No. 11-3776
Criminal

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

WILLIAM STEGMEIER,

Defendant and Appellant.

Appeal from the United States District Court
for the District of South Dakota
Southern Division

The Honorable Lawrence L. Piersol
United States District Judge

APPELLEE'S BRIEF

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SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

William Stegmeier appeals his convictions following a jury's guilty verdicts for knowingly and willfully harboring a fugitive and for knowingly providing a firearm to a felon and a fugitive. Stegmeier challenges the sufficiency of the evidence for both offenses. He also alleges his conviction for providing a firearm to a prohibited person violates the Second Amendment, and he challenges the use of a special verdict form. Finally, Stegmeier claims the district court abused its discretion by advising jurors that they must base their verdict upon the evidence and must find guilt if the elements were proven beyond a reasonable doubt.

The Government opposes the arguments. Stegmeier's convictions are based upon sufficient evidence, and his Second Amendment rights were not violated. The use of special verdict form was appropriate here, and the district court did not abuse its discretion when it instructed the jury. The Government respectfully requests that this Court uphold the convictions here.

The Government respectfully submits that the facts and legal arguments are adequately presented in the briefs and record and that the decisional process would not be significantly aided by oral argument. Accordingly, the Government does not request oral argument.

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JURISDICTIONAL STATEMENT

This is an appeal of a final judgment in a criminal case. The district court had original jurisdiction over Stegmeier's case pursuant to 18 U.S.C. § 3231. The district court's written judgment and commitment was entered on December 7, 2011. Stegmeier filed a timely Notice of Appeal on December 16, 2011. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. WHETHER NO REASONABLE JUROR COULD HAVE FOUND STEGMEIER ACTED TO PREVENT KELLEY'S DISCOVERY AND ARREST.

United States v. Hayes, 518 F.3d 989, 995 (8th Cir. 2008)

United States v. Erdman, 953 F.2d 387 (8th Cir. 1992)

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II. WHETHER NO REASONABLE JUROR COULD HAVE FOUND THAT STEGMEIER "DISPOSED" OF A FIREARM TO KELLEY.

Huddleston v. United States, 415 U.S. 814, 924 S. Ct. 1262 (1974)

United States v. Monteleone, 77 F.3d 1086 (8th Cir. 1996)

United States v. Perez, 663 F.3d 387 (8th Cir. 2011)

III. WHETHER STEGMEIER'S FIREARM CONVICTION VIOLATED THE SECOND AMENDMENT OF THE CONSTITUTION.

District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783 (2008)

United States v. Huet, 665 F.3d 588 (3d Cir. 2012)

United States v. Bena, 664 F.3d 1180 (8th Cir. 2011)

IV. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY USING A SPECIAL VERDICT FORM TO DISTINGUISH BETWEEN THE TWO SUBSECTIONS OF 18 U.S.C. § 922(d) WITH WHICH STEGMEIER WAS CHARGED.

United States v. Lamoreaux, 422 F.3d 750 (8th Cir. 2005)

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V. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY INSTRUCTING THE JURY THAT IT MUST BASE ITS VERDICT ON THE EVIDENCE AND MUST FIND GUILT IF THE ELEMENTS OF AN OFFENSE WERE PROVED BEYOND A REASONABLE DOUBT.

United States v. Rubashkin, 655 F.3d 849 (8th Cir. 2011)

United States v. Horsman, 114 F.3d 822 (8th Cir. 1997)

United States v. Kroh, 915 F.2d 335 (8th Cir. 1990)

STATEMENT OF THE CASE

On April 6, 2011, Stegmeier was indicted on three counts all relating to Thomas Kelley, another federal criminal defendant. Stegmeier's charges included harboring a fugitive pursuant to 18 U.S.C. § 1071, being an accessory-after-the-fact

to Kelley's failure to appear in violation of 18 U.S.C. §§ 3 and 3146(a)(1), and providing a firearm to a prohibited person (Kelley) pursuant to 18 U.S.C. §§ 922(d)(1) and (d)(2).[1] The accessory count was dismissed on October 4, 2011, upon the Government's motion. CR 41, 46.[2]

Stegmeier's jury trial on the two remaining counts began on October 5, 2011. The jury found Stegmeier guilty on both counts, and he was sentenced on December 6, 2011, to twenty-four months in prison on each count, to be served concurrently. CR 70. The judgment and commitment was entered on December 7, 2011. CR 70.

Following his convictions, on October 21, 2011, Stegmeier filed a motion for acquittal on both counts, urging the same positions now taken in his appeal. CR 58. The district court denied the motion in a memorandum opinion that addressed each of Stegmeier's arguments. CR 66.

