UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 11-3776

United States of America
Appellee
v.
William Stegmeier
Appellant

Appeal from U.S. District Court for the District of South Dakota – Sioux Falls
(CR 11-40038)

APPELLANT'S BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Defendant-Appellant William Stegmeier ("Stegmeier") was charged in a three-count indictment with harboring a fugitive named Thomas Kelley ("Kelley"), being an accessory after the fact to Thomas Kelley's failure to appear at Kelley's sentencing hearing for various tax-related offenses, and providing a firearm to Kelley, a felon and fugitive under 18 U.S.C. § 922(d). Prior to trial, Count 2 (being an accessory to Kelley's failure to appear) was voluntarily dismissed by the Government.

Kelley was tried on the remaining two counts on October 5, 6 and 7, 2011. The District Court imposed, over Stegmeier's objection, a special verdict form which asked the jury to answer yes-or-no questions with regard to the firearm disposition count. The District Court also instructed the jury, over Stegmeier's objection, that it was required to convict Stegmeier if the prosecution met its burden of proof and that the jurors would be violating their sworn oaths as jurors if they were to base their verdicts upon factors unapproved by the Court.

On October 7, 2011 the jury convicted Stegmeier on both Counts 1 and 3. The jury marked the special verdict form to indicate that the jury had unanimously found that Stegmeier knew or had reasonable cause to believe Kelley was both a felon and a fugitive. Stegmeier was sentenced to 24 months incarceration on December 6, 2011.

On appeal Stegmeier challenges the sufficiency of the evidence on both counts, along with certain of the District Court's jury instructions and the use of a special verdict form over Stegmeier's objection. Additionally, Stegmeier challenges the firearm conviction on Second Amendment grounds.

Counsel for Stegmeier requests oral argument in order to assist this Court of Appeals in deciding this case.

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JURISDICTIONAL STATEMENT

William Stegmeier was charged in the U.S. District of South Dakota on April 6, 2011 (Filing # 1 in the District Court) with harboring a fugitive named Thomas Kelley in violation of 18 U.S.C. § 1071 (Count 1), being an accessory after the fact to Thomas Kelley's Failure to Appear at a sentencing hearing in violation of 18 U.S.C. §§ 3 and 3146(a)(I) (Count 2), and selling or disposing of a firearm to Thomas Kelley in violation of 18 U.S.C. § 922(d)(I) and (d)(2) (Count 3). Prior to trial, The Government dismissed Count 2 (being an accessory after the fact).

As Stegmeier was charged with offenses against the laws of the United States, jurisdiction in the trial court was based on 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States"). Stegmeier was tried on October 5, 6, and 7, 2011. On October 7, a federal jury in Sioux Falls, South Dakota found Stegmeier guilty of both counts. Stegmeier was sentenced to 24 months in federal prison on December 6, 2011.

Stegmeier filed a timely appeal on December 16, 2011. This court's jurisdiction is based on 28 U.S.C. § 1291, which provides for jurisdiction over a final judgment from a U.S. District Court.

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STATEMENT OF ISSUES, WITH APPOSITE CASES

QUESTIONS PRESENTED

1. **Was William Stegmeier properly convicted of harboring a fugitive, when the facts indicate that he did nothing to prevent the fugitive's apprehension and arrest?**
   Apposite Cases: *United States v. Hogg*, 670 F.2d 1358 (4th Cir. 1982); *United States v. Foy*, 416 F.2d 940 (7th Cir. 1969).

2. **Did the District Court Err in construing 18 U.S.C. § 922(d) to allow conviction for merely allowing a guest to have access to a firearm in a residence or vehicle?**
   Apposite Cases: *United States v. Blue*, 957 F.2d 106 (4th Cir. 1992)

3. **If so, did Stegmeier's conviction for disposing of a firearm violate the Second Amendment?**
   Apposite Case: *District of Columbia v. Heller*, 554 U.S. 570 (2008)

4. **Did the District Court invade the province of Stegmeier's jury by presenting them with a verdict form containing special interrogatories, over Stegmeier's objection?**
   Apposite Cases: *Gray v. United States*, 174 F.2d 919 (8th Cir. 1949) (holding that special verdict forms in criminal cases, over a defendant's objection, are generally unlawful).

5. **Did the District Court invade the province of Stegmeier's jury by means of unnecessarily intimidating jury instructions?**
   Apposite Case: *Dinger v. United States*, 28 F.2d 548, 550, 551(8th Cir. 1928)

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STATEMENT OF THE CASE

On April 6, 2011, a grand jury in the U.S. District of South Dakota issued a three-count indictment against William Stegmeier ("Stegmeier"). The indictment accused Stegmeier of harboring a fugitive named Thomas Kelley ("Kelley") in violation of 18 U.S.C. § 1071 (Count 1), being an accessory after the fact to Thomas Kelley's Failure to Appear at a sentencing hearing in violation of 18 U.S.C. §§ 3 and 3146(a)(I) (Count 2), and selling or disposing of a firearm to Thomas Kelley in violation of 18 U.S.C. § 922(d)(I) and (d)(2) (Count 3). Prior to trial, The Government dismissed Count 2 (being an accessory after the fact).

Stegmeier was tried on the remaining two counts on October 5, 6 and 7, 2011. The evidence indicated that Stegmeier, a manufacturer and businessman in the Sioux Falls area, had allowed Kelley, a former employee and friend, to stay in Stegmeier's large RV motorhome which was parked outside Stegmeier's home and office in Tea, South Dakota. Later, Stegmeier employed Kelley to work on his company's demolition and construction project at a grain elevator facility in Wood Lake, Minnesota.

Kelley was a fugitive from numerous federal tax and fraud-related offenses of which he had been convicted in May, 2010. *United States v. Kelley*, U.S.D.S.D.

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Case No. 4:08-cr-40173. Kelley had failed to attend his sentencing hearing on the charges. There was evidence that Stegmeier had read a newspaper clipping more than a year earlier which reported that Kelley was then facing prosecution over IRS tax charges. Kelley did not testify at Stegmeier's trial.

Evidence at trial was conflicting regarding whether Stegmeier knew with any specificity that an arrest warrant had been issued for Kelley in the Fall of 2010. Stegmeier admitted that he was cavalier regarding Kelley's legal status, and said that Kelley had assured Stegmeier that his legal problems were nothing to worry about and had been resolved. Stegmeier testified that he did not follow any of Kelley's proceedings.

Stegmeier stated that when Kelley first moved into Stegmeier's motor home, Stegmeier informed Kelley that he kept a handgun in a closet in the motorhome along with other items. He did not show the handgun to Kelley or authorize Kelley to touch it. Weeks later, Stegmeier hired Kelley to help his company rebuild some grain elevator equipment in Wood Lake, Minnesota. Stegmeier, Kelley and the motorhome were removed to Wood Lake for the temporary assignment.

Kelley was arrested while walking outside in Wood Lake, Minnesota on December 22, 2010. Kelley was later tried in a separate case, convicted of failure to appear and sentenced to 70 months in Federal prison. (Stegmeier did not testify in Kelley's case). On the day of Kelley's arrest, Stegmeier's motorhome was searched with the consent of Stegmeier. Stegmeier's .357 Magnum handgun was found in a location different from the closet where Stegmeier had last seen the handgun. No fingerprints were found on the handgun. (Kelley was never prosecuted for any charges relating to the handgun.)

At Stegmeier's trial, the District Court presented the jury with a verdict form that asked the jury to mark the form indicating whether Stegmeier was guilty or not guilty regarding each count. However, the verdict form departed from normal practice in that it asked the jury to indicate specifically whether the jury unanimously found that Stegmeier had known or had reasonable cause to believe that Kelley was either a felon or a fugitive or both (the relevant statute, 18 U.S.C. § 922 (d) provides for criminal liability for "selling or disposing" of a firearm to someone under either status). This special verdict form was presented to the jury over Stegmeier's objection, upon the District Court's theory that Count 3 of the indictment was "duplicitous." The District Court also instructed the jurors that they would be violating their oaths if they were to base their verdict on factors

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other than those outlined by the Court and that if the Government proved its firearm charge beyond a reasonable doubt, the jury "must" convict Stegmeier.

On October 7, 2011 the jury convicted Stegmeier on both Counts 1 and 3. The jury marked the special verdict form to indicate that the jury had unanimously found that Stegmeier knew or had reasonable cause to believe Kelley was both a felon and a fugitive. Stegmeier was sentenced to 24 months incarceration on December 6, 2011. He filed his timely notice of appeal on December 16, 2011.

Stegmeier asserts five primary errors in this appeal, including insufficiency of the evidence with regard to both counts, Second Amendment violations with regard to Count 3, the unlawful use of the special verdict form and the use of abusive and intimidating jury instructions.

