the Armed Career Criminal Act (ACCA) to fifteen years in prison because he was once convicted of possessing a short-barreled shotgun in violation of Minnesota law. Without the enhancement, Mr. Johnson faced a sentence of no more than ten years. The significant increase in his sentence was error.

Mere possession of a short-barreled shotgun is not a violent felony within the meaning of the "residual clause" of the ACCA. This Court has held that, to qualify as a violent felony under that clause, an offense must be similar in kind and in degree of risk to the statute's enumerated offenses. Possession of a short-barreled shotgun fails both of these tests.

Possession of a short-barreled shotgun is not similar in kind to the enumerated offenses in several ways. Most significantly, none of the enumerated offenses are mere possession offenses. Moreover, possession of a short-barreled shotgun is not even a crime in a majority of states. In addition, in several jurisdictions that do criminalize possession of short-barreled shotguns, including Minnesota at the time of Mr. Johnson's offense, it is akin to a strict-liability offense. Because statutes like Minnesota's punish conduct amounting to no more than mere possession – conduct that is so obviously passive and nonviolent that it is widely legal – possessing a short-barreled shotgun is not purposeful, violent, or aggressive. It is therefore not a violent felony.

Mere possession of a short-barreled shotgun is also not similar in degree of risk to any of the enumerated offenses or to its closest analog, use of explosives. Simply possessing such a weapon presents little risk of physical injury, but the illegal use of explosives is extremely dangerous. Moreover, while statistics isolating the risk of simple possession of a short-barreled shotgun are not available, statistics involving use of firearms are. Those statistics reveal that handguns are used in far more crimes than short-barreled shotguns. In addition, legitimate uses exist for short-barreled shotguns, undermining a belief that possession of such weapons is inherently suspect.

Enhancing Mr. Johnson's sentence under the ACCA also contravenes the rule of lenity. That venerable doctrine mandates that, when struggling to interpret the scope of a criminal statue, ambiguity and doubt should be resolved in favor of the defendant, whose liberty is at stake. In this case, lenity mandates a finding that the ACCA's definition of violent felony, at a minimum, does not clearly include within its scope mere possession of a short-barreled shotgun.

The Eighth Circuit Court of Appeals erred when it determined that Samuel Johnson's prior conviction for possession of a short-barreled shotgun in violation of Minnesota law is a violent felony under the ACCA. His sentence should be vacated and his case remanded for resentencing.

ARGUMENT

I. MERE POSSESSION OF A SHORT-BARRELED SHOTGUN IS NOT A VIOLENT FELONY UNDER THE ACCA.

Mere possession of a short-barreled shotgun is not a violent felony under the Armed Career Criminal Act. This Court has held that, in order to trigger the enhancement of the ACCA under the residual clause, a predicate offense must be similar in kind and degree of risk to the enumerated offenses set forth in that clause. Mere possession of a short-barreled shotgun is neither.

First, the mere possession of an item, even an item such as a weapon, is not a "violent felony" under any interpretation of the term. Second, possession of

a short-barreled shotgun is widely legal, as long as it is registered in compliance with federal law. This fact alone indicates that a majority of jurisdictions do not believe it is dangerous enough to prohibit outright, and its legality in many places makes possession of a short-barreled shotgun, even where it is a crime, very different from the enumerated offenses. Third, possession of a short-barreled shotgun is not "purposeful, violent or aggressive," analysis that remains applicable in this case due to the passive nature of the offense conduct and the *mens rea* involved in many of the state statutes which address possession of short-barreled shotguns. Finally, possession of a short-barreled shotgun is nowhere near as risky as, nor in any way similar to, its closest analog in § 924(e)(2), the *use* of explosives.

A. The ACCA's Definition of Violent Felony: An Evolving Standard.

The present case is the latest in a series[1] that has called upon the Court to determine whether certain crimes constitute violent felonies under the Armed Career Criminal Act, an onerous recidivist statute that increases both the minimum and maximum penalties applicable to a person convicted of being a felon in possession of a firearm under 18 U.S.C. § 922(g). *See* 18 U.S.C. § 924(e). If a defendant has certain convictions in his criminal history, the sentencing options mandated by statute increase from

1. *See Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); *James v. United States*, 550 U.S. 192 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Johnson v. United States,* 559 U.S. 133 (2010); *Sykes v. United States*, __U.S. __, 131 S. Ct. 2267 (2011); *Descamps v. United States*, __U.S. __ ,133 S. Ct. 2276 (2013).

zero to ten years in prison to fifteen years to life. *Compare* § 924(a)(2) *with* § 924(e). This significant enhancement applies when the defendant has three previous convictions for a "serious drug offense" or a "violent felony."

An offense is deemed a "violent felony" under 18 U.S.C. § 924(e)(2)(B) if it is a crime punishable by more than one year in prison that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Given the unclear language of the statute, this Court and lower courts have struggled for years with how to separate offenses that qualify as violent felonies from those that do not. *See, e.g.*, *James v. United States*, 550 U.S. 192, 216 (2007) (Scalia, J., dissenting) ("Imprecision and indeterminancy are particularly inappropriate in the application of a criminal statute. Years of prison hinge on the scope of the ACCA's residual provision, yet its boundaries are ill defined.")

The statute itself identifies three ways by which a prior conviction can be treated as a violent felony: the elements test, the enumerated offenses, and the "otherwise" or residual clause. Although the first two tests have certainly required this Court's attention more often than most criminal statutes in recent years – *see, e.g.*, *Taylor v.*

United States, 495 U.S. 575 (1990) (enumerated offenses); *Johnson v. United States*, 559 U.S. 133 (2010) (element test); *Descamps v. United States*, 133 S. Ct. 2276 (2013) (enumerated offenses) – it is the residual clause that has given rise to four previous examinations by this Court since 2007, and which gives rise to today's inquiry.[2] Of course, as this Court has recognized, the residual clause cannot be read in isolation, but must be read within the context of the other parts of the "violent felony" definition. Such consideration demonstrates that possessing a short-barreled shotgun is not a violent felony.

1. Congress Designed the ACCA to Apply Uniformly and to Enhance Sentences for Offenders With Serious and Dangerous Criminal Histories.

What is known today as the Armed Career Criminal Act began life in 1984, and provided that a significant sentence enhancement should apply to anyone convicted of being a prohibited person in possession of a firearm who had three previous convictions "for robbery or burglary." *Taylor*, 495 U.S. at 581 (quoting Pub. L. 98-473, ch. 18, 98 Stat. 2185). In defining the scope of this enhancement, Congress intended to create national uniformity:

> Furthermore, in terms of fundamental fairness, the Act should ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same

2. Underscoring the ambiguity of this provision, Justice Scalia has aptly referred to it as "the Delphic residual clause." *Sykes*, 131 S. Ct. at 2284 (Scalia, J., dissenting).

> type of conduct is punishable on the Federal level in all cases.

S. Rep. No. 98-190, at 20. As the Court discerned in its examination of the legislative history of the ACCA in *Taylor*, Congress intended to employ uniform analysis, so that violations of various state statutes that punished similar conduct would be treated similarly for the purpose of future enhancement, even when the states themselves used differing terms to describe the criminal offenses. Whether in the 1984 iteration of the statute, which listed only robbery and burglary as predicates, or in the amended version of 1986, "Congress intended that the enhancement provision be triggered by crimes having certain specified elements, not by crimes that happened to be labeled 'robbery' or 'burglary' by the laws of the state of conviction." *Taylor*, 495 U.S. at 588-89.

In addition to striving for uniformity and consistency, Congress also sought to apply the fifteen-year mandatory minimum penalty only to serious career recidivists. As Senator Arlen Specter stated when reopening the debate about the ACCA in 1986, the statute was intended as a "new tool to be used against the most dangerous criminals." 132 Cong. Rec. 7697. The drafters and proponents of the legislation sought to weed out minor crimes, non-felonies, and "just garden variety local crimes" from consideration as predicate offenses.[3] To this end, Congress ultimately decided that only "violent felonies" and certain serious

---

3. Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong. 12 (May 21, 1986) (hereinafter "ACCA Subcommittee Hearing").

drug offenses would trigger the ACCA's application. Congress explicitly rejected a proposal made during the 1986 amendments to the Act that would have covered "*every* offense that involved a substantial risk of the use of 'physical force against the person or property of another.'" *Begay*, 553 U.S. at 144 (quoting *Taylor*, 495 at 583, in turn quoting S. 2312, 99th Cong., 2d Sess. (1986)). Instead, the drafters of the legislation sought to include grave offenses against property, even if they lacked an explicit element of force, but only when they presented a serious risk of injury. ACCA Subcommittee Hearing 15; *Taylor*, 495 U.S. at 584. After considering various options, including adopting just the "elements" test or the enumerated offense list alone, Congress adopted all three tests, pairing the enumerated examples explicitly with the residual clause as reflected in the current version of the ACCA. *See Taylor*, 495 U.S. at 587.

