CASE NO. 13-5714

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Appellee,	)	
v.	)	**ORAL ARGUMENT**
	)	**REQUESTED**
EDWARD YOUNG,	)	
	)	
Defendant/Appellant.	)	**APPEAL FROM THE UNITED**
	)	**STATES DISTRICT COURT FOR**
	)	**THE EASTERN DISTRICT OF**
	)	**TENNESSEE**

REPLY BRIEF OF APPELLANT

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LEGAL ANALYSIS

In its Brief of the United States, the government, in conclusory fashion, accuses Mr. Young of "…refus[ing] to acknowledge the seriousness of his prior criminal history and present actions[,]" (Appellee Br. at 28), "…attempt[ing] to rewrite the record on appeal[,]" (id. at 27), and being "…precisely the kind of felon for whom the ACCA was designed[,]" (id. at 4). Ironically, however, it is the government's very own brief that illustrates the fatal weaknesses in the foundation of the government's arguments on everything from the facts in the record to the applicable legal theories and relevant caselaw related to the same.

Factually, while the government accuses Mr. Young of making "bald assertions" regarding the underlying, uncontested facts in the record, (id. at 23), the government does not contest any of the facts asserted by Mr. Young, instead merely describing certain of those facts as "self serving[,]" (id. at 18-19). In an effort to distract this Court from the facts surrounding Mr. Young's conviction for the possession of the shotgun shells at issue, the government conveniently ignores that Mr. Young's prior felony convictions are all more than twenty years old and states that Mr. Young "appears" to have been responsible for other crimes. (Id. at 27).

Legally, the government, in its Fifth Amendment fair notice analysis, did not offer this Court a single cite to a case holding that it is common public knowledge

that felons are prohibited from possessing ammunition under federal law. In its Eighth Amendment analysis, the government basically ignored the gross disproportionality analysis required by the U.S. Supreme Court and merely engaged in a facial defense of the Armed Career Criminal Act when confronted with an as-applied challenge.

Ultimately, the government's attempts to obfuscate the central facts and central legal issues are unavailing, as will be shown in greater detail below.

I. Sentencing Edward Young to the ACCA Mandatory Minimum of 15 Years for Possession of Shotgun Shells in Violation of 18 U.S.C. Section 922(g)(1) Violated the Due Process Clause of the Fifth Amendment.

A. 18 U.S.C. § 922(g)(1) as a Strict Liability Offense.

The government claims that "[c]ontrary to [Mr. Young's] contention, 18 U.S.C. § 922(g)(1) is not a strict liability offense[; r]ather, the statute contains a requirement that the defendant have acted 'knowingly' in order for its penalty provisions to apply." (Appellee Br. at 7.) The government goes on to quote Bryan v. United States, 524 U.S. 184, 192 (1998), in stating that "[t]he term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law." (Id. at 8.)

There is little consensus as to the definition of "strict liability." John Shepard Wiley, Jr., Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation, 85 Va. L. Rev. 1021, 1031-34 (Sept. 1999). However,

despite what the government says, strict liability can exist even when a defendant does something knowingly, as "…liability is 'strict' because the proof need not demonstrate that the defendant's mental state is blameworthy[; c]ulpability is irrelevant." Id. See also Liparota v. U.S., 471 U.S. 419, 423-30, 105 S.Ct. 2084, 85 L.Ed2d 434 (1985) (discussing 7 U.S.C. § 2024(b)(1) as an imposition of "strict liability" in spite of a "knowing" requirement due to the absence of a "mens rea" or "'evil-meaning mind'" requirement). "Sections 922(g) and 924(e)(1), however, do not focus on the motive or purpose of the current possession of firearms[.]" U.S. v. Reynolds, 215 F.3d 1210, 1214 (11th Cir. 2000) (citing U.S. v. Funches, 135 F.3d 1405, 1407 (11th Cir. 1998) ("stating that a § 922 offense is a strict liability offense and a defendant's state of mind is generally irrelevant")).

The presence of a specific intent, scienter requirement that shows culpable intent on the part of a defendant often weighs heavily against a finding of a lack of fair notice. See U.S. v. Caseer, 399 F.3d 828, 839 (6th Cir. 2005); U.S. v. Huff, No. 3:10-CR-73, 2011 WL 1308099, at *4 (E.D. Tenn. Jan. 3, 2011). Section 922(g)(1) has no such specific intent, scienter requirement and thus has been considered to be a strict liability statute.

Here, the uncontroverted proof shows that Mr. Young was apparently in possession of the shotgun shells even before he knew the shells were there in his home, and he then discovered the shotgun shells after he had already taken

possession of them. Even then, though, Mr. Young did not know that federal law prevented him from possessing the shotgun shells. Because section 922(g)(1) is a strict liability statute that lacks such a specific intent, scienter requirement, the government was never required to prove (and never could have proven) that Mr. Young had the specific intent to violate federal law by possessing the shotgun shells.

