

---

No. 19-5098

---

IN THE  
SUPREME COURT OF THE UNITED STATES

RONALD F. WHITE, JR.,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

---

PETITIONER'S REPLY TO  
BRIEF OF THE UNITED STATES IN OPPOSITION

---

**LAINE CARDARELLA**  
Federal Public Defender  
Western District of Missouri

Rebecca L. Kurz  
Assistant Federal Public Defender  
1000 Walnut, Suite 600  
Kansas City, Missouri 64106  
(816) 471-8282  
Becky\_Kurz@fd.org  
Attorney for Petitioner

## TABLE OF CONTENTS

	<u>Page</u>
Table of Contents .....	i
Index to Appendix to Petitioner’s Reply to Government’s Brief in Opposition .....	i
Table of Authorities .....	
Reply to Government’s Brief in Opposition.....	1
<b>A. Proof of constructive possession of a firearm does not, on its own, establish knowledge of the firearm’s characteristics. ....</b>	<b>3</b>
<b>B. The Eighth Circuit upheld Mr. White’s conviction on the theory that he was in the duffel bag at some point in time and it could be assumed that the shotgun was in the bag at that time.....</b>	<b>7</b>
<b>C. Possession coupled with a readily observable characteristic does not satisfy <i>Staples’ mens rea</i> requirement as a matter of law. ....</b>	<b>12</b>
Conclusion .....	14
Appendix to Petitioner’s Reply to Government’s Brief in Opposition .....	15

## INDEX TO APPENDIX

Appendix A Government’s Exhibit 27 .....	1
Appendix B Government’s Exhibit 28 .....	2

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Beers v. AG U.S.</i> , 927 F.3d 150 (3d Cir. 2019) .....	1
<i>Binderup v. AG of U.S.</i> , 836 F.3d 336 (3d Cir. 2016) .....	1
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008) .....	3
<i>Henderson v. United States</i> , 135 S. Ct. 1780 (2015) .....	5
<i>Siewe v. Gonzales</i> , 480 F.3d 160 (2d Cir. 2007) .....	10
<i>Staples v. United States</i> , 511 U.S. 600 (1994) .....	3, 6, 7
<i>United States v. Al-Rekabi</i> , 454 F.3d 1113 (10th Cir. 2006).....	6
<i>United States v. Anderson</i> , 747 F.3d 51 (2d Cir. 2014) .....	10
<i>United States v. Edwards</i> , 90 F.3d 199 (7th Cir. 1996) .....	12
<i>United States v. Garcia</i> , 919 F.3d 489 (7th Cir. 2019) .....	10
<i>United States v. Gergen</i> , 172 F.3d 719 (9th Cir. 1999) .....	2-3, 11
<i>United States v. Griffin</i> , 684 F.3d 691 (7th Cir. 2012) .....	6
<i>United States v. Jamison</i> , 635 F.3d 962 (7th Cir. 2011) .....	2, 11
<i>United States v. Manzella</i> , 791 F.2d 1263 (7th Cir. 1986) .....	6
<i>United States v. Michel</i> , 446 F.3d 1122 (10th Cir. 2006) .....	2, 11, 12
<i>United States v. Nieves-Castano</i> , 480 F.3d 597 (1st Cir. 2007) .....	3, 11
<i>United States v. Orozco-Martinez</i> , 440 F. Supp. 2d 915 (E.D. Wis. 2006) ....	12-13

*United States v. Pauling*, 924 F.3d 649 (2d Cir. 2019) ..... 9-10, 10

*United States v. White*, 915 F.3d 1195 (8th Cir. 2019) ..... 8, 9

**Statutes**

18 U.S.C. § 922..... 3

18 U.S.C. § 925..... 1

26 U.S.C. § 5845 ..... 4, 12

26 U.S.C. § 5861 ..... 3, 6, 7

**Other**

U.S. Constitutional Amendment II ..... 3

## REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

The government dismisses Mr. White's argument as a mere factual dispute concerning the sufficiency of the evidence to convict, an issue the government deems unworthy of further review by this Court. White has served years in prison for purportedly possessing a shotgun that is not illegal to own, but for failing to register the shotgun because he purportedly knew its bore diameter was .752 inches rather than .5 inches.<sup>1</sup> As a result, Mr. White is now a felon and has forever lost his Second Amendment right to possess firearms.<sup>2</sup> But the legal principles at issue here reach beyond White's individual concerns for at least two reasons.

