No. 06-3157

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RUDOLPH GEORGE STANKO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES DISTRICT JUDGE
JOSEPH BATAILLON

Prepared and Submitted by:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

SECONDARY AUTHORITIES

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The Appellant, Rudolph George Stanko ("Stanko"), by and through his appointed counsel, submits this reply brief in order to address issues in the December 8th brief ("brief") of the Appellee United States of America ("the government").

I. STANKO'S 1984 CONVICTION FOR VIOLATING THE FEDERAL MEAT INSPECTION ACT WAS PLAINLY, LITERALLY, AND OBVIOUSLY A VIOLATION OF A LAW AIMED AT PRESERVING A FAIR MARKETPLACE

First, the government argues that Stanko's twenty-two-year-old convictions for violating the Federal Meat Inspection Act (FMIA) are not

unfair-trade or business-related offenses because "the purpose of the Federal Meat Inspection Act is to safeguard the public against adulterated meat" rather than to regulate trade. Brief at 14.

Here the government's claims are refuted by the purposes stated in the very introductory statement of the FMIA:

> § 602. Congressional statement of findings
>
> Meat and meat food products are an important source of the Nation's total supply of food. . . . Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food ***products in interstate or foreign commerce***, are injurious to the public welfare, ***destroy markets*** for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and ***result in sundry losses to livestock producers*** and processors of meat and meat food products, as well as injury to ***consumers***. The unwholesome, adulterated, mislabeled, or deceptively packaged articles ***can be sold at lower prices and compete unfairly*** with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. . . . [R]egulation by the Secretary and cooperation by the States . . . are appropriate to ***prevent and eliminate burdens upon such commerce***, to effectively regulate such commerce, and to protect the health and welfare of ***consumers***.

21 U.S.C. § 602 (emphasis added)

No person can violate the FMIA without being involved in the business or trade of commercial meat production, commercial meat processing, or commercial meat distribution. Private production for noncommercial purposes is completely unregulated by the FMIA, regardless

of meat quality, production standards, or adulteration. 21 U.S.C.§ 623(a) (exempting all personal, household, and employee meat production and processing not intended for commercial sale). In no hypothetical case could any FMIA conviction be disassociated with trade and commerce. The FMIA places no duties and imposes no legal obligations upon a person not engaged in the production, marketing, or management of a business enterprise.

That the FMIA is a scheme of business regulation is uncontested. While every business regulation scheme has underlying substantive objectives (e.g., product safety, consumer protection, auto safety, aviation safety, work safety, etc.), it can hardly be said that someone convicted of violating such laws has not committed an "offense[ ] relating to the regulation of business practices." 18 U.S.C. § 921(a)(20)(A).

All business regulations impose standards on businesses, meaning that those businesses that operate outside such standards have an unfair advantage in the marketplace. *C.f., Cook Family Foods, Ltd. v. Voss*, 781 F. Supp. 1458, 1471 (C.D.Ca. 1991) (regional differences in enforcement standards are unfair to meat processors). "In form and political substance, the 1906 Meat Inspection Act was a consumer protection statute. . . . it created quality control . . . . [that meant] Choice" or "prime" meat from any

packer would satisfy a standard of quality generally understood by consumers." Peter c. Carstensen, "*How to Assess the Impact of Antitrust on the American Economy: Examining History or Theorizing?,*" 74 Iowa L. Rev. 1175, 1205 (1989).

II. LAWS REGULATING "BUSINESS," "TRADE," AND "MARKETS" CANNOT BE DOCTRINALLY DISTINGUISHED

The Appellant submits, respectfully, that any distinctions drawn between terms like "trade," "markets," "commerce," or "business" are without solid conceptual or doctrinal foundation. *See, e.g., The New Oxford American Dictionary* (2001); *The Random House College Dictionary, Revised* (1984); *Webster's New World Dictionary of the American Language* (all defining " trade," "commerce," "business," and "markets,"—in various permutations—to include the other terms in their definitions). It is conceptually impossible to distinguish a "trade" law from a "business" law, or a law regulating businesses and establishing market or production standards from a law regulating trade practices. To do so is to apply the law in a squishy, confusing, and arbitrary manner inconsistent with principles of sound jurisprudence.