Ultimately, "use of explosives" was included in the list of enumerated offenses. Although the legislative history contains relatively little discussion regarding its initial inclusion in the list, a representative of the Department of Justice who spoke during the 1986 debates explained that "various explosives offenses involving, for example, the destruction of energy facilities or the destruction of public conveyances" would count as predicate offenses. ACCA Subcommittee Hearing 15 (testimony of James Knapp, Deputy Assistant Attorney General); *see also id.* at 23 (describing "use of explosives or firebombs to destroy a vehicle or building"). There is no mention in the legislative history that Congress or other proponents of the legislation intended it to cover mere possession of either explosives or firearms.

2. The Residual Clause Must Be Read in Conjunction With the Enumerated Offenses.

The residual clause of the violent felony definition includes those offenses that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). Despite the statute's less than pellucid phrasing, over the course of four decisions in five years, the Court has established that the enumerated felonies preceding the residual clause decisively inform which predicate offenses are covered by its language. "In our view, the provision's listed examples – burglary, arson, extortion, or crimes involving the use of explosives – illustrate the kinds of crimes that fall within the statute's scope." *Begay*, 553 U.S. at 142; *see also James*, 550 U.S. at 203 ("In this case, we can ask whether the risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses . . . .").

> '[T]o give effect . . . to every clause and word' of this statute, we should read the examples as limiting the crimes that clause (ii) covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves.

Begay 553 U.S. at 143 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (further internal quotation marks and citation omitted)).

Crimes that necessarily involve intentional and provocative behavior, such as the enumerated offenses themselves and vehicular flight from law enforcement as

addressed in *Sykes*, may require no more than comparing the risks attendant to the offense in question with the risks posed by the crime's closest analog among the enumerated offenses. *See Sykes*, 131 S. Ct. at 2275-76. In contrast, in considering offenses that lack such an element of aggressive or even intentional action, risk analysis alone would allow the inclusion of offenses "too unlike the provision's listed examples for [one] to believe that Congress intended the provision to cover [them]," *Begay*, 553 U.S. at 141-42, and analysis of the nature of the predicate offense is necessary.

Under any iteration of this Court's analysis, mere possession of a short-barreled shotgun is not a violent felony because it is neither similar in kind nor in degree of risk to any of the enumerated offenses.

B. Mere Possession of a Short-Barreled Shotgun Is Not a Violent Felony.

Mere possession of a short-barreled shotgun is not a violent felony because it does not involve conduct that "presents a serious potential risk of physical injury to another." First, it is not "similar in kind" in any way to the enumerated offenses. It is a crime of mere possession and nothing more, which distinguishes it entirely from the enumerated offenses and from inclusion as a violent felony. In addition, it is not universally or even widely criminalized, which also places it in marked contrast to the enumerated offenses. Finally, possession of a short-barreled shotgun is at times a strict-liability offense, which means that the analysis of *Begay* is uniquely relevant. The offense, regardless of *mens rea*, is never "purposeful, violent or aggressive."

Second, mere possession of a short-barreled shotgun is not as risky or dangerous as its closest analog among the enumerated offenses: use of explosives. A close examination of available data reveals that far more crimes are committed with handguns, which are almost universally lawful for possession by ordinary citizens, than with short-barreled shotguns. Concerns about the inherent danger of short-barreled shotguns, which led to their federal regulation in the first place, are not only based upon dated beliefs about their use by "gangsters," but are belied by the growing legal availability and possession of such weapons by law-abiding Americans. Indeed, fewer than a third of state governments have determined that mere possession of a short-barreled shotgun is risky enough to criminalize across the board.

1. Possession of a Short-Barreled Shotgun is Not "Similar in Kind" to the Enumerated Offenses.

This Court's analysis requires that an offense be "similar in kind" to the enumerated offenses in order to fall under the residual clause. *See* section I(A)(2), *supra*. In *Begay*, the Court explicitly rejected a suggestion that the enumerated crimes were included as nothing more than quantitative parameters, reasoning that the examples are "so far from clear in respect to the degree of risk each poses that it is difficult to accept clarification in respect to degree of risk as Congress' only reason for including them." *Begay*, 553 U.S. at 143. The *Begay* Court carefully examined the enumerated offenses for guidance and concluded that they "all typically involve purposeful, violent, and aggressive conduct." *Id*. at 144-45 (internal quotation marks omitted); *see also Chambers*, 555 U.S.

at 128. The Court explained that burglary involves unlawfully entering a building with intent to commit a crime, arson requires intentionally causing a fire with "the purpose of" destruction, and "use" of explosives suggests a higher degree of intent than negligent or accidental conduct. *Begay*, 553 U.S. at 145. When an offense – such as the negligent DUI in *Begay* or the passive failure-to-report in *Chambers* – is not intentional or violent, it is not similar to the enumerated offenses. This focus on the active and purposeful nature of the four enumerated offenses highlighted part of what it means to be "similar in kind."

In *Sykes v. United States*, the Court once again grappled with whether a contested offense was similar in kind as well as in degree of risk posed to the enumerated offenses. At issue in *Sykes* was an Indiana statute criminalizing fleeing the police in a motor vehicle. The Court described both the intentional nature of flight from law enforcement and the hazards it created:

> When a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern for the safety of property and persons of pedestrians and other drivers an inherent part of the offense. . . . A criminal who takes flight and creates a risk of this dimension takes action similar in degree of danger to that involved in arson, which also entails intentional release of a destructive force dangerous to others. . . . The attempt to elude capture is a direct challenge to an officer's authority. It is a provocative and dangerous act that dares, and in a typical case requires, the officer to give chase.

Sykes, 131 S. Ct. at 2273. The Court emphasized that in every instance and by its very nature, fleeing the police involves intentional defiance of lawful authority and use of a vehicle. *Id.*

The *Sykes* Court suggested that, in many cases, the examination of whether an offense involves "purposeful, violent and aggressive" conduct "will be redundant with the inquiry into risk, for crimes that fall within the former formulation and those that present serious potential risks of physical injury to others tend to be one and the same." 131 S. Ct. at 2275. *Sykes* explained that predicate offenses that involve intentional and very risky conduct like fleeing the police in a motor vehicle may not require the "redundant" analysis of *Begay's* "purposeful, violent and aggressive" test. *Id.* In contrast, "a crime akin to strict liability, negligence, and recklessness crimes" would likely still require the analysis. *Id.* at 2276.[4]

Possession of a short-barreled shotgun stands in marked contrast to the enumerated offenses in several ways: it is an offense of mere possession; it is widely

4. The *Sykes* Court did not overrule *Begay* and *Chambers*, its decisions from just a few years before, but explained that the central analysis of those decisions might not always be necessary to examine whether an offense is included within the residual clause. *See Sykes*, 131 S.Ct. at 2285 (Scalia, J. dissenting) (noting that the purposeful, violent and aggressive test still exists and all three words must still have meaning); *id.* at 2289 n.1 (Kagan, J. dissenting) (noting that the purposeful, violent and aggressive test "will make a resurgence"); *see also Chambers*, 555 U.S. at 131 (Alito, J., concurring) (recognizing that "*stare decisis* in respect to statutory interpretation has 'special force'") (quoting *John R. Sand and Gravel Co. v. United States*, 552 U.S. 130, 139 (2008)).

legal rather than universally prohibited; and it is not "purposeful, violent and aggressive." Accordingly, it is not "similar in kind" to the enumerated offenses.

a. Possession Is Not Violent.

Perhaps the most important distinction between possession of a short-barreled shotgun and the enumerated offenses is that none of the listed crimes treat mere possession of anything as a violent felony. Indeed, the one enumerated offense that appears to base violent felony status on an item rather than an act requires *use* of that item: explosives.

By its very nature, the crime of possessing a short-barreled weapon requires possession and nothing more; that possession alone forms the basis for the requisite analytical comparisons. This Court has long counseled that determining whether a conviction under a particular state statute is a violent felony requires an examination of the elements of the offense and the specific conduct required to violate the statute, not speculation about what additional conduct might occur. In *Taylor v. United States*, the Court held that § 924(e) required a "categorical approach," looking "only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." 495 U.S. at 600-01; *see also Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) ("The key . . . is elements not facts.").