STATEMENT OF THE FACTS

William Stegmeier is a longtime manufacturer and businessman in the Sioux Falls, South Dakota area. Stegmeier's company, RMS Roller-Grinder, Inc. ("RMS"), manufactures grinding equipment for use in grain elevators and has contributed numerous innovations in the feed grain processing industry. Over the past two decades, RMS has employed scores of people at its plant in Tea, South Dakota, a suburb of Sioux Falls. Stegmeier met Thomas Kelley in 2004 and later

hired Kelley as an independent contractor to do sales and other work for RMS. Tr. Trans. 372-73. Kelley's employment lasted approximately eight months, until Kelley was laid off around January 2009. Tr. Trans. 377.

Around December 2008, another employee of RMS, Steve Schwarting, showed Stegmeier a newspaper clipping which reported that Thomas Kelley was facing a number of tax-related criminal charges. Tr. Trans. 377.

Stegmeier testified that he asked Thomas Kelley about the news clipping around December 2008, and that Kelley had said "Oh, don't worry about that. That's all going to get cleared up." Tr. Trans. 378. Stegmeier said he was unaware Kelley went to trial on charges in May 2010 or that Kelley had failed to appear at his sentencing hearing in August 2010. Tr. Trans. 380.

In late September or early October 2010, while Stegmeier was working in his home office, he was notified that Thomas Kelley had come to see him. Tr. Trans. 383. According to Stegmeier, Kelley indicated that he had been having personal or financial troubles and needed a place to stay until a harvesting job opportunity developed in a week or so.

According to Stegmeier, the conversation with Kelley was straightforward:

> Then he [Kelley] said, "The real reason I'm here, Bill, is I'm wondering if you have a room, an extra bedroom I could use for a week." I said, "Well, yeah, I sure do." We were standing beside the

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> motor home. I said, "You're more than welcome to a bedroom. It might make more sense to stay in the motor home. Then you have some privacy." Really what I was thinking about was my privacy. "Yeah, that's wonderful."

Tr. Trans. 384.

The motorhome contained space for several guests and had at least four beds, including a couch. Tr. Trans. 422-23. The motorhome contained some of Stegmeier's personal possessions including boxes of shoes. Tr. Trans. 385. As Thomas Kelley was loading some clothes into the motorhome, Stegmeier informed Kelley that, among other possessions which Stegmeier kept in the motorhome, there was a handgun in a closet of the motorhome. Tr. Trans. 385. During his trial, he testified: "The gun is always in the motor home. That's where I keep the gun. I had no reason to take it out." Tr. Trans. 432.

Stegmeier testified that he did not follow Kelley's tax case proceedings, which had been approximately a year and a half earlier. Tr. Trans. 430. In Stegmeier's account, "Kelley shows up. He's free as a bird, happy-go-lucky. Gives me no reason to believe he's running from anybody." Tr. Trans. 443. "Kelley came and went like a person who was not running or hiding" testified Stegmeier. "Kelley shopped in local grocery stores, and went to a casino in the area." "There was no – no, there was no evidence he was hiding or no behavioral indications to lead somebody to believe he was hiding. He looked like anybody

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else in his mannerisms and what he did." Tr. Trans. 443. Stegmeier testified that he had had previous employees with legal problems such as DUI cases, and that he did not monitor or keep track of their court proceedings. Tr. Trans. 442.

At trial, the Government produced five witnesses. The Government's star witness, Dave Gable, had worked with both Stegmeier and Kelley at the Wood Lake construction project. According to Gable, on a day in October or December 2010, Gable was present in Stegmeier's office along with RMS Supervisor Alex Pearson when Stegmeier showed the two of them a local county law enforcement website and told the two of them that Thomas Kelley was described on the website as a 'wanted' person. Alex Pearson, who testified for the Defense, contradicted Gable's account and said he never saw Stegmeier show such a website or heard Stegmeier say anything about Kelley being wanted. Trial Transcript, at 316-318.

Gable also testified that there were rampant rumors and gossip around the RMS facility in Tea as well as the Wood Lake site regarding Thomas Kelley being "wanted" or a fugitive. Defense witnesses Jennifer MacRunnels, Alex Pearson and Steve Alfson all contradicted this claim, testifying that they never heard such talk around the company. Gable identified RMS metal worker Steve Alfson as being the probable source of Gable's own idea that Kelley was a fugitive. However, the testimony of Steve Alfson contradicted Gable. Alfson, a nine-year RMS employee, worked in the RMS plant along with Gable, Thomas Kelley himself (at

times), and Stegmeier. Tr. Trans. at 346-52. Alfson testified that he did not recall any rumors around the shop that Kelley was a fugitive or a felon. Tr. Trans. 350. Alfson said he never told Dave Gable that Kelley was a fugitive and that he could not have done so because he himself did not know. Tr. Trans. 351.

Stegmeier's company, RMS, had previously contracted with the Equity grain elevator firm in Wood Lake, Minnesota to rebuild and install corn-grinding machinery. RMS was nearing certain deadlines and Stegmeier was enlisted by RMS to oversee the Wood Lake project. By October 2010 it appeared that Kelley's plans for working on local grain harvests had fallen through, and Stegmeier invited Kelley to work on the Wood Lake project. Stegmeier's motorhome was moved to Wood Lake to serve as a temporary lodging quarters and jobsite office.

The Wood Lake project grew to employ four workers: Stegmeier himself, acting as consultant and supervisor of the project, Kelley working as an independent contractor, Dave Gable, an RMS employee who was brought up from the RMS plant in Tea, and Jens Christians, an independent contractor. Trial Transcript, p. 180. Kelley, unlike the other workers at Wood Lake, requested Stegmeier to pay him in cash. Tr. Trans. 434. Kelley continued to stay in the motorhome, which was parked at the Equity Grain Elevator property in Wood

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Lake. Stegmeier also stayed in the motorhome when he stayed overnight at Wood Lake. Christians and Gable stayed at a local motel.

Stegmeier cooperated with authorities , and gave several statements to investigators regarding what he knew about Kelley's status. Stegmeier consistently indicated he was cavalier regarding Stegmeier's legal status in the hectic manner of his life in 2010.

SUMMARY OF THE ARGUMENT

The District Court erred in imposing upon the jury, over Stegmeier's timely objection, a special verdict form, a practice disfavored or prohibited in all Eighth Circuit jurisdictions. *See Gray v. United States*, 174 F.2d 919 (8th Cir. 1949) In general, special verdict forms increase the probability of conviction in criminal cases by invading the province of jury deliberations and subjecting them to a mechanical analysis. Contrary to the District Court's rationale for the special form, Count 3 was not duplicitious, and even if it was duplicitious, A proper, oral, jury instruction already instructed the jury on the requirement of unanimity. Moreover, by forcing the jury to focus on the low level of scienter required for conviction on the firearm count ("knew or had reasonable cause to believe"), the special verdict form directed the jury away from the much higher level of scienter required for conviction on the fugitive harboring count ("knew" with specific intent) and from the absence of evidence of "disposition" of Stegmeier's firearm to

Kelley in the firearm count. Thus, the special interrogatories increased the likelihood of conviction on both counts.

The verdict form followed a series of intimidating and threatening jury instructions given by the District Court, which pressured the jury into an understanding that guilty verdicts would be received more favorably than not guilty verdicts. Stegmeier's jurors were instructed that it would be a "violation of [thei]r sworn duty" if the jurors' deliberations strayed from court-approved factors, with a suggestion of punishment if they were to do so. The jury were also told, over Stegmeier's objection, that they were required to convict Stegmeier if the government proved its case beyond a reasonable doubt.

Stegmeier's most vigourously contested elements involved the absence of evidence of "disposal" of a firearm to Kelley under any normal, dictionary definition of the term disposal. Moreover, the imposition of criminal liability upon Stegmeier—a law-abiding citizen and gun owner up until the alleged events in this case—for mere failure to move his firearm from his RV upon Kelley's use of the RV—create a terrifying burden upon the Second Amendment rights of gun owners. If such a burden were to become the law, Americans' rights to keep firearms in their homes, vehicles and property would be severely burdened, as Americans would be required to remove such firearms before allowing access to guests or

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even to perform background checks upon guests who might enter their homes or other property.

Stegmeier also challenges the sufficiency of evidence that Stegmeier exhibited a specific intent to obstruct authorities from apprehending Tom Kelley. The crime of harboring a fugitive under 18 U.S.C. § 1071 requires evidence that a harborer did so with the specific intent to thwart investigators or law enforcement agencies. No such evidence was presented in Stegmeier's trial.

ARGUMENT

WILLIAM STEGMEIER WAS IMPROPERLY CONVICTED OF HARBORING A FUGITIVE, WHEN THE FACTS INDICATE THAT HE DID NOTHING TO PREVENT THOMAS KELLEY'S APPREHENSION AND ARREST.

