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

REPLY BRIEF FOR THE PETITIONER

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I. When Analyzed Properly, With An Emphasis On Elements Instead of Speculation, Possession of a Short-Barreled Shotgun Does Not Present a Serious Potential Risk.

Samuel Johnson's 2007 conviction for possession of a short-barreled shotgun in violation of Minnesota Statute § 609.67 is not a "violent felony" under the ACCA, 18 U.S.C. § 924(e). It is an offense of mere possession that does not present a serious potential risk of physical injury to another. The government concedes that no statistics document injuries, deaths or other risks from the mere possession of short-barreled shotguns. Govt. Br. 29. Instead, the government abandons the statutory elements of the offense to argue that because such a weapon is dangerous when used in violent crimes, its simple possession is a violent felony. For several reasons, the government's argument must fail.

First, analysis of whether a particular crime is a violent felony must focus on the conviction itself, its elements, and the conduct necessarily underpinning that conviction. This Court's precedent, including decisions interpreting the residual clause specifically, requires such categorical analysis. The government untethers this Court's "ordinary case" doctrine from the necessary consideration of an offense's elements. Moreover, the government's approach, which allows a court to imagine what offenses a defendant could commit with a short-barreled shotgun, provides no meaningful limits on the definition of violent felony; this enables even plainly non-violent possession to be analyzed as though a defendant was convicted of a far more serious offense.

Applying the proper analytical framework reveals that mere possession of a short-barreled shotgun poses neither the type nor the degree of risk exemplified by the enumerated offenses, and therefore is not a violent felony.

A. This Court's Precedent Requires An Elements-Based Analysis of the Offense of Conviction.

The relevant points of comparison for determining whether a prior offense is a violent felony are the elements of the offense, not speculation about what additional conduct might occur. Pet. Br. 19-20. The government counters that the cases Petitioner relies upon for this argument do not involve the residual clause and therefore are inapposite (Govt. Br. 43-44) and further asserts that residual clause analysis permits speculation about risks beyond those posed by the offense alone. However, a close examination of the Court's precedent, including decisions interpreting the residual clause, confirms that the elements provide parameters for risk analysis. The government's use of the ordinary case doctrine must be rejected.

1. Residual Clause Analysis Focuses On the Elements.

From its first exploration of the residual clause, in *James v. United States*, 550 U.S. 192 (2007), the Court emphasized the categorical nature of the required analysis.

> [W]e next ask whether attempted burglary, as defined by Florida law, is an offense that "involves conduct that presents a serious

> potential risk of physical injury to another." In answering this question, we employ the "'categorical approach'" that this Court has taken with respect to other offenses under ACCA. . . . That is, we consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender.

James, 550 U.S. 192, 201-02 (2007) (internal citations omitted) (quoting *Shepard v. United States*, 544 U.S. 13, 17 (2005), quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)) (emphasis in the original). Examining Florida's attempted burglary statute, the Court said that "[t]he pivotal question. . . is whether overt conduct directed toward unlawfully entering or remaining in a dwelling, with intent to commit a felony therein, is 'conduct that presents a serious potential risk of physical injury to another.'" *James*, 550 U.S. at 203 (quoting the ACCA). In *Begay v. United States*, 553 U.S. 137, 141 (2008), the Court reiterated the elements-based nature of the residual clause assessment: "In determining whether this crime is a violent felony, we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." In short, whether this Court considers the residual clause or other parts of the ACCA's definition of violent felony, the "categorical approach" requires an examination of the offense and its elements, not unchecked speculation. Therefore, the Court's admonitions from *Johnson* and *Moncrieffe* that a reviewing court must examine the "least of th[e] acts" criminalized by the statute are relevant to

the question before the Court. *Moncreiffe*, 133 S. Ct. at 1684; *Johnson*, 559 U.S. at 137; *see also United States v. Amos*, 501 F.3d 524, 527 (6th Cir. 2007) ("[T]he Court must consider the least objectionable conduct that would violate this statute. Consequently, to qualify as a violent felony, the possession of the [short-barreled shotgun] would have to pose a serious potential risk to others even if Amos kept it as a collector's item or family heirloom, stored it in his attic, or used it to fend off groundhogs from his garden.") (internal citations omitted).