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[1] These two subsections were alleged because Kelley was a prohibited person for two separate reasons: he was a convicted felon (§ 922(d)(1)) and also a fugitive from justice (§ 922(d)(2)).

[2] The Government adopts Stegmeier's citation formula in that the trial transcript will be referred to as "Tr. Trans." followed by the appropriate page number. Docket entries in the Clerk's Record will be designated as "CR" followed by the pertinent entry number. The Appellant's Brief will be referred to as "AB" followed by the appropriate page number.

STATEMENT OF THE FACTS

Thomas Kelley became a fugitive after he failed to appear at his sentencing following a jury's guilty verdicts on twenty-two tax and related financial crimes.[3] Kelley was a fugitive from August 23, 2010, until his arrest on December 22, 2010. Tr. Trans. 41, 52-53. When Kelley first went into hiding, he stayed at a farm near Letcher, South Dakota.[4] Tr. Trans. 126-127. In late September or early October 2010, Kelley ventured to Stegmeier's home in Tea, South Dakota. Tr. Trans. 129-130.

Kelley was arrested in Wood Lake, Minnesota, following an anonymous tip that came in after he was posted on the Minnehaha County Most Wanted website. Tr. Trans. 48-51. Before his capture, Kelley had been living in a recreational vehicle ("RV") that was parked inside a snowed-in metal quonset shed near a grain elevator on which Stegmeier's company was working. Tr. Trans. 58, 61-62. The RV belonged to Stegmeier, and Stegmeier had been letting Kelley live in it, free of

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[3] Kelley's underlying case is *United States v. Kelley*, D.S.D., Case No. 4:08-cr-40173. He was also tried by a jury and convicted for his failure to appear. *See United States v. Kelley*, D.S.D., Case No. 4:10-cr-40100. Kelley's direct, consolidated appeal, No. 11-2660, is scheduled to be submitted to a panel of this Court on the briefs on May 14, 2012.

[4] The owner of the Letcher farm is Theodore Nelson. In a separate prosecution, Nelson was also charged with harboring Kelley. He pled guilty, and on November 7, 2011, was sentenced to twelve months and one day in prison. *See United States v. Nelson*, D.S.D., Case No. 4:11-cr-40037.

charge, first outside his home in Tea, then later where it was found in Wood Lake. Tr. Trans. 61-62.

Kelley was working for Stegmeier on the grain elevator project, but Kelley was being paid in cash, off the official payroll. Tr. Trans. 69, 333. The cash payments made to Kelley by Stegmeier's company took a circuitous route. First the company secretary would write out a check payable to "cash" on the company account. Tr. Trans. 292, 332. She would give that check to Stegmeier, and he would exchange it for cash which he would deliver to Kelley. Tr. Trans. 292-296, 332. This was unique to Kelley; other workers received checks written out payable directly to them. Tr. Trans. 294-299. The result was that no IRS notices, such as Forms W-2 or 1099, were generated reflecting that Kelley was working there, and no company checks bore Kelley's name. Tr. Trans. 294. This whole method for paying Kelley in cash, off the books, was directed by Stegmeier. Tr. Trans. 294.

Several witnesses testified that before Kelley was captured, Stegmeier made comments indicating he knew Kelley was a fugitive. David Gabel also worked for Stegmeier's company, and he worked alongside Stegmeier and Kelley on the Wood Lake grain elevator project. Gabel testified that he first learned Kelley was a fugitive during a meeting in Stegmeier's home office before Kelley was captured. Tr. Trans. 164. Stegmeier was seated facing a computer monitor, and he stated to Gabel and

another man, "Tom Kelley is No. 2 on the Minnehaha County Most Wanted List." Tr. Trans. 164-65.

Gabel further testified that after Stegmeier was charged and released on bond, he and Stegmeier continued working together. Tr. Trans. 165-166. Once while the two were returning from the jobsite in Minnesota, Stegmeier told Gabel he was upset about being a federal criminal defendant, and he said to Gabel "[i]f I knew Tom Kelley was wanted, half the shop knew that Tom Kelley was wanted." He then turned to Gabel and asked "Did you know?" Tr. Trans. 166. Gabel testified that he responded "Yes, Bill. I knew because you told me." Tr. Trans. 166. When asked how Stegmeier responded to that, Gabel testified, "[w]e didn't talk anymore on the way home. We had no more to say." Tr. Trans. 166. Gabel was later asked if his response was a "conversation stopper." Tr. Trans. 184. He responded, "Yes. I was kind of pissed. I felt like he was trying to threaten me at that time." Tr. Trans. 184.