Standard of Review: Arguments for insufficiency of evidence are reviewed *de novo*, viewing the evidence in the light most favorable to the jury verdict and making all reasonable inferences in support of the verdict. *United States v. Birdine*, 515 F.3d 842, 844 (8th Cir.2008). Reversal occurs only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id.*

Within the vast history of jurisprudence pursuant to 18 U.S.C. § 1071, almost never has a defendant's mere help with lodging a fugitive or providing employment to a fugitive led to a conviction for harboring a fugitive. Rather, 18 U.S.C. § 1071 explicitly requires a showing of physical acts of thwarting or evasion of authorities. See *United States v. Zerba*, 21 F.3d 250, 252 (8th Cir. 1994);

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United States v. Lockhart, 956 F.2d 1418, 1423 (7th Cir. 1992); *United States v. Udey*, 748 F.2d 1231, 1235-36 (8th Cir. 1982). "Failure to disclose a fugitive's location and giving financial assistance do not constitute harboring. . ." *Lockhart*, 956 F.2d at 1423, quoting *United States v. Stacey*, 896 F.2d 75, 77 (5th Cir. 1990); United States v. Yarbrough, 852 F.2d at 1543; United States v. Foy, 416 F.2d at 941. The plain text of § 1071 reads:

> Whoever [1] harbors or conceals any person [2] for whose arrest a warrant
> or process has been issued under the provisions of any law of the United States, [3] *so as to prevent his discovery and arrest*, [4] after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person, shall be fined under this title or imprisoned not more than one year, or both . . .

18 U.S.C. § 1071 (emphasis and numerals added).

It is significant that § 1071 requires for conviction the very highest levels of scienter and intent known to the criminal law: positive knowledge with specific intent. Yet the evidence of Stegmeier's knowledge of Kelley's arrest warrant was slender and contested, and the evidence of Stegmeier's specific intent to "prevent [Kelley's] discovery and arrest" was nonexistent. Compare to *United States v. Hogg*, 670 F.2d 1358 (4th Cir. 1982) (fugitive harboring convictions overturned due to insufficiency of the evidence; defendants had been party buddies of a fugitive who told some of them he was a prison escapee; some of the defendants had sheltered the fugitive temporarily, provided him with transportation, etc.).

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Conviction for harboring a fugitive requires some physical or affirmative act to prevent discovery or arrest, not mere passive assisting, employing or sheltering of a fugitive. See *United States v. Stacey*, 896 F.2d 75 (5th Cir. 1990). At trial, the prosecution made much of the fact that Kelley moved the RV he was staying in into the interior of a large metal Quonset hut, as if doing so was an act of concealment. Tr. Trans. 466. Yet Stegmeier was not even aware that the RV had been so moved, and such movement was consistent with getting the RV out of the sub-freezing temperatures of winter in Minnesota. The prosecution also made much out of "paper shuffling to get Tom Kelley paid in cash, but of course keep him off the books at least as far as the IRS was concerned." Tr. Trans. 466. Yet Kelley had always been an independent contractor, not a payroll employee, of RMS—even during Kelley's previous stint with RMS in 2008 (prior to Kelley ever being indicted)—and neither Stegmeier nor RMS *had ever made payroll reports to the IRS in Kelley's name*. Tr. Trans. 291. Jennifer MacRunnuls, a secretary and payroll clerk for RMS, indicated that independent-contractor arrangements of the type were "common at the time" and that such contractors had been paid in cash "once or twice" before. Tr. Trans. 293.

Most published federal cases alleging harboring a fugitive involve instances of lying to authorities or other deception in preventing a fugitive's arrest. *See, e.g., United States v. Bissonette*, 586 F.2d 73 (8th Cir.1978) (concealment of the fact that

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a fugitive was in defendant's basement); *Stamps v. United States*, 387 F.2d 993 (8th Cir. 1967) (active lying to authorities); *United States v. Udey*, 748 F.2d 1231 (8th Cir. 1984) (involving lies to law enforcement and hiding fugitive Gordon Kahl until Kahl was killed in a shootout on some of defendants' property); *United States v. Andruska*, 964 F.2d 640 (7th Cir. 1992) (defendant lied to police regarding identity of her fugitive passenger).

Yet deceiving authorities, by itself, does not constitute harboring a fugitive. A defendant's conviction of harboring or concealing a fugitive was reversed on appeal in *United States v. Foy*, 416 F.2d 940 (7th Cir. 1969), because the conduct was not sufficient to support a conviction. In *Foy*, FBI agents were searching for a fugitive in an apartment where the defendant was present. The defendant told FBI agents that he had not seen the fugitive that day, *id*. at 941; the FBI agents discovered the fugitive hiding on a ledge outside the bedroom window. The Court of Appeals for the Seventh Circuit considered whether the false statement failing to disclose the fugitive's hiding place was the type of assistance contemplated by § 1071 and held it was not. A false statement alone does not violate the statute because, "[t]he statute is intended to punish acts 'calculated to obstruct the efforts of the authorities to effect arrest of the fugitive....'" *Id*. *Foy* distinguished cases where the defendant commits affirmative acts intended to prevent the arrest of the fugitive.

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In Stegmeier's case, the government showed only that Stegmeier had some level of awareness that Kelley had legal problems (the evidence showed that Stegmeier was either cavalier regarding Kelley's legal status (taken in Stegmeier's best light) or that Kelley was aware, or became aware at some point, that Kelley was something of a 'wanted' man (although trial witnesses conflicted regarding this)). In any case, Stegmeier's acts of letting Kelley use his motorhome, employing Kelley and allowing Kelley to be paid in cash--even when taken in a light most favorable to the Government—do not establish a violation of § 1071. The government produced no evidence that Stegmeier obstructed authorities, deceived investigators or otherwise worked to thwart Kelley's apprehension. Accordingly, Stegmeier was wrongly convicted of harboring Kelley.

THE DISTRICT COURT ERRED IN CONSTRUING 18 U.S.C. § 922(d) TO ALLOW CONVICTION FOR MERELY ALLOWING A GUEST TO HAVE ACCESS TO A FIREARM IN A RESIDENCE OR VEHICLE

Never in the history of the Federal Gun Control Act has a court recognized 'host liability'—the mere allowing of a prohibited person to have access to a living area containing a firearm—as grounds for conviction of the host for "selling or otherwise disposing" of a firearm to a prohibited person under 18 U.S.C. § 922(d). Stegmeier was convicted of violating 922(d) for simply having a gun in his RV at a time when he allowed a guest who happened to be a prohibited person to stay in the RV. Stegmeier did not hand the handgun to Kelley, did not deliver the

handgun to Kelley, and did not in any way relinquish his own title or ownership, even temporarily, to Kelley. No fingerprints were found on the firearm, and no evidence was produced indicating even that Kelley ever touched the firearm. The firearm was, however, found in a location in Stegmeier's RV different from where Stegmeier normally kept it, and some of Kelley's items, including a wallet, were found near the firearm.

Significantly, Stegmeier's conviction is inconsistent with the plain, dictionary definition of the term "dispose." According to *Black's Law Dictionary*, dispose means "To alienate or direct the ownership of property, as disposition by will." (2nd ed. 1910). The placement of the term "dispose" alongside the term "sell" in § 922(d) ("It shall be unlawful for any person to *sell or otherwise dispose*") also suggests that conviction requires some evidence of an intent at least to transfer ownership, at least temporarily. Yet the Supreme Court greatly expanded the scope of the term "dispose"—by essentially equating it with "delivery"—in *Huddleston v. United States*, 415 U.S. 814 (1974), and This Court of Appeals affirmed this expansive definition in *United States v. Monteleone*, 77 F.3d 1086, 1092 (8th Cir. 1996).

Nonetheless, the facts in Stegmeier's case are insufficient to sustain his conviction even according to the expanded definition of "dispose" (mere delivery) recognized in *Monteleone*.

The District Court twice described the gun case against Stegmeier as "weak" but allowed the count to go to the jury and sustained the jury's verdict. After the prosecution rested, Stegmeier's Counsel made an oral motion for acquittal on Count 3. There was so little evidence supporting the charge that the District Court almost granted the motion:

> THE COURT: But it seems to me that it's a jury question with regard to that. The gun case, *I would say, is weak*, but that's not for the Court to determine. So the motion is denied.

Tr. Trans. At 410.[1]

When the Government moved for immediate detention of Stegmeier following the jury's verdict, the District Court again expressed an opinion that the Count "wasn't strong."

> THE COURT: Thank you. You can sit down. Even assuming there's some presumption [of detention after conviction] with regard to that, this is an unusual gun case. It isn't a situation of selling a hot gun to somebody. As the Court reflected, frankly, the jury convicted the

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[1] Stegmeier's counsel renewed its motion to dismiss Count 3 at the end of the defense's case:

> MR. BECRAFT: I'll renew on the same grounds, Judge.
>
> - * * *
>
> THE COURT: Well, the Government's position didn't get any better on that one in the defense case, but, nonetheless, at the end of the Government's case the Court found there was enough on the gun count to submit it to the jury. So it will be submitted to the jury. All right.

Tr. Trans. 464.

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> Defendant, *but the gun case under these circumstances, in the Court's view, wasn't strong* under the facts of this case.

Tr. Trans. 507. The District Court denied the Government's motion and continued Stegmeier's release on bail.