In *Johnson v. United States*, the Court suggested that, in deciding whether a predicate offense satisfies the definition of violent felony, a court should consider the "least of [the] acts" necessary to violate the statute and

nothing more. *Johnson*, 559 U.S. 133, 137 (2010) (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005) (plurality opinion)). In an even more recent decision exploring the way in which *Taylor's* categorical approach applies under the Immigration and Naturalization Act (INA), the Court further explained this "minimum conduct" assessment:

> Because we examine what the state conviction *necessarily* involved, not the facts underlying the case, we must presume that the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, and then determine whether even those acts are encompassed by the generic federal offense.

Moncrieffe v. Holder, __ U.S. __, 133 S. Ct. 1678, 1684 (2013) (quoting *Johnson*, 559 U.S. at 137) (emphasis added). The *Moncrieffe* Court described this analysis as a "focus on the minimum conduct criminalized by the state statute," and suggested it would avoid using "legal imagination." *Id*. at 1684-85. With this guidance in mind, the Court must consider the basic passive elements of mere possession of a short-barreled shotgun, and not some imagined use of that shotgun, when comparing it to the enumerated crimes.

Examining the crime of possession of a short-barreled weapon demonstrates that it requires possession and nothing more. The Minnesota statute applies to "whoever owns, possesses or operates" a short-barreled shotgun. Minn. Stat. § 609.67, subd. 2. In Minnesota and most of the few states that prohibit possession of the weapon, the ban even applies to citizens who are otherwise permitted to own firearms, and there is no requirement that the

shotgun be used in or possessed during another crime. Indeed, in several cases prosecuted under Minnesota statute § 609.67 and other states' similar statutes, the weapon in question was possessed at home or in a closet or a locked gun cabinet.[5] As the Seventh Circuit noted in *United States v. Miller*, "short-barreled shotgun cases often involve a passive possession in which the weapon is not exposed to others." 721 F.3d 435, 439 (7th Cir. 2013).

> The range of conduct which could constitute knowing possession of a short-barreled shotgun can vary on a scale of risk of danger to others, but the mere possession of a weapon doesn't have to involve any risk. For example, brandishing the weapon, loading it, or actually pulling the trigger are all highly dangerous activities. But those separate actions go beyond the mere possession of the weapon. Something as simple as stuffing a

5. *See, e.g., State v. Salyers*, 842 N.W.2d 28 (Minn. App. 2014) (short-barreled shotgun in locked gun cabinet); *State v. Robinson*, No. C3-01-2243, 2003 WL 347592 (Minn. App. Feb. 18, 2003) (short-barreled shotgun in closet); *State v. Guerra*, 565 N.W.2d 10 (Minn. App. 1997) (found in home with no allegation that it had been used in a crime. *See also State v. Beavers,* 912 A.2d 1105 (Conn. App. 2007) (short-barreled shotgun found in sheath in closet); *Thompson v. State*, 378 So.2d 859 (Fla. Dist. Ct. App. 1979) (gun found in trunk of repossessed car); *People v. Yankaway*, 2014 Ill. App. 2d 121048-U (Ill. Ct. App. June 9, 2014) (short-barreled shotgun found in top canopy in bedroom of house); *Boston Hous. Auth. v. Guirola*, 575 N.E.2d 1100 (Mass. 1991) (short-barreled shotgun found in broom closet); *People v. Etcheverry*, 347 N.E.2d 654 (N.Y. 1976) (short-barreled shotgun found in dresser); *State v. Garrett*, 635 N.W.2d 615 (Wis. Ct. App. 2001) (weapon found in closet).

> short-barreled shotgun (regardless of whether loaded or even assembled) under a mattress, a relatively passive and not inherently violent act, is all it takes to violate Wisconsin's law against possessing short-barreled shotguns.

Id. at 440. Therefore, in comparing possession of a short-barreled shotgun to the enumerated offenses, the appropriate conduct to compare is mere possession itself and nothing more.

In contrast, the enumerated offenses all involve active felonies and none criminalizes mere possession of an object. Possession is so unlike these action-based felonies that it cannot be described as "similar in kind." The closest analog among the listed offenses is "use of explosives," and the differences between use and possession are enormous.

This Court and others have recognized the significant difference between possessing and using something, even something potentially dangerous such as a firearm. In *Bailey v. United States*, 516 U.S. 137 (1995), this Court ruled that "use" of a firearm in relation to drug trafficking requires evidence of "active employment" of the firearm by the defendant. The Court observed that "use must connote more than mere possession of a firearm by a person who commits a drug offense." *Id.*; *see also United States v. Fish*, 368 F.3d 1200, 1203 (9th Cir. 2004) ("Federal law clearly recognizes a distinction between 'use' and 'possession.'") More recently, in *United States v. Castleman*, the Court addressed the meaning of the term "use of physical force" in the context of 18 U.S.C. § 922(g)(9), which prohibits gun possession by persons convicted of misdemeanor crimes of domestic violence. __ U.S. __, 134 S. Ct. 1405 (2014).

Although the Court made clear that § 922(g)(9)'s definition was not to be interpreted identically with the ACCA's very similar provision, 134 S. Ct. at 1410, its discussion of the word "use," is nonetheless instructive. "[It] is correct that under *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the word 'use' conveys the idea that the thing used (here, 'physical force') has been made the user's instrument." *Castleman*, 134 S. Ct. at 1410. As *Leocal* explained, "use . . . most naturally suggests a higher degree of intent than negligent or merely accidental conduct." 543 U.S. at 9.

Similarly, in lower court cases considering whether a predicate offense is a violent felony under the ACCA, several courts have emphasized that simple possession of an item, even a dangerous item, can never be enough. Long before the instructive analysis of *Begay*, the First Circuit found that possession offenses by their very nature do "not fit easily within the literal language of the statute." *United States v. Doe*, 960 F.2d. 221, 224 (1st Cir. 1992) (Breyer, J.) (considering whether felon-in-possession offenses should count as violent felonies under the ACCA). In *Doe*, the court found that there was little risk of physical harm accompanying the conduct that normally constitutes firearm possession, "for simple possession, even by a felon, takes place in a variety of ways (*e.g.*, in a closet, in a storeroom, in a car, in a pocket) many, perhaps most, of which do not involve likely accompanying violence." *Id*. at 224-25; *see also United States v. Oliver*, 20 F.3d 415, 418 (11th Cir. 1994) ("Th[e enumerated] offenses each manifest *affirmative, overt and active conduct* in which the danger posed to others extends beyond the mere possession of a weapon, and is far more threatening in an immediate sense.") (emphasis added); *see also United States v. Lane*, 252 F.3d, 905, 907 (7th Cir. 2001) (addressing possession of a gun in the context of a pretrial-release statute and noting

that "[t]he active use of a gun is a crime of violence in a way that mere possession of it, even if criminal, is not.").

More recently, the Eleventh Circuit explored the critical difference between possession offenses and the enumerated crimes in *United States v. Archer*. "The act of possession does not, without more, however, involve any aggressive or violent behavior." *Archer*, 531 F.3d 1347, 1351 (11th Cir. 2008) (concluding that carrying a concealed weapon is not a violent felony); *see also United States v. Alexander*, 217 F. App'x. 417 (6th Cir. 2007) (unpublished) ("[T]he enumerated violent felonies all typically require the offender to engage in active conduct. Just as an individual who merely *possesses* explosives or *possesses* a match does not commit a violent felony, so an individual who merely *possesses* a concealed weapon would not seem to commit such a crime.") (emphasis in original).

Finally, assuming possession of a short-barreled weapon is similar to possession of an explosive for this analysis, a conclusion that mere possession of a short-barreled shotgun is similar in kind and therefore a violent felony would functionally erase the term "use" from the phrase "use of explosives," thereby violating basic rules of statutory interpretation. The Court has held that it avoids a statutory construction that would render another part of the same statute superfluous. *See Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *Pennsylvania Dept. Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (expressing "deep reluctance" to interpret statutory provisions "so as to render superfluous other provisions in the same enactment"). This basic canon has been applied by lower courts to reject a reading of the definition of "violent felony" that functionally ignores the "use" which

precedes "explosives" by finding that mere possession of dangerous items is sufficient. *See United States v. Oliver*, 20 F.3d 415, 418 (11th Cir. 1994) ("Most significantly, the statute requires that the *use* – rather than possession – of explosives gives rise to a potential violent felony. It is unlikely that in enacting section 924(e), Congress intended that the possession of a firearm be deemed a violent felony, while the possession of explosives would not be so categorized."); *see also United States v. Fish*, 368 F.3d 1200, 1204 (9th Cir 2004) (holding that an interpretation that possession of a pipe bomb is crime of violence under the guidelines' similar provision "would render the provision's specific inclusion of '*use* of explosives' in the same section surplusage. . . [T]his interpretation would violate fundamental principles of statutory construction . . .").