Barb Kelley, Thomas Kelley's wife, also testified as a Government witness. She admitted that while Kelley was staying with Stegmeier in Tea, she several times made the roughly one-hour drive from her home in Salem, South Dakota, to visit him there. Tr. Trans. 107. She testified that Kelley was not staying at home "[b]ecause he was on the run." Tr. Trans. 107. The U.S. Marshals Service and other federal and state law enforcement agents had been to her home looking for Kelley. Tr. Trans.

107. One of those who came to her house looking for Kelley was the local county sheriff. Tr. Trans. 108. Barb Kelley testified that she and Kelley had known the sheriff for years, and his office is in a courthouse that "is kitty-corner across the street" from her house. Tr. Trans. 108. She stated, "I know you can see my house from his [office]." Tr. Trans. 108.

Barb Kelley further testified that when she visited Kelley at Stegmeier's, her husband's fugitive status "wasn't a secret," and was talked about openly. Tr. Trans. 144. She also stated that at one point when she was there, Stegmeier made the comment to her that "if anyone came looking for Tom, he had a place he could hide." Tr. Trans. 109. There was then the following exchange on the record:

> Prosecutor: So, in your presence and in Tom's presence, after Tom Kelley was on the run, you heard Bill Stegmeier say that he would hide him. Is that right?
>
> Barb Kelley: Yes.
>
> Prosecutor: Words are important here. Did he use the word "hide"?
>
> Barb Kelley: Yes.

Tr. Trans. 110.

Barb Kelley also testified that she discovered at one point that her husband was second on the Minnehaha County Most Wanted List. Tr. Trans. 116. She learned it from her husband, who was alerted to it by Stegmeier. Tr. Trans. 116. Barb Kelley

then confirmed this was true by going onto the website herself, where she saw that he was indeed on the site, listed second. Tr. Trans. 116.[5]

Two law enforcement agents testified about the events leading up to and the December 22, 2010, capture of Kelley. They arrived in Wood Lake, Minnesota, in the early morning hours as part of a team of federal and state agents. Tr. Trans. 52-53. They conducted surveillance before Kelley was seen walking outside the quonset hut and arrested. Tr. Trans. 53. After the arrest, several agents remained on site (where Stegmeier's RV was parked) to collect evidence and interview some of the grain elevator employees. Tr. Trans. 57. At some point later that day, Stegmeier arrived at the job site, apparently unaware that Kelley had been apprehended. Tr. Trans. 57-61.

The agents first asked Stegmeier questions intending to gain consent to search the RV. Stegmeier confirmed to the agents that it was his RV, that he was allowing Kelley to stay in it, that Kelley was not paying rent of any sort, and that Stegmeier was able to come and go in and out of the RV as he pleased. Tr. Trans. 62-63. After Stegmeier consented to the search, agents sought to locate a .357 handgun, after

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[5] Jens Christensen was another worker for Stegmeier's company assigned to work alongside Kelley on the Wood Lake grain elevator project. Christensen testified that, at one point while they ate lunch together during the project, Stegmeier said to him in reference to Kelley, "[h]e's the most wanted man." Tr. Trans. 147-48; 159-60.

Stegmeier admitted that there was a gun in the RV. Tr. Trans. 65. When the gun was not located in the place Stegmeier thought it would be, Stegmeier stated he had told Kelley where it was, but Kelley "must have moved it." Tr. Trans. 65. The fully loaded gun was ultimately located in a compartment alongside the bed in the RV, next to Kelley's wallet. Tr. Trans. 65-66.

The agents testified about additional pre-indictment communications they had with Stegmeier, including two separate recorded interviews.[6] The recordings of those two interviews were introduced into evidence and ultimately played to the jury. Trial Exs. 11, 11A, 12, 12A; Tr. Trans. 222-229, 247-248. In those interviews, Stegmeier made various relevant statements, many of which were reiterated during his trial testimony, including the following:

- Kelley and Stegmeier had known each other since meeting on or around July 4, 2004. Tr. Trans. 371-372.
- Kelley had worked previously for Stegmeier in May 2008 until about January 2009. Tr. Trans. 375, 377.
- During that period when Kelley was first working for him, Stegmeier learned Kelley was under federal indictment. Tr. Trans. 377. He learned it from another employee who showed him a December 13, 2008, newspaper article about the indictment. Tr. Trans. 378, 422.