2. Risk Analysis Under the Residual Clause Does Not Permit Limitless Speculation.

The government's proposed residual clause analysis goes beyond the conduct underlying the actual elements to consider other crimes it claims (without statistical backing) "ordinarily attend the offense." Govt. Br. 44. Therefore, the government repeatedly urges the Court to presume that the "ordinary case" of possession of a short-barreled shotgun "is possession in connection with violent crimes and other serious offenses." Govt. Br. 18; *accord* Govt. Br. 17, 31, 39, 42, 44-45. In two ways, the government's analysis strays from this Court's jurisprudence: First, the government misapprehends the "ordinary case" concept, using it to justify rather than prevent significant speculation. Second, the government misconstrues the way the risk presented by an offense should be evaluated.

The phrase "ordinary case," comes from *James*, 550 U.S. at 208: "Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury

to another." Such a common-sense limitation serves to prevent imaginative attorneys from suggesting nonviolent but farfetched ways a crime can be committed, in an effort to alter a court's conclusion about whether the offense is violent.

> One can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury – for example, an attempted murder where, the gun, unbeknownst to the shooter, had no bullets . . . .

Id. (citation omitted) The ordinary case doctrine discourages courts from straining to imagine how the elements of an offense can be completed in a clearly anomalous way.

The government claims that Petitioner's argument regarding risk is based on speculation, rather than an ordinary case, when in fact the opposite is true. The offense of possessing a short-barreled shotgun requires possession and not more. While one can imagine awful things that could be or have been done with such a weapon, as the government does when it references Columbine, such acts are far beyond the ordinary case. It is no more appropriate for this Court to assess the risk presented by mere possession of a short-barreled shotgun by considering one of the worst crime sprees ever committed with such a weapon than it would be for the Court to conclude that an obviously violent attempted murder is not actually violent because of the imagined "empty gun scenario."[1]

1. In *United States v. Miller*, 721 F.3d 435 (7th Cir. 2013), the court acknowledged that a short-barreled shotgun can be

In addition to misapprehending the ordinary case concept, the government attenuates the risk at issue from the underlying offense beyond what residual clause analysis permits. While this Court has weighed consequences that might follow directly from an offense, in each instance such consequences are tied to the conduct required by the statutory elements of the predicate crime. Thus, the Court has considered the risk of an encounter with a homeowner in a burglary, *see James*, 550 U.S. at 211, or the danger that one fleeing the police might hit a bystander, *Sykes v. United States*, 131 S. Ct. 2267, 2273-74 (2011). In each of these examples, the defendant's own actions in committing the offense directly generated the risk that troubled the Court. For instance, a fleeing

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possessed in a variety of circumstances, ranging from "patently violent," as when used in a robbery, to "at best latent," as when hidden at home.

> But what is the ordinary case of mere possession? We know that we are not simply to imagine the ways in which the statute can be violated with minimal risk of physical injury to others. Nor are we to hypothesize dangerous ways in which violations could occur. Instead, we are to focus on the generic crime as ordinarily committed – that is whether *most* instances of the crime present the required degree of risk.
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> . . .
>
> [W]e are to look at the conduct required by the statute, that is, the ordinary manner of violating the law. And in the ordinary case, the possession of a short-barreled shotgun does not create any potential risks of harm to another person because all that is involved is the knowing possession of a weapon.

Miller, 721 F.3d at 439-40 (citations omitted).

defendant could kill a pedestrian despite committing no crime beyond fleeing, and the possibility of a dangerous encounter with a homeowner arises from burglary itself, even if the burglar commits no further criminal offense.

In marked contrast, the government's argument here rests on the premise that a person who unlawfully possesses a short-barreled shotgun would necessarily use such a weapon in a serious crime. Such an argument requires the defendant to commit the crime at issue, mere possession, as well as a further violent crime. Only when the defendant himself takes the additional steps imagined (committing one or more distinct and much worse crimes) does the required risk arise.

This sleight of hand goes beyond surmising what dangers arise from committing the predicate offense, to imagining what dangers arise from a wholly separate and more violent crime of which mere possession of the weapon is only a first step. Judge Gruender, dissenting from the Eighth Circuit's decision in *United States v. Vincent*, described the flaw inherent in this reasoning when applied to possession of a short-barreled shotgun.

> The core difference between criminal use and criminal possession . . . is that use typically involves violent and aggressive conduct, while simple possession merely creates a potential for violence and aggression that is ordinarily realized only if possession ripens into use. In many instances . . . criminal possession never ripens into criminal use and so never results in violence or aggression.