In sum, one of the starkest differences between the crime of mere possession of a short-barreled shotgun and every one of the enumerated offenses is that none of them criminalizes the simple possession of an item. Even the current offense's closest analog explicitly requires "use" of a potentially dangerous object. For this reason alone, possession of a short-barreled shotgun is not "similar in kind" to the enumerated offenses and therefore not a violent felony.

b. Possession of Short-Barreled Shotguns Is Widely Legal.

Second, possession of short-barreled shotguns is legal in many states and, if properly registered, it is legal federally. In contrast, not a single enumerated offense, and indeed none of the offenses previously analyzed by this

Court regarding whether they are violent felonies (DUI, failure to surrender for service of a sentence, burglary, fleeing the police in a motor vehicle) are legal *anywhere*. While such offenses might be treated more severely in some states than others (for example, drunken driving, which is always a misdemeanor in some states but can be a felony in others) every state prohibits every one of these offenses. Possession of a properly registered short-barreled shotgun, fully legal in states ranging from Alaska to Wyoming, fundamentally differs from the enumerated offenses for this reason alone.

Federally, short-barreled shotguns, along with silencers, machine guns, explosives and certain other weapons, are highly regulated but not banned by the National Firearms Act, enacted in 1934. *See* 26 U.S.C. §§ 5801 *et. seq.* A person (or manufacturer) who makes a short-barreled weapon must register the weapon with the National Firearms Registration and Transfer Record and pay a tax of $ 200. 26 U.S.C. §§ 5821, 5822, 5841.[6] If the weapon is transferred, it must be registered by the transferor to the transferee. 26 U.S.C. § 5841(b). Possession or transfer of an unregistered short-barreled shotgun is a felony punishable by up to ten years in prison, 26 U.S.C. §§ 5861, 5871, but possession of a properly registered weapon is not, unless the person possessing the gun is otherwise a "prohibited person" under 18 U.S.C. § 922(g). Indeed, the website for the Bureau of Alcohol, Tobacco and Firearms ("BATF") provides forms for

6. It is noteworthy that, when the ACCA was enacted in 1984, and when it was amended two years later, Congress's decision to regulate rather than ban the possession of short-barreled shotguns had been the law of the land for several decades.

manufacturers of short-barreled shotguns and separate forms for transferees among the public (presumably purchasers) to use to register their weapons and pay the required tax.[7] According to the BATF, in 2013 more than 163,000 NFA Applications were processed for registration of all types of covered weapons, up more than 100,000 from the number of applications processed in 2005.[8]

Not only is possession of a properly registered short-barreled shotgun legal at the federal level, but a majority of states either do not specifically prohibit possession of short-barreled shotguns, or permit such possession as long as the firearm is registered in accordance with federal law. In eight states, no laws prohibit mere possession of short-barreled shotguns, and in two additional states such possession is permitted by adults.[9] In twenty-three states,

---

7. https://www.atf.gov/content/library/firearms-forms (last visited June 23, 2014) (Form 5320.1 for making a NFA firearm and Form 5320.4 for transferring a NFA firearm).

8. *See* http://www.atf.gov/statistics/index.html.https://www.atf.gov/content/how-long-does-it-take-atf-process-my-nfa-application. (last visited June 23, 2014).

9. Counsel could locate no laws governing short-barreled shotguns or "sawed off shotguns" in the statutes of Kentucky, Mississippi, New Hampshire, New Mexico, Vermont, West Virginia, or Wyoming. In Montana, there is no prohibition against possession of a short-barreled shotgun if it is originally manufactured as such, but it is unlawful to possess a "sawed off" shotgun unless it is federally registered. Mont. Code Ann. § 45-8-340. In Idaho, possession of short-barreled shotguns is legal for adults, though prohibited for minors, Idaho Code Ann. § 18-3302F, and in Utah, possession itself by adults is not prohibited, but certain carrying of short-barreled shotguns is unlawful, as is possession by minors. Utah Code Ann. 1953 §§ 76-10-504 & 76-10-509.4.

possession of short-barreled shotguns by regular citizens is lawful if the gun is registered in compliance with the federal National Firearms Act,[10] and in four others if it is registered with a state agency.[11] In one of those states, Michigan, possession of short-barreled shotguns used to be unlawful, but that prohibition was repealed in 2014.[12] Only twelve states have statutes similar to Minnesota's, prohibiting possession of short-barreled shotguns by ordinary citizens regardless of compliance with federal registration.[13] Samuel Johnson's conduct, mere possession

---

10. Ala. Code § 13A-11-63; Alaska Stat. Ann. § 11.61.200; Ariz. Rev. Stat. Ann. § 13-3102; Colo. Rev. Stat. Ann. § 18-12-102 (legal if registered for adults and non-felons); Conn. Gen. Stat. Ann. § 53a-211; Fla. Stat. Ann. § 790.221; Ga. Code Ann § 16-11-122; Kan. Stat. Ann. § 21-6301; Md. Public Safety § 5-203; Michigan Senate Bill 610 (2014); Neb. Rev. Stat. § 28-1203; Nev. Rev. Stat. Ann. § 202.275; N.Y. Penal Law § 265.02 (possession of originally manufactured short-barreled shotguns legal if registered; possession of sawed off shotguns illegal); N.D. Cent. Code Ann. § 62.1-02-03; Okla. Stat. Ann. tit. 21 § 1289.18; Or. Rev. Stat. Ann., § 166.272; 18 Pa. Cons. Stat. Ann. § 908; S.C. Code Ann. § 16-23-230; S.D. Codified laws § 22-14-6; Tenn Code Ann. § 39-17-1302; Tex. Penal Code Ann. § 46.05; Wis. Stat. Ann. § 941.28; Rev. Code of Wash. Ann. § 9.41.190.

11. La. Rev. Stat. Ann. § 40:1785 (requires registration with Department. of Public Safety); Me. Rev. Stat. tit. 15, § 393 (Commissioner of Public Safety); Mass. Gen. Laws. Ann. ch. 269, § 10 (local officials); Ohio Rev. Code Ann. § 2923.17 (local chief of police).

12. *See* Mich. C.L. Ann. § 750.224b, as amended Mi. SB 610 (2014).

13. Ark. Code § 5-73-104 (felony); Cal. Penal Code §§ 33210, 32215 (misdemeanor or felony); Del. Code Ann. tit. 11, § 1444 (felony); Haw. Rev. Stat. § 134-8 (felony); 720 Ill. C. Stat. 5/24-1 (felony); Ind. Code Ann. § 35-47-5-4.1 (misdemeanor or felony);

of a short-barreled shotgun, is *per se* criminalized in only twenty-six percent of states.[14]

In sum, a clear and essential difference between the offense at issue and every one of the offenses enumerated in § 924(e)(2) is that the latter punish conduct that is universally illegal, while the former does not. Because possession of a short-barreled shotgun is not similar to the enumerated offenses in this critical respect, it is not a violent felony under the ACCA.

c. Possession of a Short-Barreled Shotgun Is Not "Purposeful, Violent or Aggressive."

Mere possession of a short-barreled weapon does not involve the "purposeful, violent and aggressive" conduct contemplated by *Begay* and *Chambers*. *See Begay,* 553 U.S. at 144-45; *Chambers*, 555 U.S. at 128. Indeed, as argued above, the simple possession of a short-barreled weapon alone is neither violent nor aggressive; additional steps are required to convert simple possession into an act that uses violence or employs aggression. In addition, under several state statutes, the required *mens rea* is not even "purposeful."

Iowa Code Ann. § 724.1 (felony); Mo. Ann. Stat. § 571.020 (felony); N.J. Stat. Ann. 2C:39-3 (felony); N.C. Gen. Stat. Ann. § 14-288.8 (felony); R.I. Gen. Laws Ann. § 11-47-8 (felony); Va. Code Ann. § 18.2-300 (felony).

