
No.

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD F. WHITE, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

In *Staples v. United States*, the Court held that to obtain a conviction under 26 U.S.C. § 5861(d), the government was required to prove that the defendant possessed an unregistered firearm and knew the characteristic of the firearm that subjected it to registration under the National Firearms Act, even though the statute did not contain a *mens rea* element. 511 U.S. 600, 619 (1994). In this case, the characteristic that made the firearm subject to registration was the fact that it had a bore over one half inch in diameter. The government never contended that White had actual possession of the firearm, only that he constructively possessed the firearm, which was concealed in a duffel bag in a bedroom closet at his parents' home. There was no evidence that White ever handled the gun, saw the gun, or spoke of the gun in a manner suggesting he was familiar with the weapon and knew its bore width.

The district court found White guilty, concluding, “the person possessing the gun is easily aware of the bore being more than a half inch.” The United States Court of Appeals for the Eighth Circuit affirmed, concluding that in the absence of direct evidence, a district court can infer the requisite knowledge of the physical characteristics of the firearm from the condition of the firearm, including any

external indications signaling the nature of the weapon, if constructive possession is established. *United States v. White*, 915 F.3d 1195, 1199 (8th Cir. 2019).

This Court should accept certiorari to resolve a circuit split among the Courts of Appeals concerning the application of *Staples* in cases involving constructive possession of firearms with observable characteristics. The First, Seventh, Ninth, and Tenth Circuits require evidence that the defendant saw or handled the firearm before permitting an inference that the defendant knew the characteristic of a weapon that made it subject to registration. *United States v. Michel*, 446 F.3d 1122 (10th Cir. 2006); *United States v. Jamison*, 635 F.3d 962 (7th Cir. 2011); *United States v. Gergen*, 172 F.3d 719 (9th Cir. 1999); *United States v. Nieves-Castano*, 480 F.3d 597 (1st Cir. 2007). The Eighth and Eleventh Circuits, on the other hand, make no such requirement. *United States v. White*, 915 F.3d 1195 (8th Cir. 2019); *United States v. Miller*, 255 F.3d 1282 (11th Cir. 2001).

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Petitioner, Ronald F. White, Jr., respectfully asks this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 15, 2019, affirming the district court's judgment.

OPINION BELOW

The Eighth Circuit's opinion affirming the judgment of the district court is reported at *United States v. White*, 915 F.3d 1195 (8th Cir. 2019), and is included

in the Appendix at page 1. A copy of the order denying rehearing is included in the Appendix at page 6.

JURISDICTION

Jurisdiction in the United States District Court for the Western District of Missouri was pursuant to 18 U.S.C. § 3231, because White was charged and convicted of an offense against the United States, i.e., possession of an unregistered firearm, in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871.

White appealed from his conviction and sentence to the United States Court of Appeals for the Eighth Circuit. Jurisdiction in that court was established by 28 U.S.C. § 1291.

The Eighth Circuit denied rehearing on March 27, 2019. In accordance with Sup. Ct. R. 13.3, this petition is filed within ninety days of the date on which the Court of Appeals entered its final order affirming the district court's judgement in this case. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.3.

CONSTITUTIONAL PROVISION INVOKED

No person shall be . . . deprived of life, liberty or property, without due process of law. . . . U.S. Const., Amend. V.

I. STATEMENT OF THE CASE

A. Procedural History

On June 27, 2014, White was charged by Superseding Indictment with possession of an unregistered firearm, in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871 (DCD 28, Superseding Indictment at p. 1-2).¹ The unregistered firearm in question was a “Street Sweeper,” which is a 12 gauge shotgun that has a bore over one half inch in diameter and is not deemed suitable for sporting purposes. On July 22, 2014, a jury found White guilty (DCD 54, Minutes of Jury Trial at 1).