Stanko's alleged predicate offenses were crimes whose *very elements* required involvement in trade practices and business activity. None of the cases cited by the government for the proposition that an underlying

business purpose is insufficient (e.g., *United States v. Kruckel*, 1993 WL 765648 (D.N.J. 1993) (unpublished opinion); *Dreher v. United States*, 115 F.3d 330 (5th Cir. 1997); *United States v. Oldroyd*, No. 97-30354, 1998 U.S.App.LEXIS 17501 (9th Cir. 1998) (unpublished opinion)) involved such a nexus.

Interestingly, the government cites a case, *United States v. Meldish*, 722 F.2d 26 (2d Cir. 1983), for the proposition that "[m]isbranding or adulterating meat is not similar to acts designed to repress competition" (Brief, p. 24) *whose own words* state that deceptive advertising or labeling *is* sufficiently similar. *Id*. at 27-28 (emphasis added) (citing *Armstrong Paint & Varnish Works v. Nu-Enamel Corp*., 305 U.S. 315, 335-36 (1938).

Unlike all three previously published 921(a)(20)(A) cases, Stanko's 1984 convictions involved criminal liability solely based on Stanko's position as owner and C.E.O. of a regulated business. Indeed, the *Cattle King* Packing decision established a legal precedent that has been cited as an expansion of the vicarious liability of business managers. *See United States v. Hiland*, 909 F.2d 1114, 1128 n.18 (8th Cir. 1990) (mentioning the "responsible relationship" standard developed in Cattle King); *United States v. MacDonald & Watson Waste Oil Co*., 933 F.2d 35, 53 (1st Cir. 1991) (citing *Cattle King* for the proposition that mere negligence can be used for a

felony prosecution in the context of business management); *Unites States v. Easter*, 981 F.2d 1549, 1553 (10th Cir. 1992). The rule of *Cattle King* has been broadly discussed in this context. See "*The Responsible Corporate Officer, Criminal Liability, and Mens Rea*," 46 Am.U.L.Rev. 543 (1996); "*'Willful Blindness': A Better Doctrine for Holding Corporate Officers Criminally Responsible For RCRA Violation,*" 42 DePaul L. Rev. 1461 (1993); "*Recent Development: Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and Its Analogues in United States Law*," 38 Harv. Int'l L.J. 272 (1997); "*Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine,*" 21 Stan. Envt. L.J. 283 (2002); "*General Corporate Criminal Liability,*" 60 Tex. B.J. 121 (1997).

III. THE GOVERNMENT'S CLAIM THAT A CONVICTION UNDER 922(g) REQUIRES ONLY THAT THE GOVERNMENT PROVE TWO OR THREE ELEMENTS IS UNFOUNDED

Federal law does not prohibit felons from possessing firearms. See 18 U.S.C. § 921(a)(20)(A). Rather, federal law prohibits only those felons whose unpardoned felonies do not pertain or relate to the regulation of business practices from doing so. *Id*. The government proposes that convicting someone for violating 18 U.S.C. § 922(g) requires only that it

prove two or three elements, (Brief at pp. 19-20), citing various cases as support for such a proposition. But none of the cases cited by the government involve analysis of the 921(a)(20) business practices exclusion. It is, in fact, well settled law that Section 922 is pregnant with numerous exceptions, exclusions, and affirmative defenses. Indeed, the Supreme Court recently found that the affirmative defense of duress is available to those accused under Section 922, and that jury instructions must be provided accordingly when a defendant raises such a defense, *Dixon v. United States*, 126 S.Ct. 2437 (2006).