First, the district court and the Eighth Circuit concluded that Mr. White constructively possessed the shotgun and used that theory to infer his knowledge of the firearm's particular characteristics, something that normally could be inferred

---

<sup>1</sup> At the time White purportedly possessed the shotgun, it was impossible to register the firearm because the Bureau of Alcohol, Tobacco, and Firearms (ATF) declared that after May 1, 2001, no registrations would be accepted for Streetsweeper shotguns. See, ATF Ruling 2001-1.

<sup>2</sup> Under 18 U.S.C. § 925(c), a prohibited person can apply to the Attorney General for relief from the prohibition on firearm possession, but, in 1992, Congress defunded the program administered by the ATF, which means that prohibited persons are forever prohibited from possessing firearms absent a successful as-applied constitutional challenge. *Beers v. Attorney General United States of America*, 927 F.3d 150, 156 n. 38 (3d Cir. 2019); *Binderup v. Attorney General United States of America*, 836 F.3d 336 (3d Cir. 2016).

only from actual possession. The district court created a legal presumption—constructive possession of an object establishes knowledge of the object’s readily observable characteristics—rather than making a factual finding that Mr. White saw or handled the firearm.

Second, the Eighth Circuit fundamentally misunderstands what may be deemed a reasonable inference proven beyond a reasonable doubt, as opposed to mere speculation. The Eighth Circuit breaks ranks with the First, Seventh, Ninth, and Tenth Circuits, which require evidence that the defendant saw or handled the firearm or otherwise demonstrated knowledge of its characteristics before permitting an inference that the defendant knew the characteristic of the firearm that subjected it to registration. *United States v. Michel*, 446 F.3d 1122, 1131 (10th Cir. 2006) (government’s theory that defendant must have seen the sawed-off shotgun was pure speculation and did not support an inference that the defendant knew the barrel length was less than 18 inches); *United States v. Jamison*, 635 F.3d 962, 968 (7th Cir. 2011) (inference that defendant knew characteristics of a firearm permitted where shotgun was obviously too short coupled with evidence that defendant handled the gun); *United States v. Gergen*, 172 F.3d 719, 725 (9th Cir. 1999) (instructional error permitted retrial where jury could rationally infer from fingerprint on the firearm that the defendant handled the firearm and the

hacksawed barrel extended only ¾ of an inch past the magazine cap); *United States v. Nieves-Castano*, 480 F.3d 597, 601-02 (1st Cir. 2007) (court refused to infer defendant's knowledge that firearm was a machine gun where characteristic was not obvious even though defendant was aware of the firearm's presence).

**A. Proof of constructive possession of a firearm does not, on its own, establish knowledge of the firearm's characteristics.**

On October 31, 2013, police officers executing a search warrant found a duffel bag containing five guns in a bedroom closet in the home of Mr. White's parents, where he sometimes stayed when visiting from California (District Court Docket [DCD] 185, Tr. 68-69, 118, 122-23). At that time, Mr. White had a fundamental constitutional right to possess firearms. U.S. Const., Amend. II; *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). He was not a prohibited person under 18 U.S.C. § 922(g).

Mr. White was accused of possessing an unregistered firearm, a Street Sweeper shotgun not suitable for sporting purposes with a bore over one-half inch in diameter, in violation of 26 U.S.C. § 5861(d) (DCD 116, Second Superseding Indictment). To secure a conviction under that statute, the government must prove beyond a reasonable doubt, that the accused knew the characteristic of the firearm that subjected it to registration. *Staples v. United States*, 511 U.S. 600, 619 (1994).