White appealed and a panel of the Eighth Circuit affirmed his conviction for possession of an unregistered firearm. *United States v. White*, 824 F.3d 783, 792 (8th Cir. 2016). White filed a petition for rehearing, and the Eighth Circuit granted rehearing *en banc* and vacated the panel opinion. *United States v. White*, 863 F.3d 784, 785 (8th Cir. 2017).

In the *en banc* proceedings, White argued that the panel decision was contrary to the holding in *Staples v. United States*, 511 U.S. 600 (1994). More specifically, White argued that the jury was improperly instructed as to *mens rea*,

¹ White was also charged and convicted of unlawful possession of a stolen firearm, in violation of 18 U.S.C. §§ 922(j) and 924(a)(2). That conviction was reversed on appeal, however, due to insufficient evidence.

because the jury was not required to find beyond a reasonable doubt that White knew the characteristic of the shotgun—that the barrel had a bore diameter over one-half inch—that required the shotgun to be registered pursuant to the National Firearms Act. *White*, 863 F.3d at 786. The Eighth Circuit agreed and overruled precedent holding that no *mens rea* was required if the weapon was deemed “quasi-suspect.” *Id.* at 787-790, overruling *United States v. Barr*, 32 F.3d 1320 (8th Cir. 1994).

Although White had already served 46 months of his 57-month term of imprisonment and had been released to a halfway house, the government chose to try the case a second time (DCD 165, Minute Entry at 1; DCD 187, Tr. at 383). A bench trial began on October 31, 2017 (DCD 165, Minute Entry at 1). The district court found White guilty (DCD 187, Tr. at 378). On May 25, 2018, the court sentenced White to 46 months’ imprisonment, with credit for time served, to be followed by three years of supervised release (DCD 179, Judgment at 1-3). On June 6, 2018, White filed a timely notice of appeal (DCD 180, Notice of Appeal).

On appeal, White challenged the sufficiency of the evidence, arguing that the government failed to prove that he knowingly possessed the Street Sweeper shotgun and that he knew that the shotgun’s barrel had a bore over one-half inch in diameter. A panel of the Eighth Circuit affirmed the conviction and sentence.

United States v. White, 915 F.3d 1195 (8th Cir. 2019). White filed a timely petition for rehearing which the court denied on March 27, 2019.

B. Testimony and Evidence Presented at the Bench Trial

In October of 2013, local police deemed White, Andre Simmons, Terrance Diamond, and others to be persons of interest in a criminal investigation, so officers surveilled White's parents' house where White occasionally stayed (DCD 185, Tr. at 58-60, 67, 69-70; Gov't. Ex. 19; Appendix at 13). White worked as a rap artist and songwriter and lived in California, but he stayed with his parents when he visited Kansas City, Missouri (DCD 185, Tr. at 81, 118, 122-23). Detective Loran Freeman testified that he surveilled the house, but did not see White or any other person of interest (DCD 185, Tr. at 60-61).

On October 28, 2013, the police searched trash left outside the White residence and found some marijuana, rolling papers, and mail addressed to White's father, Ronald White, Sr., and stepmother, Rachelle White (DCD 185, Tr. at 61-63). Using this information, Detective Freeman obtained a search warrant for the residence (DCD 185, Tr. at 63-64). According to the warrant application, Andre Simmons was "at the identified residence for extended periods of time" (Gov't. Ex. 19; Appendix at 13). On October 31, 2013, the police executed the warrant (DCD 185, Tr. at 64-65).

In one of the bedrooms, on the top shelf of a closet, the police found a black duffel bag containing five firearms, including a 12-gauge Street Sweeper shotgun, a Stag Arms rifle, and a .357 revolver (DCD 185, Tr. at 68-69, 74, 87, 99-100; Appendix at 7; Defendant's Ex. 105, Evidence Log). The black duffel bag also contained an Amtrak ticket in White's name dated February 1, 2013—approximately nine months prior to the execution of the search warrant—for travel from Los Angeles, California, to Kansas City, Missouri, and a credit card receipt (DCD 185, Tr. at 75-76, 91-92). White's parents denied any knowledge of the duffel bag and its contents (DCD 185, Tr. at 116-17, 128-29).