B. Obscurity of the Ammunition Provision of 18 U.S.C. § 922(g)(1).

The government states that "…possession of ammunition by a convicted felon is not the kind of apparently innocent conduct that citizens would be surprised to learn is criminal[,]" (Appellee Br. at 14) and that "…it is…reasonable to expect a felon to know that his possession of ammunition would…be subject to regulation[,]" (id. at 12).

Despite the fact that the government cited numerous cases for the proposition that it is common knowledge that felons are prohibited from possessing guns, (Appellee Br. at 11-12), the government does not cite to a single case stating that it is common knowledge that felons may not possess ammunition. Instead, all the government does after stating a citizen should not be surprised by restrictions on ammunition is cite to United States v. Phillips, 117 F. App'x 942, 954 (11th Cir. 2006) for the proposition that Congress could rationally decide to punish the possession of ammunition by a felon; however, the language quoted from that case

does not address in any way whether an average citizen or felon would expect ammunition to be so regulated. The only discussion regarding whether someone might know or expect that felons would be prohibited from possessing ammunition that includes on-point citations to cases is a discussion of what a law enforcement officer might know, not what an average citizen or felon might know. (Appellee Br. at 14 n.3.)

Ultimately, the government is reduced to making unsupported arguments without citation such as, "Firearms and ammunition, while technically distinct, generally go together." (Appellee Br. at 12.) In point of fact, though, while elsewhere touting the "seriousness" of Mr. Young's crime, the government concedes the shotgun shells, in the absence of a shotgun, posed no danger "…unless [Mr. Young] was intending to throw the shotgun shells at large targets from close range[.]" (Appellee Br. at 14 n.4.) This concession from the government makes it clear that Mr. Young's possession of the shotgun shells, which was initially unwitting and is permitted under Tennessee state law,[1] does constitute "apparently innocent conduct." This point is further reinforced by another concession by the government, which is that it is only "…unlikely that a felon would have a legitimate purpose for possessing ammunition[,]" (id. at 14), meaning, of course, that it is entirely possible that a felon would have a legitimate

[1] The "vast majority" of states do not prohibit the possession of shotgun shells by a felon. (Proposed Amicus Br. at 5.)

reason for possessing ammunition and that such possession, in the absence of a firearm, would not endanger anyone. See also Ratzlaf v. U.S., 510 U.S. 135, 144-45, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) (rejecting the government's contention that an ordinary person would not engage in structuring innocently and noting that "…currency structuring is not inevitably nefarious").

II. Sentencing Edward Young to the ACCA Mandatory Minimum of 15 Years Violated the Eighth Amendment Prohibition Against Cruel and Unusual Punishment.

A. Mr. Young's Eighth Amendment Sentencing Challenge Is As-Applied.

The government states that "[Mr. Young's] unlawful possession of ammunition was not any less serious than the offenses committed by the ACCA offenders in cases where the ACCA's penalties have been upheld[; o]n the contrary, by statutory definition, [Mr. Young's] offense was of exactly the same type as the offenses committed by those other offenders since the ACCA's penalties only apply to individuals 'who violate[] section 922(g).'" (Appellee Br. at 18.) The government then cites to U.S. v. Moore, 643 F.3d 451, 453, 456 (6th Cir. 2011) for an example of a defendant who had his as-applied Eighth Amendment challenge to his sentence based on a section 922(g)(1) firearm violation denied. The government goes on to suggest that this Court could not rule in Mr. Young's favor on this as-applied challenge without overruling prior

decisions of this Court.[2] (Appellee Br. at 17.)

However, the government has oversimplified the analysis conducted in Moore. The Court in Moore stated that "[i]n considering whether a punishment is grossly disproportionate, culpability plays a role." 643 F.3d at 456 (citing Solem v. Helm, 463 U.S. 277, 293, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)). The Court went on to note that there may be factual distinctions as to how the same charged crime is committed and used murder as an example. Id. The Court then cited a list of cases[3] that had upheld the ACCA against as-applied challenges after consideration of the specific facts in each. Id.

The government is, as indicated above, taking the position that Mr. Young's violation of section 922(g)(1) is "by statutory definition" just the same as every other violation of section 922(g). That, however, is not the analysis called for by the Moore case.

This analysis of the facts of each particular case takes on even more significance when the elements of the particular crime, as here, do not include a specific intent, scienter element. "[T]here is a much greater likelihood that these extreme punishments will be disproportionate when applied to strict liability crimes[.]" Ian P. Farrell, Strict Scrutiny under the Eighth Amendment, 40 Fla.St.

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[2] This appears to be an example of the government confusing a facial challenge with an as-applied challenge.

[3] The list included U.S. v. Reynolds, 215 F.3d 1210 (11th Cir. 2000) (cited above). Id.