[6] The first interview was conducted on scene in Stegmeier's truck in Wood Lake, Minnesota, on December 22, 2010, just after the agents had finished the consent search of the RV. It was audio recorded. Tr. Trans. 221-222. The second interview was conducted at the FBI offices in Sioux Falls, South Dakota, on January 14, 2011. It was video and audio recorded. Tr. Trans. 227-228.

- During that 2008-2009 stint working for Stegmeier, Kelley was paid with company payroll checks made payable directly to him. Tr. Trans. 376, 423.

- Before Kelley's capture, Stegmeier allowed Kelley to have full use of his RV, first at his house in Tea, South Dakota, then later where it was located in the metal quonset building in Wood Lake, Minnesota. Tr. Trans. 422-423.

- Stegmeier was aware that Kelley was using an alias, "George," at least with some people at the Wood Lake, Minnesota, job site. Tr. Trans. 423-424.

- Stegmeier and Kelley stayed overnight together at times in the RV in Wood Lake, Minnesota. Tr. Trans. 426.

- When Stegmeier first showed Kelley around the RV, Stegmeier told Kelley that there was a gun inside, and where precisely it was. He did not remove the gun from the RV before letting Kelley have full use of it, gun included. Tr. Trans. 431-432.

- Stegmeier did not restrict Kelley from any compartments within the RV. Tr. Trans. 431-432.

Stegmeier's trial began October 5, 2011, and concluded October 7, 2011, when the jury returned guilty verdicts as to each of the counts presented to them. Tr. Trans. 501-502. Stegmeier moved for acquittal at the end of the second trial day, arguing that the facts failed to support the Government's theory that Stegmeier disposed of the gun to Kelley. Tr. Trans. 408. The district court denied the motion. Tr. Trans. 410. Stegmeier objected to the district court's proposed jury instructions 3 and 21, urging that they should be revised to eliminate or revise portions that instructed the jury that it would violate their sworn legal duty to base a verdict on non-evidence, and

that they "must find" Stegmeier guilty if the elements were proven beyond a reasonable doubt, respectively. Tr. Trans. 449, 451. These objections were denied, and these are the two instructions Stegmeier now focuses upon in his appeal (for the same reasons). Tr. Trans. 449, 451. Stegmeier also objected to the use of a special verdict form. Tr. Trans. 451-453.

Following trial, on October 21, 2011, Stegmeier filed a motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29. CR 58. He again objected to the use of a special verdict form, and he also made essentially the same sufficiency-of-evidence arguments that he now makes on appeal (that the Government failed to prove Stegmeier prevented Kelley's detection and arrest, and that he did not dispose of the firearm to Kelley). Finally, Stegmeier also claimed, as he does in this appeal, that his firearm conviction under these facts violates his Second Amendment rights. CR 58 at 7-8. The district court denied the motion for acquittal in a memorandum and opinion order entered December 2, 2011. CR 66. Stegmeier was sentenced on December 6, 2011, to 24 months' imprisonment on each count, to be served concurrently.

SUMMARY OF THE ARGUMENT

Stegmeier's appeal presents no novel or difficult issues. There was substantial evidence – both circumstantial and direct – that Stegmeier knew Kelley was a fugitive and a felon, and he intended to prevent Kelley's discovery and arrest. He provided

Kelley an RV in which to live, a job in another state, cash wages rather than payments that would create a paper trail, and a fully loaded .357 revolver. Stegmeier also told several people he knew Kelley was a fugitive and even admitted to Kelley's wife that he was prepared to "hide" Kelley.

The evidence was likewise sufficient to sustain Stegmeier's conviction for disposing of a firearm to Kelley. Stegmeier admitted he gave Kelley unfettered access to everything in the RV, including a loaded revolver, the location of which he specifically told Kelley about when he gave him dominion over the RV. When agents could not locate the gun during a search of the RV, Stegmeier told them Kelley must have moved it. The handgun was eventually found alongside Kelley's bed near his wallet.

The conviction for providing Kelley with the firearm does not implicate Second Amendment concerns. Stegmeier was not using the gun to protect his home, and the Second Amendment does not protect a person's efforts to provide a firearm to another person. The application of 18 U.S.C. § 922(d) here is in keeping with the long-standing prohibitions upon an individual's right to possess firearms.

The use of a special verdict form was appropriate here given that one count contained two equally sufficient theories of conviction. The district court's interrogatories ensured unanimity in the jury's verdicts and did not constitute an abuse of discretion.

Finally, the district court did not abuse its discretion when instructing the jury. The instructions accurately stated the law.