The guns found in the duffel bag were tested for DNA. "An indiscernible mixture of genetic profiles from at least two contributors" was obtained from the trigger guard of the Street Sweeper (Appendix at 19). White was excluded as a potential contributor of DNA found on the Street Sweeper, although his DNA was on the .357 revolver found in the duffel bag (DCD 185, Tr. at 163, 167-70; Appendix at 22). Andre Simmons's DNA was found on the Stag Arms rifle (DCD 185, Tr. at 161-62; Appendix at 19).

The government presented evidence that the Street Sweeper shotgun is a destructive device, because it is a shotgun with a bore over one-half inch in diameter that has been deemed not suitable for sporting purposes by the Bureau of

Alcohol, Tobacco, Firearms and Explosives (DCD 186, Tr. at 261-62, 267, 274). The bore diameter of the shotgun was .752 inches (DCD 186, Tr. at 279). The Street Sweeper had never been registered and White did not have any firearms registered to him (DCD 186, Tr. at 195-96, 202).

The government admitted that White was not present when the search warrant was executed and denied any reliance on a theory of actual possession: “we’ve never contended or asked anyone to believe that there’s evidence that he was in actual physical possession” (DCD 187, Tr. at 360-61). The government argued: “It’s a constructive possession case. It’s based on largely circumstantial evidence with very little direct evidence, but there are ample, permissible, and reasonable inferences drawn from that evidence to sustain the beyond a reasonable doubt proof of each element of the offense. . . .” (DCD 187, Tr. at 377-78).

The district court found White guilty, concluding that he possessed the unregistered Street Sweeper based on the following facts: 1) the Street Sweeper was found in the duffel bag, which also contained an Amtrak ticket in White’s name; 2) White’s DNA was on the .357 revolver in the duffel bag; 3) White’s parents denied knowledge of the guns and duffel bag; 4) White sometimes stayed in the bedroom where the duffel bag was found; and 5) some of White’s clothing was in the bedroom closet (DCD 187, Tr. at 378).

Having concluded that White constructively possessed the Street Sweeper, the district court also concluded that he knew it was a destructive device, saying, “the person possessing the gun is easily aware of the bore being more than a half inch” (DCD 187, Tr. at 379). The district court did not make any findings of fact that White had ever seen or handled the Street Sweeper or that he had ever opened the duffel bag at a time the Street Sweeper was inside the bag. There was no evidence as to who put the Street Sweeper in the duffel bag or when that occurred.

II. REASONS FOR GRANTING REVIEW

This Court should grant certiorari, because the Eighth Circuit’s opinion in this case has widened a circuit split regarding the application of *Staples v. United States*. In *Staples*, the Court held that to obtain a conviction under 26 U.S.C. § 5861(d), the government was required to prove that the defendant knew the characteristic of his firearm that made it subject to registration, even though the statute did not contain a *mens rea* element. 511 U.S. 600, 619 (1994). In *Staples*, there was no question that the defendant possessed a firearm subject to registration under the statute. *Id.* at 603. The issue was whether the government had to prove that he knew that an internal modification to the weapon permitted it to fire in a fully automatic mode, which would make the weapon a “machinegun,” as statutorily defined, and would thus require registration. *Id.* at 603-04. The

defendant claimed that he was unaware of the modification and that anytime he had used the weapon, it only fired in a semiautomatic fashion. *Id.* at 603. Since the jury instructions did not require the jury to find that the defendant knew the gun would fire automatically, this Court reversed the appellate court's opinion and remanded for further proceedings. *Id.* at 604, 620.

Here, the firearm in question has an external characteristic—a bore diameter greater than one half inch—that subjects it to registration. The question is whether a defendant who constructively possesses such a firearm should be deemed to know of the external characteristic in the absence of any proof that he ever handled the firearm, saw the firearm, spoke of the firearm in a manner establishing familiarity with the characteristic, or engaged in conduct that would demonstrate awareness of the external characteristic.