14. Admittedly, Mr. Johnson would have been precluded from possessing a shotgun of any length in any state, due to his status as a felon in 2007. That prohibition, found in both federal and Minnesota state law, is separate from and unrelated to the specific Minnesota prohibition against possessing a short-barreled shotgun.

It is true that in *Sykes*, the Court indicated that "*in many cases* the purposeful, violent and aggressive inquiry will be redundant with the inquiry into risk, for crimes that fall within the former formulation and those that present serious potential risks of physical injury to others *tend* to be one and the same." *Sykes*, 131 S. Ct. at 2275 (emphasis added). The Court also suggested that the purposeful, violent and aggressive inquiry, so central to its holding in both *Begay* and *Chambers*, was uniquely relevant in cases involving a lesser *mens rea* than the intentionality required by the fleeing statute it was then considering. *Id*. at 2275-76.

The possession offense in the present case, however, is one in which the risk analysis is *not* redundant with the "purposeful, violent and aggressive" inquiry. Neither the Minnesota statute, nor the other state statutes that prohibit mere possession of a short-barreled shotgun require any additional intent to use the firearm in a dangerous or criminal manner. In marked contrast, the Court in *Sykes* repeatedly described the high level of intentionality required by the felony fleeing-the-police statute; indeed, not only must a defendant intentionally flee, but inherent in this flight is a "determination to elude capture" and a "direct challenge" to an officer's authority. *Id.* at 2273-74. A confrontation with police has already occurred by the time the flight begins. *Id.*

Moreover, in some states and almost certainly in Minnesota when Mr. Johnson was convicted of his short-barreled shotgun offense, the offense is essentially one of strict liability: the prosecution need not even prove that the defendant was aware that the weapon he possessed had characteristics that rendered it unlawful. Although the

National Firearms Act itself was silent as to the required degree of intent for a violation, *see* 26 U.S.C. §§ 5861, 5871, in *Staples v. United States*, 511 U.S. 600 (1994), this Court held that the government must prove that a defendant is aware of the characteristics of a firearm – in *Staples* itself, its fully automatic status – that bring it under the requirements of the Act. However, that rule is not universally applied.

When Mr. Johnson violated the Minnesota statute in 2007, it was almost certainly a strict liability offense. Minnesota statute § 609.67 itself is silent as to the required *mens rea*, with no explicit requirement of knowledge or intent. The section of Minnesota's criminal code setting forth definitions specifies that "[w]hen criminal intent is an element of a crime in [the criminal code], such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe.'" Minn. Stat. § 609.02 subd. 9 (2007). Therefore, the statute's absence of language regarding intent suggests that the statute lacks an explicit *mens rea* requirement. The Minnesota Supreme Court has never specifically addressed the degree of intentionality required to unlawfully possess a short-barreled shotgun.[15]

15. A 2012 Minnesota Supreme Court decision interpreting another firearm statute concluded that, even though the law was silent as to *mens rea*, the state had to prove that the defendant knowingly possessed the firearm. *See State v. Ndikum*, 815 N.W.2d 816 (Minn. 2012). However, that case dealt with possession of a handgun, and there was no discussion about whether a defendant had to be aware of certain characteristics of the firearm. Moreover, that decision came several years after Mr. Johnson's conviction for possessing a short-barreled shotgun.

Moreover, in 2007 Minnesota's pattern jury instructions only required the government to prove two elements: that a defendant "owned or possessed" a weapon that met the statutory definition of short-barreled shotgun, and that he or she did so at a particular time and place. 10A Minn. Prac., Jury Instr. Guides - Criminal CRIMJIG 32, 44 (5th ed. 2006). To be sure, the pattern jury instructions in effect today require the government to prove that the defendant "knew or had reason to know" that a firearm was a short-barreled shotgun in order to be convicted under § 609.67. *See* 10A Minn. Prac., Jury Instr. Guides - Criminal CRIMJIG 32,44 (5th ed. 2012 version). This explicit *mens rea* requirement was inserted into the model jury instructions by a 2009 amendment, although it was not based on any change in the statute or appellate court decisions. *See* 10A Minn. Prac. Jury Instr. Guides - Criminal CRIMJIG 32,44 (5th ed. 2009 Pocket Part).[16]

In sum, possession of a short-barreled shotgun in violation of Minnesota law was almost certainly a strict liability offense in 2007, and possibly remains one today. Minnesota is not alone.

Other states that regulate or prohibit possession of short-barreled shotguns adopt a wide range of *mens*

16. In a recent Eighth Circuit decision addressing the "violent felony" status of possession of a short-barreled shotgun, the court assumed without deciding that the Minnesota offense had been a strict liability crime as of 1998, when the underlying predicate offense then before it had been committed. *See United States v. Brown*, 734 F.3d 824 (8th Cir. 2013); *see also State v. Salyers*, 842 N.W.2d 28, 35 (Minn. App. 2014) (affirming conviction under § 609.67 for a shotgun kept in a locked gun closet without discussing whether defendant knew barrel was short).

rea requirements for the offense. Several of the state statutes regulating or criminalizing possession of short-barreled shotguns are silent as to the required scienter, and jurisprudence from those states is either unclear or non-existent as to state of mind.[17] However, in other states, including Illinois, Iowa, Massachusetts, New Jersey and North Carolina, and Tennessee, the offense is one of strict liability: the government must only prove that the defendant knowingly possessed a weapon, but need not prove any knowledge of undersize length of the barrel.[18] In

17. For instance, Florida Stat. Ann. § 790.221 does not specify a *mens rea* requirement regarding knowledge of the illegal characteristics of the gun, or even knowledge of the gun's presence, and Florida jurisprudence sheds little light. *See, e.g., Cummings v. State*, 633 So. 2d 559 (Fla. Dist. Ct. App. 1994) (holding defendant's proximity to short-barrel shotgun he denied knowledge of was enough to establish constructive possession); *but see McDaniels v. State*, 388 So. 2d 259 (Fla. Dist. Ct. App. 1980) (holding court abused its discretion in taking judicial notice of unproved elements of barrel length as well as overall length of shotgun). Montana Code Ann. § 45-8-340 prohibits "knowingly possess[ing]" a short-barrel or sawed-off shotgun, but Montana caselaw does not address whether ignorance as to the dimensions of the shotgun is a valid defense. Similarly, North Dakota Cent. Code Ann. § 62.1-02-03 does not specify a mens rea requirement with regards to knowledge of the illegal characteristic of the gun, or even knowledge of the gun's presence, and North Dakota caselaw does not clarify the applicable *mens rea*.

18. *See, e.g., State v. Winders*, 366 N.W.2d 193 (Iowa Ct. App. 1985) ("'knowingly' in statute [I. C. A. § 724.3] proscribing possession of offensive weapon merely requires that defendant had knowledge that she possessed weapon within general meaning of such term, rather than knowledge that she possessed an 'offensive weapon' as statutorily defined"); *United States v. Corona-Pena*, 432 F. App'x. 702 (9th Cir. 2011) (quoting *People v Wright*, 140 Ill.

very few states is the law clear that the government must prove that the defendant was aware of the characteristics of the weapon which subjected it to prohibition or greater regulation.[19]

In sum, in at least several of the states that criminalize possession of a short-barreled shotgun, the applicable

App. 3d 576, 595 (1986) ("[720 ILCS 5/24-1] does not require that defendant in fact know the shotgun's barrel measured less than 18 inches")); *Com. v. O'Connell*, 738 N.E.2d 346, 351 (Mass. 2000) ("[T]he Commonwealth need not prove that defendant knew that the physical characteristics of the firearm he possessed (such as barrel length) rendered it subject to regulation [under Mass. Gen. Laws Ann. ch. 269, § 10]... his ignorance vis-à-vis that firearm's dimensions is not a valid defense."); 10B N.J. Pl. & Pr. Forms § 93:281 (jury instructions regarding possession of sawed-off shotgun do not require state to prove scienter in order to convict under N.J. Stat. Ann. § 2C:39-3); *State v. Watterson*, 679 S.E.2d 897 (N.C. App. 2009) (holding that violation of N.C. Gen. Stat. Ann. § 14-288.8 did not require proof that defendant knew the barrels of shotguns in his possession were less than 18 inches long); *United States v. Fogarty*, 344 F.2d 475, 478 (6th Cir. 1965) (Under Tennessee Code Ann. § 39-17-1302, "the mere possession of such a firearm is a violation of the statute. Scienter is not an element of the offense.")