U.L. Rev. 853, 856 (2013). The cases cited by the government either involved a crime that included a specific intent, scienter element or, for example, in the case of U.S. v. Rodriquez, 553 U.S. 377 (2008), involved a felon's firearm possession violation of section 922(g)(1), which courts have held to be a commonly known prohibition; in that case, the felon would have been deemed to have known he was breaking the law by possessing the firearm. Thus, Mr. Young's as-applied challenge is significantly different from the cases the government seeks to analogize.

B. The Government's Lack of a Gross Disproportionality Analysis.

The government claims that "[Mr. Young's] fifteen-year sentence for possessing ammunition after having been convicted of three violent felonies, while severe, is not grossly disproportionate to his offense." (Appellee Br. at 23.) Rather than engage in a gross disproportionality analysis, the government merely states that Mr. Young is wrong about section 922(g)(1) constituting a strict liability offense and has failed to appreciate the serious nature of his crime and criminal history. (Id.)

The strict liability argument has been addressed above and in the Brief of Appellant.

With regard to Mr. Young's purported failure to appreciate the seriousness of the instant offense and his criminal history, reference will again be made to the

government's concession that the shotgun shells, in the absence of a shotgun, posed no danger "…unless [Mr. Young] was intending to throw the shotgun shells at large targets from close range[.]" (Appellee Br. at 14 n.4.) Despite this concession, however, the government would have this Court compare Mr. Young's instant offense to firearms violations under section 922(g) such as in U.S. v. Moore, 643 F.3d 451 (6th Cir. 2011) and U.S. v. Brown, 443 Fed. Appx. 956 (6th Cir. 2011). (Appellee Br. at 16-17.)

In Moore, "…witnesses reported seeing Moore beat his girlfriend while holding a firearm[,]" which was the basis of the section 922(g) conviction that resulted in a 180 month sentence under the ACCA. 643 F.3d at 455. Mr. Moore's sentencing guideline range was 151-188 months in the absence of the ACCA. Id. at 453-54. In Brown, the defendant either stole a .40 Glock or received the .40 Glock from others who had stolen it and traded it for meth, depending on which confession was credited, and was sentenced under the ACCA to 180 months. 443 Fed. Appx. at 957-58. Mr. Brown's guideline range was 210-262 months. Id. at 958.

It is obvious that Mr. Young is far less culpable than either Mr. Moore or Mr. Brown despite all three men having received exactly the same sentence. This is, in part, reflected by Mr. Young's guideline range of 10-16 months. It is also indicated by the fact that, as discussed above, both Mr. Moore and Mr. Brown would be deemed to have known that their possession of firearms was illegal. The

government, however, absolutely refuses to even mention the circumstances surrounding how and why Mr. Young came into possession of the shotgun shells despite their relevance to the question of culpability; this is true even though the content of the declarations containing that evidence was accepted as accurate by the Court without objection. (5/9/13 Hr'g Tr. at 3-4, RE 41, Page ID# 111-12.) Clearly, there can be no analysis of gross disproportionality under an as-applied challenge without an assessment of culpability.

The government also emphasizes Mr. Young's criminal history. However, the government never credits that Mr. Young's criminal history is taken into account by virtue of the criminal history portion of the guideline range calculations. The government stresses Mr. Young's prior felony convictions but never mentions that every one of them is more than twenty years old.

The government is finally reduced to saying that Mr. Young violated section 922(g)(1) and technically qualifies under the ACCA as an "armed career criminal," claiming that Congress could rationally pass legislation that contains the provisions that the legislation contains, including longer recidivist sentences. (Appellee Br. 21-23.) That is nothing more than a facial defense of the ACCA, however, and conveniently ignores the issues raised by an as-applied challenge.

Finally, the government never addresses in the Eighth Amendment context that a "vast majority" of states do not prohibit felons from possessing shotgun

shells. (Proposed Amicus Br. at 5.) This is relevant because "'courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.'" Gonzalez v. Duncan, 551 F.3d 875, 880 (9th Cir. 2008) (quoting Solem v. Helm, 463 U.S. 277, 291, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)). Here, the simple comparison is a 180 month sentence without the possibility of parole under federal law on the one hand versus no charges whatsoever being brought in the "vast majority" of states on the other hand.

In short, this is the rare case that requires a finding of gross disproportionality for all of the above-stated reasons, and the Eighth Amendment should bar the application of the ACCA to Mr. Young's case.

Conclusion.

Mr. Young has received an absurdly long recidivist penalty Congress obviously did not intend for him for an unwitting, innocent, and passive violation of a statute with the lowest level of criminal culpability, a strict liability statute, without fair notice of the existence of the same. As a result, Mr. Young currently scheduled to serve 180 months, fifteen years, for having discovered shotgun shells among items he was going to sell to help a neighbor.

Appellant Edward Young respectfully requests that this Court VACATE the sentence imposed on May 9, 2013, by the court below and remand this case with a direction that the lower court sentence Mr. Young to time already served.

Respectfully submitted,

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Pursuant to 6th Cir. R. 32(a)(7)(c), the undersigned certifies this brief complies with the type-volume limitations of 6th Cir. R. 32(a)(7)(B).

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