Relying on two opinions from the Eleventh Circuit and a dissenting opinion from the District of Columbia, the Eighth Circuit concluded that in the absence of direct evidence, a court can infer the requisite knowledge of the physical characteristics of the firearm from the condition of the firearm, including any external characteristics. *White*, 915 F.3d at 1199; *United States v. Hutchins*, 292 F. App'x. 842, 844 (11th Cir. 2008); *United States v. Miller*, 225 F.3d 1282 (11th Cir. 2001); *United States v. Spinner*, 152 F.3d 950, 963 (D.C. Cir. 1998) (Garland,

J. dissenting).²

The court failed to explain, however, how such an inference could be drawn in a case such as *White*'s where there was no proof that the defendant saw or handled the firearm or engaged in other conduct demonstrating familiarity with the firearm's characteristics. Other Courts of Appeals have required that evidence of an obvious external characteristic be coupled with evidence that the defendant handled the gun before permitting an inference that the defendant knew of its features. *See e.g., United States v. Jamison*, 635 F.3d 962, 968 (7th Cir. 2011); *United States v. Michel*, 446 F.3d 1122, 1131-32 (10th Cir. 2006); *United States v. Gergen*, 172 F.3d 719, 725 (9th Cir. 1999); *United States v. Nieves-Castrano*, 480 F.3d 597, 600-01 (1st Cir. 2007). This Court should grant certiorari to resolve this circuit split.

III. ARGUMENT

In *White*'s case the Eighth Circuit adopted a rule that a court can infer the requisite knowledge of the physical characteristics of a firearm based on external

² The Court also cited *United States v. Gonzales*, 535 F.3d 1174, 1179 (10th Cir. 2008). That opinion does not support the proposition for which it was cited. The court in *Gonzales* specifically noted that the evidence was sufficient to support the § 5861(d) conviction, because the sawed off shotgun was “visible from the driver’s seat and would have been obvious to the driver,” who was the sole owner of the car and was driving when pulled over by the police). *Id.*

indications signaling the nature of the weapon. 915 F.3d at 1199. According to the Eighth Circuit, the government's burden to prove such knowledge may be satisfied by presenting testimony regarding the characteristics of the gun or by admitting the firearm into evidence. *Id.* at 1199-1200.

The Eighth Circuit relied on *United States v. Miller*, in which the Eleventh Circuit took a similar position. 255 F.3d 1282, 1287 (11th Cir. 2001). In *Miller*, the police stopped a defendant with an outstanding arrest warrant while he was driving his vehicle. *Id.* at 1284. During an inventory search, officers found a short-barreled shotgun in the trunk of the defendant's vehicle. *Id.* Miller did not testify, but asserted in closing argument that he was not aware the shotgun was in his vehicle. *Id.* at 1285.

The court concluded that the jury could reasonably infer that the defendant knew that the barrel was shorter than 18 inches, because it was a patently obvious characteristic, there was testimony at trial as to the length of the barrel, and the firearm was admitted into evidence and shown to the jury. *Id.* at 1287. The opinion does not cite any evidence indicating that the defendant saw the shotgun or put it in the trunk of his vehicle. The vehicle was registered to the defendant, but the opinion does not indicate whether he was the sole owner or driver of the vehicle.

In *United States v. Hutchins*, the Eleventh Circuit upheld the defendant's § 5861(d) conviction in spite of his contention that there was no proof that he had ever seen or actually possessed the two unregistered sawed-off shotguns. 292 F. App'x. 842, 843 (11th Cir. 2008) (unpublished). The police found the firearms in a shed on the defendant's property. *Id.* at 844. The defendant directed the police to the location of the key that unlocked the padlock on the shed's door. *Id.* Citing its earlier opinion in *Miller*, the court wrote, "We have upheld a jury verdict where the Government offered no direct evidence the defendant knew his shotgun's barrel was shorter than 18 inches, noting 'the length of the barrel is a patently obvious characteristic, readily apparent to anyone . . . who observes the gun.'" *Id.*

The Eighth Circuit in *White* and the Eleventh Circuit in *Miller* and *Hutchins* suggest that possession of a weapon with obvious external characteristics subjecting it to registration satisfies *Staples*. Other circuits, however, have concluded that knowing possession of a firearm on its own does not establish knowledge of the characteristic requiring registration.

