**UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

No: 11-3776

United States of America
Appellee
v.
William Stegmeier
Appellant

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

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# APPELLANT'S REPLY

Submitted by
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COMES NOW THE APPELLANT, William Stegmeier ("Stegmeier") with this Brief in Reply to the Government's Brief filed on May 1, 2012. Stegmeier relies and stands on his earlier brief, but offers the following points in contradiction to certain assertions made in the Government's Brief. Stegmeier requests oral argument to further assist the Court of Appeals in the determination of issues in this appeal.

## SPECIAL INTERROGATORIES

The Government asserts—in the face of dozens and perhaps hundreds of published opinions which state that special verdict forms in criminal cases are disfavored—that such verdict forms are no cause for concern, entirely proper and appropriate. "The special verdict in this case," according to the Brief of the United States, "merely protected against a potential for a unanimity problem." Brief of Appellee at 22. According to the Government, "[t]his Court has recognized that special verdict forms may properly be used in criminal cases," citing *United States v. Ryan*, 9 F.3d 660, 671 (8th Cir. 1993). The *Ryan* opinion states that "[t]he courts have indeed been critical of special interrogatories in criminal cases" (citations omitted) but that such interrogatories "may be appropriately and effectively used in

particular situations without abridging the concerns over their use generally." *Ryan* at 670-71.[1]

Most significant in the *Ryan* opinion is its holding "that the use of special verdict forms, closely crafted and carefully scrutinized, may be appropriate for some limited purposes." "[T]he questions posed by the judge [were] in the interest of clarity, completeness, and avoidance of the retrial of a lengthy case." *Id.* at 671.

By contrast, the verdict form in Stegmeier's case was neither closely crafted nor carefully scrutinized. The interrogatories were entirely pointless and increased the likelihood of jury confusion and misdirection. A regular jury instruction

[1] The *Ryan* opinion cited *United States v. Owens*, 904 F.2d 411 (8th Cir. 1990) and *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) for the proposition that "special interrogatories may be appropriately and effectively used in particular situations without abridging the concerns expressed over their use generally" But this Court of Appeals in *Owens* noted specifically that "The district court used a general verdict form, permitting the jury only to find Owens either guilty or not guilty of the offense charged in the indictment" and gave no further discussion to the question. *Owens* at 413 n.1. The entire discussion of special verdicts in *Aguilar* is as follows: "Essentially, appellants fault the trial judge for not providing a special verdict. However, "it has long been the law that 'it is not the practice of the Federal Courts in criminal cases to call for special verdicts.'" [citations omitted]. While a special verdict is the exception and not the rule, there may be cases in which it is appropriate. It is counsel's duty, though, to request a special verdict in order to record the jury's thinking for purposes of appeal. *Id.* Failure to make a request to the trial court waives any error (except plain error) premised on the lack of a special verdict." *Aguilar* at 690-91.

properly alerted the jury to the requirement of unanimity regarding all material facts. One could hardly imagine a more obvious abuse of discretion.

The Government also cites *United States v. Reed*, 147 F.3d 1178 (9th Cir. 1998) as "listing many cases across various circuits endorsing the use of special verdict forms under various circumstances." *Reed* states only that "[e]xceptions to the general rule disfavoring special verdicts in criminal cases have been expanded . . . ." Specifically, special interrogatories may be appropriate where they are requested by the defense or where they deal primarily with sentencing matters.

## BUSHEL'S CASE

In essence, the Government asks this Court to overturn *Bushel's Case*, 124 E.R. 1006 (1670), a precedent more than 300 years old. To say that special verdict forms may be nonchalantly imposed on juries in criminal cases is to reject principles of Anglo-American law which formed the very foundation of trial by jury.

In 1670, the great Quaker William Penn (later the founder of Pennsylvania) and another Quaker minister named William Mead were put on trial in London for the offense of unlawfully assembling a group of Quaker congregants in the streets for a sermon. (Royal ministers, seeking to ban the preaching of the Quaker religion, had padlocked Penn's church doors before the Sunday service, forcing

Penn to give his sermon in the street). Penn openly admitted he had preached in the street, and there were multiple witnesses.

After the jury returned several "not guilty" verdicts, the judges ordered the jurors imprisoned "without meat, drink, fire or tobacco." When the jurors insisted on returning a verdict of not guilty, the court fined them forty marks and ordered them confined in Newgate Prison along with Penn and Mead (who were not released but instead found in contempt of court). Four jurors, including Edward Bushel, refused to pay and spent several months in prison.

