

Case No. 06-3157

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

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**United States of America,  
Appellee,**

**v.**

**Rudolph George Stanko,  
Appellant.**

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On Appeal from the United States District Court  
For the District of Nebraska, No. 8:05CR93  
The Honorable Joseph F. Bataillon, Judge

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**BRIEF OF *AMICUS CURIAE*  
FULLY INFORMED JURY ASSOCIATION  
IN SUPPORT OF APPELLANT *AND* IN SUPPORT OF  
REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

In compliance with Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, the *amicus* is not a corporation that issues stock, nor does it have a parent corporation that issues stock.

### **INTEREST OF *AMICI CURIAE***

The Fully Informed Jury Association (FIJA) is a nationwide, non-profit, nonpartisan education and research public policy institute incorporated in Montana since 1991. The FIJA mission is to educate Americans regarding the role of the jury in our justice system and the preservation of the full function of the jury as the final arbiter in our courts of law. FIJA generates revenue through seminar fees and the sale of FIJA publications and materials. FIJA is a tax-exempt educational foundation under Section 501 (c) 3 of the Internal Revenue Code.

The *amicus curiae* Fully Informed Jury Association submits this brief in support of the Brief of the Appellant, which it adopts and incorporates by reference.

## **SUMMARY OF THE ARGUMENT**

This brief addresses the interests of both juries and criminal defendants. Accordingly, two points are highlighted: (1) The Appellant, Rudolph George Stanko ("Stanko") was denied his right to a lawful trial by a jury that was fully informed of the definitions of the laws Stanko allegedly violated, and (2), the jury that convicted Stanko was denied its right to fully consider the guilt of Stanko regarding each element of the offenses alleged.

## **ARGUMENT**

### **1. "TRIAL BY JURY" REQUIRES JURY REVIEW OF ALL ELEMENTS OF A CRIME—INCLUDING THE DEFINITIONS OF STATUTORY OFFENSES**

The Appellant, Rudolph George Stanko, was charged with possessing firearms and ammunition after being convicted of a "crime punishable by imprisonment for a term exceeding one year" under 18 U.S.C. §922(g)(1). Stanko alleged in pretrial

motions that the statute did not apply to him because the phrase “crime punishable by imprisonment for a term exceeding one year” is defined at 18 U.S.C. §921(a)(20) so as not to include:

- (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices

Stanko alleged that his alleged predicate offense—a 22-year-old conviction for conspiracy to violate the Federal Meat Inspection Act—was an offense of this type. The trial judge, however, did not advise the jury on the definition of “crime punishable by imprisonment for a term exceeding one year”, and instead substituted the phrase “felony conviction,” defined as any “crime punishable by imprisonment for a term exceeding one year.”

During trial, the District Court denied the Appellant’s request to have the statutory definition of “crime punishable by imprisonment for a term exceeding one year” read to the jury. Stanko’s attorney, David A. Domina, offered the following proposed jury instruction, referencing the definition provided in the exact statute that Stanko was charged with violating:

PROPOSED INSTRUCTION NO. 11

If you find Defendant's prior conviction, if any, was any federal or state offense pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, you must find the Defendant not guilty.

Document # 261

During oral argument on the jury instructions, the District Court indicated that it was not "willing to contemplate" instructing the jury of the statutory definition:

THE COURT: The objection is noted and overruled. Felon is defined in count one and I don't think it needs to be any further defined. I understand that felon carries a certain pejorative connotation, but I think under the circumstances there is no realistic way around it, or at least one that I'm willing to contemplate at this time. So your objections are overruled. I assume that you have the same objection to Instruction 12 with respect to the use of the word felon?

MR. DOMINA: We do.

THE COURT: That's overruled. Any other objections to Instruction 12?

MR. DOMINA: Instruction 12 has that same deficiency in the elements, the white collar crime exception not being submitted.

THE COURT: That's overruled. Any other objections to 12?

MR. DOMINA: No, Your Honor.

THE COURT: Instruction 13, I assume you have the same objections?

MR. DOMINA: Correct. I don't see that 13 uses the term felon, but it does fail to submit the exception in the act.

THE COURT: Those objections are overruled.

Trial transcript, pp. 15-17.

Ultimately, the District Court imposed a final instruction reading:

The crime of being a felon in possession of a firearm has three essential elements, which are:

1. The defendant has been convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year;
2. The defendant thereafter knowingly possessed or received the following firearms, . . . [and]
3. The firearms were transported across a state line at some time during or before the defendant's possession."

Document # 269, p. 15.