Thus, in Mr. White's case, the government had to prove that he possessed the shotgun *and* knew the shotgun had a bore over one-half inch in diameter. 26 U.S.C. §§ 5845(a)(8) and (f)(2).

The duffel bag contained an Amtrak ticket in Mr. White's name dated February 1, 2013 (nine months prior to the date of the search), a credit card receipt for food purchased on Amtrak, and a .357 revolver that had White's DNA on it (DCD 185, Tr. at 69, 91-92, 163). A DNA profile was obtained from the shotgun, but Mr. White was excluded as a potential contributor (DCD 185, Tr. at 163). Some of Mr. White's clothing was found in the same closet where the duffel bag was found (DCD 185, Tr. at 131). Mr. White's parents denied any knowledge of the guns and duffel bag (DCD 185, Tr. at 116-17, 128-29). Based on these facts, the district court concluded that Mr. White constructively possessed the unregistered shotgun (DCD 187, Tr. at 378).

Based on its finding of constructive possession, the district court said, "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 would support a finding of actual possession and the government explicitly disavowed any reliance on a theory of actual possession (DCD 187, Tr. at 360-61; 378-79). More specifically, the district court did not find that White had ever seen

or handled the shotgun or that he had ever opened the duffel bag at a time when the shotgun was inside the bag (DCD 187, Tr. at 378-79). There was no evidence as to who put the shotgun in the duffel bag or when that occurred.

Furthermore, there was no evidence from any officer that upon opening the duffel bag the bore diameter of the shotgun was visible and obviously wider than one half inch. There was no evidence as to when any officer first realized the bore was over one half inch in diameter.

In its brief in opposition to Mr. White's petition, the government makes no effort to defend the district court's reasoning that a defendant's knowledge of a firearm's particular characteristics can be proven through a theory of constructive possession, most likely because the district court's reasoning is indefensible.

“Actual possession exists when a person has direct physical control over a thing.”

*Henderson v. United States*, 135 S.Ct. 1780, 1784 (2015). “Constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object.” *Id.*

Constructive possession is a legal fiction designed to allow the law to “reach beyond puppets to puppeteers,” so that, for example, a drug dealer who never actually possesses the drugs his operation distributes may be punished as well as his street level hirelings who conduct the hand-to-hand transactions. *Id.*, citing

*United States v. Al-Rekabi*, 454 F.3d 1113, 1118 (10th Cir. 2006); see also, *United States v. Manzella*, 791 F.2d 1263, 1266 (7th Cir. 1986). This legal fiction permits a finding of possession where there is a sufficient connection between a defendant and contraband, even though the defendant does not “actually have immediate, physical control of the object.” *United States v. Griffin*, 684 F.3d 691, 695 (7th Cir. 2012).

Even if Mr. White knew that firearms (in the ordinary, not the statutory, meaning of the word) were in the duffel bag and had the power and intent to control the firearms, such that he constructively possessed all of the firearms found in the duffel bag, that is not enough to convict under § 5861(d). Unlike actual possession of a firearm with readily observable characteristics, a finding of constructive possession alone does not automatically permit an inference that the possessor knew the particular characteristics of the firearms possessed.

Thus, the government is wrong when it suggests that Mr. White raises nothing more than a factual dispute undeserving of this Court’s review. Mr. White challenges a dangerous precedent that subverts this Court’s holding in *Staples*. *Staples*’ holding is based on the law’s unwillingness to permit a criminal conviction for an offense punishable by up to ten years in prison on an individual who may not have a guilty mind. *Staples*, 511 U.S. at 605, 615. The idea is so

antithetical to Anglo-American jurisprudence that this Court refused to impose criminal liability even though Congress had not included a mental state in the statute. *Id.* at 605-06.