ARGUMENT

I. THERE WAS AMPLE EVIDENCE THAT STEGMEIER KNOWINGLY ACTED TO PREVENTED THOMAS KELLEY'S APPREHENSION AND ARREST.

A. Standard of review.

When reviewing the denial of a motion for judgment of acquittal based upon insufficient evidence, this Court

> must review the evidence "in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting all reasonable inferences drawn from the evidence that supports the jury's verdict."

United States v. Abfalter, 340 F.3d 646, 654-55 (8th Cir. 2003) (quoting *United States v. Erdman*, 953 F.2d 387, 389 (8th Cir. 1992). "Th[is] standard of review is . . . a strict one, and a jury's verdict will not be lightly overturned." *United States v. Parker*, 364 F.3d 934, 943 (8th Cir. 2004). This Court will reverse a conviction "only if no reasonable juror could have found the defendant guilty beyond a reasonable doubt." *United States v. Vazquez-Garcia*, 340 F.3d 632, 636 (8th Cir. 2003).

B. The evidence here was sufficient to sustain Stegmeier's conviction for harboring Kelley.

To convict a defendant of harboring a fugitive, the Government must prove beyond a reasonable doubt that "(1) the defendant had specific knowledge that a

federal warrant had been issued for the person's arrest, (2) the defendant harbored or concealed the person for whom the arrest warrant had been issued, and (3) the defendant intended to prevent the person's discovery and arrest." *United States v. Hayes*, 518 F.3d 989, 995 (8th Cir. 2008) citing *United States v. Hash*, 688 F.2d 49 (8th Cir. 1982) (per curiam). *See also* 18 U.S.C. § 1071. Stegmeier's focus on appeal is on the final element.

There was ample evidence, both direct and circumstantial, that Stegmeier intended to prevent Kelley's discovery and arrest. Stegmeier gave Kelley a place to stay, away from his residence where the authorities had been looking for him. Tr. Trans. 61-62; 107-108, *see United States v. Udey*, 748 F.2d 1231, 1236 (8th Cir. 1984) (evidence sufficient for conviction in part because defendant let fugitive stay at his residence). Stegmeier provided Kelley with money, using a system whereby Kelley would be paid in cash, off the books and out of the records filed with the IRS, the lead agency in Kelley's case. Tr. Trans. 69, 292-299, 332. *See Erdman*, 953 F.2d at 390 (evidence of intent to prevent fugitive's discovery and arrest was, in part, helping fugitive convert checks to cash). The place where Stegmeier ultimately employed Kelley and allowed him to stay was a community in another state, hours away from where Kelley was being sought. Tr. Trans. 61-62. *See Erdman*, 953 F.2d at 390 (defendant also helped fugitive find employment). Even the RV where Kelley was ultimately found was hidden inside a snowed-in, metal shed. Tr. Trans. 58, 61-

62. And of course, when Stegmeier's loaded .357 was found in the RV, it was in a compartment right next to the bed where Kelley slept, just next to his wallet. Tr. Trans. 65-66. Stegmeier's actions contributed in whole or in large part to each of these undisputed facts, each of which helped or were intended to help Kelley evade capture.

When Stegmeier's actions are placed in the context of the ample additional evidence that he was fully aware of Kelley's fugitive status, the motivation for helping Kelley avoid capture becomes even more apparent. For instance, there was testimony that Stegmeier knew full well that Kelley was listed on the Minnehaha County Most Wanted list (Tr. Trans. 116, 147-148, 159-160, 164-165), that Kelley went to stay with Stegmeier "because he was on the run" (Tr. Trans. 107), and that Stegmeier said that "he had a place [Kelley] could hide." Tr. Trans. 109. *See Udey*, 748 F.2d at 1236 (evidence sufficient for conviction included discussions about fugitive's "most wanted" posters).

Although Stegmeier may well disagree with the jury's apparent credibility determinations as to some of this testimony, that disagreement is not a matter for appellate review. *See, i.e., United States v. White*, No. 11-2049, 2012 WL 1123843, at *2 (8th Cir. April 5, 2012), quoting *United States v. McKay*, 431 F.3d 1085, 1094 (8th Cir. 2005) ("Attacks on the sufficiency of the evidence that call upon this court to scrutinize the credibility of witnesses are generally not an appropriate ground for

reversal."). The jurors did not act unreasonably when they found Stegmeier guilty beyond a reasonable doubt of knowingly concealing Kelley from arrest, and his conviction under 18 U.S.C. § 1071 should be affirmed.