Even under the most expansive notions of constructive possession, constructive disposition and "possession-by-dominion," the facts in Stegmeier's case do not establish proof sufficient for a reasonable jury to return a verdict of guilty regarding Count 3 of the indictment. Stegmeier did not sell, dispose or otherwise transfer even temporary ownership or possession of the handgun in question to Kelley. Stegmeier merely provided Thomas Kelley with the temporary use of a motorhome, while retaining full ownership of the motorhome and rights of entry into the motorhome.

Significantly, a number of convictions for possession-of-firearms-by-felons have been reversed based on the government's failure to sufficiently connect the defendants to the weapons they allegedly possessed. *See United States v. Blue*, 957 F.2d 106 (4th Cir. 1992) (conviction reversed where evidence showed only that a gun was found under a defendant's car seat and there was no other evidence linking the gun to the defendant other than an officer's testimony that he had seen the defendant's shoulder dip down after stopping the car); *United States v. Soto*, 779 F.2d 558, 560-61 (9th Cir. 1986) (mere presence of defendant as passenger in

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car where guns were found insufficient to establish possession; the proximity of the defendant to weapons goes only to accessibility but not to the dominion or control element which the government must prove); *United States v. Beverly*, 750 F.2d 34 (6th Cir. 1984) (conviction reversed due to insufficient evidence of possession despite fact that the gun had defendant's fingerprints on it and was found in a wastebasket near the defendant); *United States v. Bernal*, 719 F.2d 1475, 1479 (9th Cir. 1983) (same); *United States v. Pitts*, 3 F.Supp.2d 637 (E.D.Pa. 1998) (defendant driver could not be sentenced for carrying a firearm in a Mazda car where gun was found in close proximity but where he did not own the gun and no one ever observed him possessing the gun).

In no reported published case has a conviction been upheld for disposing of a firearm to a felon/fugitive based on facts such as those exhibited in Stegmeier's case. Absent from the trial was any evidence that Stegmeier did anything to aid Kelley in possessing or taking possession of the firearm; that Stegmeier personally offered the firearm to Kelley, that Stegmeier even handled the firearm in the presence of Kelley; that Kelley handled, held, fired, used or took possession of the firearm; that Kelley was ever in the direct unobstructed presence of the firearm; or that Kelley and Stegmeier ever shared a moment in the mutual presence of the firearm. There were no fingerprints found on the firearm belonging to Kelley or Stegmeier. When Stegmeier was asked at trial if he had any arrangement about the

gun with Tom Kelley, Stegmeier testified: "No. I didn't even authorize him to touch it." Tr. Trans. 406.

Additionally, although there was evidence that Thomas Kelley may have had general access to the interior of the motorhome, there was no evidence that Kelley had dominion and control over every area of the motorhome. Indeed, there was no evidence that the firearm was located in an area where Thomas Kelley had exercised dominion and control. (Only a reference to the firearm being located near Kelley's wallet was referenced).

Significantly, convictions for possessing and transferring firearms have been reversed where they were supported by evidence far exceeding the evidence of possession or transfer suggested by the government in Stegmeier's case. For example, in *United States v. Katz,* 582 F.3d 749 (7th Cir. 2009), the Seventh Circuit reversed the conviction of a felon convicted of possessing a firearm that was found with his fingerprints on it in his girlfriend's home. The *Katz* Court found that the evidence of Katz's dominion and control over every area of his girlfriend's home was not sufficiently established at trial.

STEGMEIER HAD A SECOND AMENDMENT RIGHT TO KEEP A HANDGUN IN HIS RV AND WAS UNDER NO OBLIGATION TO REMOVE THE HANDGUN UPON ENTERTAINING GUESTS

Much of the above discussion regarding the insufficiency of evidence of Stegmeier's "disposal" of a firearm must also be examined under the constitutional lens provided by the Second Amendment. If Stegmeier's conviction were to be sustained, such a precedent would heavily burden the rights of millions of Americans to keep and bear arms in their living quarters, their motorhomes, their boats and their other vehicles. The Supreme Court, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), ruled that the Second Amendment protects an individual, personal, right to keep and bear firearms for general purposes, including self-defense.

Stegmeier's conviction under Count 3 was a conviction of a gun owner for merely inviting a guest to stay in a motorhome that happened to contain a firearm in a closet. According to Stegmeier's testimony, he normally kept the handgun in a closet in the motor home and kept other guns around his home.[2] Stegmeier testified that he informed Kelley of the firearm but "didn't even authorize him to touch it." Tr. Trans. 406.

If Stegmeier's conviction is sustained as the law, virtually every person who keeps guns in his homes or vehicles would be liable for federal prosecution under 922(d) in the event that someone with a felony conviction or other legal problems

[2] "The gun is always in the motor home. That's where I keep the gun. I had no reason to take it out." Tr. Trans. 432.

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enters their homes or vehicles. Those who display guns at tables in gun shows, flea markets or antique fairs could be prosecuted for felonies for failing to perform background checks on all persons who stride by. Sports Department salesmen at WalMart, L.L. Bean, or other department stores could face felony prosecution if someone with legal problems or criminal convictions stops by to shop for mittens or backpacking gear.

Stegmeier suffered under no firearm disabilities whatsoever prior to his indictment in this case, and he was entitled to keep arms within the confines of his motorhome. *Cf., United States v. Hadley*, 431 F.3d 484, 507 (6th Cir. 2005); *United States v. Kitchen*, 57 F.3d 516, 520 (7th Cir. 1995). Stegmeier, a nonfelon who had a lawful right to own and possess firearms, was the sole owner of the handgun and kept it in his motorhome—as was his constitutional right. Accordingly, Stegmeier's conviction on Count 3 was violative of the Second Amendment.

THE DISTRICT COURT'S USE OF A VERDICT FORM WITH SPECIAL INTERROGATORIES VIOLATED STEGMEIER'S RIGHTS TO DUE PROCESS AND TRIAL BY JURY

Standard of Review: Normal trial rulings, after a timely objection, are subject to abuse of discretion analysis. *See United States v. Rubashkin*, 655 F.3d 849, 861 (8th Cir. 2011). However, the issues at issue herein also involve a construction of law that a long-settled Eighth Circuit ruling, *United States v. Gray*, 174 F.2d 919 (8th Cir. 1949), is not binding or at least distinguishable. Rulings on the construction of law are subject to *de novo* review. *Alpine Glass, Inc. v. Ill. Farmers Ins. Co.*, 643 F.3d 659 (8th Cir. 2011).

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For centuries, the general rule in Anglo-American criminal cases has been that juries have a right to issue a general verdict, a one- or two word statement or a check next to the designation "guilty" or "not guilty" on a verdict form. Under basic principles of jury independence, a criminal jury is never required to explain its verdict and can never be punished for an acquittal that seems illogical or unsound to prosecutors or judges. Special interrogatories and special verdict forms in criminal cases—in which jurors are requested to explain their reasoning or to describe their factual findings in detail—are disfavored across the federal circuits. *See, e.g.*, *Gray v. United States*, 8 Cir., 174 F.2d 919 (1949); *Heald v. Mullaney*, 505 F.2d 1241, 1245 (1st Cir. 1974) ("We have little doubt that, in general, the use of special questions and verdicts in any criminal proceeding, state or federal, is suspect not only as a matter of sound judicial policy but of due process as well"); *United States v. Spock*, 416 F.2d 165, 180-81 (1st Cir. 1969); *United States v. Adcock*, 2 Cir., 447 F.2d 1337 (2d Cir. 1971); *United States v. Bosch*, 505 F.2d 78, 82 (5th Cir. 1974); *United States v. Wilson*, 629 F.2d 439, 443 (6th Cir. 1980) ("a jury is entitled to acquit the defendant because it has no sympathy for the government's position. It has a general veto power, and this power should not be attenuated by requiring the jury to answer in writing a detailed list of questions or explain its reasons").

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While there are exceptions, and special interrogatories are occasionally sought by defendants,[3] such interrogatories are generally disfavored because they have the tendency of increasing the likelihood of conviction. *See, e.g., United States v. Ogando*, 968 F.2d 146, 147-48 (2d Cir. 1992) (asking juries questions based on their verdict risks "catechizing jurors away from an acquittal towards a seemingly more logical conviction. Yet the jury, as the conscience of the community must be permitted to look at more than logic"); *United States v. Ruggiero*, 726 F.2d 913, 927 (2d Cir. 1984) (Newman, J., concurring in part and dissenting in part) ("[t]here is apprehension that eliciting "yes" or "no" answers to questions concerning the elements of an offense may propel a jury toward a logical conclusion of guilt, whereas a more generalized assessment might have yielded an acquittal"); *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998)(special findings may "partly restrict [the jury's] historic function, that of tempering rules of law by common sense brought to bear on the facts of a specific case."); *Spock*, 416 F.2d 165, 182 (1st Cir. 1969) ("There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step . . . . By a progression of

[3] Indeed, there are cases where a defendant sought but was denied special interrogatories, and which were later reversed due to prejudice. *See United States v. Loeswick*, 844 F.2d 1397 (9th Cir. 1988) (reversing conviction on one count which alleged two conspiracies because "[t]he trial judge here denied the defendants' request for special interrogatories and for an additional instruction").