Vincent, 575 F.3d 820, 830 (8th Cir. 2009) (Gruender, J., dissenting).[2]

The government's own authority demonstrates the significant attenuation inherent in its risk analysis and its misuse of "ordinary case." At footnote 14, pages 36-37, the government lists sixteen cases spanning fifteen jurisdictions and five decades which discuss horrible crimes committed with short-barreled shotguns. However, in only two of the sixteen cases does it appear that a defendant was actually charged with or convicted of possession of a short-barreled shotgun, or any merely possessory weapons offense. *See Dennis v. Mitchell*, 354 F.3d 511 (6th Cir. 2003); *State v. Rose*, 548 A.2d 1058 (N.J. 1988). Instead, the defendants were convicted of crimes ranging from capital murder to robbery, crimes that are readily classified as violent felonies. This collection of decisions demonstrates that, if anything, when a defendant uses a short-barreled shotgun in a violent crime, he is likely to be charged with that violent crime and, thereby, treated as an Armed Career Criminal if the rest of his criminal record so requires; he is less likely to also or only be charged with possession of the weapon.[3] The

2. *See also United States v. Doe*, 960 F.2d 221, 224 (1st Cir. 1992) (Breyer, J.) ("One can easily imagine a significant likelihood that physical harm will often accompany the very conduct that normally constitutes, say, burglary or arson. It is much harder, however, to imagine such a risk of physical harm often 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.")

3. Judge Gruender's dissent in *Vincent* addresses the flawed reasoning relied upon by the government. "Under the categorical

attenuation between the offense at issue (mere possession of a short-barreled shotgun) and the harm imagined by the government's analysis (use of the weapon during a violent crime) is so great that it demonstrates the unworkability of the proposed analytical framework.

B. The "Ordinary Case" of Possession Is Mere Possession.

The government's argument that the ordinary case of possession of a short-barreled shotgun involves actual use during a violent crime is largely based on two critical but flawed assumptions: first, there is no legitimate purpose for such a gun, so an evil purpose can be fairly assumed; and second, the only reason someone would unlawfully possess such a weapon (i.e., fail to register it) is because he intends to use it in a crime. Both assumptions are incorrect and provide a shaky foundation for the government's analysis.

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approach, our focus is limited to the statutory definition of the crime at hand, which forecloses a roving inquire into the totality of the circumstances associated with the crime or how the crime might be committed on a particular occasion. As a result, if the crime of possessing a sawed-off shotgun itself does not involve violent and aggressive conduct, then it makes no difference whether it is frequently discovered in connection with a *different* offense (e.g. armed robbery or brandishing a firearm) that *is* violent and aggressive." *Vincent*, 575 F.3d at 831 (Gruender, J., dissenting) (internal citations and quotations omitted). Judge Gruender noted that, when a short-barreled shotgun is used in a violent crime, that conviction would "supplant the crime of possessing a sawed-off shotgun as the relevant conviction for the purposes of applying the ACCA." *Id.*

First, it is simply untrue that there is no reason for a person to possess a short-barreled shotgun other than a nefarious intention to use it in a crime. The government's own Brief belies their assertion on this point. As they concede at footnote 9, page 21, internal records kept by the ATF demonstrate that tens of thousands of short-barreled shotguns have been registered by ordinary citizens in states across the country where such possession is legal. Such weapons are not only widely available, but are specifically marketed to law-abiding citizens as ideal self-defense weapons. Pet. Br. 40 n. 26.

It cannot be that these ordinary citizens are electing to both purchase and pay $200 to register weapons that have no valid use. Indeed, Amici Gun Owners of America, et al., describe that a short-barreled shotgun is an ideal weapon for home defense, and more useful than a traditional shotgun for smaller and less strong persons. Gun Owners Br. 18-20.

As the government mentions at least four times in its Brief, this Court noted in *District of Columbia v. Heller* that short-barreled shotguns are "not typically possessed by law-abiding citizens for lawful purposes"; admittedly, Congress presumed the same thing when it enacted the National Firearms Act (NFA). *Heller*, 554 U.S. 570, 624-25. However, Mr. Johnson urges that the Court's passing characterization of these weapons in *Heller* is unsupported by data and is called into question by a contemporary close examination like the one underway in this case; such dicta cannot bear the weight the government places on it.[4] Indeed, both the *Heller* Court and Congress in

4. Inherent in the government's reasoning is an assumption that short-barreled shotguns are significantly more dangerous

enacting the NFA were motivated in part by the short-barreled shotgun's reputation as a gangster gun. It is possible that, had the *Heller* Court been aware of the tens of thousands of law-abiding citizens who now own short-barreled shotguns, believing them to be worthy of purchase and taxation, it would have characterized the weapons differently. More critically, Mr. Johnson is not arguing that short-barreled shotguns cannot be regulated by such statutes as the NFA, nor questioning the Court's suggestion that such weapons are not clearly protected by the Second Amendment. Neither question is raised by the inquiry actually before the Court here: whether possession of such a weapon, where prohibited, is a violent felony under the ACCA.