Without apparent embarrassment, the government claims "[t]he instruction provided to the jury in the instant case followed the Eighth Circuit Model Jury Instruction 6.18 [FELON IN POSSESSION OF FIREARM] (2006 Ed.). . . . set[ting] out three elements for the offense . . ." In fact, the District Court *strayed* from the Model Jury Instruction regarding the principal issue in question. The Model Instruction states : "One, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year; . . ." The District Court, on the other hand, stated on the record that it was not "willing to contemplate" instructing the jury on the statutory definition. Trial transcript, pp. 15-17, and instead substituted a final instruction reading "The defendant has been convicted of a *felony*,"

which the District Court then *defined* as "a crime punishable by imprisonment for a term exceeding one year."

Document # 269, p. 15.

Model jury instructions have no binding authority but are drafted merely to assist courts and litigators in crafting case-specific instructions. Moreover, the 8th Circuit's Model Jury Instructions regarding firearm offenses are not as limiting as the government contends. Indeed, the advisory notes to the Model Jury Instructions state openly that the potentially conflicting goals of the statute, "coupled with a long and, at times confusing, legislative history, can make interpretation of this statute difficult." The Model Instructions cite David T. Hardy's 1987 law review article, "*The Firearm Owners' Protection Act: A Historical and Legal Perspective,*" 17 Cumb. L. Rev. 585, as the authoritative source regarding questions of interpretation. As shown in the Appellant's earlier brief, Hardy's article clearly establishes that 921(a)(20)(A) was intended by the drafters to exclude all business-related predicate offenses, rather than any specialized subset of offenses known only to law enforcement, prosecutors or judges, such as business offenses with particular goals or agendas. Hardy's legislative history of the origins of 921(a)(20)'s current text establishes that the business exclusion was regarded by the drafters as an

element of a 922(g) offense, which must be proved beyond a reasonable doubt by the government in each case.

The advisory notes also show plainly that the government's claimed legislative history, at page 23 of its brief, has been rendered moot by subsequent amendments. In fact, the advisory notes direct modern interpreters of the statute to newer editions of the *U.S. Code Cong. & Admin. News*, as well as to Hardy's article. By no means do the notes to the Model Instructions suggest that the government's burden in 922(g) cases is limited to proving two or three elements. "The Eighth Circuit has not decided," state the advisory notes, "whether [, for examples,] justification and coercion can be defenses to a charge under section 922(g)."

IV. EVEN IF 921(a)(20)(A) WERE MERELY AN AFFIRMATIVE DEFENSE, IT STILL MUST BE CONSIDERED BY A JURY

Finally, the government seeks to paint the definition of terms found in Section 921(a)(20) as allowing for a mere affirmative defense whose burden is borne by the defendant. Brief p. 21. But the government's construction of an "affirmative defense" is like nothing known in the criminal law. The government argues that an affirmative defense can be scuttled by a district judge and withheld from consideration by the jury by way of a directed verdict of guilt "as a matter of law" before trial.

Even if 921(a)(20)(A) provides merely an affirmative defense, it still entitles a defendant to a jury instruction on the issue. The law regarding this is well established and binding upon all federal courts. See, e.g. *Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432 U.S. 197 (1977); *Gilmore v. Taylor*, 508 U.S. 333 (1993). "The omission of an adequate affirmative defense instruction constitutes a profound violation of a defendant's constitutional rights. It creates an ex post-facto law, misinforms the jury as to the governing legal principles, and denies a defendant his right to a fair trial." *Id*., (Blackmun, J., dissenting); *Dixon v. United States*, 126 S.Ct. 2437 (2006) (Breyer, dissenting) (burden of disproving duress should be on the government when the relevant statutes are silent).

It should also be noted that the 8th Circuit's Model Jury Instructions, upon which the government relies for support for the claim that the government need only prove three elements for a 922(g) conviction, provide expressly that "If the evidence in the case is sufficient to support submission of one of the so-called 'affirmative defenses' other than insanity or withdrawal from conspiracy, this or similar language should be used in [the ELEMENTS OF OFFENSE] instruction," as well as in an affirmative defense instruction given separately. Model Instruction 3.09 n.3. The Appellant's proposed instructions, rejected by the District Court, were

consistent with this model instruction, while the District Court's final instructions were not.

