

CASE NO. 13-5714

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)

Appellee,)

v.)

EDWARD YOUNG,)

Appellant.)

**ORAL ARGUMENT
REQUESTED**

**APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF
TENNESSEE**

BRIEF OF APPELLANT

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**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, Edward Young makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

By: /s/ Christopher T. Varner

Date: September 27, 2013

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant Edward Young (“Mr. Young”) requests that the Court grant oral argument for this appeal. The federal district court stated at Mr. Young’s sentencing hearing that the issues raised by Mr. Young in opposing the application of the Armed Career Criminal Act to Mr. Young’s sentence were ones “...that the appellate courts and perhaps the Supreme Court one day will address.” (5/9/13 Hr’g Tr. at 21, RE 41, Page ID# 129.) The federal district court went on to say that “...the Court acknowledges that this argument is novel[; t]he Court believes that it is going to make its way up to the circuit court and perhaps to the Supreme Court.” (5/9/13 Hr’g Tr. at 22, RE 41, Page ID# 130.) Finally, the federal district court, in directly addressing Mr. Young, stated, “Mr. Young, you have the right to appeal your sentence[; y]ou heard me state earlier that I thought the issue raised by your counsel was one that is deserving of appellate court review and perhaps even United States Supreme Court review[, a]nd that means that you should appeal the sentence the Court announced.” (5/9/13 Hr’g Tr. at 28, RE 41, Page ID# 136.)

While the briefing as to why the Fifth and Eighth Amendments, as applied, bar the application of the Armed Career Criminal Act to Mr. Young’s sentence should be sufficient for this Court to vacate Mr. Young’s sentence, oral argument would allow the attorneys for both sides to address any outstanding factual or legal issues which this Court deems relevant. Accordingly, Mr. Young believes that oral

argument is appropriate.

JURISDICTIONAL STATEMENT

Jurisdiction in the federal district court below was proper under 18 U.S.C. section 3231. This Court has jurisdiction of the instant appeal pursuant to 18 U.S.C. section 1291. On May 9, 2013, Mr. Young's sentencing hearing was held, and the Court sentenced Mr. Young to 180 months. (Judgment at 2, RE 38, Page ID# 99.) The Notice of Appeal, filed on May 22, 2013, was timely. (Def.'s Notice of Appeal at 1, RE 39, Page ID# 104.)

STATEMENT OF ISSUES

- I. Whether the Due Process Clause of the Fifth Amendment bars the application of the sentencing enhancement of the Armed Career Criminal Act, 18 U.S.C. section 924(e), to a conviction for being a felon in possession of ammunition in violation of a strict liability statute, 18 U.S.C. section 922(g)(1), when the defendant's possession was passive, innocent, and initially unwitting and when the defendant did not have fair notice of the strict liability statute in question; and

- II. Whether the Eighth Amendment bars the application of the sentencing enhancement of the Armed Career Criminal Act, 18 U.S.C. section 924(e), to a conviction for being a felon in possession of ammunition in violation of a strict liability statute, 18 U.S.C. section 922(g)(1), when the defendant's possession was passive, innocent, and initially unwitting, when the defendant did not have fair notice of the strict liability statute in question, and when the resulting mandatory minimum sentence is 18 times greater than the minimum sentence the defendant would have otherwise received and more than 11 times greater than the maximum sentence the defendant would have otherwise received.

STATEMENT OF THE CASE

On May 1, 2012, Mr. Young was indicted for being a felon in possession of ammunition, seven shotgun shells, in violation of 18 U.S.C. section 922(g)(1). (Indictment at 1, RE 1, Page ID# 1.) Mr. Young entered into a written Plea Agreement (Plea Agreement at 7, RE 29, Page ID# 60; PSR at 3 (¶ 2)), and on January 14, 2013, Mr. Young pled guilty to having possessed the seven shotgun shells while being a convicted felon in violation of 18 U.S.C. section 922(g)(1) (Judgment at 1, RE 38, Page ID# 98; PSR at 3 (¶¶ 1, 4)).^[1] The Presentence Investigation Report (“PSR”) concluded that Mr. Young should be found to be an Armed Career Criminal pursuant to 18 U.S.C. section 924(e) and sentenced to a mandatory minimum of 180 months pursuant to the Armed Career Criminal Act (“ACCA”). On May 9, 2013, Mr. Young’s sentencing hearing was held, and the Court denied Mr. Young’s motion to bar the application of 18 U.S.C. section 924(e) to Mr. Young’s sentence under the Fifth and Eighth Amendments and sentenced Mr. Young to 180 months. (Judgment at 2, RE 38, Page ID# 99; 5/9/13 Hr’g Tr. at 21, 27, RE 41, Page ID# 129, 135.) The Notice of Appeal, filed on May 22, 2013, was timely. (Def.’s Notice of Appeal at 1, RE 39, Page ID# 104.)

^[1] The PSR is not included in the electronic database, meaning the citations to the RE and Page ID# cannot be made, but undersigned counsel has been informed that the Court has received the seventeen-page PSR with three exhibits. The first exhibit is correspondence dated February 28, 2013, from undersigned counsel to Mr. Young’s probation officer. The second exhibit is a two-page Addendum to the PSR. The third exhibit is a four-page statement of reasons.

For the reasons that follow, Mr. Young challenges the application of the ACCA to his case as being violative of the Due Process Clause of the Fifth Amendment and of Eighth Amendment's prohibition of cruel and unusual punishment and asserts that his 180 month sentence under the ACCA should be vacated and that, upon remand, the sentencing advisory range of 10-16 months should be the point of departure for his sentencing; given that Mr. Young has already served 16 months (PSR at 3 (¶ 3)), any sentence should be for time served.

STATEMENT OF FACTS

In October 2011, a search was conducted of Mr. Young's residence, and seven (7) shotgun shells were discovered. (PSR at 3 (¶ 4).) Mr. Young had previously been convicted of felonies¹ and was subsequently charged with being a felon in possession of ammunition. (Id. at 3 (¶¶ 1, 4).) On May 1, 2012, Mr. Young was indicted on that charge. (Indictment at 1, RE 1, Page ID# 1.) Mr. Young entered into a written Plea Agreement (Plea Agreement at 7, RE 29, Page ID# 60; PSR at 3 (¶ 2)), and Mr. Young pled guilty to having possessed the seven shotgun shells while being a convicted felon (Judgment at 1, RE 38, Page ID# 98; PSR at 3 (¶¶ 1, 4)). On May 9, 2013, Mr. Young's sentencing hearing was held, and the Court denied Mr. Young's motion to bar the application of 18 U.S.C. section 924(e) to Mr. Young's sentence under the Fifth and Eighth Amendments and sentenced Mr. Young to 180 months. (Judgment at 2, RE 38, Page ID# 99; 5/9/13 Hr'g Tr. at 21, 27, RE 41, Page ID# 129, 135.)