II. THE GOVERNMENT MET ITS BURDEN TO PROVE STEGMEIER "DISPOSED" OF A FIREARM TO A PROHIBITED PERSON.

A. Standard of review.

Again, when reviewing the sufficiency of evidence, this Court will reverse a conviction "only if no reasonable juror could have found the defendant guilty beyond a reasonable doubt." *United States v. Vazquez-Garcia*, 340 F.3d 632, 636 (8th Cir. 2003).

B. This case involves a straightforward application of the statute.

There was nothing incorrect about the application of 18 U.S.C. § 922(d) to the facts here. The statute, in relevant part, reads "[i]t shall be unlawful for any person to sell or otherwise dispose of any firearm . . ." "[A] disposal occurs when a person 'comes into possession, control, or power of disposal of a firearm.'" *United States v. Monteleone*, 77 F.3d 1086, 1092 (8th Cir. 1996) quoting *Huddleston v. United States*, 415 U.S. 814, 823, 94 S. Ct. 1262, 1268 (1974).

It is well settled that "[p]ossession can be actual or constructive. Actual possession is the knowing, direct, and physical control over a thing. Constructive possession is established by proof that the defendant had control over the place where

the firearm was located, or control, ownership, or dominion over the firearm itself." *United States v. Perez*, 663 F.3d 387, 391 (8th Cir. 2011) (internal quotations omitted) (affirming sufficiency of evidence establishing defendant's constructive possession of a firearm). Furthermore, possession "may be based on circumstantial evidence which is intrinsically as probative as direct evidence." *Id.* at 391 (additional internal quotations omitted).

The facts support the jury's finding here. Stegmeier gave Kelley an RV to use freely. He placed no restrictions as to which compartments Kelley could or could not access. Tr. Trans. 431-432. Nothing in the RV was off limits to Kelley, and Stegmeier testified, in no uncertain terms, "[h]e could use everything." Tr. Trans. 432. One of those things in the RV was a loaded .357 revolver. Stegmeier told Kelley about it and where it was when he first let Kelley use the RV. Tr. Trans. 432. In other words, Kelley had full dominion and control over the place where the firearm was located, and, therefore, he constructively possessed the gun.

Stegmeier's reaction to the agents' efforts to locate the gun during the December 22, 2010, search of the RV illustrates Kelley's unfettered access and control over it. When agents could not immediately find the .357 revolver by searching the location where Stegmeier told them he had last seen it, he advised that Kelley "must have moved" the gun (Tr. Trans. 65) or that he "probably moved the gun." Tr. Trans. 206. As it turned out, the gun was located in a compartment next

to the bed where Kelley was sleeping, along with Kelley's wallet. Tr. Trans. 65-66. Given these facts, the jury could easily determine that Stegmeier intentionally disposed of the firearm to Kelley.

Stegmeier's claim that 18 U.S.C. § 922(d) does not amount to "host liability" for unwittingly allowing a prohibited person within an RV overlooks that the evidence here does not present such a situation. AB at 15. Instead, the evidence demonstrates he transferred full use of an RV containing a gun to Kelley, someone he knew or had reasonable cause to be believe was a convicted felon and a fugitive. Stegmeier's concerns – which essentially overlook the specific intent element of 18 U.S.C. § 922(d) and the jury's finding that Stegmeier met that element – are simply not presented here.

III. STEGMEIER'S CONVICTION FOR KNOWINGLY DISPOSING OF A FIREARM TO A CONVICTED FELON AND FUGITIVE DOES NOT VIOLATE THE SECOND AMENDMENT.

A. Standard of review.

Stegmeier filed a post-verdict motion pursuant to Fed. R. Crim. P. 29, citing the Second Amendment as a basis for his argument that he was not guilty of violating 18 U.S.C. § 922(d). Therefore, his claim of constitutional error is reviewed de novo. *United States v. Washington*, 318 F.3d 845, 854 (8th Cir. 2003).

B. Stegmeier's Second Amendment right to possess a firearm is not implicated.

The Second Amendment protects an individual right of "law-abiding, responsible citizens to use arms in defense of hearth and home." *District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S. Ct. 2783, 2821 (2008). However, the Second Amendment does not allow a citizen the right to carry a firearm "for any purpose." *Id*. at 595, 626-627.

In this case, Stegmeier did not use the .357 revolver to defend his "hearth and home." He gave the gun to Kelley when he provided the RV to assist him in evading arrest by taking it to a rural community hours from Stegmeier's home. In fact, when Stegmeier first showed Kelley around the RV, he deliberately told Kelley about the gun and where it was. Quite simply, the Second Amendment right described in *Heller* does not involve a knowing transfer such as this which is unconnected to a law-abiding citizen's effort to defend his home.