The “long tradition of widespread lawful gun ownership by private individuals in this country” counsels against the notion that a *mens rea* element is not required in order to convict under § 5861(d), because such an interpretation of the statute “would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely innocent.” *Id.* at 610, 614-15. Adopting the district court’s presumption, that those who constructively possess a firearm are easily aware of the firearm’s characteristics, will allow convictions of people whose conduct was entirely innocent.

**B. The Eighth Circuit upheld Mr. White’s conviction on the theory that he was in the duffel bag at some point in time and it could be assumed that the shotgun was in the bag at that time.**

The Eighth Circuit concluded, “There was ample circumstantial evidence for the district court to reasonably infer White constructively possessed the shotgun because he had access to and control over the duffel bag found in his bedroom closet and *had knowledge of the shotgun because it was found inside the duffel bag*

*along with the revolver, which had his DNA on it, and the train ticket in his name.”* *White*, 915 F.3d at 1198-99 (emphasis added). On appeal, Mr. White conceded that it is reasonable to infer that he put the .357 revolver, Amtrak ticket, and receipt in the black duffel bag “at some point in time,” but argued that there was no evidence from which it could be inferred that he put those items in the bag at the time the bag contained the shotgun. See, *United States v. Ronald White*, No. 18-2233, Oral Argument (January 18, 2019) and Petition for Rehearing at 4 (March 6, 2019). The Eighth Circuit believes this concession proved Mr. White’s guilt beyond a reasonable doubt. *United States v. White*, 915 F.3d 1195, 1199 (8th Cir. 2019).

The Eighth Circuit reasoned that “the evidence rationally supports two conflicting hypotheses.” *Id.* It is not clear what hypotheticals the court had in mind, although one was obviously premised on counsel’s argument that there was no evidence that White was in the duffel bag at the time the bag contained the shotgun. *Id.* Although the court did not explicitly state each hypothesis, it apparently thought one hypothesis was that Mr. White put the items in the duffel bag at some point *before* an unknown person put the shotgun in the duffel bag, and another hypothesis was that Mr. White put the items in the duffel bag *after* an unknown person put the shotgun in the duffel bag. *Id.* The court concluded,

“[a]lthough both hypotheses may be reasonable, it is White’s that we must disregard on review.” *Id.*

The court then turned to “whether White knew the shotgun had a bore diameter of more than one-half inch” and referred to the district court’s finding that “the person possessing the gun is easily aware of the bore being more than a half inch.” *Id.* The appellate court never explicitly stated that it was reasonable to infer that Mr. White actually saw or handled the shotgun. It merely said, “We have already discussed the sufficiency of the evidence as to White’s knowing possession of the shotgun.” *Id.* Because there was testimony that the bore diameter was .752 inches and the shotgun was admitted in evidence, the court said, “there was ample circumstantial evidence for the district court to reasonably infer White knew the shotgun had a bore diameter of more than one-half inch.” *Id.* at 1200.

The Eighth Circuit’s reasoning is flawed. There is a significant difference between a mere possibility and a reasonable inference established beyond a reasonable doubt. The evidence does not permit a *reasonable inference* that White put the Amtrak ticket and revolver in the duffel bag after an unknown person put the shotgun in the bag. “An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that is known to exist.” *United States v. Pauling*, 924 F.3d 649, 656

(2d Cir. 2019), quoting *Siewe v. Gonzales*, 480 F.3d 160, 168 (2d Cir. 2007).

The standard of appellate review of a sufficiency claim gives the government the benefit of all reasonable inferences to be drawn from the evidence. *Id.* The government need not disprove every conceivable hypothesis of innocence, but at the same time, a conviction must be based on reasonable inferences, not impermissible speculation. *Id.*; *United States v. Anderson*, 747 F.3d 51, 60 (2d Cir. 2014); *United States v. Garcia*, 919 F.3d 489, 503 (7th Cir. 2019).