It is uncontested² that Mr. Young came into possession of the seven shotgun

¹ Mr. Young's most recent felony convictions, other than the section 922(g)(1) conviction in the instant case, were in 1992. (PSR at 5-10 (¶¶ 19-22)). Thus, all of his other felony convictions are more than twenty years old.

² Attached to Defendant's Sentencing Memorandum, which was filed one week before the sentencing hearing, were the Declarations of Edward Young and Neva Mumpower. (Def.'s Sentencing Mem. Ex. A, RE 35-1, Page ID# 81; Def.'s Sentencing Mem. Ex. B, RE 35-2, Page ID# 82.) Counsel for Defendant Young informed the Court during the sentencing hearing that the declarations were being

shells as a result of having been asked by a widow neighbor, Neva Mumpower, to help dispose of some of her deceased husband's effects that she had been storing. (Def.'s Sentencing Mem. Ex. A (Young Decl. ¶ 3), RE 35-1, Page ID# 81; Def.'s Sentencing Mem. Ex. B (Mumpower Decl. ¶¶ 3-4, 7), RE 35-2, Page ID# 82.) The seven (7) shotgun shells at issue were mixed in with some of her deceased husband's effects that Ms. Mumpower requested that Mr. Young sell. (Def.'s Sentencing Mem. Ex. A (Young Decl. ¶ 6), RE 35-1, Page ID# 81; Def.'s Sentencing Mem. Ex. B (Mumpower Decl. ¶¶ 4, 6-7), RE 35-2, Page ID# 82.) Mr. Young did not realize he had possession of the shotgun shells until after he was going through the boxes at his house to sort items for sale and came across the shotgun shells mixed in with other items, whereupon he put them up until he could return the shotgun shells to Ms. Mumpower. (Def.'s Sentencing Mem. Ex. A (Young Decl. ¶ 6), RE 35-1, Page ID# 81; Def.'s Sentencing Mem. Ex. B (Mumpower Decl. ¶¶ 4, 6-7), RE 35-2, Page ID# 82; 5/9/13 Hr'g Tr. at 24, RE 41, Page ID# 132.)

The shotgun shells were not stolen. (PSR Ex. 2 (Addendum to PSR at 1).)

The shotgun shells were not used in the commission of any crime, and there was

presented for evidentiary purposes, and the Court, after having been advised that the government had no objection, stated that “[t]he Court, then, will accept the declarations and deem that the contents of those declarations are accurate[; t]herefore[,] that will be the evidence, then, that the Court will rely upon, in addition to the matters in the presentence report that are not subject to objection.” (5/9/13 Hr'g Tr. at 3-4, RE 41, Page ID# 111-12.)

no shotgun found. (PSR at 3, 15 (¶¶ 4, 48).) Mr. Young had no idea that possessing the shotgun shells posed any problem under federal law ((Def.'s Sentencing Mem. Ex. A (Young Decl. ¶ 7), RE 35-1, Page ID# 81), and Mr. Young freely admitted possessing the shotgun shells (PSR at 3 (¶ 4)). However, Mr. Young had not intended to possess the shotgun shells. (5/9/13 Hr'g Tr. at 24, RE 41, Page ID# 132.)

Mr. Young's family is highly opposed to any further incarceration and believes his presence in the home is crucial to the family unit. (PSR Exs. C-H.)

SUMMARY OF THE ARGUMENT

On May 9, 2013, Mr. Young was sentenced to 180 months under the ACCA, 18 U.S.C. section 924(e), for a violation of 18 U.S.C. section 922(g)(1). Both the Due Process Clause of the Fifth Amendment and the Eighth Amendment bar the application of the ACCA to Mr. Young's sentence under the facts discussed above.

The Due Process Clause of the Fifth Amendment requires that fair notice be given to citizens that certain conduct is prohibited. Ordinarily, the criminal intent element of a criminal statute, once satisfied, takes care of that issue. However, where, as here, the criminal statute at issue is a strict liability statute, the matter of fair notice becomes more important. Most criminal statutes lacking an element of criminal intent provide for a small penalty and little to no damage to a prospective offender's reputation (are not felonies). Otherwise, courts will often impose a criminal intent element if the statute does not qualify as a public welfare statute. With regard to section 922(g)(1), courts have held that felons are on notice of felons being prohibited from possessing firearms via general public knowledge. Courts do not say the same thing about ammunition, however, and as shotgun shells in particular are regulated very differently than firearms, Mr. Young did not have fair notice of the prohibition against felons possessing ammunition.

The Eighth Amendment requires that sentences not be grossly disproportionate to the gravity of the crime committed. Where, as here, Mr. Young was convicted of an innocent, passive, and initially unwitting possession of shotgun shells in violation of a strict liability statute of which he did not have fair notice, a recidivist sentence based on a statutory scheme that was clearly not intended to affect Mr. Young is grossly disproportionate to the offense committed. The unholy marriage of the lowest level of criminal culpability to the highest level of punishment, recidivist penalties that should be inapplicable, constitutes an Eighth Amendment violation.

As a result of the above, Mr. Young asks that his sentence be vacated and that the lower court be directed to sentence him within the applicable sentencing guideline range without the application of the ACCA, which will result in a sentence of time served.

STANDARD OF REVIEW

This Court reviews the federal district court's interpretation and application of the United States Sentencing Guidelines de novo. See U.S. v. Mojica, 214 F.3d 1169, 1171 (10th Cir. 2000).

LEGAL ANALYSIS

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. The Fifth Amendment Requirement of Fair Notice.