19. *See e.g., State v. Hill*, 970 S.W.2d 868 (Mo. Ct. App. 1998) (holding that state satisfied evidentiary burden under Mo. Ann. Stat. § 571.020 by establishing that defendant had reasonable notice that gun was "short-barreled," despite no knowledge of actual barrel length); *Kelly v. State*, 638 S.W.2d 203, 204 (Tex. App. 1982) ("The state had to prove that appellant did intentionally or knowingly possess a short-barrel firearm (as described in the indictment). The mistake of fact held by the appellant as to the length he had cut the barrel could negate the kind of culpability required for the commission of the offense."); *People v. King*, 38 Cal. 4th 617 (2006) (state must prove defendant knew gun had shortened barrel).

mens rea approximates strict liability. This means that in such states, including Minnesota in 2007, there can be little doubt that the degree of intentionality is on par with that required by driving while intoxicated, and therefore *Begay's* analysis remains relevant and essential.

Under the *Begay* test, mere possession of a short-barreled shotgun is not a violent felony because it is not "purposeful, violent and aggressive." As argued above, passive possession of the weapon alone is enough to violate the Minnesota statute and most others: such conduct is not "purposeful" in the way the enumerated crimes are and, by itself, is certainly not "violent" or "aggressive." This is a third reason the offense is not "similar in kind" to the enumerated offenses.

2. Mere Possession of a Short-Barreled Shotgun Presents Far Less Risk Than Its Closest Analog or Any Of The Enumerated Crimes.

This Court's precedent regarding the residual clause has emphasized that, in order for a prior conviction to count as a predicate offense, a close analysis of the risk presented by the offense is required. *See James,* 550 U.S. at 205-06; *Begay* 553 U.S. at 141-42*; Chambers*, 555 U.S. at 128-29*; Sykes*, 131 S. Ct. at 2273-75. "In general, levels of risk divide crimes that qualify from those that do not." *Sykes*, 131 S. Ct. at 2275 (citing *James*, 550 U.S. 192). To that end, the Court has held that "a crime involves the requisite risk when 'the risk posed by [the crime in question] is comparable to that posed by its closest analog among the enumerated offenses.'" *Id.* at 2273 (quoting *James,* 550 U.S. at 203); s*ee also Begay*,

553 U.S. at 149 (Scalia, J. concurring) (noting that *James'* analysis requiring comparison to closest analog must be followed for "unenumerated crimes that are analogous to enumerated crimes" such as the relationship between attempted burglary and burglary).

In order to compare the "degree of risk posed" between an offense and its closest analog, the Court has examined statistics to determine the extent to which a prior offense results in death or injury. Among the enumerated offenses and the other predicates reviewed by this Court, drunk driving creates the greatest degree of risk, causing 17,000 deaths in 2006 alone, and untold injuries. *Begay*, 553 U.S. at 141. At the other end of the risk spectrum was failing to report for service of a sentence, which led to no instances of violence among 160 cases examined. *Chambers*, 555 U.S. at 129. In *Sykes*, the Court noted that more than a hundred "nonsuspects" are killed each year in police chases, and many more people are injured, with between 4% and 17% of chases ending in injury. In burglaries of homes, in contrast, 3.2% of examined offenses resulted in injuries, and arson led to injury in 3.3 % of crimes. *See Sykes*, 131 S. Ct. at 2274-75.[20]

---

20. Although statistics have certainly been important in this Court's analysis, the Court has made clear that "they are not dispositive." *Sykes*, 131 S. Ct. at 2274. Indeed, in *Begay*, the Court found that drunk driving is not a violent felony under the ACCA despite the fact that the offense kills more people each year than all of the other enumerated offenses combined. Moreover, a singular focus on statistics has been criticized, as such data is rarely uniform and its meaning often subject to debate and manipulation. *See, e.g.*, *Sykes*, 131 S. Ct. at 2286 (Scalia, J., dissenting) (describing contradictions in data and concluding that "our statistical analysis in ACCA cases is untested judicial fact finding masquerading as statutory interpretation").

Mere possession of a short-barreled shotgun cannot be described as presenting a risk of injury on par with either its closest analog or with any of the other enumerated offenses. Such statistics as are available do not suggest that mere possession of short-barreled shotguns is as risky as the use of explosives. Admittedly, precise statistical analysis regarding how often injury occurs in conjunction with the simple possession of a short-barreled shotgun is difficult to locate, but statistics regarding gun crimes in general are not. The Bureau of Justice Statistics within the United States Department of Justice issued a report entitled Firearm Violence, 1993-2011 (May 2013).[21] Although the report contained no specific data regarding short-barreled shotguns, it analyzed crimes nationwide committed with firearms in each of the years between 1994 and 2011. On average in those years, 71.4% of all homicides committed with guns and 91.3% of all nonfatal violence committed with guns were committed with handguns. The report contained no separate category for short-barreled shotguns, but all shotguns, rifles and "other types of firearms" together made up a very clear minority of violence involving firearms.[22]

---

21. Michael Planty and Jennifer Truman, Firearm Violence, 1993-2011, Bureau of Justice Statistics, May 7, 2013, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4616 (Last visited June 25, 2014).

22. Even these statistics, which demonstrate that short-barreled shotguns are used in many fewer violent crimes than handguns, are not squarely applicable to the current case because they measure the use of guns in crime. The rate of injury or death from mere possession of a short-barreled shotgun is certain to be far less than the rate of injury from active crimes involving short-barreled shotguns, but it is the possession offense only that must be analyzed. *See Moncrieffe*, 133 S. Ct. at 1684.

Similarly, an annual report prepared by the California Department of Justice, Bureau of Forensic Services entitled "Firearms Used in the Commission of Crimes" details the "number and type of firearms used most frequently in the commission of violent, homicidal, street and drug trafficking crimes."[23] Between 2009 and 2011, the Bureau examined 441 firearms that had been used in crimes within its service area.[24] Among those were 378 handguns, an assortment of other firearms, and only four short-barreled shotguns or rifles. During those three years, handguns were used in 85.7% of all crimes, 82.9% of non-fatal crimes of violence, 84.7 % of homicides and 90.0% of crimes committed by gangs.

Such statistics demonstrate that, among firearms, short-barreled shotguns are involved in, at most, a small minority of crimes involving guns, and represent a very small percentage of injuries caused by gun crimes. Any belief that short-barreled shotguns are, today, more commonly used by criminals than other types of firearms, and therefore somehow indicative of criminality in and of themselves is simply not borne out by this data.

The risk posed by unlawful use of explosives is, in contrast, substantial. As explored above, the term "use"

---

23. Kamala D. Haris, 2009 Firearms Used in the Commission of Crimes, State of Cal. Dept. of Justice, 2009, http://ag.ca.gov/publications/Firearms_Report_09.pdf; 2010 Firearms Used in the Commission of Crimes, 2010, http://ag.ca.gov/publications/Firearms_Report_10.pdf; 2011 Firearms Used in the Commission of Crimes, 2011, http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/Firearms_Report_11.pdf. (Last visited June 25, 2014)

24. Admittedly, these surveys involve only a small subset of gun crimes occurring in California.

in the inclusion of explosives in the enumerated crimes list is important. *See* section C(1)(a), supra. Use of explosives necessarily entails an active employment of a dangerous item, rather than merely passive possession. The legislative history of the ACCA's 1986 amendment certainly reflects that Congress contemplated the inclusion of very dangerous active crimes such as "destruction" of energy facilities and public conveyances. *See* section A(1), *supra*. While statistics are not readily available specifically for crimes involving the use of explosives, it is difficult to imagine that the rate of injuries and even death from such offenses is not very great indeed.[25] In contrast, the crime of mere possession of a sawed-off shotgun does not require the weapon to be used, nor even require the gun to be shown to another person or brandished at any time. Possession alone is enough. The risk presented by such mere possession is certain to be extremely low indeed.

