

A REVIEW OF THE “SIMILAR CONTEXT” RATIONALE
FOR APPLYING THE
GUN CONTROL ACT DEFINITION OF, AND
EVIDENTIARY STANDARD FOR,
WILLFULNESS IN ADMINISTRATIVE ACTIONS
REGARDING EXPLOSIVES LICENSING

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I. INTRODUCTION

Federal explosives law¹ authorizes the issuing of licenses² and permits³ to manufacturers and users of explosives.⁴ The federal agency charged with issuing these licenses and permits, and enforcing

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1. See 18 U.S.C. §§ 841-848 (2000); 27 C.F.R. §§ 555.1-555.224 (2008).

2. “License” is not defined in either 18 U.S.C. § 841 (2000) or 27 C.F.R. § 555.11 (2008). However, the term is defined in the Administrative Procedures Act, 5 U.S.C. § 551(8) (2000) (“[L]icense’ includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission . . .”). See also 18 U.S.C. § 841(m) (2000) (“‘Licensee’ means any importer, manufacturer, or dealer licensed under the provisions of this chapter.”); 27 C.F.R. § 555.11 (2008) (“*Licensee*. Any importer, manufacturer, or dealer licensed under this part.”).

3. See 18 U.S.C. § 841(j) (Supp. V 2005) (“‘Permittee’ means any user of explosives for a lawful purpose, who has obtained either a user permit or a limited permit under the provisions of this chapter.”); 27 C.F.R. § 555.11 (2008) (“*Permittee*. Any user of explosives for a lawful purpose who has obtained either a user permit or a limited permit under this part.”); *Id.* (“*Limited permit*. A permit issued to a person authorizing him to receive for his use explosive materials from a licensee or permittee in his state of residence on no more than 6 occasions during the 12-month period in which the permit is valid. A limited permit does not authorize the receipt or transportation of explosive materials in interstate or foreign commerce.”).

4. See 18 U.S.C. § 843 (2000 & Supp. V 2005); 27 C.F.R. §§ 555.41-555.63 (2008).

compliance with the explosive laws, is the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”).⁵ ATF is generally known for its *criminal* enforcement and *civil* regulation and enforcement missions over firearms and ammunition via the Gun Control Act (“GCA”)⁶ and the National Firearms Act (“NFA”).⁷ However, ATF also enforces criminal explosive laws⁸ and civil regulations⁹ governing explosives licenses and permits. Although the Homeland Security Act added “Explosives”¹⁰ to ATF’s name when the agency was transferred from the Treasury Department to the Justice Department, explosives regulation and enforcement had previously been part of ATF’s mission.¹¹ However, the

5. ATF formerly resided within the United States Department of the Treasury but is now a bureau of the United States Department of Justice (“DOJ”). See Homeland Security Act of 2002, Pub. L. No. 107-296, § 1111(a)(1), 1111(c), 116 Stat. 2135, 2274-75 (codified as amended at 28 U.S.C.A. § 599A(a)(1), (a)(3) (West 2006)) (transferring the Bureau of Alcohol, Tobacco and Firearms from the Department of the Treasury to DOJ as the Bureau of Alcohol, Tobacco, Firearms, and Explosives). Federal explosives laws are enforced by the Attorney General, “acting through the Director” of the Bureau of Alcohol, Tobacco, Firearms, and Explosives. *Id.* § 1111(a)(3), 116 Stat. at 2274 (codified as amended at 28 U.S.C.A. § 599A(a)(3) (West 2006)). See also 28 C.F.R. § 0.133(a) (2007).

6. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-928 (2000), 26 U.S.C. §§ 5801-7273 (2000)). Regulations promulgated pursuant to the GCA were renumbered from part 178 of title 27 to part 478 of title 27 of the *Code of Federal Regulations*. Reorganization of Title 27, Code of Federal Regulations, 68 Fed. Reg. 3744 (Jan. 24, 2003).

7. Act of June 26, 1934, ch. 757, 48 Stat. 1236. See 26 U.S.C. §§ 5801-5871 (2000). See also 27 C.F.R. pt. 479 (2007).

8. 18 U.S.C. §§ 841-848 (2000).

9. For the federal explosives regulations, see 27 C.F.R. pt. 555 (2008). Regulations promulgated pursuant to the explosives statutes were renumbered from part 55 of title 27 to part 555 of title 27 of the *Code of Federal Regulations*. Reorganization of Title 27, Code of Federal Regulations, 68 Fed. Reg. at 3744.