The Fifth Amendment's due process clause requires fair notice to citizens of conduct that is prohibited. In the great majority of criminal convictions, the requirement of fair notice is assumed to have been met by the prosecution's proof of the defendant's criminal intent, or mens rea. "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion[; i]t is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." Morissette v. U.S., 342 U.S. 246, 250, 72 S.Ct. 240, 96 L.Ed. 288 (1952). Ordinarily, "[t]he elimination of the element of criminal intent does not violate the due process clause where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch [one's reputation, as a felony conviction does]." U.S. v. Williams, 872 F.2d 773, 777 (6th Cir. 1989) (quoting U.S. v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985)). However, for the small minority of crimes that do not require proof of criminal intent for a conviction, fair notice becomes a much larger issue.

The U.S. Supreme Court, in Liparota v. U.S., 471 U.S. 419, 105 S.Ct. 2084,

85 L.Ed.2d 434 (1985), discussed this concept while imposing a criminal intent component to obtain a conviction for misconduct involving food stamps, stating that “[a]pplication of the rule of lenity [to require proof of criminal intent] ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.” 471 U.S. at 427. In so doing, the Supreme Court distinguished food stamp misconduct from public welfare offenses that involve “...a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety[,]” and thus do not require a showing of criminal intent. *Id.* at 432-33.

While the Sixth Circuit has noted that “...the general rule [is] that citizens are presumed to know the requirements of the law[, the Sixth Circuit has] also noted that this rule is not absolute, and may be abrogated when a law is ‘so technical or obscure that it threatens to ensnare individuals engaged in apparently innocent conduct,’ because to presume knowledge of such a law would violate a core due process principle, namely that citizens are entitled to fair warning that their conduct may be criminal.” *U.S. v. Napier*, 233 F.3d 394, 397-98 (6th Cir. 2000) (quoting *U.S. v. Baker*, 197 F.3d 211, 218-19 (6th Cir. 1999)). “‘The requirement of fair notice is not applied mechanically or without regard for the common sense judgment that people do not review copies of every law passed.’”

U.S. v. Caseer, 399 F. 3d 828, 836 (6th Cir. 2005) (quoting Columbia Nat. Res., Inc. v. Tatum, 58 F.3d 1101, 1105 (6th Cir. 1995)).

B. 18 U.S.C. § 922(g)(1) as a Public Welfare Offense.

Section 922(g)(1) provides in pertinent part that a felon may not “...possess in or affecting commerce, any firearm or ammunition[.]” Section 922(g)(1) is a strict liability offense. See, e.g., U.S. v. Reynolds, 215 F.3d 1210, 1214 (11th Cir. 2000) (citation omitted); U.S. v. Hammons, No. CR 07-1164, 2012 WL 119616, at *21 (D. New Mexico Jan. 12, 2012) (citations omitted). As a result, a conviction under section 922(g)(1), a malum prohibitum offense, does not require proof of mens rea or criminal intent.

The Sixth Circuit has recognized “...the well-settled principle that ‘[a] statute may provide criminal liability without mens rea consistent with due process if it is a regulatory measure in the interest of public safety.’” U.S. v. Murphy, 96 F.3d 846, 849 (6th Cir. 1996) (quoting U.S. v. Goodell, 990 F.2d 497, 499 (9th Cir. 1993)). The exception for public-welfare offenses includes minor violations for “liquor laws, the pure food laws, the anti-narcotics laws, motor vehicle and traffic regulations, sanitary, building and factory laws and the like.”” U.S. v. Handy, 570 F.Supp.2d 437, 476 (E.D.N.Y. 2008) (quoting U.S. v. Cordoba-Hincapie, 825 F. Supp. 485, 496 (E.D.N.Y. 1993) (citation omitted)).

Under ordinary circumstances, guns can be innocently owned without

putting their owners on notice of the likelihood of strict regulation. Staples v. U.S., 511 U.S. 600, 604-15, 114 S.Ct. 1793, 1796-1803, 128 L.Ed.2d 608 (1994). As a result, “[f]ederal statutes related to firearms almost uniformly explicitly require a mens rea component[, and c]ourts have employed the rule of lenity to read in a mens rea for those firearms-related statutes which do not have one.” U.S. v. Handy, 570 F.Supp.2d 437, 475 (E.D.N.Y. 2008) (citations omitted). However, “...a person convicted of a felony cannot reasonably expect to be free from regulation when possessing a firearm.” U.S. v. Capps, 77 F.3d 350, 353 (10th Cir. 1996).

In Napier, the defendant pointed out that the lack of a mens rea requirement for 922(g) violations meant that persons could be punished for “...conduct that an ordinary person would not consider to be criminal[.]” citing Judge Posner’s dissent in U.S. v. Wilson, 159 F.3d 280 (7th Cir. 1998), cert. denied, 527 U.S. 1024, 119 S. Ct. 2371, 144 L.Ed.2d 774 (1999), and U.S. v. Emerson, 46 F. Supp.2d 598 (N.D. Tex. 1999). Id. at 397. At issue were alleged violations of § 922(g)(8) for possession of a firearm and ammunition by a person subject to various domestic violence orders. The Sixth Circuit denied the Fifth Amendment challenge, noting that the domestic violence orders contain language regarding the ban on possession of firearms and that persons subject to domestic violence orders should be on notice that their status might cause the government to restrict their ability to

possess firearms. Id. at 398-99. See also U.S. v. Beavers, 206 F.3d 706, 708-10 (6th Cir. 2000). Significantly, however, the Sixth Circuit did not make the same statements in Napier regarding ammunition even though illegal possession of ammunition was also at issue.

Other courts have dealt similarly with the issue of possession of firearms by prohibited persons and the question of notice. For example, in U.S. v. Giles the court held that the defendant should have known of the prohibition against felons possessing firearms by virtue of having completed a Form 4473 (or more than one) that warned the defendant he could not legally buy a gun. 640 F.2d 621, 629 (5th Cir. 1981) (“While we might sympathize with his protestations that he did not know his conduct was illegal, our sympathy is tempered by the fact that each Form 4473 plainly warned him that he could not buy a gun.”). However, the court took due care to note that “...due process concepts of notice might limit the operation of th[e] rule [that ignorance of the law is no excuse] in some circumstances when ‘a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.’” Id. at 628 (quoting Lambert v. California, 355 U.S. 225, 228, 78 S. Ct. 240, 242, 2 L.Ed.2d 228 (1957) (citation omitted)).