Lower federal courts have at times presumed mere possession of short-barreled shotguns to be risky by adopting the oft-repeated but never substantiated adage that such weapons "are not useful except for violent and

25. The ATF publishes a fact sheet which describes "Explosives Incidents in the United States," and injuries and deaths resulting from them. The rate of injury and death ranged from 7.6% in 2004 and 7.1 % in 2013, at the high end, to less than 1 % in 2011. However, because the analyzed incidents included "stolen explosives and other categories," in addition to crimes clearly involving the active use of explosives, like bombings and attempted bombings, the injury rates for actual "use of explosives" are certain to be higher. *See* Bureau of Alcohol Tobacco and Firearms Fact Sheet, May 2014, "U.S. Bomb Data Center."

https://www.atf.gov/publications/factsheets/factsheet-us-bomb-data-center.html (Last visited June 23, 2014)

criminal purposes." *See* e.g., *United States v. Lillard*, 685 F.3d 773, 776 (8th Cir. 2012) (quoting *United States v. Childs*, 403 F.3d 970, 971 (8th Cir. 2005)). Such a presumption, however, relying as it does on visions of short-barreled weapons from gangster movies and gun lore, goes too far. As explored above, short-barreled shotguns are possessed legally, following legitimate federal registration, by an increasing number of ordinary nonviolent citizens in many states. Even criminal court decisions demonstrate valid and benign uses to which the weapons are put. *See, e.g.*, *United States v. Buffalo*, 10 F.3d 575 (8th Cir. 1993) (noting that defendant used sawed-off shotgun to "shoot skunks, weasels, and racoons that killed his chickens"); *United States v. Hammond*, No. 90-30333, 1991 WL 103450 (9th Cir. June 11, 1991) (unpub'd) (affirming district court's finding that defendant intended to use short-barreled shotgun only for hunting purposes, including hunting of grouse). The availability of such examples is especially striking because only a minority of prosecutions for short-barreled shotgun possession result in appellate court decisions.

Moreover, the same features that originally gave rise to the reputation of the weapon as inherently offensive and violent in nature lead gun manufacturers to advertise it today as ideal for the protection of one's home and family.[26] Even states like Minnesota, which generally prohibit possession of short-barreled shotguns, make exceptions for their possession by members of the military, law

26. *See, e.g.,* http://www.impactguns.com/benelli-m4-entrycbq-14 ("Now the same Benelli M4 used by the U.S. Marine Corps can be your home defense shotgun of choice," offering for sale a shotgun with a 14" barrel and noting that "all NFA rules apply") (last visited on June 24, 2014).

enforcement, trainers, corrections officers, and some security guards, in seeming recognition of the weapon's value in self-defense and defense of others. *See* Minn. Stat. 609.67, subs 3 & 5. And Michigan's recent legalization of possession of properly registered short-barreled shotguns reflects a growing national recognition that such possession is neither inherently nefarious nor risky.

Citizens living in states where their possession is lawful can buy brand new short-barreled weapons either in a gun store or online, register them and pay the tax, and possess them legally for home defense, hunting, collection, or any other non-violent reason. In the past, the belief that short-barreled shotguns were primarily used by criminals, even "gangsters," might have been substantiated both by their use in notorious and high-profile crimes, and by the fact that such weapons had to be made intentionally by sawing off a longer barrel from a traditional shotgun. Indeed, that belief motivated Congress, in 1934, to require their registration and taxation under the National Firearms Act, although not to ban such weapons outright. *See, e.g.*, Conf. Rep. No. 90-1956, *reprinted in* 1968 U.S.C.C.A.N. 4426, 4434 (1968) ("National Firearms Act covers gangster-type weapons such as machine guns, sawed-off shotguns, short-barreled rifles, mufflers and silencers.") But that seven-decades old belief alone, particularly when contradicted by the rise of law-abiding people properly registering specially regulated weapons like short-barreled shotguns, is not enough for this Court to conclude that mere possession of such a weapon presents a risk similar to the use of explosives or, for that matter, any of the other enumerated offenses.

In sum, the risk presented by the mere possession of short-barreled shotguns is simply not on par with that presented by use of explosives or any of the other enumerated offenses set forth at § 924(e)(2)(B)(ii).

C. Several Circuit Courts Have Correctly Analyzed the Issue: The Eighth Circuit Did Not.

In light of the plain meaning of the term "violent felony," and under both the risk-centric analysis of *Sykes* and the more multi-faceted analysis of *Begay* and *Chambers*, mere possession of a short-barreled shotgun in violation of Minn. Stat. § 609.67 is not a predicate offense for purposes of the ACCA. The analysis of the Eighth Circuit in finding otherwise is contrary to this Court's teachings, and several other courts have reached the correct conclusion, either explicitly or indirectly.

The Sixth, Seventh, and Eleventh Circuits have all ruled that possession of a sawed-off or short-barreled weapon is not a violent felony within the meaning of the residual clause of § 924(e). *United States v. Amos*, 501 F.3d 525 (6th Cir. 2007); *United States v. Miller*, 721 F.3d 435 (7th Cir. 2013); *United States v. McGill*, 618 F.3d 1273, 1279 (11th Cir. 2010). The Fourth Circuit has reached the same conclusion in two unpublished opinions. *See United States v. Haste*, 292 Fed. Appx. 249 (4th Cir. 2008)(unpub'd); *United States v. Ross*, 416 Fed. Appx. 289 (4th Cir. 2011)(unpub'd). [27] A close examination of several

27. The Tenth Circuit has not reached the question of whether possession of a short-barreled shotgun is a violent felony under the ACCA, but its ruling regarding the application of a separate

of those decisions supports Mr. Johnson's position that mere possession of a short-barreled shotgun is not a violent felony.

In *United States v. Miller*, decided one month prior to the Eighth Circuit's decision below, the Seventh Circuit conducted a searching analysis and concluded that violation of Wisconsin's statute prohibiting possession of a shotgun with a short barrel is not a violent felony. *Miller*, 721 F.3d 435, 439-40 (7th Cir. 2013). Following an examination of the many ways in which the Wisconsin statute could be violated by "passive possession in which the weapon is not exposed to others," the court found that "the risk of physical injury to another presented by the mere possession of a short-barreled shotgun is not in the same league as the risks presented by the offenses of burglary, arson, extortion, or crimes involving the use of explosives." *Id*. at 439-440. The *Miller* court specifically analyzed and rejected the Eighth Circuit's decisions from *Vincent* and *Lillard*, and noted it would be following the contrary holdings of the Sixth and Eleventh Circuits.

> We simply don't think that the latent risks inherent in the offense of possessing a short-barreled shotgun are sufficient to qualify for the residual clause when the crimes from which we are instructed to guide our determination – burglary, arson, extortion, and crimes involving the *use* of explosives – all are inherently risky

---

firearm statute to short-barreled weapons suggests that it would follow the Sixth, Seventh and Eleventh Circuits. *See United States v. Serafin*, 562 F.3d 1105 (10th Cir. 2009)(finding short-barreled shotgun possession not a crime of violence under related provision of § 924(c)(3)(B)).

> without that extra step required for the risk to manifest.

Id. at 443.[28]

The Sixth Circuit reached the same conclusion as the Seventh, though in a decision issued even prior to this Court's decision in *Begay*. In *United States v. Amos*, 501 F.3d 524 (6th Cir. 2007), the court found that violation of a Tennessee statute criminalizing mere possession of a sawed-off shotgun was not a violent felony under the ACCA. The *Amos* court noted that possession does not "fit well with the more active crimes included in the statute." *Amos,* 501 F.3d at 528. The court also found a difference between crimes that carry a risk of violence and those that carry a "future" risk. *Amos,* 501 F.3d at 528-29.

The Eleventh Circuit also correctly concluded that mere possession of a short-barreled shotgun is not a violent felony under the ACCA. *See United States v. McGill,* 618 F.3d 1273 (11th Cir. 2010). The *McGill* court noted that

---

28. The *Miller* court rejected the government's suggestion that the ACCA's residual clause must be read to include possession of a short-barreled shotgun because, in the commentary to the Sentencing Guidelines, the Sentencing Commission concluded that it was covered by the definition of "crime of violence" used for the career offender guideline enhancement. *See* U.S.S.G. § 4B1.2, comment. (n.1) ("Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g. a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'"). The *Miller* court found that possession of a short-barreled shotgun was added to the crime of violence definition in 2004, before *James, Begay* and their progeny, and "how courts look at ACCA's residual clause has changed since this amendment." *Miller*, 721 F.3d at 442.

both short-barreled shotguns and explosives are regulated in the same manner by the National Firearms Act, requiring registration and taxation, as described above. *Id.* at 1279. Although Congress treats them largely the same in the NFA, the court found it important Congress did not include possession of explosives in the enumerated offenses, but only "use of explosives." "We cannot classify *possessing* one type of NFA outlawed weapon as a violent felony when the ACCA speaks only to the *use* of another." *McGill*, 618 F.3d at 1279.[29]

Only the Eighth Circuit has specifically addressed the issue since this Court's decisions from *Begay*, *Chambers and Sykes,* and still concluded that possession of a short-barreled shotgun is a violent felony.[30] In light of the above-analysis, the Eighth Circuit's decisions on this point were reached in error. The Eighth Circuit rested its reasoning in *Vincent* and *Lillard* almost entirely on the belief that "[s]awed-off shotguns 'are inherently dangerous and lack usefulness except for violent and criminal purposes.'"