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questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted ”).

The rule against special interrogatories in criminal cases in the Eighth Circuit is as strong as in any circuit. In *Gray v. United States*, 174 F.2d 919, 923-24 (8th Cir. 1949), this Court of Appeals observed that “[i]n such trials the practice has been settled time out of mind to charge but one crime in one count, to accept but one general plea to it and to call upon the jury to make but one general response, guilty or not guilty. Such established procedure was obviously departed from here [in *Gray*] over appellant's objection and it may not be held that such a departure did not affect appellant's substantial right to be tried according to law.” Thus, not only does the law in This Circuit generally forbid special interrogatories in criminal cases, but it also mandates that the use of such interrogatories over a defendant’s objection is never harmless error. *See also United States v. Williams*, 902 F.2d 675, 678 (8th Cir. 1990) (“As a general rule, courts avoid using special verdict forms because of their potential for confusing a jury.”). This rule has been repeated several times in Eighth Circuit decisions. *United States v. Lamoreaux*, 422 F.3d 750, 756 (8th Cir.2005); *United States v. Pierce*, 479 F.3d 546, 551 (8th Cir. 2007).

THE SPECIAL VERDICT FORM

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At Stegmeier's trial, the District Court, with the approval of the prosecutor but over the timely objection of Stegmeier, presented the jury with a verdict form that asked the following special interrogatories regarding Count 3:

Did you unanimously agree that the defendant knew or had reasonable cause to
believe that Thomas R. Kelley had been convicted of a crime punishable by
imprisonment for a term exceeding one year?
_____ Yes _____ No

Did you unanimously agree that the defendant knew or had reasonable cause to
believe that Thomas R. Kelley was a fugitive from justice?
_____ Yes _____ No

Stegmeier's counsel objected to the verdict form on October 6:

> THE COURT: You are talking about the verdict form now?
>
> MR. BECRAFT: Yes, Your Honor. We object to the interrogatories that relate to the firearm charge.
>
> THE COURT: Just a minute. Let me look at that. Well, I added that from the initial draft that I received of the instructions, and I'll tell you why. That's a disjunctive charge. In the event that there was a guilty verdict on that, but it's in the disjunctive, first of all, the instructions tell the jury whichever of the disjunctive you find, it has to be unanimous on whichever one. Half of them can't think it's one is disjunctive and half of them think it's the other, and he's, therefore, guilty, because one way or another we get to an even dozen.
>
> So the rest of it is if there was a challenge as to the sufficiency of the evidence, then you're not going to know which one it was that

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> they found guilt on. That's the reason theat I split it up and have that special interrogatory. Just as a matter of practice, I don't like special interrogatories, but sometimes they're necessary. That's the reason the Court entered that in.
>
> Let me hear from the Government. Do you have any objection to the special interrogatory?
>
> MR. KOLINER: I don't, Your Honor.
>
> THE COURT: That was my thinking process in doing that.
>
> MR. BECRAFT: I just think it should be handled with an instruction. For either one of these, you have to unanimously agree, and it's taken care of giving that type of an instruction rather than an interrogatory.
>
> THE COURT: The instruction says that.
>
> MR. BECRAFT: I think the instruction is sufficient to cover, and we don't need interrogatories is my position.
>
> THE COURT: I understand. I think, for one thing, in testing sufficiency of the evidence, you need to know which, if either one of them or both of them, they found unanimously as a basis for conviction. So I'm going to go with my idea and give the special interrogatory.

Tr. Trans. 451-53.

Stegmeier renewed his objection to the verdict form in a Rule 29 Motion for Acquittal after the trial, citing this Circuit's 1949 ruling in *Gray*. The District Court denied the motion on December 2, 2011 (filing # 66), distinguishing *Gray* and saying that Count 3 was "duplicitous" and thus warranted the special verdict form over Stegmeier's objection. According to the District Court:

> The primary concern with a duplicitous charge is that a jury may convict a defendant without unanimously agreeing on the defendant's guilt with respect to a particular offense. *See United States v. Karam*, 37 F.3d 1280, 1286 (8th Cir. 1994). A duplicitous charge may be corrected by giving a unanimity instruction comparable to the one that was included in Instruction No. 21 in this case. Id. However, the wisest approach is to give both a unanimity instruction and use a special verdict form so that the record clearly reflects unanimity in the jury's verdict. *See United States v. Starks*, 472 F.3d 466, 471 (7th Cir. 2006). The use of the special verdict form does not entitle Stegmeier to a judgment of acquittal.

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The District Court cited two opinions, *United States v. Karam*, 37 F.3d 1280 (8th Cir. 1994) and *United States v. Starks*, 472 F.3d 466 (7th Cir. 2006). Neither case supports the proposition that special interrogatories may be imposed upon a jury, over a defendant's objection, whenever there exists a danger of "a duplicitous charge." Indeed, *Karam*, the only Eighth Circuit case, <u>stands for the precise opposite proposition</u>.

United States v. Karam involved a defendant who requested "dismissal of the indictment or, in the alternative, providing the jury with a special verdict form." 37 F.3d at 1285. The Eighth Circuit wrote that "we believe the district court's instructions to the jury cured the duplicity." *Id.* The Court of Appeals then referenced cases in three other circuits which have held that "the risk of a nonunanimous verdict inherent in a duplicitous count may be cured when the jury

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is given a limiting instruction that requires it to unanimously find the defendant guilty with respect to at least one distinct act." "We find the rationale of these cases persuasive," wrote this Court, "<u>and adopt it as our own</u>" (emphasis added).

United States v. Starks, a Seventh Circuit opinion, involved a defendant accused of obstructing justice by doing either or both of physically pushing a Justice Department investigator and/or attempting to destroy an affidavit. The district court gave a special verdict form to the jury asking the jury to state by which means—pushing the investigator or destroying the affidavit (or both)—the defendant had obstructed justice. Because there was no objection to the verdict form by either party, no issue was framed regarding the special verdict form on appeal. The Seventh Circuit praised the district judge's actions, saying "[a]ny concerns about duplicity in Starks' indictment were cured by the prudent actions of the district judge" in giving both a unanimity instruction and "wisely [going] further by using the special verdict form. . . ." Nothing in *Starks* supports the imposition of a special verdict form in a criminal case over a defense objection. Notwithstanding the Seventh Circuit's dicta that it is "wise" to use both an oral instruction and a special verdict form to ensure jury unanimity in cases of allegedly duplicitous counts, *never* has a federal appellate court held that such dual mechanisms are required to sustain a conviction on such a count.

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Moreover, in Stegmeier's case, (1) Count 3 was not duplicitous, (2) even if Count 3 was duplicitous, any error attributable to such duplicity was waived by Stegmeier, and (3) any problem arising from such alleged duplicity was cured by a proper jury instruction. The imposition of the interrogatories over Stegmeier's objection prejudiced Stegmeier by directing the jury's focus toward matters which were largely uncontested by Stegmeier to the exclusion of Stegmeier's most strenuously asserted defenses.

COUNT 3 WAS <u>NOT</u> DUPLICITOUS

Duplicity occurs when an indictment combines two or more distinct and separate offenses into a single count. *United States v. Nattier,* 127 F.3d 655, 657 (8th Cir.1997). The "principal vice" of a duplicitous indictment "is that the jury may convict a defendant without unanimous agreement on the defendant's guilt with respect to a particular offense." *United States v. Yielding*, 657 F.3d 688, 702 (2011). Count 3 in Stegmeier's case <u>was not duplicitous</u>. The Count alleged a single violation of 18 U.S.C. 922(d), the sale or disposal of a firearm to a prohibited person. Although Thomas Kelley was both a felon and a fugitive in August 2010, the alleged act of selling or disposing a firearm to Kelley was a single offense, as an act of selling or disposing of the same firearm to Kelley could not have involved different facts of commission on Stegmeier's part.

An indictment that alleges, in a single count, different ways the defendant might have violated a criminal law is not duplicitous. *See* FED. R. CRIM. P. 7(c)(1); see, e.g., *United States v. Calderin-Rodriguez*, 244 F.3d 977, 985 (8th Cir. 2001) (indictment charging conspiracy to distribute several different drugs not duplicitous); *United States v. Stewart*, 433 F.3d 273, 319 (2d Cir. 2006) (indictment charging "several different types of fraudulent conduct" not duplicitous because not different offenses but means of committing single offense); *United States v. Caldwell*, 302 F.3d 399, 408 (5th Cir. 2002) (indictment charging mail fraud not duplicitous because each count alleged only 1 instance of use of mail for fraud though mailing in furtherance of multiple schemes); *United States v. Damrah*, 412 F.3d 618, 622-23 (6th Cir. 2005) (indictment charging multiple means of committing single offense not duplicitous); *United States v. Davis*, 471 F.3d 783, 790-91 (7th Cir. 2006) (indictment charging health care fraud accomplished through 3 different methods not duplicitous; *United States v. Arreola*, 467 F.3d 1153, 1158, 1161 (9th Cir. 2006) (indictment charging use and possession of firearm not duplicitous because use and possession single offense); *United States v. Weller*, 238 F.3d 1215, 1219-20 (10th Cir. 2001) (indictment charging embezzlement and misapplication of funds not duplicitous because different means of committing single offense); *United States v. Hubbell*, 177 F.3d 11, 14 (D.C. Cir. 1999) (indictment charging numerous false statements and acts of

concealment not duplicitous because count alleged scheme of concealment of material facts).