Likewise, in another case the Sixth Circuit did not excuse a defendant from criminal liability who claimed that he could not understand a Colorado statute

barring felons from possessing firearms and went on to state that felons should know that their right to possess firearms might be restricted. U.S. v. Haire, 89 Fed. Appx. 551, 555-56 (6th Cir. 2004). However, the Sixth Circuit, citing Baker in the same way as the Sixth Circuit did in Napier, noted that the maxim that ignorance of the law is no excuse should not always be applied when statutes "...are so technical or obscure as to risk ensnaring individuals engaged in apparently innocent conduct[.]" Id. at 555 (citing Baker, 197 F.3d at 219).

The common theme of the cases cited above is that in each instance, the defendant, as a prohibited person, should have known that possession of a firearm was prohibited. See also Brian E. Sobczyk, 18 U.S.C. § 922(g)(9) and the Lambert Due Process Exception Requiring Actual Knowledge of the Law: United States v. Hutzell, 217 F.3d 966 (8th Cir. 2000), 80 Neb. L. Rev. 103, 122 (2001) (discussing that it is public knowledge that possession of a gun after being convicted of a violent crime is highly regulated). "The reasonable expectations of felons are wholly distinct from the reasonable expectations of ordinary citizens[;] a person who pleads guilty to, or is convicted by a jury of, a felony cannot, thereafter, reasonably expect to be free from regulation when possessing a firearm." U.S. v. Langley, 62 F.3d 602, 607 (4th Cir. 1995).

Thus, courts have generally agreed that prohibited persons have fair notice that their ability to possess firearms is highly regulated, if not completely barred.

C. The Differences Between Regulation of Firearms and Shotgun Shells.

Shotgun shells are not inherently dangerous in and of themselves.

Applicable Tennessee law does not prohibit felons from possessing shotgun shells.

See Tenn. Code Ann. §§ 39-17-1301(13), 1304, & 1307. By way of contrast,

Tennessee law does prohibit felons from possessing firearms. Tenn. Code Ann. § 39-17-1307.

Shotgun shells are not weapons, and “[p]ossession of shotgun shells is not illegal, absent some other factor which makes it so.” U.S. v. Teague, No. 2:10-CR-006-RWS-SSC, 2010 WL 6529640, at *13 (N.D. Ga. Nov. 12, 2010) (citing Lemon, below, 153 F.Supp.2d at 959-62). Ammunition is inoperative without a gun and can be used recreationally for legitimate purposes,³ unlike, say, silencers, which are also inoperative without a gun but are not “intrinsicly innocent.” U.S. v. Lemons, 153 F. Supp.2d 948, 959 (E.D. Wis. 2001) (quoting U.S. v. Poulos, 895 F.2d 1113, 1122 (6th Cir. 1990)). Furthermore, ammunition is not automatically contraband that may be seized without a warrant and cannot be seized unless there is “...probable cause at that time to believe the ammunition was linked to criminal activity” or there is proof that the officers knew at the time of seizure that the person possessing the same was a convicted felon. Id. (citing

³ “Lawful sporting purposes” may reduce a defendant’s base level offense for a violation of 922(g). U.S. v. Mojica, 214 F.3d 1169, 1171-72 (10th Cir. 2000) (citing U.S.S.G § 2K2.1, comment (n.10)).

Blom, below, 242 F.3d at 808). Under federal law, shotgun shells are specifically excluded from the definition of “destructive device.” 18 U.S.C. § 921(a)(4)(B).

In fact, the Eighth Circuit has suggested that while a state police officer would surely know it is illegal for a felon to possess a firearm, even a state police officer might not know it is a federal law violation for a felon to possess ammunition. U.S. v. Blom, 242 F.3d 799, 808 (8th Cir. 2001) (distinguishing between “likely” knowing and “surely” knowing).

A perfect example of this disparity can be found in Mr. Young’s Judgment in a Criminal Case, which provides in the terms of supervised release that “[t]he defendant shall not possess a firearm, destructive device, or any other dangerous weapon.” (Judgment at 3, RE 38, Page ID# 100.) This is identical to the instruction given by the Court during Mr. Young’s sentencing. (5/9/13 Hr’g Tr. at 27, RE 41, Page ID# 135.) As noted above, shotgun shells are not firearms, destructive devices, or weapons under federal law, and thus, possessing shotgun shells during supervised release, as opposed to a firearm, would not violate the terms of the same under the above instructions.

As a result of the above, there is a vast gulf between what courts have frequently found to be common knowledge in society, which is that felons may not possess firearms, and the far more obscure part of that same statutory scheme, which is that felons may not possess ammunition, including shotgun shells.

Shotgun shells in particular perhaps have the closest association of all ammunition with innocent recreational activity. In fact, that vast gulf may exist in part because the firearms prohibition component of section 922(g)(1) is so well known, meaning that the average person (or even the average felon) thinks that the firearms prohibition component of section 922(g)(1) is the entirety of the regulation, obscuring the prohibition against felons possessing ammunition.⁴

D. Application of Lack of Fair Notice to Mr. Young's Sentence.

“[T]he Sixth Circuit has recognized that the obscurity of a law can be relevant when the law reaches those engaged in “‘apparently innocent conduct.’”

U.S. v. Huff, No. 3:10-CR-73, 2011 WL 1308099, at *7 (E.D. Tenn. Jan. 3, 2011) (quoting U.S. v. Baker, 197 F.3d 211, 218-19 (6th Cir. 1999) (cited above)).

“Liability for a negligent state of mind, often considered an exception to mens rea, is not ‘an abandonment of the mens rea principle but rather its extension to include blame for the absence of a state of mind that, according to societal norms, the actor should have had.’” U.S. v. Handy, 570 F.Supp.2d 437, 476 (E.D.N.Y. 2008)

(quoting U.S. v. Cordoba-Hincapie, 825 F. Supp. 485, 500 (E.D.N.Y. 1993)

(citation omitted)).

⁴ Because the prohibition against the possession of firearms by felons is mentioned so much and the prohibition against the possession of ammunition by felons is mentioned so little, the effect can be analogized to an oral version of a rule of construction—*expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another).