The Third Circuit Court of Appeals reached a similar conclusion in *United States v. Huet*, 665 F.3d 588, 602 (3d Cir. 2012). In *Huet*, the Third Circuit held that the Second Amendment does not provide an individual with a constitutional right to facilitate a prohibited person's possession of a firearm. Although the defendant in *Huet* had the lawful right to keep a rifle in her home, she could, nevertheless, be charged with aiding and abetting the rifle's possession by a prohibited person without

implicating the defendant's Second Amendment rights.[7] *See id.* ("[T]he Second Amendment does not afford citizens the right to carry a firearm for 'any purpose.'") (citing *Heller*, 554 U.S. at 595).

The Supreme Court in *Heller* acknowledged that "[l]ike most rights, the right secured by the Second Amendment is not unlimited," and that "nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . or laws imposing conditions on the commercial sale of arms." *United States v. Bena,* 664 F.3d 1180, 1182 (8th Cir. 2011) (quoting *Heller*, 554 U.S. at 626–27, 128 S. Ct. 2783). These "presumptively lawful regulatory measures" were cited by the Court to serve as examples and not an exhaustive list. *Id.* (quoting *Heller*, 554 U.S. at 627 n.26). This Court has further concluded that "[s]cholarship suggests historical support for a common-law tradition that permits restrictions directed at citizens who are not law-abiding and responsible." *Bena*, 664 F.3d at 1183.

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[7] There appears to be no published, post-*Heller* cases directly addressing a Second Amendment challenge to a conviction under a subsection of 18 U.S.C. § 922(d). In an unpublished decision, the Fourth Circuit Court of Appeals rejected a post-*Heller* challenge to § 922(d), holding that the Second Amendment protects an individual's right to bear arms, but does not give a corresponding right to provide a firearm to another. *See United States v. Chafin*, 423 F. App'x 342, 343-344 (4th Cir. 2011) (unpublished). This Court held that § 922(d) did not violate the Commerce Clause in *United States v. Monteleone*, 77 F.3d 1086 (8th Cir. 1996).

Here, the restriction on Kelley's right to possess a firearm was "presumptively lawful," and Stegmeier's act of intentionally giving a handgun to Kelley has nothing to do with the Second Amendment right described in *Heller*. Stegmeier's guilt for the § 922(d) charge was not simply, as Stegmeier suggests, based upon an unwitting act of allowing Kelley in close proximity to the gun. *See* AB 21. Instead, it was based upon the jury's determination that he intentionally gave the gun to Kelly who he "knew or had reasonable cause to believe" was a felon and a fugitive. *See* Final Inst. 21.

Without any direct support for their constitutional argument that Stegmeier's Second Amendment rights were violated here, Stegmeier and his amici either gloss over or completely overlook the scienter requirement of § 922(d) and the evidence in this case. Stegmeier disposed of the .357 handgun with knowledge that Kelley was a prohibited person for two separate reasons. Under these facts, this case involves nothing more novel than a straightforward, lawful application of 18 U.S.C. § 922(d), and Stegmeier's conviction for knowingly disposing of a firearm to a felon and a fugitive should be affirmed.

IV. THE USE OF A SPECIAL VERDICT FORM WAS PROPER.

A. Standard of review.

On appeal, use of a special verdict form is reviewed for abuse of discretion. *United States v. Lamoreaux*, 422 F.3d 750, 756 (8th Cir. 2005); *see also United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998).

B. The special verdict in this case merely protected against a potential for a unanimity problem.

This Court has recognized that special verdict forms may properly be used in criminal cases. *See United States v. Ryan*, 9 F.3d 660, 671 (8th Cir. 1993), *vacated in part on other grounds,* 41 F.3d 361 (8th Cir. 1994) (en banc); *see also Reed*, 147 F.3d at 1180-81 (listing many cases across various circuits endorsing the use of special verdict forms under various circumstances). In *Ryan*, this Court affirmed the district court's use of special interrogatories in an arson case, reasoning that special interrogatories can be "appropriately and effectively used in particular situations." *Ryan*, 9 F.3d at 671. Those situations include questions that further interests of clarity and completeness and avoid retrial, and where the questions do not infringe upon a jury's power to deliberate by asking the jury why it reached certain conclusions or by directing the jury's course. *Id.*