The unit of prosecution described in Section 922(d) is the selling or disposing of a firearm to an individual who is legally prohibited from receiving it. Cases in which the Government alleges two counts for a single firearm transaction to someone in <u>two categories</u> *have been reversed on grounds that a single firearm disposition can only be charged as one crime*. *See United States v. Richardson*, 439 F.3d 421 (8th Cir. 2006) (en banc) ("Congress intended the 'allowable unit of prosecution' to be an incident of possession regardless of whether a defendant satisfied more than one section 922(g) classification, possessed more than one firearm, or possessed a firearm and ammunition"); *United States v. Parker*, 508 F.3d 434, 439-40 (7th Cir. 2007) (indictment charging both possession of firearm by drug user and possession by felon multiplicitous because unit of prosecution is individual incident of firearm possession).

The same goes for cases in which the Government has charged a felon with multiple counts involving multiple firearms for the same act of possession. *See, e.g., United States v. Webber*, 255 F.3d 523, 527 (8th Cir. 2001) (indictment charging separate counts for firearm possession not multiplicitous because based on separate transactions); *United States v. Matthews*, 240 F.3d 806, 813 (9th Cir. 2000) (indictment charging 3 counts of being felon-in-possession multiplicitous

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because defendant possessed all 3 guns simultaneously on single occasion). Only where firearm violations involve different acts or transactions may such offenses be broken up into different counts. *United States. v. Grant*, 114 F.3d 323, 329 (1st Cir. 1997) (indictment charging 4 counts of weapons violations not multiplicitous because each count related to distinct time place, and type of weapon); *United States v. Goodine*, 400 F.3d 202, 203-04, 209 (4th Cir. 2005) (indictment charging gun crimes not multiplicitous because bullets and gun were at different times in different locations and charges supported by distinct evidence); *United States v. Jenkins*, 313 F.3d 549, 557 (10th Cir. 2002) (indictment charging 2 counts of gun possession not multiplicitous because different events on different dates). Thus, the dual disabilities of Thomas Kelley could not have been charged in separate counts.

Nor could there have been any sentencing implications relating to Kelley's dual statuses,[4] as an alleged sale or disposition of a firearm to Kelley under either or both statuses invoked the identical sentence. Compare this to *United States v. Sturdivant*, 244 F.3d 77 (2d Cir. 2001). *Sturdivant* involved a count alleging

[4] As the criminal laws have multiplied and grown more complicated over the past century, some courts and commentators have become more tolerant of special verdict forms to resolve sentencing issues. For a discussion, see *United States v. Barrett*, 870 F.2d 953, 955 (3d Cir. 1989) ("sharply contrast[ing]" use of special interrogatories "to assist in sentencing" with their impermissible use "to clarify an ambiguous verdict").

participation in two separate drug transactions. There was "uncertainty as to whether the jury's general verdict represented a unanimous finding that defendant was guilty based on participation in both drug transactions or just one." *Id*. At 72. There were sentencing implications because one transaction involved a higher drug quantity, yet the District Court in *Sturdivant* "assumed that he had been convicted of possessing and distributing the aggregate drug quantity involved in both" transactions. *Id*. The Second Circuit found that the duplicity problem was cured by the use of a proper unanimity jury instruction, but ordered that Sturdivant be resentenced as if the jury had convicted him of only the lower drug quantity.

EVEN IF COUNT 3 WAS DUPLICITOUS, ANY ERROR ATTRIBUTABLE TO SUCH DUPLICITY WAS WAIVED BY STEGMEIER

Not only was Count 3 *not* duplicitous. The law makes clear that Stegmeier had waived any claim that Count 3 was duplicitious by not challenging such alleged duplicity before trial. "A challenge to an indictment based on duplicity must be raised prior to trial.... Raising the objection at the close of the government's case is too late." *United States v. Hager*, 969 F.2d 883, 890 (10th Cir.1992). As a general rule, all objections to the form of an indictment must be made before trial. *United States v. Trammell*, 133 F.3d 1343 (10th Cir. 1998) (holding that because a defendant did not timely challenge his indictment on duplicity grounds, he waived any later challenge based on a failure to use a special verdict form to avoid the alleged duplicity problems). See also *United States v.*

Murray, 618 F.2d 892, 899 n.8 (2nd Cir. 1980) ("Under Fed. R. Crim. P. 12(b)(2), objections based on defects in the indictment must be raised prior to trial").

EVEN IF COUNT 3 WAS DUPLICITOUS AND STEGMEIER HADN'T WAIVED HIS OBJECTION, ANY PROBLEM ARISING FROM SUCH DUPLICITY WAS CURED BY A PROPER JURY INSTRUCTION

In all of the annals of federal criminal law, never has any federal circuit reversed a conviction for duplicity on grounds that a convicting court should have used a special verdict form where an oral jury instruction properly drew the jury's attention to the need for unanimous agreement among jurors to cure the problem. The Courts of Appeals are resounding in their agreement on this question. See *United States v. Nattier*, 127 F.3d 655, 658 (8th Cir. 1997) (duplicitous indictment not fatal because risk of nonunanimous verdict resulting from alleged duplicitous indictment cured by limiting instruction); *United States v. Trammell*, 133 F.3d 1343, 1354-55 (10th Cir. 1998) (duplicitous indictment not fatal because risk of nonunanimous verdict resulting from duplicitous indictment cured by jury instruction: "This court has held jury instructions which are far more general than those provided here counteract problems created by a duplicitous indictment"); *United States v. Buchmeier*, 255 F.3d 415, 425 (7th Cir. 2001) (duplicitous indictment harmless error where no prejudicial evidentiary rulings at trial and jury given unanimity instruction). *United States v. Miller*, 520 F.3d 504, 513-14 (5th Cir. 2008) (any alleged duplicity cured by jury instruction clarifying which alleged

affirmative act required unanimous finding to support conviction); *United States v. Damrah*, 412 F.3d 618, 622-23 (6th Cir. 2005) (any alleged duplicity cured by unanimity instruction to jury explaining 3 elements of crime and requiring unanimous agreement on each); *United States v. Hughes*, 310 F.3d 557, 560 (7th Cir. 2002) (any alleged duplicity cured by instruction requiring jury to agree unanimously on each aspect of conspiracy).

Indeed, as already described, This Circuit affirmatively ruled that such a limiting instruction is all that is required to cure a duplicitous count, as a matter of law. *United States v. Karam*, 37 F.3d 1280 (8th Cir. 1994) ("we believe the district court's instructions to the jury cured the duplicity," as other cases have held, and "[w]e adopt [this rule] our own").

In Stegmeier's case, an oral instruction (Instruction 21) properly informed the jury of the requirement that the jury must be unanimous on each factual component required for a guilty verdict on Count 3.

> The Government may prove the second element by either proving beyond a reasonable doubt that the defendant knew or had reasonable cause to believe that Thomas R. Kelley had been convicted a crime punishable by imprisonment for a term exceeding one year, or by proving beyond a reasonable doubt that the defendant knew or had reasonable cause to believe that Thomas R. Kelley was a fugitive from justice. However, you must <u>unanimously agree</u> that the defendant knew or had reasonable cause to believe that Thomas R. Kelley had been convicted of a crime punishable by imprisonment for a term exceeding one year, or <u>unanimously agree</u> the defendant knew or had

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> reasonable cause to believe that Thomas R. Kelley was a fugitive from justice. If you cannot agree in that manner, you must find the defendant not guilty of the crime of Providing a Firearm to a Prohibited Person.

Final Jury Instruction #21 (excerpted) (emphasis added), Document # 54.

COUNTS 1 AND 3 REQUIRE SIGNIFICANTLY DIFFERING LEVELS OF SCIENTER FOR CONVICTION, BUT THE SPECIAL VERDICT FORM FOCUSED THE JURY ON THE LOW LEVEL OF SCIENTER APPLICABLE TO COUNT 3.

It is significant that Counts 1 and 3 require substantially differing levels of scienter for conviction. Conviction under Count 1 required proof beyond a reasonable doubt of the very highest levels of scienter and intent recognized in criminal law: Stegmeier's positive knowledge of the existence of an arrest warrant and of Kelley's fugitive status, along with specific intent to thwart the authorities in Kelley's behalf. Conviction under Count 3, on the other hand, required only that Stegmeier be found to have had "*reasonable cause* to *believe*" that Kelley was prohibited from possessing firearms. The verdict form imposed upon the jury focused the jury's deliberations upon the much lower scienter requirements of the firearm count.