In Caseer, the Sixth Circuit further discussed the concept of fair notice in the Fifth Amendment context, quoting a law review article in a parenthetical in stating that “[t]he real source of notice is not the arcane pronouncements of the law reports but the customs and the sensibilities of people—what Holmes termed a sense of ‘common social duty’ ... [I]t may well be that preoccupation with the concept of ‘lawyer’s notice’ has diverted our attention from instances of real unfairness.” 399 F.3d at 839 (quoting John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 231 (Mar. 1989) (quoting Nash v. U.S., 229 U.S. 373, 377, 33 S.Ct. 780, 57 L.Ed. 1232 (1913))). If it is true that “...due process issues require that each case be considered on its own unique facts, including not just the text of a regulation, but also the subject matter of that regulation and the persons who are targeted by its enactment[,]” Caseer, 399 F. 3d at 857 (Holschuh, D.J., concurring in part & dissenting in part), the above-listed facts of Mr. Young’s case are relevant to the determination of whether there has been a violation of due process.

It is undisputed that Mr. Young unwittingly came into possession of the seven shotgun shells at issue innocently and passively, only discovering the shotgun shells mixed in with other effects of his neighbor’s deceased husband as he later sorted through items to be sold at his home after having taken possession of the same. This situation closely mirrors a hypothetical used by the Supreme

Court in describing imposing a strict liability standard for food stamp conduct; the Supreme Court pointed out that “[s]uch a reading would...render criminal a nonrecipient of food stamps who ‘possessed’ stamps because he was mistakenly sent them through the mail due to administrative error[.]” Liparota, 471 U.S. at 426-427. In that case, the Supreme Court reversed a conviction based on the defendant’s mistake of law in not realizing he was not permitted to purchase food stamps for less than their face value, and the Supreme Court, in so doing, also found that fair notice to the defendant did not exist such that the food stamp violation could be deemed a public welfare offense. Id. at 432-34 (distinguishing food stamps from hand grenades and adulterated drugs).

The offense of being a felon in possession of ammunition in violation of section 922(g)(1) is a strict liability offense. Thus, it is possible for Mr. Young to have innocently and passively been in possession of the shotgun shells, not having intended to violate any law and not knowing he was violating any law, and to have violated section 922(g)(1), a malum prohibitum offense, in the process, which is in fact what happened. Given that Mr. Young’s possession of the shotgun shells was more passive than the defendant’s possession of the food stamps in Liparota, it stands to reason that Mr. Young’s mistake of law is the more innocent of the two.

Furthermore, there is no reason that Mr. Young should be deemed to have been more on notice as to the issue of his possession of the shotgun shells violating

federal law than the defendant in Liparota was regarding the issue of the purchase of food stamps for less than face value violating federal law. In Staples, the Supreme Court effectively found that guns were closer to food stamps than to hand grenades in terms of putting one on notice of the likelihood of regulation. 511 U.S. at 606-16. As shown above, shotgun shells are treated much differently than guns under both state and federal law, even when it comes to possession of the same by convicted felons, and the Eighth Circuit expressly acknowledged that even a state police officer who would know that a felon cannot possess a firearm under federal law might not know that a felon may not possess ammunition under federal law.⁵ Thus, Mr. Young has never had fair notice of the federal law prohibition against felons possessing shotgun shells.

It stands to reason that if Mr. Young had no notice that he was violating federal law by possessing shotgun shells, he certainly had no notice that he might be subjecting himself to the Armed Career Criminal Act. If the title of the ACCA is "...not merely decorative[,]" as discussed below, then Mr. Young would have absolutely no idea that the innocent and passive possession of shotgun shells might lead to a mandatory minimum 15-year sentence, especially as Mr. Young knows he has never even been accused of having been criminally armed or having used a

⁵ It bears noting that Mr. Young's 1992 convictions that resulted in his imprisonment and subsequent release in 1996 were state court charges, and he was confined to a state prison. (See PSR at 5-10 (¶¶ 19-22)).

weapon in the commission of a crime. Under these circumstances, the application of the 15-year mandatory minimum sentence under the ACCA for the innocent and passive violation of an obscure provision of a strict liability statute would be an unconstitutional violation of Mr. Young's due process rights guaranteed by the Fifth Amendment.

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

A. The Standards for an Eighth Amendment Challenge to the ACCA.

The ACCA has been the subject of many Eighth Amendment challenges. The Sixth Circuit stated in 2011 that "...we are aware of no court of appeals decision that has struck down the Armed Career Criminal Act as violative of the Eighth Amendment." U.S. v. Moore, 643 F.3d 451, 456 (6th Cir. 2011). Five months later, the Sixth Circuit, in U.S. v. Brown, 443 Fed. Appx. 956 (6th Cir. 2011), cited (among other cases) Moore in denying Fifth and Eighth Amendment challenges to the ACCA and stated that "[i]n the teeth of these precedents [the defendant] has not identified, nor have we found, any decision from any court invalidating the application of ACCA's mandatory minimum to an individual on constitutional grounds[; the defendant] gives no good reason for making this case the first." 443 Fed. Appx. at 960. Respectfully, there are many good reasons for making Mr. Young's case the first.

In Moore, the Sixth Circuit discussed at length the analysis required to evaluate an Eighth Amendment challenge to the ACCA. The Eighth Amendment contains a “narrow proportionality principle.” 643 F.3d at 454 (quoting Harmelin v. Michigan, 501 U.S. 957, 996, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991)). The proportionality between crime and sentence does not have to be strict; the Eighth Amendment will strike down only a sentence that is extreme or grossly disproportionate. Id. (citations omitted). The U.S. Supreme Court has made clear that “[a] gross proportionality principle is applicable to sentences for terms of years.” Lockyer v. Andrade, 538 U.S. 63, 72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). “Th[e] analysis begins with a comparison of the gravity of the offense and the severity of the sentence.” Moore, 643 F.3d at 455 (citation omitted).