10. Homeland Security Act § 1111(a)(1), 116 Stat. at 2274 (codified at 28 U.S.C.A. § 599A(a)(1) (West 2006)).

11. “Subject to the direction of the Attorney General, [ATF] shall be responsible for investigating . . . criminal and regulatory violations of the Federal firearms, explosives, arson, alcohol, and tobacco smuggling laws . . .” *Id.* § 1111(b)-(b)(1), 116 Stat. at 2275 (codified at 28 U.S.C.A. § 599A(b)-(b)(1) (West 2006)). “ATF contributes to the Nation’s fight against terrorism by enforcing the [civil] regulations affecting the legal commerce of explosives, as well as the criminal statutes against illegal use of these commodities.” *Anti-Terrorism Explosives Act of 2002: Hearing on H.R. 4864 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 107th Cong. 4 (2002) (statement of Bradley A. Buckles, Director, Bureau of Alcohol, Tobacco and Firearms). See Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1102, 84 Stat. 922, 952-60 (codified as amended at 18 U.S.C. §§ 841-848 (2000)). Explosives licenses and permits are regulated by the Secretary of the Treasury. See 18 U.S.C. §§ 841(k), 843(a), (c), (d) (2000). See also Safe Explosives Act, Pub. L. No. 107-296, tit. XI, subtit. C, 116 Stat. 2280 (2002) (codified at 18 U.S.C. §§ 841-845

Safe Explosives Act,¹² a part of the Homeland Security Act,¹³ served to, *inter alia*, emphasize ATF's explosives-enforcement role.¹⁴

II. ADMINISTRATIVE PROCEEDINGS

ATF's jurisdiction for initiating civil administrative actions against potential firearms licensees to deny Federal Firearms License applications,¹⁵ or to revoke¹⁶ existing firearms licenses, is limited to willful violations of the GCA.¹⁷ ATF's administrative jurisdiction in

(Supp. II 2002)).

12. Safe Explosives Act, 116 Stat. at 2280 (codified at 18 U.S.C. §§ 841-845 (Supp. II 2002)).

13. Homeland Security Act, 116 Stat. 2135 (codified in scattered sections of the U.S.C.).

14. "[ATF] is amending the regulations to implement the provisions of the Safe Explosives Act . . . [which] requires that all persons receiving explosives on and after May 24, 2003, obtain a Federal license or permit, and creates a new type of permit, the 'limited permit' . . ." Implementation of the Safe Explosives Act, Title XI, Subtitle C of Public Law 107-296, 68 Fed. Reg. 13,768, 13,768 (March 20, 2003) (codified at 27 C.F.R. pt. 555) (emphasis added).

15. See 18 U.S.C. § 923(d)(2) (Supp. V 2005); 27 C.F.R. §§ 478.71-478.72 (2008). See generally *Cucchiara v. Sec'y of Treasury*, 652 F.2d 28 (9th Cir. 1981); *Stein's Inc., v. Blumenthal*, 649 F.2d 463 (7th Cir. 1980); *Prino v. Simon*, 606 F.2d 449 (4th Cir. 1979); *Lewin v. Blumenthal*, 590 F.2d 268 (8th Cir. 1979); *Trader Vic's Ltd. v. O'Neill*, 169 F. Supp. 2d 957 (N.D. Ind. 2001); *Powers v. Bureau of Alcohol, Tobacco & Firearms, Dep't of Treasury*, 505 F. Supp. 695 (N.D. Fla. 1980); *Fin & Feather Sport Shop, Inc. v. U.S. Treasury Dep't, Internal Revenue Serv., Bureau of Alcohol, Tobacco & Firearms*, 481 F. Supp. 800 (D. Neb. 1979); *Serv. Arms Co. v. United States*, 463 F. Supp. 21 (W.D. Okla. 1978); *Weidner v. Kennedy*, 309 F. Supp. 1018 (C.D. Cal. 1970) (denying licensee's motion for summary judgment). See also *DiMartino v. Buckles*, 129 F. Supp. 2d 824 (D. Md. 2001), *aff'd per curiam*, 19 Fed. Appx. 114 (4th Cir. 2001).

16. See 18 U.S.C. § 923(e) (Supp. V 2005); 27 C.F.R. § 478.73 (2008). See generally *Appalachian Res. Dev. Corp. v. McCabe*, 387 F.3d 461 (6th Cir. 2004); *Sturdy v. Bentsen*, 129 F.3d 122 (8th Cir. 1997) (*per curiam*); *Perri v. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms*, 637 F.2d 1332 (9th Cir. 1981); *Pinion Enters. v. Ashcroft*, 371 F. Supp. 2d 1311 (N.D. Ala. 2005); *Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 348 F. Supp. 2d 1299 (S.D. Ala. 2004), *aff'd per curiam*, 415 F.3d 1274 (11th Cir. 2005); *Breit & Johnson Sporting Goods, Inc. v. Ashcroft*, 320 F. Supp. 2d 671 (N.D. Ill. 2004); *3 Bridges, Inc. v. United States*, 216 F. Supp. 2d 655 (E.D. Ky. 2002); *T.T. Salvage Auction Co. v. Sec'y, U.S. Dep't of Treasury*, 859 F. Supp. 977 (E.D.N.C. 1994); *Cisewski v. Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms*, 773 F. Supp. 148 (E.D. Wis. 1991); *Al's Loan Office, Inc. v. U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms*, 738 F. Supp. 221 (E.D. Mich. 1990); *Shyda v. Dir., Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of Treasury*, 448 F. Supp. 409 (M.D. Pa. 1977); *Rich v. United States*, 383 F. Supp. 797 (S.D. Ohio 1974); *McLemore v. U.S. Treasury Dep't*, 317 F. Supp. 1077 (N.D. Fla. 1970).