It is also significant that Stegmeier's defense to the firearm count involved the total absence of evidence of transfer or disposal of a firearm from Stegmeier to Kelley. Stegmeier barely contested that he might have had "reasonable cause to

believe" that Kelley had some questionable legal status.[5] The special interrogatories on the verdict form regarding Count 3, by forcing the jury's deliberations to center on the low scienter requirement of Count 3, drew the jury's deliberations away from both the higher scienter requirement of Count 1 and the contested disposal of the firearm in Count 3. The special verdict form <u>led the jury to focus away from each of Stegmeier's primary defenses in the trial</u>. Compare *United States v. McCracken*, 488 F.2d 406, 414 (5th Cir. 1974) ("[u]nder some conditions the repetition of particular instructions might have a tendency to force a verdict against an accused by unduly underscoring certain aspects of the case").

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[5] Although Stegmeier's scienter regarding Kelley's statuses was in some contention, the fact of Stegmeier's "reasonable cause to believe" was not in serious doubt. Stegmeier's counsel virtually stipulated to Kelley's dual statuses during closing argument:

> MR. BECRAFT: . . . the first fact, the first element you have to find is that a Federal warrant had been issued for Tom Kelley for his convictions. Well, *the defense in this case does not dispute that. Undoubtedly, that did happen. Tom Kelley was indicted. . . . That's an undisputed element.*
>
> * * *
>
> We're not contesting that [Thomas Kelley] had been convicted, and it was a crime punishable for more than a year, and Tom Kelley was a fugitive from justice.
>
> What we do dispute in this case is this. When you look at the statute, it says "sell or otherwise dispose of." That didn't happen in this case. And, also, he was completely unaware of the fact that Tom Kelley was a—had been convicted and was a fugitive. Transcript at 485-86.

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Thus, the special verdict form had the tendency to lead the jury down a pathway to wrongful conviction on both counts.[6]

THE DISTRICT COURT'S UNNECESSARILY INTIMIDATING INSTRUCTIONS TO THE JURY

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[6] Nor can the sequence of print on the verdict form—with the request for the jury's 'guilty' or 'not guilty' entries on Counts 1 and 3 coming first, followed by the special interrogatories—mitigate the error in Stegmeier's case. The interrogatories begin on the front face of the two-page verdict from and provided the jury with the clear focus on the very low scienter requirements of 18 U.S.C. §922(d) to the exclusion of the many other issues in contention in Stegmeier's trial. When Stegmeier's jury looked at the verdict form during their deliberations they saw the general verdict questions on the same side of the page as the first of the interrogatories. Nor did the District Court direct the jury to address the form sequentially. *See* Final Jury Instruction No. 23's final direction: *"Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed upon the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal that you are ready to return to the courtroom."*

For a discussion of this issue, see *United States v. Udeozor*, 515 F.3d 260, 271 (4th Cir. 2008). *Udeozor* involved special interrogatories pertaining to sentencing facts. The Fourth Circuit wrote that "while it is better practice to submit the general verdict and special verdict forms separately, the district judge [in *Udeozor*], both in the formal jury instructions and in the verdict form, *instructed the jury not to consider the three special findings unless it first found Dr. Udeozor guilty*" (emphasis added). In Stegmeier's case, there was no such admonition and the jury was faced with the verdict form en toto, with not even a limiting instruction regarding the sequence with which the jury were expected to address the form.

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In Stegmeier's case, the intimidating use of special interrogatories followed a series of onerous instructions by the District Court, each stressing to jurors that they were under the control of the District Judge and suggesting that the jurors may be punished if they stray from the District Court's directions:

> **Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything other than the evidence received in the case and the instructions of the Court.**

Jury Instruction 3, Document # 54: 4.

This District Court's warning that it would be a "violation of your sworn duty" was not only false.[7] It was also menacing and intimidating, in that it

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[7] Note that the tone of Instruction #3 is not substantiated by the text of the actual oath the jurors took in Stegmeier's case. The oath does not appear in the transcript (which reflects only "(Jury, sworn)" (Trial Transcript at 25). However, the oath used in the U.S. District of South Dakota states:

> *You, and each of you, do solemnly swear or Affirm that you will well and truly try the issues and true deliverance make, in the case no___ pending between the United States of America and the defendant(s) ___, and a true verdict render, according to the evidence and the law as given you by the Court. So Help You God.*

This oath hardly bound the jurors not to "base [their] verdict upon anything other than the evidence received in the case and the instructions of the Court." The jurors in Stegmeier's case swore only that they would "well and truly try the issues and a true deliverance make" in the case, and that they would render a "true verdict" "according to the evidence and the law as given by the Court"—though not to the exclusion of "anything" else.

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suggested to jurors that they stood to be punished if the scope of their deliberations widened into matters "other than the evidence received in the case and the instructions of the Court." Of course, this is false and in defiance of well settled principles of trial by jury. Stegmeier's counsel properly and timely objected to the giving of this false and intimidating instruction:

> MR. BECRAFT: I would like to direct the Court's attention to no. 3. . . . It says, "keep constantly in mind that it would be a violation." I think it would be better to say something like, "Keep constantly in mind that you should base your verdict upon the evidence," and not talk about violation of your sworn duty. That's my suggestion for a couple word changes on No. 3.
>
> THE COURT: I understand the suggestion, but I think as it's stated, it correctly states the law. I'm not saying yours doesn't, but I think it's a matter of semantics.

Tr. Trans. 449-50.

Contrary to the District Court's suggestions, such an instruction does not correctly state the law. *See Jackson v. Virginia,* 443 U.S. 307, 317 n.10 (1979) (referring to the jury's "unassailable" power to issue an "unreasonable verdict of 'not guilty'"); *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (criminal juries have an inherent discretionary power to "decline to convict," and such "discretionary exercises of leniency are final and unreviewable"); *Batson v. Kentucky,* 476 U.S. 79, 86-87 n.8 (1986) (the jury's role "as a check on official power" is in fact "its intended function"); *United States v. Wilson*, 629 F.2d 439, 443 (6th Cir. 1980) ("a jury is entitled to acquit the defendant because it has no

sympathy for the government's position. It has a general veto power**");** *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969) ("the jury, as the conscience of the community, must be permitted to look at more than logic . . . . The constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly"). *See also State v. Koch*, 85 P. 272, 274 (Mont. 1906) ("It has nevertheless always been recognized in practice in this jurisdiction, that the jury has power to disregard the law as declared and acquit the defendant, however convincing the evidence may be, and that the court or judge has no power to punish them for such conduct"); *Titus v. State*, 7 A. 621, 624 (N.J. 1886) ("some of the jurors were called as witnesses, . . . to prove their own official misconduct, or that of their fellows. Such course was conspicuously illegal. The court could not have based its action on such testimony, for it has been the long-established rule that jurors cannot be called to the stand for such a purpose").

The only Supreme Court justice ever impeached, Samuel Chase, was impeached in part for "endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give" during a 1798 treason trial. *See* William H. Rehnquist, *Grand Inquests: The Historic*

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Impeachments of Justice Samuel Chase and President Andrew Johnson 59-60 (1992). (Chase later recanted and acknowledged that the jury had power to deliberate upon matters outside the limited scope of his instructions, and the U.S. Senate declined to convict and remove Chase.)

Since Bushell's Case in 1670 (Howell's State Trials, Vol. 6, Page 999 (6 How. 999)), Anglo-American law has enshrined the principle that no juror can ever be punished for his verdict, no matter how nonsensical or seemingly illogical the verdict might seem to presiding judges or prosecutors. Jurors have had the common law and constitutional right to deliberate freely and to exonerate any defendant regardless of the seeming appearance of great weight of evidence. The District Court's imposition of its special verdict form in Stegmeier's case, combined with Instruction 3's stern suggestion that jurors might face punishment if they were identified as deliberating outside the scope allowed by the District Court, deprived Stegmeier of trial by an impartial jury. *See United States v. Spock*, 416 F.2d 165 (1st Cir. 1969) (discussing jurors' well-established "power to follow or not to follow the instructions of the court").

Jurors who deliberate under a direction that they concentrate on specific matters, under a fear of punishment for any "violation[s] of [ ] sworn dut[ies]" are not deliberating freely. *Cf.*, *Weare v. United States*, 1 F.2d 617, 619 (8th Cir. 1924) ("In reading portions of the instructions, it would be difficult to tell whether one

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were reading the instructions of a court or the argument of a prosecutor. . . . The whole tenor of the instructions was apparently to influence the jury to return a verdict of guilty").[8]

INSTRUCTION NO. 21 FALSELY COMMANDED THE JURY REGARDING HOW TO APPLY THE LAW

Stegmeier's counsel also objected to certain language in Instruction No. 21.[9] That instruction tells the jury that:

> - * * *
>
> **If both of these elements have been proved beyond a reasonable doubt as to the defendant, then you *must find the defendant guilty* of the crime of Providing a Firearm to a Prohibited Person; otherwise you must find the defendant not guilty of this crime.**

Instruction No. 21, Document # 54: 23 (emphasis added).[10] This direction is found at the conclusion of the reasonable doubt instruction regarding Count 3.