B. The Gravity of the Offense.

As discussed above, the felon-in-possession of ammunition charge under 18 U.S.C. section 922(g)(1) is a strict liability offense. The sentencing enhancement of the ACCA under 18 U.S.C. section 924(e) is a “harsh” and “severe” penalty. This combination of a strict liability, malum prohibitum offense involving the lowest level of criminal culpability with an enhanced penalty has been problematic for the courts from the inception of the ACCA.⁶ One way in which courts appear

⁶ To ameliorate the potential for “...harsh and absurd result[s,]” various courts have recognized defenses to a section 922(g)(1) charge such as justification and innocent possession. U.S. v. Mason, 233 F.3d 619, 622-25 (D.C. Cir. 2000).

to have resolved this is to find some element of wrongful intentional conduct on the part of the defendant associated with the possession of the firearm or ammunition that brings the case within the ambit of the ills Congress intended for the ACCA to correct and that justifies the imposition of the ACCA's mandatory minimum sentence. See, e.g., U.S. v. Haire, 89 Fed. Appx. 551, 559 (6th Cir. 2004) (“[The defendant] cannot be heard to complain that he is being harshly penalized for the mere possession of a gun” when the gun had its serial number filed off and was possessed during the commission of a sexual assault.)

In U.S. v. Lyons, 403 F.3d 1248 (11th Cir. 2005), the court dispensed with the defendant's Eighth Amendment challenge to the imposition of an enhanced sentence under the ACCA for possession of ammunition (while assaulting a police officer) by noting that “...the Supreme Court has consistently affirmed the imposition of longer sentences, even for non-violent offenses, based on an offender's recidivism.” 403 F.3d at 1256. The court then goes on to cite three U.S. Supreme Court cases to support its proposition, but in all three cited cases, the offense that resulted in the imposition of the heightened sentence was an offense that had an element of intent. Id. at 1256-57.

In the first of the three U.S. Supreme Court cases, Ewing v. California, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003), the Supreme Court, in describing the defendant's offense that had given rise to the criminal prosecution, stated,

“Even standing alone, Ewing’s theft should not be taken lightly[; h]is crime was certainly not ‘one of the most passive felonies a person could commit[,’ and t]o the contrary, the Supreme Court of California has noted the ‘seriousness’ of grand theft in the context of proportionality review.” 538 U.S. at 28 (citations omitted).

In the second of the three cases, Hutto v. Davis, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982), the defendant was charged and convicted of possession of approximately nine ounces of marijuana with the intent to distribute and distribution of marijuana. 454 U.S. at 371.

In the third of the three cases, Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), the defendant was charged and convicted of obtaining \$120.75 by false pretenses, which constituted felony theft under Texas law. 445 U.S. at 266. The Supreme Court noted while the defendant’s conviction for felony theft could have resulted in a sentence of up to ten years even in the absence of the recidivist statute at issue and upheld the recidivist sentence as not violating the Eighth Amendment, “[t]his is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, [such as] if a legislature made overtime parking a felony punishable by life imprisonment.” 445 U.S. at 274, n.11.

Here, those avenues of justification are not available. The shotgun shells were unrelated to the reason the search of Mr. Young’s home was conducted, were

not used in the commission of any crime, and were not the fruits of any crime. The possession of the shotgun shells by Mr. Young cannot be tied to any criminal intent or moral culpability on his part. In fact, Mr. Young possessed the shotgun shells at the request of the neighbor to whom the shotgun shells belonged.

In assessing the culpability of an offender, the U.S. Supreme Court has long recognized “that there are generally accepted criteria for comparing the severity of different crimes on a broad scale[,]” and has noted that “South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts.” Solem v. Helm, 463 U.S. 277, 293-94, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). “[C]riminal offenses requiring no mens rea have a ‘generally disfavored status.’” Liparota v. U.S., 471 U.S. 419, 426, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985) (quoting U.S. v. U.S. Gypsum Co., 438 U.S. 422, 438, 98 S.Ct. 2864, 2874, 57 L.Ed.2d 854 (1978)). See also John Shepard Wiley, Jr., Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation, 85 Va. L. Rev. 1021, 1105 (Sept. 1999) (“[F]or strict liability crimes, traditionally, ‘penalties commonly are relatively small, and conviction does no grave damage to an offender’s reputation[; t]he small penalties attached to such offenses logically complimented the absence of a mens rea requirement: In a system that generally requires a ‘vicious will’ ... imposing severe punishments for offenses that require

no mens rea would seem incongruous.” (quoting Staples v. U.S., 511 U.S. 600, 616-18 (1994) (reversing district court conviction for possession of fully automatic machine gun due to defendant’s asserted lack of knowledge of the same)).

Under the Eighth Amendment proportionality analysis, courts have found a lack of criminal intent to be significant when comparing the gravity of the offense to the severity of the sentence. In one example mentioned above, the U.S. Supreme Court, in “...hold[ing that] as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted[,]” Solem, 463 U.S. at 290, viewed as significant that the defendant’s “...crime [of passing a “no account” check for \$100.00] was ‘one of the most passive felonies a person could commit[, involving] neither violence nor threat of violence to any person[,]’” id. at 296 (citation omitted), in concluding that his sentence was significantly disproportionate to his crime and was thus barred by the Eighth Amendment.

Similarly, the Ninth Circuit, in Gonzalez v. Duncan, 551 F.3d 875 (9th Cir. 2008), ruled that the defendant’s “entirely passive, harmless, and technical violation of the registration law” for sex offenders was not a sufficiently grave offense to merit a sentence of 28 years to life and accordingly ruled that the sentence was violative of the Eighth Amendment. Id. at 889. Significantly, the Ninth Circuit noted that in order to be convicted of the “regulatory offense” of

failing to update one's registration annually, the defendant's actual knowledge of the duty to register was required and that no actual harm or danger to society resulted from the defendant's technical failure to update his registration at the required time. Id. at 884.

In the instant case, it is unchallenged in the record that Mr. Young did not know that he was not allowed to possess the shotgun shells, that he received the shotgun shells passively, that he did not know the shotgun shells were in the boxes turned over to him by the widow neighbor until he later sorted the contents of the same, and that the shotgun shells were neither used in a crime or the fruits of a crime. It is also unchallenged that there was no shotgun found in which the shells could have been used. Given these facts, taken with the strict liability nature of the offense, Mr. Young's criminal culpability is actually less than those of the defendants in Solem and Gonzalez, each of whom were convicted of crimes that contained a mens rea element and still had their respective sentences abrogated by the Eighth Amendment. In terms of culpability, Mr. Young's case is most closely analogous to the hypothetical referenced above in Rummel of a mandatory life sentence resulting from overtime parking.