17. See *Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms &*

explosives-licensing (and permit) cases is, however, limited to willful violations of the applicable federal law only with respect to denying license applications.¹⁸ As to existing licenses, the ATF “may revoke any license or permit . . . if in the opinion of the Attorney General the holder thereof has *violated any*” explosives statute or regulation.¹⁹

Unfortunately for the license or permit holder or applicant, willfulness is not defined in the GCA or the explosives laws.²⁰ Because the relevant statutes and regulations do not define willfulness, the task of developing a definition²¹ and evidentiary standard²² for willfulness (in appeals from GCA administrative actions) falls to the judiciary.²³ The majority of federal circuit courts define willfulness, for GCA purposes, as knowledge of the law and purposeful disregard of or plain indifference thereto.²⁴ Conversely, there is not a long line of published, federal

Explosives, 415 F.3d 1274 (11th Cir. 2005); *Appalachian Res. Dev. Corp.*, 387 F.3d at 464; *Perri*, 637 F.2d at 1336; *Cucchiara*, 652 F.2d at 30; *Sturdy*, 129 F.3d at 122; *Stein’s, Inc.*, 649 F.2d at 467; *Lewin*, 590 F.2d at 269; *Prino*, 606 F.2d at 450; *Pinion Enters., Inc.*, 371 F. Supp. 2d at 1315; *Breit & Johnson Sporting Goods, Inc.*, 320 F. Supp. 2d at 678; *3 Bridges, Inc.*, 216 F. Supp. 2d at 657; *Trader Vic’s Ltd.*, 169 F. Supp. 2d at 963; *T.T. Salvage Auction Co.*, 859 F. Supp. at 979; *Cisewski*, 773 F. Supp. at 152; *Al’s Loan Office, Inc.*, 738 F. Supp. at 224; *Powers*, 505 F. Supp. at 696; *Fin & Feather Sport Shop, Inc.*, 481 F. Supp. at 804; *Serv. Arms Co.*, 463 F. Supp. at 23; *Shyda*, 448 F. Supp. at 415; *Rich*, 383 F. Supp. at 799-800; *McLemore*, 317 F. Supp. at 1077.

18. See 18 U.S.C. § 843(b)(2) (2000); 27 C.F.R. § 555.49(a)(2)(iii), (b)(2)(ii) (2008). See also 18 U.S.C. § 843(c) (Supp. V 2005); 27 C.F.R. § 555.72 (2008) (discussing initial application denial); *Id.* § 555.74 (discussing renewal application denial); 18 U.S.C. § 843(d) (Supp. V 2005); 27 C.F.R. § 555.74 (2008) (discussing revocation).

19. 18 U.S.C. § 843(d) (Supp. V 2005) (emphasis added).

20. “The term ‘willful’ is not defined by [the GCA].” *Willingham Sports, Inc.*, 415 F.3d at 1276. “[W]illfulness is not defined in the Federal explosives law” Brief for the Respondent at 20, *Luna Tech, Inc. v. Bureau of Alcohol, Tobacco & Firearms*, 183 Fed. Appx. 863 (11th Cir. 2006) (No. 05-14350) [hereinafter Brief for the Respondent].

21. In this article, the definition of willfulness is the legal standard as articulated in federal-court decisions.

22. In this article, the evidentiary standard means the facts that must be in the evidence to satisfy the legal standard of willfulness.

23. While the GCA statutes and regulations have changed over the years, this article focuses on the resulting case law concerning willfulness and the potential application of the GCA standard to the explosives laws.

24.

Four of the five circuits that have addressed the matter have concluded that a violation is “willful” for purposes of § 923 where a firearms dealer “knew of his legal obligation and purposefully disregarded or was plainly indifferent to the recordkeeping requirements.” *Lewin v. Blumenthal*, 590 F.2d 268, 269 (8th Cir. 1979); accord *Appalachian Res. Dev. Corp. v. McCabe*, 387 F.3d 461, 464-65 (6th Cir. 2004); *Perri v. Dep’t of the Treasury*, 637 F.2d 1332, 1336 (9th Cir. 1981); *Stein’s, Inc. v. Blumenthal*, 649 F.2d 463, 467 (7th Cir. 1980). The definition of “willful” adopted by the other of the five circuits to consider

appellate decisions in explosives civil administrative enforcement actions as is the case for GCA appeals.

Unlike GCA administrative actions, which are appealed to district courts, explosives cases are appealed to circuit courts of appeal, to the ATF Director, or to both.²⁵ The circuit courts will find no willfulness definition or evidentiary standard of willfulness in the explosives statutes or regulations.²⁶ As in the early GCA cases where the courts worked through the problem of articulating a GCA definition of, and evidentiary standard for, willfulness,²⁷ the circuit courts may struggle with these issues as more explosives administrative decisions are appealed.

III. *LUNA TECH, INC. V. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS*²⁸

The administrative prosecution of Luna Tech, Inc. (“Luna Tech”) involved a multi-license, combination revocation and denial action.²⁹

the issue differs only in that the term “plain indifference” is not explicitly used. *Prino v. Simon*, 606 F.2d 449, 451 (4th Cir. 1979) (“‘Willful’ means action taken knowledgeably by one subject to the statutory provisions in disregard of the action’s legality A conscious, intentional, deliberate, voluntary decision properly is described as willful, regardless of venal motive.” (internal marks and citation omitted)).