Here, the district court did not abuse its discretion by separating Count Three into two separate questions on the verdict form. Count Three charged Stegmeier with

providing a firearm to Kelley, who, the indictment alleged, was prohibited under two separate statutory subsections – 18 U.S.C. §§ 922(d)(1) (convicted felon) and 922(d)(2) (fugitive from justice). Given the charge, the district court was appropriately concerned about unanimity, and therefore gave both a unanimity instruction (Instruction No. 21), and also required unanimous votes on each of the two subsections. As the district court noted in response to Stegmeier's objection, the purpose of the instruction was to protect Stegmeier's interests, not to abridge them: "[I]f there was a challenge as to the sufficiency of the evidence [and the two theories were not separated], then you're not going to know which one it was that they found guilt on. That's the reason that I split it up and have that special interrogatory." Tr. Trans. 452. Here, the district court did not use a special verdict form to break a single offense into specific questions about each element. *See, e.g., United States v. Spock*, 416 F.2d 165 (1st Cir. 1969). Rather, the verdict form here simply separated the theories of criminal liability for the 18 U.S.C. § 922(d) charge to ensure unanimity. Under these circumstances, the district court's use of a special verdict form should be affirmed.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN INSTRUCTING THE JURY.

A. Standard of review.

Stegmeier appeals two particular jury instructions given by the district court and preserved these arguments by making objections at trial. Thus, the standard of appellate review is abuse of discretion. *United States v. Rubashkin*, 655 F.3d 849, 862 (8th Cir. 2011). A reversal is only appropriate if an error in the instructions was prejudicial. *United States v. Yielding*, 657 F.3d 688, 708 (8th Cir. 2011).

B. There was nothing improper about Jury Instruction 3.

A "'district court has wide discretion in formulating appropriate jury instructions.'" *United States v. Poitra*, 648 F.3d 884, 887 (8th Cir. 2011) quoting *United States v. White Calf*, 634 F.3d 453, 456 (8th Cir. 2011). "When reviewing jury instructions, this Court evaluates 'whether the instructions, taken as a whole, and viewed in light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury.'" *United States v. Renner*, 648 F.3d 680, 686 (8th Cir. 2011) quoting *United States v. Beckman*, 222 F.3d 512, 520 (8th Cir. 2000).

Jury Instruction 3 accurately stated the law. The instruction simply instructed the jury to consider and evaluate the evidence in the case "only for the purposes for which it was received and to give such evidence a reasonable and fair construction" in light of common knowledge and natural tendencies and inclinations. CR 53 at

Instruction 3. This instruction was not crafted from whole cloth by the district court, but rather is a pattern instruction from O'Malley, Genig and Lee, Federal Jury Practice and Instructions, § 12.02 (5th ed. 2000).[8] Stegmeier claims the instruction was improper because it goes on to state that "[i]t 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." Stegmeier argues that part of the instruction was "false," and "menacing and intimidating." AB at 40.

The claims lack merit. Instructing a jury otherwise – that they are free to disregard jury instructions and base a verdict on non-evidence – would have been tantamount to giving Stegmeier a right to jury nullification, which is not a right defendants possess. *See United States v. Horsman*, 114 F.3d 822, 829 (8th Cir. 1997), quoting *United States v. Gonzalez*, 110 F.3d 936, 947-48 (2d Cir. 1997) ("[J]ury nullification, while it is available to a defendant, is only a power that the jury has and not a 'right' belonging to the defendant, much less a substantial right.").

C. Jury Instruction 21 was legally accurate.

Stegmeier's argument as to Jury Instruction 21 was squarely rejected by this Court in *United States v. Kroh*, 915 F.2d 326, 335 (8th Cir. 1990). Jury

[8] The instruction given by the district court was modified slightly, but the modifications were purely stylistic and did not alter the wording Stegmeier claims is objectionable.

Instruction 21 explained the elements for the charge under 18 U.S.C. § 922(d) and, relevant to his appeal, instructed the jury that they "must find" Stegmeier guilty if they found that the elements had been proved beyond a reasonable doubt. CR 53 at Instruction 21. Stegmeier claims the jury should have been instructed instead that they merely "may find" him guilty upon such a finding. AB at 45. In *Kroh*, when faced with this same "must" vs. "may" distinction, this Court held succinctly that "[w]e find that the instructions as given constitute no error of any kind." *Id.* The district did not abuse its discretion by instructing the jury as it did.

CONCLUSION

The United States respectfully requests that the appellant's convictions be affirmed.

Respectfully submitted this 1st day of May, 2012.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,118 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this brief was submitted for filing to the Clerk of the Eighth Circuit Court of Appeals via electronic filing, and that copies of same were served upon the following, via e-filing, on May 1, 2012:

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