It is conceivable that White put the items in the duffel bag after the shotgun had been put in the bag, but it is not a rational inference established beyond a reasonable doubt. When the shotgun was put into the bag is not a known fact. White could have put the Amtrak ticket, receipt, and revolver in the duffel bag either before or after an unknown person put the shotgun in the bag, but the evidence does not permit an inference as to which possibility occurred beyond a reasonable doubt. It is pure speculation to say that White put the items in the bag after an unknown person put the shotgun in the bag.

It is telling that neither the district court nor the Eighth Circuit was willing to plainly state that Mr. White saw or handled the firearm or that it was reasonable to infer that he saw or handled the shotgun. If both courts were convinced beyond any reasonable doubt that Mr. White knew the shotgun had a bore diameter over

one half inch in diameter, then why could neither court explicitly say that it was reasonable to infer that Mr. White saw the shotgun bore? Both courts skirted the issue.

In reviewing the sufficiency of the evidence, the appellate court was required to defer to the district court's findings of fact, but the district court never found that Mr. White saw or handled the shotgun. The district court merely assumed that a person who constructively possesses a gun is aware of its characteristics. The district court created a legal presumption—constructive possession of an object establishes knowledge of the object's readily observable characteristics—rather than making a factual finding.

By deferring to this presumption the Eighth Circuit has split from those circuits which have consistently required that evidence of an obvious external characteristic be coupled with evidence that the defendant handled or saw the firearm before permitting an inference that the defendant was aware of the characteristic requiring registration. *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).

**C. Possession coupled with a readily observable characteristic does not satisfy *Staples*' *mens rea* requirement as a matter of law.**

Even if it is assumed that White put the Amtrak ticket and revolver in the bag after an unknown person put the shotgun in the bag—a point he does not concede—the government was still required to prove beyond a reasonable doubt that White actually saw the bore diameter of the barrel and noted that it was over one half inch in diameter. The fact that a firearm may have readily observable characteristics provides a means for proving knowledge, but it is not a substitute for such proof. *United States v. Edwards*, 90 F.3d 199, 205 (7th Cir. 1996); *see also, United States v. Michel*, 446 F.3d 1122, 1130-32 (10th Cir. 2006). A court cannot “just assume as a matter of law that the knowledge requirement is met in the case of a sawed-off shotgun, because its length is immediately apparent and externally visible to anyone observing it.” *Edwards*, 90 F.3d at 204.

There will be cases, for example, in which the accused possessed a shotgun with a barrel obviously shorter than the 18-inch limit in 26 U.S.C. § 5845(a)(1), and knowledge will be easy to prove. *Id.* But there will also be cases where the barrel is close to 18 inches in length and reasonable doubt will exist as to whether the accused was aware of the actual length. *Id.*; *see e.g., United States v. Orozco-Martinez*, 440 F.Supp.2d 915, 920 (E.D.Wisc. 2006) (jury acquitted even though

there was photographic evidence of the accused holding his shotgun, which had a barrel length of 16-3/4 inches).

Photographs of the open duffel bag and of the guns displayed on the bedroom floor demonstrate that the bore diameter of the shotgun is not readily discernable as being over one half inch in diameter (See attached Government Ex. 27 and 28). A person could look at the guns without realizing that the Street Sweeper shotgun had a bore diameter over one half inch in diameter. Contrary to the Seventh Circuit's view in *Edwards* and the Tenth Circuit's view in *Michel*, the district court and the Eighth Circuit allowed the existence of an observable characteristic to substitute for proof of knowledge of that characteristic. This Court should grant certiorari to resolve this circuit split as to the proof required to support a conviction for possession of an unregistered firearm.

## CONCLUSION

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

Respectfully submitted,

**LAINE CARDARELLA**  
Federal Public Defender  
Western District of Missouri

s/Rebecca Kurz  
Rebecca L. Kurz  
Assistant Federal Public Defender  
Western District of Missouri  
1000 Walnut, Suite 600  
Kansas City, Missouri 64106  
Becky\_Kurz@fd.org  
(816) 471-8282