In all five of these circuits, a bad purpose or evil motive is not required. *Appalachian Res. Dev. Corp.*, 387 F.3d at 464-65; *Stein’s, Inc.*, 649 F.2d at 467; *Cucchiara v. Sec’y of the Treasury*, 652 F.2d 28, 30 (9th Cir. 1981); *Lewin*, 590 F.2d at 269; see also *Prino*, 606 F.2d at 451. Instead, the firearms dealer is considered to have acted willfully under § 923 if, with knowledge of what the regulations require, the dealer repeatedly violates those regulations. See *Appalachian Res. Dev. Corp.*, 387 F.3d at 464 (agreeing with the district court’s determination that violations of firearm regulations were “willful” because the dealer had knowledge of its obligations and repeatedly violated them); *Stein’s, Inc.*, 649 F.2d at 468 (same); *Cucchiara*, 652 F.2d at 30 (same); *Lewin*, 590 F.2d at 269 (same); see also *Prino*, 606 F.2d at 450-51.

Willingham Sports, Inc., 415 F.3d at 1276-77.

25. 18 U.S.C. § 843(e)(2) (Supp. V 2005); 27 C.F.R. §§ 555.79-555.80 (2008).

26. See Brief for the Respondent, *supra* note 20, at 20 (“[W]illfulness is not defined in the Federal explosives law”). See also *Midwest Fireworks Mfg. Co. v. U.S. Dep’t of Treasury, Bureau of Alcohol, Tobacco & Firearms, Cent. Region* 840 F.2d 17 (6th Cir. 1988) (per curiam) (denying explosives-license-renewal application for “willfully” falsifying the application with no discussion of a willfulness definition or evidentiary standard).

27. See *Willingham Sports, Inc.*, 415 F.3d at 1276-77.

28. *Luna Tech, Inc. v. Bureau of Alcohol, Tobacco & Firearms*, 183 Fed. Appx. 863 (11th Cir. 2006). Brief for the Respondent, *supra* note 20, at 3.

29. *Id.* at 865 (emphasis added) (“A hearing on the *revocation and denials of renewal* was held before an Administrative Law Judge.”).

The chain of events leading to the decision on review was triggered by the

After ATF rendered its administrative-adjudication decision affirming the Administrative Law Judge's ("ALJ's") decision,³⁰ Luna Tech appealed to the Eleventh Circuit³¹ which rendered its decision in *Luna Tech, Inc. v. Bureau of Alcohol, Tobacco and Firearms*, denying the petition for review of ATF's decision.³² The government argued on appeal that the GCA willfulness definition should be applied to explosives actions because explosives actions occur in a "similar context"³³ to GCA license-denial cases. The government offered no explanation in its brief to support the "similar context" claim; however, the legislative history does contain some direct references to the GCA.³⁴

Luna Tech initially appeared to agree with the government's position on the applicability of the willfulness definition:

It can then be determined from Eleventh Circuit court cases and other federal court cases *defining "willfulness" under ATFE gun regulations* that it must be shown that: 1. Luna Tech, as licensee, knew about its legal obligations under the federal explosives statute and regulations; and 2. Luna Tech *purposefully disregarded or was plainly indifferent* to the

explosion and fire in Luna Tech's laboratory and "lab magazine." The explosion and fire killed one employee and seriously injured two others. The ensuing investigation revealed a series of violations of the Federal explosives laws, including the failure to notify ATF of the construction and use of a magazine attached to its laboratory, the failure to properly store explosives, and the failure to meet record-keeping requirements. After an administrative hearing, the agency found that Luna Tech had willfully violated the regulations and ordered the revocation and denial of renewal of petitioner's licenses.

Brief for the Respondent, *supra* note 20, at 15 (generally describing Luna Tech's violations).

30. Luna Tech appealed to the Director of ATF, who issued an order affirming the ALJ's decision. *Id.* at 3.

31. "Luna Tech, Inc., petitions for review of the revocation by the Bureau of Alcohol, Tobacco, Firearms and Explosives of its license to manufacture high explosives and the decision of the ATF not to renew its licenses to manufacture binary explosives and import low explosives." *Luna Tech, Inc.*, 183 Fed. Appx. at 864.

32. *Id.* at 866.

33. The government argued for the application of the GCA willfulness definition, which was articulated in *Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 415 F.3d 1274, 1277 (11th Cir. 2005), which is a "purposeful disregard of or plain indifference to the laws and regulations." Brief for the Respondent, *supra* note 20, at 20 (quoting *Willingham Sports, Inc.*, 415 F.3d at 1277) ("The same definition is applicable here.").