In sum, a central premise of the government's flawed "ordinary case" analysis is the presumption that short-

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than other, less-regulated weapons. This is no longer necessarily true.

While the Columbine killers used short-barreled shotguns, other weapons (including largely unregulated assault weapons) are more commonly used in such terrible crimes. *See*, *e.g.*, Erica Goode, *Rifle Used in Killings, America's Most Popular, Highlights Regulation Debate*, N.Y. Times, December 16, 2012 (discussing use of AR-15 Rifle in Newtown School Shooting and two other mass shootings). Likewise, gun manufacturers have designed handguns that are not only capable of serious destruction, but look dangerous and are carefully designed to avoid the NFA's registration requirements. *See, e.g.*, http://www.sigsauer.com/CatalogProductDetails/p556-swat-pistol-with-sb15-pistol-stabilizing-brace.aspx (last visited September 14, 2014). It cannot be that the unlawful possession of a short-barreled shotgun is so much more dangerous than the unlawful possession of weapons such as these that the former is a violent felony and the latter are not.

barreled shotguns have no valid purpose, a presumption that is simply untrue.

Similarly, the government's argument that intention to use a short-barreled shotgun in a crime can be assumed from a defendant's willingness to possess it unlawfully and without proper registration (Govt. Br. 25-27) is equally unsubstantiated. It may be that people who possess short-barreled shotguns for the purpose of criminal activity do not register them, but that does not make the converse true.

There are many reasons why a person might possess an unregistered firearm. A person might fail to register such a weapon because he is unaware of the registration requirement,[5] because he does not wish to pay the hefty tax, because he is frustrated with the ATF's slow processing of registrations,[6] or because he does not want to provide the government with information about his weapons.[7] Additionally, people who are precluded from

5. *See, e.g.*, *United States v. Jamison*, 635 F.3d 962 (7th Cir. 2011) (noting it is no defense to possession of an unregistered short-barreled shotgun that defendant was unaware of registration requirement).

6. The ATF has recently added staff to review registration applications for short-barreled shotguns and other NFA weapons to reduce a delay in processing that averages ten months. *See* ATF Website: National Firearms Act Frequently Asked Questions: https://www.atf.gov/firearms/faq/national-firearms-act-processing-times.html (last visited September 14, 2014).

7. Many Americans, particularly those that support gun ownership, are strongly opposed to perceived efforts on the part of the federal government to create a national registry of gun owners

ownership regardless of registration, whether by virtue of their presence in one of the many classes of prohibited persons set forth at 18 U.S.C. § 922(g), or by virtue of their residence in a state that bans the weapon, would fail to register the weapon despite having no intention to possess the weapon during a crime. Indeed, the government itself acknowledges that not all acts of unlawful firearms possession are likely to occur in connection with criminal activities (Govt. Br. 27), implicitly conceding that a person might unlawfully possess a weapon but not intend to use it in a crime.[8]

In short, the government's circular reasoning argues that because short-barreled shotguns are inherently bad, only criminals possess them unlawfully, and only for use during crime. Neither facts nor reason support this tautology.

Moreover, contrary to the government's assertions, legal reporters are full of decisions addressing prosecutions of defendants who illegally possess short-barreled

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and the weapons they possess. *See, e.g.*, NRA National Member Survey, 2013: http://www.nraila.org/media/1080041/113topline.pdf (last visited September 16, 2014).