C. The Severity of the Sentence.

Courts have held the fifteen year mandatory minimum sentence under the ACCA to be a "severe punishment" for felony gun possession. U.S. v. Mitchell,

932 F.2d 1027, 1029 (2nd Cir. 1991). See also U.S. v. Yirkovsky, 259 F.3d 704, 707 n.4 (8th Cir. 2001) (referring to the ACCA’s mandatory minimum of 180 months as “an extreme penalty”); U.S. v. Coleman, No. 1:09-CR-175, 2010 WL 582678, at *10 (N.D. Ohio Feb. 10, 2010) (characterizing the imposition of the ACCA’s 180 month mandatory minimum as “a harsh result” for felony possession of a non-functioning firearm that would otherwise have resulted in a sentencing advisory range of 57-71 months).

Here, the PSR has concluded that Mr. Young should be deemed an “Armed Career Criminal” pursuant to the ACCA. (PSR at 4 (¶ 14).) As can be seen from the discussion of Mr. Young’s prior criminal record in the PSR, Mr. Young has never been convicted of a weapons violation. (PSR at 4-10 (¶¶ 18-25).) In addition, all of Mr. Young’s felony convictions are, as noted above, more than 20 years old and, as accurately noted in the criminal history category calculation, are too stale to be used for that purpose. See also U.S. v. Presley, 52 F.3d 64, 69-70 (4th Cir. 1995) (convictions too stale for consideration by U.S.S.G. may be used under ACCA since there is no temporal restriction). The instant plea of guilty to and subsequent conviction for a violation of section 922(g)(1) for possessing the shotgun shells is not considered a “crime of violence” under Application Note 1 to U.S.S.G. section 4B1.2, and Mr. Young cannot be characterized as a “career offender” under U.S.S.G. section 4B1.1.

In the absence of the ACCA, Mr. Young's total criminal history score would be 1, and his criminal history category would be I. (PSR at 10 (¶ 27).) Mr. Young's offense level would have been 14, reduced to 12 by his acceptance of responsibility. (PSR at 4 (¶¶ 8-17).) As a result, the sentencing advisory range would have been 10-16 months. On the day of the sentencing hearing, May 9, 2013, Mr. Young had already served 12 months (PSR at 3 (¶ 3)), and as of now, Mr. Young has served over 16 months.

So, with Mr. Young designated an "Armed Career Criminal," Mr. Young has been given a sentence, with no possibility of parole, that is eighteen (18) times longer than the shortest sentence suggested by the U.S.S.G. and that is over eleven (11) times longer than the longest sentence suggested by the U.S.S.G. If Mr. Young is forced to serve 180 months, his youngest child will be at least 20 by the time of his release.

Even assuming arguendo the propriety of Mr. Young's conviction for an innocent violation of an obscure portion of a strict liability statute of which he had neither actual notice nor fair notice, this disparity between the 10-16 month advisory range and the 180 month mandatory minimum under the ACCA appears to be the largest disparity at issue in an Eighth Amendment challenge to the ACCA that could be found. Regardless, there can be no question whatsoever that

sentencing Mr. Young to 180 months is a “harsh”⁷ or “severe” result that is disproportionate to the crime for which Mr. Young is convicted.

D. Gross Disproportionality of Mr. Young’s Sentence.

The question then becomes whether that disproportionality rises to the level of being extreme for Eighth Amendment purposes. For the following reasons, it does.

In Gonzalez, the Ninth Circuit found that a sentence increased by a recidivist enhancement that resulted in a sentencing range that was twenty-one (21) times greater than the statutory minimum and more than nine (9) times greater than the statutory maximum was grossly disproportionate. 551 F.3d at 886-87. In so finding, the Ninth Circuit stated that “[the state] has imposed an extraordinarily harsh sentence on Gonzalez based on a violation of a technical regulatory requirement that resulted in no social harm and to which little or no moral culpability attaches.” Id. at 887.

The U.S. Supreme Court observed in discussing gross disproportionality in Helm that the defendant “...ha[d] been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.” 463 U.S. at 299. The Supreme Court also noted that Mr. Helm’s “...crime [of uttering a no-account check] was ‘one of the most passive felonies a person could commit.’” Id.

⁷ The government concedes that Mr. Young’s 180 month sentence is harsh. (5/9/13 Hr’g Tr. at 20, RE 41, Page ID# 128.)

at 296 (citation omitted). The Supreme Court went on to abrogate Helm's sentence under the Eighth Amendment. Id. at 304.

As stated above, Mr. Young's actual 180 month sentence is eighteen (18) times longer than the shortest sentence suggested by the U.S.S.G. and is over eleven (11) times longer than the longest sentence suggested by the U.S.S.G., which is comparable to the sentence in Gonzalez. However, as noted above, Mr. Young has even less criminal culpability than either Mr. Gonzalez or Mr. Helm, as Mr. Gonzalez had to have actual knowledge of the registration requirement in order to be convicted and Mr. Helm knew (or would have known, in the absence of alcohol) he was uttering a no-account check. Mr. Young's violation of section 922(g)(1) was unwitting, passive, and innocent, and this is undisputed. There is also no doubt that Mr. Young's sentence is longer than sentences that are being routinely given for far more serious conduct. Finally, the huge disparity in what Mr. Young's sentence would have been in the absence of the ACCA and what it is now confirms the gross disproportionality

Thus, Mr. Young's 180 month sentence is grossly disproportionate to the violation for which he was convicted.

E. Inapplicability of the ACCA to Mr. Young.

The application of the ACCA to Mr. Young's case does not in any way comport with the intent of Congress in enacting the ACCA. "[I]t is the

government's burden to prove that a defendant qualifies for the mandatory 15-year ACCA enhancement.” U.S. v. Amos, 501 F.3d 524, 526 (6th Cir. 2007) (quoting U.S. v. Hargrove, 416 F.3d 486, 494 (6th Cir. 2005)).

With regard to the ACCA, the U.S. Supreme Court has stated as follows:

As suggested by its title, the Armed Career Criminal Act focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun. See *Taylor, supra* at 587-588, 110 S.Ct. 2143; 470 F.3d, at 981, n. 3 (McConnell, J., dissenting in part) (“[T]he title [of the Act] was not merely decorative”). In order to determine which offenders fall into this category, the Act looks to past crimes. This is because an offender’s criminal history is relevant to the question whether he is a career criminal, or, more precisely, to the kind or degree of danger the offender would pose were he to possess a gun.