34. Importer, dealer, and "crime punishable by imprisonment for a term exceeding 1 year" [are defined] *in the same manner as under the [GCA]*" H.R. REP. NO. 91-1549, at 35-36 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4007, 4041-42 (emphasis added).

requirements in order to shown [sic] that the violations on [sic] were “willful.”³⁵

Furthermore, Luna Tech argued in its brief, in an evidentiary context, for an intent-based GCA willfulness definition: “One indication that is used by federal agencies to determine whether an entity has ‘willfully’ violated a statute and/or regulation is to show that the entity *intentionally disregarded* the statute and/or regulation.”³⁶ Luna Tech’s proposed “indication” of intent can be viewed as a departure from the government’s intent-free argument as to willfulness, in that the government stated “[a] *bad purpose or evil motive is not required*, rather, a licensee is considered to have acted willfully if, with knowledge of what the regulations require, the licensee repeatedly violates those regulations.”³⁷

Luna Tech generally addressed, without citing any law, the willfulness evidentiary standard: “Another indication used by federal agencies to determine whether an entity has ‘willfully’ violated a statute and/or regulation[] is to show that the entity has repeatedly violated a statute and/or regulation[].”³⁸ However, Luna Tech’s proposed evidentiary standard was similar to the combination partial definition (“knowledge of the regulations”) and evidentiary standard (“repeated violations”) adopted by the court: “Willfulness can be established by repeated violations with knowledge of the regulations.”³⁹

This situation reveals the paradox in which Luna Tech found itself once it petitioned the Eleventh Circuit to review ATF’s decision. The case had already been administratively adjudicated without a statutory definition or judicial determination of the legislatively intended

35. Appellant’s, Luna Tech, Inc., Brief in Support of Petition for Review of Agency Decision at 17-18, Luna Tech, Inc. v. Bureau of Alcohol, Tobacco and Firearms, 183 Fed. Appx. 863 (11th Cir. 2006) (No. 05-14350) (emphasis added) [hereinafter Brief of Appellant].

36. *Id.* at 20 (emphasis added).

37. Brief for the Respondent, *supra* note 20, at 20 (emphasis added) (citing *Willingham Sports, Inc.*, 415 F.3d at 1276-77). See *Lewin v. Blumenthal*, 590 F.2d 268, 269 & n.1 (8th Cir. 1979). “We prefer the *Shyda* court’s definition [(plain indifference to the regulatory requirements)] to the definition in *Rich* which provides without elaboration that the licensee’s conduct be ‘purposeful, intentional conduct.’” *Id.* at 269 n.1 (quoting *Rich v. United States*, 383 F. Supp. 797, 800 (S.D. Ohio 1974)). “There is no requirement of bad purpose as might be imposed were the [c]ourt faced with determining the definition of willfulness in a criminal prosecution.” *Id.* at 269.

38. Brief of Appellant, *supra* note 35, at 20.

39. Luna Tech, Inc. v. Bureau of Alcohol, Tobacco & Firearms, 183 Fed. Appx. 863, 866 (11th Cir. 2006).

definition of willfulness or its evidentiary standard. *Luna Tech, Inc.* underscores the necessity for amending the explosives laws to include a clearly stated willfulness definition and evidentiary standard. A brief review of the GCA and explosives-law legislative history concerning willfulness follows.

IV. A BRIEF LOOK AT THE LEGISLATIVE HISTORY OF THE FIREARMS AND EXPLOSIVES STATUTES

Pursuant to the Omnibus Crime Control and Safe Streets Act of 1968,⁴⁰

[a]ny application [for a firearms license] shall be disapproved . . . if [*inter alia*] . . .

. . . .

. . . the applicant has *willfully* violated any of the provisions of this chapter or regulations issued thereunder; or

. . . the applicant has *willfully* failed to disclose any material information required, or has made any false statement as to any material fact, in connection with his application⁴¹

The GCA provided additional authority to “revoke any license issued under this section if the holder of such license has violated any provision of this chapter or any rule or regulation.”⁴² Willfulness, however, was added for revocation authority in the Firearms Owners’ Protection Act of 1986.⁴³ Still, no willfulness definition was added.

The Organized Crime Control Act of 1970 (“OCCA”)⁴⁴ authorized ATF to regulate explosives administratively through the issuance of licenses and permits.⁴⁵ The House of Representatives added the explosives laws to Senate Bill 30⁴⁶ as an amendment to a broad criminal-

40. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended in scattered sections of U.S.C.).

41. *Id.* § 902, 82 Stat. at 232 (codified as amended at 18 U.S.C. § 923 (2000)) (emphasis added).

42. Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1222 (codified as amended at 18 U.S.C. § 923(e) (2000)).

43. *See* Firearms Owners’ Protection Act, Pub. L. No. 99-308, § 103(5), 100 Stat. 449, 453 (1986) (codified as amended at 18 U.S.C. § 923(e) (2000)).

44. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of U.S.C.).

45. *Id.* § 1102, 84 Stat. at 955-56 (codified as amended at 18 U.S.C. § 843 (2000)).