8. The government seems to concede that unlawful gun possession by a felon is not a violent felony, while continuing to argue that possession of a short-barreled shotgun, even by a non-felon, is. *See* Govt. Br. 27 & n. 10. It is difficult to reconcile the two positions given the total speculation that underpins the government's analysis in the instant case. Instead, the Court should conclude that the reasoning behind lower court rulings that being a felon in possession of a firearm is not a violent felony, such as *United States v. Doe,* 960 F.2d 221 (1st Cir. 1992), applies with equal force to the present question.

shotguns, but who do not do so during violent crimes, or even with the intention of one day committing such a crime. *See e.g.*, *United States v. Gunter*, 504 F. App'x. 424 (6th Cir. 2012) (under mattress in mobile home); *United States v. Saska*, 533 F. App'x. 783 (9th Cir. 2013) (in bedroom ceiling); *Commonwealth v. O'Connell*, 738 N.E.2d 346 (Mass. 2000) (in house); *State v. Simpson*, 2002 WL 924459 (Ohio App. 2002) (in attic bedroom); *State v. Mason*, 2003 WL 22235309 (Wash App. 2003) (in locked gun safe); *State v. Warfield*, 80 P.3d 625 (Wash. Ct. App. 2004) (in bedroom closet); *State v. Fox*, 843 A.2d 309 (N.H. 2004) (in utility closet); *Espinoza v. State*, 2006 WL 766976 (Tex. App. 2006) (in bedroom closet); *Hirshey v. State*, 852 N.E.2d 1008 (Ind. App. 2006) (in garage cabinet); *State v. Kidd*, 562 N.W.2d 764 (Iowa 1997) (within sleeping bag in house); *Eyambe v. State*, 2013 WL 1320507 (Tex. App. 2013) (inside a safe); *People v. Pinon*, 2012 WL 3970457 (Cal. App. 2012) (inside a locked shed); *Knight v. State*, 72 So.3d 1056 (Miss. 2011) (under cushions of couch); *State v. Spencer*, 2011 WL 3359687 (Ohio App. 2011) (in bedroom closet).

In sum, the data provided by the ATF, the analysis of Amici, the marketing of such weapons for self defense, and the many cases addressing non-violent – though unlawful – possession of short-barreled shotguns all demonstrate the fallacy of the government's assertion that the ordinary case of possession of a short-barreled shotgun is possession during a violent crime. Instead, when possession of a short-barreled shotgun itself is properly examined, it is clear that it does not pose a serious risk of potential harm on par with the enumerated offenses. It is therefore not a violent felony.

II. Because Possession of a Short-Barreled Shotgun Is Not "Similar In Kind" To The Enumerated Offenses, It Is Not a Violent Felony.

In *Begay v. United States*, the Court held that "to 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 (citation omitted; emphasis added). In his opening Brief, Mr. Johnson argued that, not only is mere possession of a short-barreled shotgun not a violent felony because it is not as risky as the enumerated offenses, but it is also different in kind from the enumerated offenses in myriad ways.

The government responds that, because it claims that the Minnesota statute in question is not a strict liability offense, *Begay's* guidance plays no part in the instant question. The government also suggests that it is irrelevant that none of the enumerated offenses are crimes of simple possession. The government errs on both counts.

First, *Begay's* analysis, which asks whether an offense is "purposeful, violent and aggressive," remains uniquely relevant and necessary in cases such as this, where statistics are unavailable and the possessory offense at issue is qualitatively different than the enumerated offenses. Second, not only was Mr. Johnson convicted of the offense of mere possession of a short-barreled shotgun at a time when Minnesota's statute was likely a strict liability offense, but even if a greater degree of knowledge were required, numerous other states treat the offense as one of strict liability. Third, in other ways mere possession of a short-barreled shotgun is so distinct

from the enumerated offenses that, even aside from the low degree of risk posed, it cannot properly be treated as a violent felony.

A. *Begay's* "Purposeful, Violent and Aggressive" Test Is Essential In the Present Case.

There can be little doubt that applying the residual clause requires more than an arithmetic comparison of degree of risk posed by the offense in question with that posed by the enumerated offenses. Just six years ago, in *Begay*, the Court rejected a suggestion that the enumerated crimes did nothing more than provide parameters against which to measure degree of risk, and noted that they all "typically involve purposeful, violent and aggressive conduct." *Id.* at 144-45. The government's efforts to dismiss *Begay's* continuing vitality and its relevance to the present case must be rejected.

1. *Begay's* Analysis Applies Beyond Strict Liability.

The Court should reject the government's implicit suggestion that *Begay* has no application to the question before the Court unless the offense is a purely strict liability offense like drunken driving. Govt. Br. 49-52. Such a narrow focus understates the continuing vitality of *Begay's* analysis. Moreover, *Begay* provides essential guidance in cases, such as this, where useful statistics are unavailable to provide a meaningful assessment of risk.