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[8] Illustrating how far modern instruction practices have strayed from those of yesteryear, the trial court in *Weare* had affirmatively instructed the jury that the jury was not bound by his opinion. Nonetheless, this Circuit concluded that "We do not think the error in this case is cured by the mere statement to the jury that they were not bound by his opinion, and that they should follow their own judgment." 1 F.2d at 619.

[9] Note that this instruction is the same instruction which contains the unanimity reminder regarding Count 3, already discussed *supra*.

[10] Document # 53 shows the jury instructions without redactions of the sources of law supporting them. The source for Instruction No. 21 is described as "Government's Proposed Jury Instruction No.6 (modified); 18 U.S.C. §§ 922(d)(1) and 922(d)(2); *United States v. Yielding*, 2011 WL 4578434 at *7 (Oct. 5,2011)." Like the citations purporting to support Instruction No. 3, this citation does not support the "must find the Defendant guilty" language. *Yielding*, now 657 F.3d 688

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Stegmeier's counsel properly and timely objected to this language:

> MR. BECRAFT: . . . Then down there after you do the second element, it says, "If both of these elements have been proved beyond a reasonable doubt, then you must find the Defendant guilty." I was wondering if the Court can change "you must" to "you can" or "may find" the Defendant guilty.
>
> THE COURT: Well, if they prove both elements, they must. That's the law.
>
> Trial transcript at 451.

As already described, it is not the law that juries must find a defendant guilty when the Government meets its burden of proof, though they may do so. *See United States v. Martin Linen Supply Co*., 430 U.S. 564, 572-73 (1977) (trial judges are prohibited from "directing the jury to come forward with [a guilty] verdict, regardless of how overwhelming the evidence may point in that direction"); *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (saying any legal system that would rob jurors of their discretion to acquit against the evidence would be "totally alien to our notions of criminal justice"); *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408 (1947) ("a judge may not direct a verdict of guilty, no matter how conclusive the evidence"); *United States v. Mentz*, 840 F.2d 315, 319 (6th Cir. 1988) ("Regardless of how overwhelming the evidence may be, the Constitution delegates to the jury, not to the trial judge, the important task of deciding guilt or innocence"); *Konda v. United States*, 166 F.91, 93 (7th

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(2011), does not appear to support the giving of a must-convict jury instruction (though the case may support other propositions extent in Instruction # 21 not at issue here).

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Cir. 1908) (an accused has a right to a chance of a jury acquittal even where "the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful and conflicting"); *Buchnanan v United States*, 244 F.2d 916 (6th Cir. 1957) (a trial judge cannot instruct a jury to convict even if the facts of guilt are undisputed).

Although the Eighth Circuit has repeatedly upheld district courts' refusal to give "jury nullification" instructions requested by defendants, see *United States v. Drefke*, 707 F.2d 978, 982 (8th Cir. 1983); *United States v. Buttorff*, 572 F.2d 619, 627 (8th Cir. 1978); *United States v. Wiley*, 503 F.2d 106, 107 (8th Cir. 1974), never has this Court held that jurors are mandated to convict defendants whenever the government meets its burden of proof. *See Dinger v. United States*, 28 F.2d 548, 550, 551(8th Cir. 1928) (trial judge's instruction that "if you believe the testimony of these agents . . . you would be justified, and in fact required, to find the defendant Dinger guilty" was a "most serious error" "not permissible in a criminal case").

Perhaps the case most directly on point regarding the District Court's must-convict jury instruction in Stegmeier's case is the D.C. Circuit's 1950 case of *Billeci v. United States*, 184 F.2d 394 (D.C. Cir. 1950). An instruction at issue in *Billeci* closely paralleled the instruction in Stegmeier's case:

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> "You must confine yourselves strictly to the question and ask yourself honestly, 'Do I believe from the evidence I have heard at this trial that the defendants have committed this crime?' If you answer the question 'Yes,' you must find the defendants guilty. If your answer is 'No,' then you must find them not guilty."

Id. at 399 (emphasis added).

In the words of the D.C. Circuit, "That statement is not the law. The law is that if the jury believes beyond a reasonable doubt that the defendant has committed the alleged offense it *should* find a verdict of guilty, but if there be a reasonable doubt in the minds of the jurors they must *acquit*. The instruction given was error." *Billeci* at 399 (emphasis added).

An "impartial jury," as required by the Sixth Amendment, is a jury "free of judicial pressure to return a particular verdict." Hon. Michael Dann, "*Must find the defendant guilty" jury instructions violate the Sixth Amendment*, 91 Judicature 15 (2007). As the *Billeci* Court concluded, a proper instruction is that a jury must *acquit* if the government fails to meet its burden of proof, but *may* convict if the government meets its burden of proof.

Never has the Supreme Court issued a decree that jurors under any circumstances, ever "must" convict. The jury instructions given by Chief Justice John Jay in the only jury trial ever held before the U.S. Supreme Court told the jury that "you [the jury] have, nevertheless, a right to take upon yourselves to

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judge of both, and to determine the law as well as the fact in controversy." *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794). "[I]t is presumed, that juries are the best judges of fact; it is, on the other hand, presumable, that the court are the best judges of the law. But still both objects are lawfully within your power of decision." *Id.*

In 1895, the Supreme Court issued *Sparf v. United States*, 156 U.S. 51(1895), a 132-page set of opinions in which the winning plurality found that a district judge may refuse to give a defense-requested manslaughter instruction in a homicide case in which the evidence did not suggest manslaughter. The winning plurality's wide-ranging opinion paved the way for the modern consensus among judges that judges may refuse to instruct jurors regarding their power to nullify the application of the law. Never, however, has the Court held that jurors *must* convict their countrymen whenever the Government proves a criminal case.

In 1972, The U.S. D.C. Circuit decided *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972), a split decision referenced more than three hundred times in subsequent cases. The *Dougherty* majority upheld the denial of a defense-requested instruction informing jurors of their nullification powers. It did so in part because "[t]he jury knows well enough that its prerogative is not limited to the choices articulated in the formal instructions of the court [due to] the fact that the judge tells the jury it must acquit (in case of reasonable doubt) *but never tells the*

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jury in so many words that it must convict . . . ." *Id*. At 1135 (emphasis added). Only forty years after the *Dougherty* decision, the District Court in Stegmeier's case used "must" in both commands—contrary to the *Dougherty* court's assumption about what a criminal trial judge would "never" do.

Jury instructions which falsely state the law regarding substantial rights and seriously undermine the fairness, integrity or public reputation of judicial proceedings are reversible error even if no objection was made in the proceedings below. *See United States v. Rush-Richardson*, 574 F.3d 906 (8th Cir.2009); *United States v. Bettelyoun*, 16 F.3d 850, 852 (8th Cir.1994). In Stegmeier's case, however, Stegmeier's counsel objected, and the District Court abused its discretion in allowing the jury deliberations to be tinged with bias and control. In this atmosphere, Stegmeier' jurors perceived that guilty verdicts would be met with warm smiles, friendly faces and expressions of gratitude, while not-guilty verdicts would need to be delivered during a chilled moment of awkwardness, anxiety and discomfort. The District Court's verdict form and jury instructions made it safer for jurors to respond by convicting Stegmeier than to provoke the wrath of the court and the prosecution team.

THE DISTRICT COURT'S ERRORS IN INSTRUCTING THE JURY CANNOT BE HARMLESS ERROR

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The Supreme Court has repeatedly stated that the scope and meaning of "trial by jury" must be construed in accordance with their scope and meaning under the common law of 1789-1791. *See, e.g., United States v. Bailey*, 444 U.S. 394, 415 n. 11 (1980). The District Court's usurpations of jury prerogatives in Stegmeier's case deprived Stegmeier of his right to trial by jury. Such a fundamental error of due process cannot be harmless error. *See Rose v. Clark*, 478 U.S. 570, 578 (1986) (harmless-error analysis presumably inapplicable where court has invaded the province of the jury, as "the wrong entity judged the defendant guilty").

As This Court of Appeals held in *Gray*, "it may not be held that such a departure [special interrogatories in a criminal case, over a defendant's objection] did not affect appellant's substantial right to be tried according to law." 174 F.2d at 924.

CONCLUSION

For the above stated reasons, William Stegmeier's convictions for harboring a fugitive and disposing of a firearm to a prohibited person are unlawful. Accordingly, Stegmeier is entitled to reversal of both convictions, a new trial or other relief this Court deems proper.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

Pursuant to FRAP 32(a)(7), this brief complies with the word-count limitation of 14,000 words. The brief is 12,558 words in length.

By /s/ Roger Roots Dated 2/19/2012

CERTIFICATE OF SERVICE

I, Roger Roots, attorney for Appellant - Defendant William Stegmeier hereby certify that on February 21, 2012, a true and correct copy of the foregoing document was served upon the following individual by E-filing through This Court's electronic filings system:

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