46. For the text of Senate Bill 30, Organized Crime Control Act of 1969, S. 30, 91st

corruption-prevention-and-enforcement bill.⁴⁷ The OCCA required approval of license and permit applications unless, *inter alia*, the applicant “willfully violated” the explosives statutes or regulations.⁴⁸

However, unlike the GCA, which was amended to require willful violations of the law prior to revoking an existing license, the explosives laws have not been similarly amended. An explosives license or permit may be revoked for simply violating any explosives statute or regulation, without regard to willfulness.⁴⁹ This is a clear difference from the GCA, which does require willful violations to be alleged for both denials and revocations,⁵⁰ and thus undercuts the government’s “similar context” contention.⁵¹

V. DIFFERENCES OR A “SIMILAR CONTEXT?”

In *Luna Tech, Inc.*, although the government was not required to prove willful violations for revocation, as it was for application denial, alleging willful violations authorized ATF to proceed without allowing Luna Tech the opportunity to show compliance.⁵² On the one hand, the

Cong. (1970), see 115 CONG. REC. 829-32 (1969). The initial part of Senate Bill 30 later became known as the Racketeer Influenced and Corrupt Organizations (RICO) Act, Pub. L. No. 91-452, tit. IX, § 901(a), 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (2000)).

47. “This title, added by the committee, establishes Federal controls over the interstate and foreign commerce of explosives and is designed to assist the States to more effectively regulate the sale, transfer and other disposition of explosives within their borders.” H.R. REP. NO. 91-1549, at 5 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4007, 4011.

48. Organized Crime Control Act § 1102, 84 Stat. at 955 (codified as amended at 18 U.S.C. § 843(b)(2) (2000)).

49. *See* 18 U.S.C. § 843(d) (Supp. V 2005).

50. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 197, 232 (codified as amended at 18 U.S.C. § 923(d)(1)(C) (2000)); *see also* Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1222 (codified as amended at 18 U.S.C. § 923(d)(1)(C) (2000)); Organized Crime Control Act § 1102, 84 Stat. at 955 (codified as amended at 18 U.S.C. § 843(b)(2) (2000)).

51. *See* Brief for the Respondent, *supra* note 20, at 20.

52. “The holder of the license or permit is entitled to an opportunity to achieve compliance with the laws and regulations before his license or permit is denied or revoked except in ‘cases of willfulness or those in which the public interest requires otherwise.’” *Id.* at 6 (quoting 27 C.F.R. § 555.71 (2005)). *See* 27 C.F.R. § 555.71 (2008).

§ 555.71 Opportunity for Compliance

Except in cases of willfulness or those in which the public interest requires otherwise, and the regional director (compliance) so alleges in the notice of denial of an application or revocation of a license or permit, no license or

government is required to allege, and eventually prove, willful violations against an *applicant*, but on the other hand, the opportunity to show compliance is eliminated. Thus, when *existing licensees* are compared to *applicants*, they are subject to a different legal treatment, because the government must allege willful violations to initiate adverse action for denials, but not for revocations. Therefore, the law allows existing licensees or permittees to show compliance (assuming the government does not allege willful violations), while simultaneously prohibiting applicants from showing compliance where willful violations are *alleged*. This is another clear difference from the GCA's omission of any provision providing for the opportunity to show compliance before a license is revoked or an application is denied.

Moreover, in a situation where a GCA action begins as a revocation proceeding, the license subsequently expires, and the licensee timely applies for renewal, then the action is "converted" to a renewal-application denial proceeding.⁵³ Where an explosives revocation action extends into the renewal period, and a timely renewal application is submitted, the court may be asked to decide whether the action should be "converted" to a denial, and thus whether willful violations must be shown even though willfulness was not initially required because the proceeding started as a revocation action.⁵⁴

The court dismissed Luna Tech's petition for review without addressing, other than by citation to case law, the rationale for the definition of, and evidentiary standard for, willfulness that it applied in

permit will be revoked or renewal application denied without first calling to the attention of the licensee or permittee the reasons for the contemplated action and affording him an opportunity to demonstrate or achieve compliance with all lawful requirements and to submit facts, arguments, or proposals of adjustment. The notice of contemplated action, ATF F 5400.12, will afford the licensee or permittee 15 days from the date of receipt of the notice to respond. If no response is received within the 15 days, or if after consideration of relevant matters presented by the licensee or permittee, the regional director (compliance) finds that the licensee or permittee is not likely to abide by the law and regulations, he will proceed as provided in § 555.74.

Id.

53. *Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 348 F. Supp. 2d 1299, 1304 n.7 (S.D. Ala. 2004), *aff'd per curiam*, 415 F.3d 1274 (11th Cir. 2005) (emphasis added) ("As a technical matter, intervening events *converted* the hearing on revocation of the License into a hearing on denial of Willingham's application for renewal of such License. The License expired on April 1, 2002, and Willingham timely filed a renewal application, notwithstanding the pending revocation action.").