In the proceedings below, Stanko had no opportunity to defend himself under the 921(a)(20)(A) business exclusion before the jury. The District Court indicated that whether Stanko's predicate offense qualified under the 921(a)(20)(A) was an element of the offense,[1] but then ruled that the 921(a)(20) exclusion was inapplicable and refused to allow the jury to be informed of the definition. Stanko's counsel was forced to attempt to defend Stanko solely on questions of possession and interstate transfer.[2]

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[1] During a December 28, 2005 suppression hearing, the District Court pronounced that "It seems to me that the burden of proof is on the government at the time of trial to prove that Mr. Stanko is a felon and that the law applies." Transcript of 12/28/05, p. 225. Then, during an April 10, 2006 hearing, the District Court agreed with Stanko's counsel that the definition found at Section 921(a)(20)(A) was an element which the government needed to prove:

> MR. DOMINA: Your Honor, I really think the government has the burden of going forward today because this is an element of the case and you previously have ruled that you consider this element to pose an issue of law.
> THE COURT: I do.

(Transcript of April 10, 2006 hearing, p. 2)

[2] See, e.g., Transcript of 4/10/06, p. 8:

> Mr. DOMINA: . . . . In order to be sure that I don't waive this position, as the court knows from our previous hearings, we believe even this issue is an issue that requires trial to a jury. You have ruled otherwise and we are prepared to

When Stanko moved for a videotaped deposition of Dick Monfort, owner of the Colorado Rockies baseball team and former owner of Monfort Meats (now a subsidiary of ConAgra) to provide trial expertise on enforcement practices under the FMIA, the District Court scheduled a pretrial hearing to consider the evidence outside the view of the trial jury. A full-day hearing on the applicability of the business exclusion, with five fact and expert witnesses, was held on April 10, 2006 (one week before trial). The District Court then denied Stanko any opportunity to inform the jury regarding the existence of the 921(a)(20)(A) business exclusion.

Stanko submits that (1) his 1984 predicate offense(s) clearly fall under the category of unfair trade and/or business-regulation offenses, and that his conviction must be reversed as a matter of law, and that (2) Stanko's trial in which the jury was kept uninformed—or, in this case, misinformed—of the governing legal principles represented a complete denial of Stanko's right to defend himself. This is true regardless of whether 921(a)(20)(A) exclusion is an affirmative defense or (more properly) an element.

CONCLUSION

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proceed under your ruling.

(Transcript of April 10, 2006, p. 8)

Literal, common-sense readings of the text of the Meat Inspection Act and the business-practices exception found in 18 U.S.C. § 921(a)(20), details of Stanko's 1984 conviction, rules of interpretation handed down by previous courts, lenity principles, and maxims of statutory construction all lead to the conclusion that Stanko's 1984 conviction for conspiracy to violate the Meat Inspection Act is not a qualifying conviction for purposes of 18 U.S.C. § 922(g). By no recognized standard can Stanko's 1984 conviction qualify under the firearm prohibitions of § 922(g). Moreover, Stanko was entitled to instruct the jury on the 921(a)(20)(A) definition whether the definition is an element or establishes an affirmative defense. Accordingly, Stanko was wrongly convicted of the firearm offenses in this case, and his conviction must be reversed.

Respectfully submitted, Dated: _____

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CERTIFICATION OF DISKETTE AND WORD PROCESSING

Pursuant to Rule 28(b) of the Eighth Circuit Rules of Appellate Procedure, I hereby certify the enclosed computer diskette containing the full text of the Appellant's Reply Brief has been scanned for viruses and is virus-free. The brief was created using Microsoft Word 2000.

_____
Roger Roots
Appointed Counsel for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing, along with a computer diskette containing a copy of the full text of this brief, were served on the following by placing them in the U.S. Mail, addressed and postage prepaid, this _____ day of _____, 2006.

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