In *United States v. Michel*, a police officer stopped a car because he knew that the driver had a suspended license. 446 F.3d 1122, 1126 (10th Cir. 2006). During the stop, the defendant, a passenger in the front seat of the car, repeatedly reached toward the back seat. *Id.* While speaking with the driver, the officer

noticed what appeared to be the barrel of a gun behind the driver's seat. *Id.* After handcuffing the driver and the defendant, the officer determined that the weapon was a sawed-off shotgun. *Id.* The defendant was convicted of being a felon in possession of a firearm and possession of an unregistered firearm. *Id.* 1126-27.

On appeal, the court determined that there was sufficient evidence to support the defendant's conviction for being a felon in possession of a firearm. *Id.* at 1128. The court determined that it was rational to infer that the defendant's attempts to reach into the back seat of the vehicle were for the purpose of moving and hiding the gun, thus "establishing his knowledge of the existence of the firearm and his exercise of dominion and control over it." *Id.* at 1129.

With respect to the defendant's conviction for possession of an unregistered firearm, however, the court was not convinced that the government carried its burden of proving that the defendant knew the barrel was shorter than eighteen inches. *Id.* at 1130. During closing argument, the government admitted that it did not know where the shotgun came from, but hypothesized that the defendant had the shotgun with him when he entered the car. *Id.* The government speculated that even if it was not the defendant's shotgun, he would have seen it when he entered the car and immediately recognized it was a sawed-off shotgun. *Id.* at 1130-31.

The court noted that evidence that a defendant observed and handled a

sawed-off shotgun can be sufficient for a factfinder to infer that the defendant knew the barrel was less than eighteen inches. *Id.* at 1131. But, the court said, there was no evidence that the defendant ever observed or handled the gun. *Id.* The court explained that while the government’s hypotheticals may not have been unreasonable, they were not “undergirded by sufficient evidence to establish them beyond a reasonable doubt.” *Id.*

The court rejected the government’s leap in logic: “The government did not ask the jury to begin with facts that could support rational inferences. The government began with the inference that Mr. Michel saw and/or handled the gun to lead the jury to the subsequent inference that Mr. Michel had knowledge of the gun’s characteristics.” *Id.* The court concluded that the jury could have inferred that the defendant knew a gun was in the car and he exercised dominion and control over it, but the evidence was far from sufficient to permit the jury to conclude that he knew the barrel had been shortened. *Id.* at 1132.

In *United States v. Jamison*, a panel of the Seventh Circuit said, “The fact that a shotgun or its barrel are obviously too short is ‘not a substitute’ for proving that Jamison knew the shotgun had characteristics that subjected it to registration . . . but it is ‘a means of proving knowledge.’” 635 F.3d 962, 968 (7th Cir. 2011), quoting *United States v. Edwards*, 90 F.3d 199, 205 (7th Cir. 1996). “[C]oupled

with evidence that the defendant handled the gun, a shotgun or barrel that is obviously too short permits an inference that the defendant knew of its features that subjected it to the statute.” *Id.* at 968.