In this respect—namely, a prior crime’s relevance to the possibility of future danger with a gun—crimes involving intentional or purposeful conduct (as in burglary and arson) are different than DUI, a strict liability crime. In both instances, the offender’s prior crimes reveal a degree of callousness toward risk, but in the former instance they also show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger. We have no reason to believe that Congress intended a 15-year mandatory prison term where that increased likelihood does not exist.

Begay v. U.S., 553 U.S. 137, 146, 128 S.Ct. 1581, 1587, 170 L.Ed.2d 490 (2008)

(with Scalia, J., also noting in concurrence that “burglary was the least risky crime among the enumerated offenses” in the ACCA). Furthermore, “[t]he principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping ‘firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.’ S.Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968).” U.S. v. Giles, 640 F.2d 621, 624 (5th Cir. 1981)

(quoting Huddleston v. U.S., 415 U.S. 814, 824, 94 S.Ct. 1262, 1268, 39 L.Ed.2d 782 (1974)). “Congress passed the ACCA to protect the public from continuing crimes by armed felons.” U.S. v. Willoughby, 653 F.3d 738,741 (8th Cir. 2011) (quoting U.S. v. Gordon, 557 F.3d 623, 624 (8th Cir. 2009)).

There are a number of reasons why the ACCA should not be applied to Mr. Young’s sentence. To begin, the ACCA predicates involved in the instant case are for burglary, which Justice Scalia has characterized as the “least risky” of the qualifying offenses, Begay, 553 U.S. at 149 (Scalia, J., concurring), and which Justice Souter has suggested are not violent in nature and are not crimes against the person, Andrade, 538 U.S. at 78 (Souter, J., dissenting), and would be stale under the U.S.S.G.

Furthermore, there is no element of criminal intent associated with Mr. Young’s possession of the shotgun shells, which is characterized under federal law as non-violent, and as noted above, the shotgun shells are not firearms, destructive devices, or weapons. Thus, Mr. Young, in relation to the instant offense, is not considered to have been armed.

Perhaps most significantly, the application to the ACCA to Mr. Young’s case resulted in a 180 month mandatory minimum sentence for Mr. Young being an “Armed Career Criminal” when he has never been accused of being armed. If the ACCA’s title is “not merely decorative,” then it is crystal clear that Mr. Young

does not fall within the category of persons Congress intended to imprison as recidivists with weapons. See, e.g., U.S. v. McKenzie, 96 Fed. Appx. 164, 166 (4th Cir. 2004) (affirming ACCA sentencing enhancement as the defendant’s offense “was not atypical” and was within “the heartland of offenses generally covered by the applicable guideline”). “We have no reason to believe that Congress intended a 15-year mandatory prison term where th[e] increased likelihood [that the offender is the kind of person who might deliberately point a gun and pull the trigger] does not exist.”⁸ Begay, 553 U.S. at 146.

From the above, it is clear that the intent of Congress in passing the ACCA was far narrower in scope than the express intent of the state legislatures that have passed much more general, “three strikes and you’re out” recidivist sentencing statutes such as those at issue in Ewing, 538 U.S. at 14-16, Helm, 463 U.S. at 281-82, and Rummel, 445 U.S. at 264, which is what the federal district court erroneously compared the ACCA to during sentencing. (5/9/13 Hr’g Tr. at 25, RE 41, Page ID# 133.) Mr. Young’s case does not fall within the class of persons Congress intended to punish via the ACCA. There is no way that one can successfully torture the English language to arrive, accurately, at the conclusion that Mr. Young is an armed career criminal.

In short, this is the rare case that requires a finding of gross

⁸ Almost every reference by a court to the purpose of the ACCA mentions firearms or weapons only and omits any reference to ammunition.

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.

In a University of Virginia law review article cited above, Mr. Wiley discusses a common judicial technique used to test the constitutionality of various statutory schemes, which is to use an extreme hypothetical, outside the heartland of more typical conduct the statute was designed to address, to reveal the flaws of that statutory scheme. John Shepard Wiley, Jr., Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation, 85 Va. L. Rev. 1021, 1035-53 (Sept. 1999) (citations omitted). Here, however, the facts are not hypothetical. Mr. Young has received a 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, 15 years, for having discovered shotgun shells among items he was going to sell to help a neighbor.

“The powers of a democratic constitutional government such as ours to punish people must be exercised rationally[; a]rbitrary and capricious punishment is not acceptable.” Handy, 570 F.Supp.2d at 439 (citing Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)). If true, the Fifth and Eighth

Amendments have to bar the application of the ACCA to Mr. Young's sentence.

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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CERTIFICATE OF COMPLIANCE

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).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 6th CIR. R. 32(a)(7)(B)(iii), THE BRIEF CONTAINS 9,884 WORDS.

2. THE BRIEF HAS BEEN PREPARED

In proportionately spaced typeface using:

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3. IF THE COURT SO REQUESTS, THE UNDERSIGNED WILL PROVIDE A COPY OF THE WORK OR LINE PRINTOUT.

4. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 6TH CIR. R. 32(A)(7), MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

By: /s/ Christopher T. Varner

CERTIFICATE OF SERVICE

I certify that on September 27, 2013 the foregoing document was served on all parties or through their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

EVANS HARRISON HACKETT PLLC

By: /s/ Christopher T. Varner

CASE NO. 13-5714**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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

APPELLANT'S DESIGNATION OF APPENDIX CONTENTS

Appellant, pursuant to Sixth Circuit Rule 28(d), hereby designate the following filings in the district court's record as items to be included in the joint appendix:

Description	Date Filed in District Court	Record Entry Number	Page ID #
Docket Sheet	Current as of 09/26/2013	NA	NA
Indictment	05/01/2012	1	1
Arrest of Edward Young	05/08/2012	NA	NA
Memorandum and Order	05/09/2012	3	4
Order of Detention	05/09/2012	4	5
Plea Agreement	01/14/2013	29	54-60

Report and Recommendation	01/14/2013	31	62-63
Order	02/04/2013	32	64-65
Sentencing Memorandum	05/02/2013	35	67-89
Judgment	05/22/2013	38	97
Notice of Appeal	05/22/2013	39	104-105
Notice of Filing of Official Transcript	07/02/2013	41	109-138
*PSR w/3 attachments	02/14/2013	NA	17 pages (w/o exs.)