---

29. Although the Eleventh Circuit reached the correct result in *McGill,* the court erroneously concluded that weapons governed by the National Firearms Act were functionally outlawed due to the onerous nature of the law's registration and taxation requirements. *McGill*, 618 F.3d 1273, 1278-79. However, as explored above more than a 160,000 applications are processed by the ATF each year under the NFA. Therefore, although the requirements of the NFA are certainly stringent, the Act cannot fairly be described as a complete bar to possession.

30. This decision joined the First Circuit, which ruled in 1998 in *United States v. Fortes* that possession of such a weapon counts as an ACCA predicate. 141 F.3d 1, 6-8 (1st Cir. 1998). Although the First Circuit reaffirmed this holding in 2006, it has not assessed it in the wake of *Begay* and its progeny. *See United States v. Bishop*, 453 F.3d 30, 31 (1st Cir. 2006).

Vincent, 575 F.3d at 825 (quoting *United States v. Childs*, 403 F.3d 970, 971 (8th Cir. 2005) (additional quotations omitted); *see also Lillard*, 685 F.3d at 776-77 (adopting "inherently dangerous" analysis to conclude that violation of Nebraska statute regarding short-barreled shotguns is a violent felony). In conducting its risk analysis, and without reference to either statistics or examples from cases, the *Vincent* court held: "Possession of a dangerous weapon that has no lawful purpose creates a serious potential risk of physical injury to others." *Vincent*, 575 F.3d at 825. The court used the same logic in the "similar in kind" half of its analysis. "Like the listed crimes, possession of a sawed-off shotgun is illegal precisely because it enables violence or the threat of violence." *Id.* at 826. Finally, the Eighth Circuit noted that its decision was supported by the fact that commentary to the sentencing guidelines' definition of "crime of violence" expressly included short-barreled shotgun possession. *Id*. at 825-826 (citing U.S.S.G. § 4B1.2(a), commentary (n.1), which includes possession of a short-barreled shotgun as a predicate offense). Nowhere did the Eighth Circuit consider that possession of a short-barreled shotgun is widely legal, and that such guns are registered federally every day by law-abiding citizens in states where they are allowed. Nor did the Court refute the analysis of dissenting Judge Gruender, who warned that the Eighth Circuit's holding "risks expanding the ACCA's residual clause to include any crime that has a hypothetical connection to violence." *Vincent*, 575 F.3d at 831 (Gruender, J., dissenting). As Judge Gruender said, "once the question is properly framed and the relevant terms are expressly defined, it becomes plain that simple possession of a sawed-off shotgun itself does not involve violent and aggressive conduct in the manner of burglary, arson, extortion, or criminal use of explosives."

In total, three circuits have expressly held in published opinions that possession of a short-barreled shotgun is not a violent felony, one has so held in unpublished opinions, one circuit has not addressed the question but would likely follow suit based upon related precedent, and only two clearly persist in concluding that such mere possession is a violent felony under the ACCA. Mr. Johnson urges that the majority of these circuits has reached the proper result, and urges this Court to so hold.

II. THE RULE OF LENITY REQUIRES THE COURT TO HOLD THAT MERE POSSESSION OF A SHORT-BARRELED SHOTGUN IS NOT A VIOLENT FELONY.

As argued above, possession of a short-barreled shotgun is not a violent felony under the ACCA in light of the plain language of that statute, its structure and legislative history, and this Court's jurisprudence interpreting its provisions. However, if the Court is not decisively persuaded, it should nonetheless rule in favor of Mr. Johnson under the rule of lenity. That venerable doctrine mandates that, when struggling to interpret the scope of a criminal statue, ambiguity and doubt should be resolved in favor of the defendant, whose liberty is at stake. In this case, lenity mandates a finding that the ACCA's definition of violent felony, at a minimum, does not clearly include within its scope mere possession of a short-barreled shotgun.

A. The Rule of Lenity is An Important "Liberty-Protecting and Democracy Promoting" Rule.[31]

The rule of lenity, also described as the canon of "strict construction of criminal statutes," *United States v. Lanier*, 520 U.S. 259, 266 (1997), provides that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *See Abramski v. United States*, __ U.S. __, __ S. Ct. __, 2014 WL 2676779, * 19 (June 16, 2014) (Scalia, J., dissenting) (citing *Skilling v. United States*, 561 U.S. 358, 410 (2010)). Such a rule "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Lanier*, 520 U.S. 259, 266 (1997).

In *United States v. Santos*, 553 U.S. 507, 514 (2008), this Court applied the rule of lenity to conclude that when there are two equally plausible interpretations of a term in a criminal statute, the "tie" must go to the defendant.

> The rule of lenity requires ambiguous criminal laws to be interpreted in favor of defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia on the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

---

31. *Abramski v. United States*, 2014 WL 2676779, * 19 (Scalia, J., dissenting).

Santos, 553 U.S. 514 (internal quotations and citations omitted); *see also United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring) ("Where it is doubtful whether the text includes the penalty, the penalty ought not be imposed.").

Certainly, the rule of lenity should not be the first line of analysis used by a court when attempting to discern the meaning of a criminal statute, but it is an essential final step when other efforts have failed. As Justice Scalia recently explained:

> [T]he rule of lenity applies whenever, after all legitimate tools of interpretation have been exhausted, "a reasonable doubt persists" regarding whether Congress has made the defendant's conduct a federal crime, *Moskal v. United States*, 498 US 103, 108 (1990) – in other words, whenever those tools do not decisively dispel the statute's ambiguity.... "[W]here text, structure, and history fail to establish the government's position is unambiguously correct… we apply the rule of lenity and resolve the ambiguity in [defendants]'s favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994)."

Abramski, at * 19 (Scalia, J., dissenting) (internal citations omitted).

B. The Rule of Lenity Requires a Conclusion That Possession of a Short-Barreled Shotgun Is Not a Violent Felony Under the ACCA.

As explored above, it would take a strained and virtually limitless reading of the definition of violent

felony to include mere possession of a short-barreled shotgun within its scope. But should the Court be left weighing the government's expansive interpretation or the narrower one advocated by the Petitioner, that "tie" must go to Mr. Johnson. The split among the Circuits and the wide legality of possession of short-barreled shotguns, combined with the plain language of the ACCA, its legislative history and this Court's jurisprudence all give rise to a "reasonable doubt" as to whether possession of a short-barreled shotgun is a violent felony, if not to a more reasonable certainty that it is not. *See Moskal*, 498 U.S. at 108.

The rule of lenity has been described as a "liberty protecting and democracy promoting rule that is 'perhaps not much less old than construction itself.'" *Abramski*, at * 19 (Scalia, J., dissenting) (quoting *United States v. Wiltberger*, 5 Wheat. 76 (1820) (Marshall, C.J.)). It should serve that function in this case by supporting a conclusion that mere possession of a short-barreled shotgun is not a violent felony under the ACCA. "[W]hen a criminal statute has two possible readings, we do not choose the harsher alternative unless Congress has spoken in language that is clear and definite." *Abramski*, at *19 (Scalia, J., dissenting) (internal quotations omitted) (quoting *Bass*, 404 U.S. at 347-49). In this case, any "tie" must be read in favor of lenity and of Mr. Johnson.[32]

32. As Justice Scalia aptly observed in his concurrence in *Begay*, "I will not condemn a man to a minimum of fifteen years in prison on the basis of such speculation. Applying the rule of lenity to a statute that demands it, I would reverse the decision of the Court of Appeals." *Begay*, 553 U.S. at 154. (internal citation omitted)(Scalia, J., concurring).

CONCLUSION

Because possession of a short-barreled shotgun in violation of Minnesota statute § 609.67 does not constitute a violent felony, Samuel Johnson does not qualify as an armed career criminal. Therefore, this Court must vacate the judgment of the Eighth Circuit and remand the case for further proceedings.

Respectfully submitted,

KATHERIAN D. ROE
Federal Defender
KATHERINE M. MENENDEZ*
Assistant Federal Defender
DOUGLAS H. R. OLSON
Assistant Federal Defender
District of Minnesota
300 South Fourth Street
107 U.S. Courthouse
Minneapolis, MN 55415
(612) 664-5858
kate_menendez@fd.org

* *Counsel of Record* *Counsel for Petitioner*