Bushel's petition for habeas corpus led to one of the greatest decisions in English history, a ruling that America's constitutional Framers were all familiar with. Under the rule of *Bushel's Case*, no criminal jury can ever be made to explain its verdict, and no juror can ever be punished for returning a verdict at odds with the view of judges and prosecutors.

While three centuries have passes since the ordeal of Edward Bushel, the principle of Bushel's Case has remained the great underpinning of trial by jury. The District Court in Stegmeier's case, however, required the jury to partially explain its verdict on paper and hinted in Instruction # 3 that the jurors might be punished if they returned a verdict at odds with the instructions of the Court.

## THE DISTRICT COURT'S MUST-CONVICT JURY INSTRUCTIONS

The Government, in its brief, states that Stegmeier's arguments regarding the District Court's must-convict instruction were "squarely rejected by this Court in *United States v. Kroh*, 915 F.2d 326, 335 (8th Cir. 1990)." Brief of the United States at 25. But a plain reading of the *Kroh* shows that, not only did this Court not "squarely reject" this argument, but that the issue was not even properly before the *Kroh* Court except for a plain-error review.

> Finally, Kroh challenges five of the jury instructions, which directed that the jury "must" -- instead of "may" -- find Kroh guilty if it found the prosecution had proved all the statutory elements of the crimes charged. Kroh is on the record as challenging only one of those five instructions for that reason. . . . **The objections now asserted as to the remaining four were not preserved for appeal, so we will review those instructions only for plain error**. See *United States v. Turner*, 725 F.2d 1154, 1158 (8th Cir. 1984).

*United States v. Kroh*, 915 F.2d at 335 (emphasis added).

The holding in *Kroh* was expressly prefaced on an assessment that the jury instructions as a whole did not invade the province of the jury. "Having reviewed the instructions *as a whole*," wrote this Court in *Kroh*, "we are convinced the court properly advised the jurors . . . that the determination of John Kroh's guilt was theirs alone, and that the instructions at issue did not usurp the jury's role." *Id.* (emphasis added).

In Stegmeier's case, by contrast, the District Court usurped the jury's role by (1) providing threatening language to the jury suggesting that the jurors would "violate their oaths" and thus might be punished if they declined to obey the Court's instructions, (2) imposing, over Stegmeier's objection, a verdict form with special interrogatories demanding that the jury focus on particular questions and explain its reasoning regarding Count 3, and (3) instructing the jury that the jury "must find the defendant guilty" in a given circumstance.

As Judge Michael Dann wrote in a thoughtful article in the journal *Judicature*, "the power of the American jury to return a verdict based on mercy or leniency, or to check abusive prosecutions, is 'one of the peaceful barricades of freedom.'" Michael Dann, *"Must Find the Defendant Guilty" Jury Instructions Violate the Sixth Amendment*, JUDICATURE Volume 91, Number 1 July-August (2007) (citing Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law To Do Justice*, 30 AM. CRIM. L. J. 239, 254 (1993)).

At its heart, the Appellee's assertions rest on a strawman argument. The Government accuses Stegmeier of arguing that the jury should have been instructed "that they are free to disregard jury instructions and base a verdict on non-evidence." Brief of Appellee, at 25. Yet nowhere does the appellant intimate that the District Court should not have instructed the jury on the law, or even that

Stegmeier's jury should have been instructed that it may disregard the law as declared by the judge. The District Court abused its discretion, however, when its instructions degenerated into outright deception.

As Judge Dann, *supra*, suggests:

> Why not simply tell the jury, as several jurisdictions do, after explaining the presumption of innocence and the reasonable doubt standard, "Before returning a verdict of guilty, all of you must agree that the guilt of the defendant for the crime charged has been proven beyond a reasonable doubt" and leave it at that? This is the course chosen by the instruction suggested in a popular federal practice manual. A similar instruction would inform the jury that "A verdict of guilty is authorized only if you all agree that the defendant's guilt has been proven beyond a reasonable doubt.

Michael Dann, *supra*, Addendum, at 17.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Roger Roots, attorney for Appellant - Defendant William Stegmeier hereby certify that on May 22, 2012, a true and correct copy of the foregoing document was served upon all of the parties and amici of record in this case by E-filing through This Court's electronic filings system:

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