In *United States v. Gergen*, a panel of the Ninth Circuit found that the district court had improperly instructed the jury as to the *mens rea* required for the offense of possession of an unregistered firearm. 172 F.3d 719, 724 (9th Cir. 1999). In order to determine whether there should be an acquittal or retrial on remand, the court also analyzed the sufficiency of the evidence. *Id.* at 724-25. The weapon in question was a sawed-off shotgun with a very short barrel that was concealed underneath a jacket in the backseat of a vehicle in which there were several passengers. *Id.* at 720, 725. There was evidence that the defendant had moved the shotgun, and even though it remained covered by the jacket, the defendant’s fingerprint was found on the gun. *Id.* at 725. Thus, there was evidence from which a jury could rationally infer that in handling the weapon, the defendant may have been able to discern that the shotgun barrel was noticeably short. *Id.* The court therefore reversed the defendant’s conviction and remanded for a new trial. *Id.*

In *United States v. Nieves-Castano*, the defendant’s conviction for unlawful possession of a machine gun was reversed due to insufficient evidence. 480 F.3d

597, 598 (1st Cir. 2007). While officers were executing a search warrant at the defendant's apartment, an officer posted outside the building saw the defendant slide a golf bag off her balcony. *Id.* at 599. A machine gun was hidden in the golf bag. *Id.* When questioned by the police, the defendant admitted that the owner of gun had asked her to hide it. *Id.* She said that she had opened the golf bag, looked inside, and observed a rifle, which she knew to be an AK-47. *Id.*

The First Circuit nonetheless reversed her conviction, concluding that there was insufficient proof that the defendant knew the gun was an automatic weapon. *Id.* There was a small hole or mark between the fire and safety settings, which caused an expert who examined the weapon to suspect it had been modified to fire automatically. *Id.* at 600. The court concluded that there was no evidence that one would see the small mark simply by looking inside the golf bag. *Id.* at 601. The court also doubted that the mark would have tipped off a layperson as to the gun's firing capabilities. *Id.* The court said that the evidence was insufficient to establish, beyond a reasonable doubt, that the defendant knew the rifle possessed the characteristics of an automatic weapon. *Id.* at 602.

Michel, Jamison, Gergen, and Nieves-Castano counsel that possession must be coupled with other evidence—such as handling the weapon, seeing the weapon, speaking of the weapon in a manner indicating familiarity with it—to permit a

rational inference that the defendant knew of the weapon's characteristics, beyond a reasonable doubt. White's constructive possession of the weapon is supported by evidence suggesting dominion and control over the duffel bag. The bag was found in the bedroom he used when visiting his parents, it contained a different gun with his DNA on it, and the bag contained an Amtrak ticket in his name dated nine months prior to the discovery of the Street Sweeper.

This circumstantial evidence does not support a rational inference that White knew, beyond a reasonable doubt, that the contents of the bag included a Street Sweeper with a bore diameter greater than one half inch. The government presented no evidence whatsoever that White ever saw the Street Sweeper, that he put it in the duffel bag, that he knew the Street Sweeper was in the duffel bag, or that he opened the bag and saw the Street Sweeper and noticed its bore diameter.

When the district court in White's case said, "the person possessing the gun is easily aware of the bore being more than a half inch," it committed an error in logic (DCD 187, Tr. at 379). The district court's finding assumes a fact not in evidence—that White saw the Street Sweeper at some point. If White never saw the gun, he could not be "easily aware" of the bore diameter. In *Staples*, the Court rejected the government's argument that Congress did not intend that the statute contain a *mens rea* element, because requiring proof of knowledge would place too

heavy a burden on the government. 511 U.S. at 615, n. 11. When the Court said, “knowledge can be inferred from circumstantial evidence, including any external indications signaling the nature of the weapon,” it did not mean that the mere existence of any external indication established knowledge. Obviously, the external indication must be perceived by the defendant before knowledge can be inferred.

The willingness of the Eighth and Eleventh Circuits to interpret and apply *Staples* in a manner that permits an inference that the defendant knew the characteristics of a firearm in his possession without proof beyond a reasonable doubt that he ever saw or handled the firearm impermissibly lowers the government’s burden of proof and violates the Due Process Clause. This Court should grant certiorari to address the conflict among the circuits as to the proper application of *Staples*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition.

Respectfully submitted,

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