First, the government overstates *Sykes*' treatment of *Begay* when it suggests that *Begay's* analysis is inapplicable unless the Minnesota statute is clearly one of strict liability. Govt. Br. 48-50. Indeed, regardless

of whether a defendant must know that the shotgun he possesses has a short barrel, no law banning such possession requires intent to commit a further crime. Such offenses are therefore plainly "*akin* to" strict liability, negligence, and recklessness crimes. The crime of mere possession of a short-barreled shotgun is markedly different from the high degree of intentionality and aggression required by the felonious vehicular flight from a law enforcement officer contemplated in *Sykes*, which necessarily entails "determination to elude capture" and a "direct challenge" to the authority of law enforcement. *Sykes*, 131 S. Ct. at 2273-74. In contrast to the actively confrontational and purposeful elements at issue in the flight offense in *Sykes*, in a case involving mere possession the qualitative assessment of *Begay* is essential to the analysis and not "redundant."

Finally, *Begay* must remain a vital part of residual clause analysis because there are many cases, such as the present one, where statistics are unavailable to assist the Court in weighing the risk presented by a predicate offense. As both parties concede, there is no clear data documenting injuries, deaths or other harm caused by the possession of short-barreled shotguns. The government argues (based on imagining other crimes that could follow from possession) that such risk is high, and Mr. Johnson counters (employing a categorical, elements-based analysis) that it is in fact quite low, but no statistics save the day. In such a case, particularly one involving no aggressive conduct, the qualitative assessment of *Begay* is invaluable. Not only is mere possession of a short-barreled shotgun not as risky as the enumerated offenses, but it is not by itself violent or aggressive like the enumerated offenses or those previously held to be violent felonies under the residual clause.

2. *Mens Rea*: Minnesota and Nationwide.

As Mr. Johnson set forth in his opening Brief, at most it is unclear whether violation of Minnesota Statute § 609.67 is today essentially a strict liability offense or an offense requiring a greater *mens rea*, and at the time of Mr. Johnson's offense it was almost certainly an offense of strict liability.[9] The government is correct that in *State v. Ndikum*, 815 N.W.2d 816 (Minn. 2012), the Supreme Court of Minnesota held that *mens rea* of knowledge should be read into a firearm statute dealing with possession of a handgun. *Ndikum* did not address whether the defendant had to be aware of certain characteristics of a firearm, but held only that the defendant must have known that he possessed it in order to violate the statute. The government argues that *Ndikum* means that a defendant charged with possession of a short-barreled shotgun must "knowingly possess" such a weapon. However, "different elements of the same offense can require different mental states." *Staples v. United States,* 511 U.S. 600, 608 (1994). Therefore, even today in light of *Ndikum*, it is not certain that a Minnesota defendant must know that the weapon he possesses has the characteristics that render it unlawful.

More importantly, the government does not effectively refute that, when Mr. Johnson was convicted in 2007, the

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9. In *Staples v. United States*, 511 U.S. 600, 606 (1994), the Court characterized the government's position that 26 U.S.C. § 5861(d) does "not require the defendant to know the facts that make his conduct illegal" as advocating "a form of strict criminal liability." The term "strict liability" is therefore appropriate to describe a statute that criminalizes the possession of a short-barreled shotgun without proof that a defendant is aware of the gun's unique characteristics.

statutory framework (in particular Minn. Stat. § 609.02, subd. 9), the model jury instructions, and the absence of jurisprudence to the contrary all suggest that the offense was likely one of strict liability. Pet. Br. 51. Although the government is correct that model jury instructions are not "binding," they are certainly "instructive," *see State v. Kelly*, 734 N.W. 2d 689, 695 (Minn. Ct. App. 2007), and the government disregards entirely the value of the 2007 instructions to discerning the *mens rea* of possession of a short-barreled shotgun at the time of Mr. Johnson's conviction.

Additionally, the government does not refute that in numerous other states with short-barreled shotgun statutes, it is either settled that a defendant need not be aware of the characteristics of the firearm that made it illegal in order to be prosecuted for such an offense, or the authority that exists is unclear as to the required state of mind. Pet. Br. 33-34 n. 18 & 19. Indeed, in Iowa, Illinois, Massachusetts, and North Carolina, either the state's Supreme Court or Court of Appeals has expressly held that no proof of knowledge regarding the weapon's dimensions is required. Therefore, *Begay* remains essential because, even if the *mens rea* of the Minnesota statute is in flux, other states treat unlawful possession of a short-barreled shotgun as strict liability offenses.

