

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAY AUBREY ISAAC HOLLIS)	
Individually and as Trustee of the)	
JAY AUBREY ISAAC HOLLIS)	
REVOCABLE LIVING TRUST,)	
)	<u>Case No.3:14-cv-03872-M</u>
)	
Plaintiff,)	
)	
v.)	
)	
LORETTA LYNCH., Attorney General of)	
the United States; THOMAS E. BRANDON,)	
Acting Director of the Bureau of Alcohol)	
Tobacco Firearm and Explosives,)	
)	
Defendants.)	
)	
)	
)	

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE
SUPPLEMENTAL AUTHORITY**

COMES NOW, Plaintiff Jay Aubrey Isaac Hollis, Individually and as Trustee of the Jay Aubrey Isaac Hollis Revocable Living Trust, by and through undersigned counsel, and files this, his Memorandum in Support of his Motion for Leave to File Supplemental Authority pursuant to LR 56.7.

LR 56.7 provides that "Except for motions, responses, replies, briefs and appendixes required by these rules, a party may not, without the permission of the presiding judge, file supplemental briefs, authorities, or evidence."

When supplemental authority issues after briefing is complete, however, the court will generally permit a party to file a notice of supplemental authority without seeking formal leave of court. Moreover, Rule 56.7 does not require as a

prerequisite that “good cause” be shown for the requested supplement; rather, whether a party will be permitted to supplement is entirely within the presiding judge's discretion.

Highland Capital Mgt. L.P. v. Bank of Am., Nat. Ass'n, 3:10-CV-1632-L, 2013 WL 4502789, at *28 (N.D. Tex. Aug. 23, 2013) *aff'd sub nom. Highland Capital Mgt., L.P. v. Bank of Am., N.A.*, 574 Fed. Appx. 486 (5th Cir. 2014)(unpublished).

On June 26, 2015, the Supreme Court of the United States issued its opinion in *Samuel James Johnson v. United States*, 576 U.S. ____ (2015). *Johnson* dealt with the residual clause of the Armed Career Criminal Act of 1984 (“ACCA”) and whether unlawful possession of a short barrel shotgun¹ was considered a “violent felony” under the ACCA. Justice Kennedy, in his concurring opinion, wrote “...Johnson’s conviction for possession of a short-barreled shotgun does not qualify as a violent felony.” *Id.* (Kennedy, J., concurring).

Justice Thomas elaborated further, stating:

Standing alone, the elements of this offense—(1) unlawfully (2) possessing (3) a short-barreled shotgun—do not describe inherently dangerous conduct. As a conceptual matter, “simple possession [of a firearm], even by a felon, takes place in a variety of ways (e.g., in a closet, in a storeroom, in a car, in a pocket) many, perhaps most, of which do not involve likely accompanying violence.” *United States v. Doe*, 960 F. 2d 221, 225 (CA1 1992). These weapons also can be stored in a manner posing a danger to no one, such as unloaded, disassembled, or locked away. By themselves, the elements of this offense indicate that the ordinary commission of this crime is far less risky than ACCA’s enumerated offenses.

Reported convictions support the conclusion that mere possession of a short-barreled shotgun does not, in the ordinary case, pose a serious risk of injury to others. A few examples suffice. In one case, officers found the sawed-off shotgun locked inside a gun cabinet in an empty home. *State v. Salyers*, 858 N. W. 2d 156, 157–158 (Minn. 2015). In another, the firearm was retrieved from the trunk of the defendant’s car. *State v. Ellenberger*, 543 N.W. 2d 673, 674 (Minn. App. 1996). In still another, the weapon was found missing a firing pin. *State v. Johnson*, 171 Wis. 2d 175, 178, 491 N. W. 2d 110, 111 (App. 1992). In these instances and others, the offense threatened no one.

The Government’s theory for why this crime should nonetheless qualify as a “violent felony” is unpersuasive. Although it does not dispute that the unlawful possession of a short-barreled shotgun can occur in a nondangerous manner, the

¹ A short barrel shotgun is regulated under the National Firearms Act as is the machinegun at issue in *Hollis*.

Government contends that this offense poses a serious risk of physical injury due to the connection between short-barreled shotguns and other serious crimes. As the Government explains, these firearms are “weapons not typically possessed by law-abiding citizens for lawful purposes,” *District of Columbia v. Heller*, 554 U. S. 570, 625 (2008), but are instead primarily intended for use in criminal activity. In light of that intended use, the Government reasons that the ordinary case of this possession offense will involve the use of a short-barreled shotgun in a serious crime, a scenario obviously posing a serious risk of physical injury.

But even assuming that those who unlawfully possess these weapons typically intend to use them in a serious crime, the risk that the Government identifies arises not from the act of possessing the weapon, but from the act of using it. Unlike attempted burglary (at least of the type at issue in *James*) or intentional vehicular flight—conduct that by itself often or always invites a dangerous confrontation—possession of a short-barreled shotgun poses a threat only when an offender decides to engage in additional, voluntary conduct that is not included in the elements of the crime. Until this weapon is assembled, loaded, or used, for example, it poses no risk of injury to others in and of itself. The risk of injury to others from mere possession of this firearm is too attenuated to treat this offense as a violent felony.

Id. at pp.4-5. (Thomas, J., concurring).

To the extent that this opinion is helpful to this Court as it is one of the few Supreme Court cases discussing National Firearms Act regulated weapons and because *Johnson v. U.S.* is a case that was not available during briefing on the government’s Motion to Dismiss or in the Alternative for Summary Judgment or during oral argument on the government’s Motion, Mr. Hollis moves this Honorable Court for leave to file his Notice of Supplemental Authority.

Respectfully submitted,

This, the 30th day of June, 2015.

/s/ Stephen D. Stamboulieh
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CERTIFICATE OF SERVICE

I, Stephen D. Stamboulieh, hereby certify that the above Memorandum in Support of Plaintiff's Motion for Leave to File Supplemental Authority has been filed electronically with the Clerk of this Court, which sends notification of such filing to all counsel of record in this case.

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