54. *Id.*

the case.⁵⁵ The court, in its opinion, did not analyze willfulness, its statutory context, or the legislative history surrounding its implementation. The authority cited by the court for applying the GCA firearm standard to *Luna Tech, Inc.*⁵⁶ was *J.A.M. Builders, Inc. v. Herman*⁵⁷ and *Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms and Explosives*.⁵⁸ *J.A.M. Builders, Inc.*, a case unrelated to either the GCA or explosives law and cited by neither party, involved the review of an Order of the Occupational Safety and Health Review Commission (“OSHRC”).⁵⁹ *Willingham Sports, Inc.*, on the other hand, is a GCA case and was cited by the government in its brief,⁶⁰ but not cited by the petitioner in its brief.⁶¹

J.A.M. Builders, Inc. was cited to support the definition of willfulness adopted by the court, which was stated as “‘an intentional disregard of, or plain indifference’ to the statutory requirements.”⁶² The court supported its chosen definition of willfulness with a case determining liability pursuant to industrial safety standards under Title 29,⁶³ not a case concerning a criminal or civil enforcement action pursuant to the criminal provisions of Title 18 or the explosives regulations.⁶⁴ Although *J.A.M. Builders, Inc.* was cited by the *Willingham Sports, Inc.* court as well, it was cited, not in direct support of, but *in accord with* the majority of federal circuit courts addressing the issue of willfulness.⁶⁵ Although the court accepted the GCA evidentiary

55. *Luna Tech, Inc. v. Bureau of Alcohol, Tobacco & Firearms*, 183 Fed. Appx. 863, 866 (11th Cir. 2006). See also *Midwest Fireworks Mfg. Co. v. U.S. Dep’t of Treasury, Bureau of Alcohol, Tobacco & Firearms, Cent. Region*, 840 F.2d 17 (6th Cir. 1988) (*per curiam*) (mentioning willfulness one time in its opinion denying the petition for review (of ATF’s renewal-application denial) without articulating a definition or evidentiary standard).

56. *Luna Tech, Inc.*, 183 Fed. Appx. at 866 (citing *Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 415 F.3d 1274, 1277 (11th Cir. 2005)).

57. *Id.* (citing *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1355 (11th Cir. 2000)).

58. *Id.* (citing *Willingham Sports, Inc.*, 415 F.3d at 1277).

59. *J.A.M. Builders, Inc.*, 233 F.3d 1350. *Luna Tech*’s brief cited two Eleventh Circuit cases deciding issues pursuant to the Occupational Safety and Health Administration and OSHRC requirements, but did not cite *J.A.M. Builders, Inc.* See Brief of Appellant, *supra* note 35, at 16.

60. Brief for the Respondent, *supra* note 20, at 20.

61. See Brief of Appellant, *supra* note 36.

62. *Luna Tech, Inc.*, 183 Fed. Appx. at 866 (emphasis added) (quoting *J.A.M. Builders, Inc.*, 233 F.3d at 1355).

63. See 29 U.S.C. § 666 (2000); 29 C.F.R. § 1926.416(a)(1) (2006).

64. See 18 U.S.C. §§ 841-848 (2000); 27 C.F.R. pt. 555 (2007).

65. “This standard *accords with* other decisions of our [c]ourt defining ‘willful’

standard from *Willingham Sports, Inc.*,⁶⁶ it did not apply the GCA willfulness definition, choosing instead “intentional disregard” language over the “purposeful disregard” standard adopted by the majority of circuit courts reviewing GCA cases.⁶⁷

As the district court observed in *Willingham Sports, Inc.*,

[i]t is . . . true that the ATF never found evidence that Willingham was *intentionally* trying to subvert the firearms purchasing process; [h]owever, these facts do not alter the inescapable conclusion that Willingham *carelessly disregarded* its recordkeeping obligations under the [GCA] for more than a decade, despite actual knowledge of those obligations⁶⁸

Whether the violations are intentional, purposeful, or careless, the analysis employed to determine the specific wording to use to decide if there were willful violations in explosives actions should utilize proper statutory-construction analysis, and should not simply use rote citation to case law deciding GCA, labor law, or other (related or unrelated) legal cases.

VI. THE “SIMILAR CONTEXT” OF PLACING REGULATED ENTITIES AT A LEGAL DISADVANTAGE

In *Rich v. United States*,⁶⁹ an early federal district-court case adjudicating an appeal from a GCA administrative firearms-license revocation, the court found itself without a definition for willfulness, or prior decisions for guidance to determine the proper willfulness standard. The court noted: “Lacking the guidance of previous judicial consideration of license revocation, the [c]ourt must seek to determine

violations in the context of regulatory schemes that impose civil penalties, as opposed to criminal ones.” *Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 415 F.3d 1274, 1277 (11th Cir. 2005) (emphasis added) (citing *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1355 (11th Cir. 2000)).

66. “Willfulness can be established by repeated violations with knowledge of the regulations.” *Luna Tech, Inc.*, 183 Fed. Appx. at 866.

67. “We agree with those five circuits that a showing of *purposeful disregard* of or plain indifference to the laws and regulations imposed on firearms dealers shows willfulness” *Willingham Sports, Inc.*, 415 F.3d at 1277 (emphasis added).

68. *Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 348 F. Supp. 2d 1299, 1311 (S.D. Ala. 2004), *aff’d per curiam*, 415 F.3d 1274 (11th Cir. 2005) (emphasis added).

69. *Rich v. United States*, 383 F. Supp. 797 (S.D. Ohio 1974).