Moreover, if it is true that *Begay* is relevant only to statutes involving purely strict liability offenses, then the test for whether mere possession of a short-barreled shotgun is a violent felony would be significantly different depending on the *mens rea* of the state statute, even though the underlying crimes are identical. For instance, violation of North Carolina's statute, which

is clearly a strict liability offense as to knowledge of the gun's length, would not be a violent felony because such a crime is not "purposeful, violent and aggressive," while a court considering California's statute would not even conduct such an inquiry because that statute requires that the defendant knew of the gun's length. Such a narrow construction of the relevance of *Begay* is clearly unworkable. Instead, *Begay's* analysis applies to the question before the Court because mere possession of a short-barreled shotgun is criminalized despite any absence of further criminal intent.

B. The Lack of Possession Offenses Among the Enumerated Offenses Supports a Finding That Possession of a Short-Barreled Shotgun Is Not a Violent Felony.

Petitioner has argued that one of several critical differences between the enumerated offenses and the offense at issue in the present case is that possession of a short-barreled shotgun is an offense of mere possession. Pet. Br. 19-25. The government mischaracterizes this argument, suggesting that Petitioner is seeking "categorical exclusion" of all possession offenses due to their absence within the listed enumerated offenses. Govt. Br. 45-46. The government observes that the effort to categorically exclude attempt offenses failed in *James*, 550 U.S. at 198-99, and suggests that, for the same reason, possession offenses cannot be excluded from the residual clause. However, the government's reliance on the failed argument in *James* is misplaced.

The Court in *James* cautioned that "the broad residual provision" was not meant to be an "exhaustive

list." *James*, 550 U.S. at 200. The crime of attempted burglary fell squarely within the ambit of the residual clause because attempted burglary, reviewing the conduct encompassed by the elements of the offense, was virtually indistinguishable from and presented at least as much risk of confrontation or injury as completed burglary. The common characteristic of the enumerated offenses was not "completion," but that they "create significant risks of bodily injury or confrontation that might result in bodily injury." *Id.* Possession of short-barreled shotgun offenses, in contrast, are excluded because they are not at all similar in kind and present significantly less risk of bodily injury or confrontation than the risk associated with the enumerated offenses, not simply because they are missing from the list of enumerated offenses. Moreover, while in *James* the Court noted that "[n]othing in the statutory language supports the view that Congress intended to limit this category solely to completed offenses," the specific inclusion of "use of explosives" among the enumerated offenses provides a strong textual rationale for excluding "possession" offenses such as found here.

Finally, the government attempts to explain why its position that merely possessing a short-barreled shotgun is a violent felony does not functionally erase the term *use* from *use of explosives* in the enumerated crimes. Govt. Br. 47-48. However, its complicated theory lacks evidentiary support and ignores the statute's plain language. The government assumes without evidence that when Congress passed the ACCA, (1) it intended that the residual clause silently included the possession of *destructive devices* under the NFA, 26 U.S.C. § 5845(f); and, (2) it added *use of explosives* only so that the use of any explosives not covered by the *destructive device*

definition would be a violent felony. But no evidence supports either assumption. Concluding that Congress intended to accomplish such a complicated objective without leaving any clues in either the statute or the legislative history beggars belief. Instead a much simpler understanding of the phrase *use of explosives* is supported by the text and legislative history: that Congress meant to include explosives offenses as violent felonies under the ACCA only if the offenses involved using explosives. This explanation hews to the plain text and avoids interpreting *use of explosives* based on the definition of a totally different term (*destructive device*) in a different statute in a different title without any evidence suggesting Congress intended such a complex and unusual interpretation. *See Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 174 (2009)("When conducting statutory interpretation, we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.") (internal citations omitted).

In sum, the Court should reject the government's assertion that the absence of possession crimes from the enumerated offenses and the inclusion of "use" before explosives have no bearing on the question before the Court. Indeed, the statute's plain language underscores the conclusion that possessing a short-barreled shotgun is not a violent felony.

CONCLUSION

For the reasons set forth herein and in Petitioner Samuel Johnson's opening Brief, the Court should hold that possession of a short-barreled shotgun is not a violent felony, and should remand so that Mr. Johnson can be resentenced.

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Respectfully submitted,

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