[c]ongressional *intent* for the statutes in question.”⁷⁰ Although *Rich* was decided prior to the addition of willful violations for GCA revocation actions, the court determined that the lack of willfulness, when viewed in the context of denials, created a paradox unintended by Congress, and determined willfulness was required to proceed with revocation.⁷¹ As in *Rich*, the *Luna Tech, Inc.* case was administratively adjudicated, and the result of the adjudication was adverse to the licensee.⁷² In both of these decisions, the licensee was placed in the precarious position of having to defend against government action without a statutory definition of willfulness, or a clearly determined standard of evidence necessary to establish willful violations. The *Rich* court recognized that

[a] review of the history and composition of the [GCA] is necessary. The *legislative history* of the [GCA] . . . reveals concern over the senseless slaughter occurring throughout the nation as a result of uncontrolled sales of firearms. Congress found that the total lack of uniform controls in the sales of firearms resulted in frustration of local controls, even when they existed and were rigidly enforced. Increasing crime rates, largely made possible by almost totally unrestricted access to inexpensive and easily concealed handguns by minors, criminals and the insane, were found to threaten the security of every citizen. Against this background, Congress enacted the criminal provisions found in [the GCA].

At the same time, however, *Congress made it clear that its purpose was not to place undue and unnecessary federal restrictions upon those citizens engaged in lawful activities.* The

70. *Id.* at 799 (emphasis added).

71.

The lack of an equivalent willful intent in the revocation section P923(e) creates an anomalous situation. Apparently the Secretary may revoke for error, inadvertence, or simple ignorance of regulation. Such revocation then becomes an exercise in futility if thereafter the Secretary by the plain language of P923(d) must reissue the license absent a showing of willful violation. It cannot be that Congress intended this formalistic paradox. Accordingly, we hold that the Secretary must show a willful violation of statutes or rules and regulations promulgated thereunder in order to prevail herein.

Id. at 800.

72. *Luna Tech, Inc. v. Bureau of Alcohol, Tobacco & Firearms*, 183 Fed. Appx. 863, 864-65 (11th Cir. 2006). Although the *Rich* court did not find willfulness, it did remand the case to the Secretary of the Treasury with instructions to impose a sixty-day suspension of the firearms license. *Rich*, 383 F. Supp. at 802.

provisions of the [GCA] were *not designed to deprive every citizen access to firearms*, but merely to implement those restrictions necessary to achieve its purposes.⁷³

Before the court determined the definition of willfulness, it held that ATF “must show a willful violation of statutes or rules and regulations promulgated thereunder in order to prevail herein.”⁷⁴ The *Rich* court recognized that “[w]illfully’ is a word of many meanings. Its construction is often influenced by its context, and *its meaning should not be divorced from the purpose which Congress intended from its use.*”⁷⁵ The court also recognized the need to utilize statutory construction to formulate a workable willful standard.⁷⁶

The *Rich* court recognized that “[t]he [GCA] is a criminal statute,” and is defined by case law in that context as “purposefully or intentionally fail[ing] to obey the statute, having knowledge of the facts.”⁷⁷ The court determined that the context of willfulness in the GCA, when read together with the legislative intent of Congress, required the conclusion that willful was intended “to include purposeful, intentional behavior.”⁷⁸ The court acknowledged that ATF “urged that ‘willful’ be deemed to include careless disregard as well, citing [non-GCA cases] as authority These cases, however, dealt with [non-GCA] statutes and [did] not provide the [c]ourt with the same insight that *a careful examination of the [GCA] itself imparts.*”⁷⁹

Later courts adopted the knowledge-of-the-law-and-purposeful-disregard-or-plain-indifference standard over the “purposeful, intentional” standard for civil administrative GCA actions.⁸⁰ However, the judicial history demonstrates the inherent need to engage in statutory-construction analysis in order to properly formulate a workable willfulness definition and evidentiary standard where the statutes and regulations at issue do not define them. Furthermore, as late as 1998, the United States Supreme Court engaged in a lengthy congressional-history

73. *Rich*, 383 F. Supp. at 799.

74. *Id.* at 800. The court resolved an apparent paradox in the statutes governing application denial and revocation and whether willful applied to both actions. *Id.*

75. *Id.* (emphasis added).

76. *See id.*

77. *Id.*

78. *Id.*

79. *Id.* (emphasis added) (citations omitted).

80. *See, e.g., Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 415 F.3d 1274, 1276-77 (11th Cir. 2005).

analysis to determine the willfulness standard in the criminal GCA context.⁸¹

The reasoning in appellate decisions of GCA administrative actions demonstrates what is required to properly establish a statutory-construction foundation. That reasoning, and the resulting foundation, would more appropriately support recommending the GCA willfulness standard for application to explosives actions than did the reasoning in *Luna Tech, Inc.*

VII. CONCLUSION

The legislative and judicial history of the GCA demonstrates the need for appropriate statutory-construction analysis to determine the proper definition of, and evidentiary standard for, willfulness in explosives actions. These laws contain both similarities and distinctions that should be analyzed prior to accepting a “similar context” assertion as sufficient to apply GCA willfulness legal standards to explosives cases. Discerning the appropriate standard of willfulness for the explosives laws, which must be achieved through a proper and complete statutory-construction analysis, is necessary for fair administrative and judicial adjudications of the explosives laws.

81. *Bryan v. United States*, 524 U.S. 184, 186-90 (1998) (utilizing legislative-history analysis to determine that knowledge the conduct is unlawful is required for willfulness in the criminal context).