Your *amicus curiae* Fully Informed Jury Association respectfully submits that the subsequent trial and resulting conviction of Stanko were improper proceedings in violation of



the Sixth Amendment right to jury trial, the Fifth Amendment Due Process Clause, and Article III, §2, clause 3 of the Constitution. Stanko was convicted of two firearm and ammunition possession counts for which the jury was misinformed regarding the relevant statutory definitions. Congress clearly intended that its definitions of terms govern all prosecutions under the Gun Control Act.

In effect, the District Court did more than merely substitute terms. It essentially rewrote the relevant statute(s). With the enactment of 18 U.S.C. § 922(g), Congress did not elect to criminalize firearm and ammunition by “felons.” The Firearm Owners Protection Act of 1986 made clear that business-related convictions could not provide the predicate offenses for prosecutions under 922(g). See David T. Hardy, *“The Firearm Owners’ Protection Act: A Historical and Legal Perspective,”* 17 *Cumb. L. Rev.* 585, 586 (1986). Indeed, the advisory notes accompanying the legislation are very explicit in their instructions to courts to apply the Gun Control Act with extreme care:

The Congress finds that—

- (1) the rights of citizens—
- (A) to keep and bear arms under the second amendment to the United States Constitution;
  - (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
  - (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
  - (D) against unconstitutional exercise of authority under the ninth and tenth amendments;
- Require additional legislation to correct existing firearms statutes and enforcement policies; . . . (Pub.L. 99-308, Section 1(b)).

Congress also reaffirmed the intent of Congress, expressed at Section 101 of Pub.L. 90-618, that:

[T]he purpose of this title is to provide support to [law enforcement] in their fight against *crime and violence*, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions [on] acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting [etc.].

Pub.L. 99-308, Section 1(b) (emphasis added).

The law is clear that a criminal defendant has a right under the Sixth Amendment right to jury trial, the Sixth Amendment right to compel witnesses to appear in his favor, the Fifth Amendment Due Process Clause, and Art. III, § 2, cl. 3 (“The Trial of all Crimes . . . shall be by Jury”) to challenge every

element of an offense. "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 476-477 (2000), (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995); see also *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *In re Winship*, 397 U.S. 358, 364 (1970)("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

Improper jury instructions concerning the elements of an offense may constitute reversible error. See, e.g., *U.S. v. Hiscott*, 586 F.2d 1271, 1275 (8<sup>th</sup> Cir., 1978) ("[A] federal trial judge in instructing a jury in a criminal case is required to define accurately the essential elements of the offense charged, and a failure on the part of the trial judge to do so is 'grave error.' [C. Wright, Federal Practice & Procedure, Criminal, s 487, p. 300](#), and cases cited.")

2. EVEN IF THE 921(a)(20)(A) EXCLUSION IS MERELY AN AFFIRMATIVE DEFENSE TO A PROSECUTION UNDER 18 U.S.C. § 922(g), THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE EXCLUSION.

The plain language of 18 U.S.C. § 921(a)(20)(A) indicates that the business exclusion is part of the definition of a 922(g) offense, and thus an element. However, even if 921(a)(20)(A) were merely an affirmative defense, it must nonetheless be proved beyond a reasonable doubt by the government. Just as with the affirmative defense of intoxication, alibi, duress, entrapment, and self-defense, the matter must be decided by a jury beyond a reasonable doubt, and cannot be finally decided by a judge.

After raising the defense, the government must prove beyond a reasonable doubt that a predicate offense was not a state or federal offense pertaining to antitrust violations, restraints of trade, unfair trade practices or other similar offenses relating to the regulation of business practices. See *United States v. Washington*, 17 F.3d 230 , 232 (8<sup>th</sup> Cir. 1993) (citing *United States v. Smith*, 981 F.2d 887, 891-92 (6<sup>th</sup> Cir. 1992);

United States v. Williams, 979 F.2d 186, 187 (11<sup>th</sup> Cir. 1992); United States v. Mayo, 705 F.2d 62, 73-76 (2d Cir. 1983); United States v. Laroche, 723 F.2d 1541 (11<sup>th</sup> Cir.), cert. denied, 467 U.S. 1245 (1984); United States v. Mayo, 705 F.2d 62 (2d Cir. 1983) (all involving the definition of "firearm").

This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p 55 (2d ed. 1872).

*Blakely v. Washington*, 542 U.S. 296, 301-302 (2004).

"[T]he guarantee that "in all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury" has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." *Apprendi*, supra, at 499 (Scalia, J., dissenting). Stanko was improperly convicted of possessing firearms and ammunition in violation of

18 U.S.C. § 922(g) because the jury was denied its right to consider each element of the alleged offense. Furthermore:

I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt.

Ring v. Arizona, 536 U.S. 584, 610, 122 S.Ct. 2428, 2444, 153 L.Ed. 556 (2002) (Scalia, J., concurring). In this case, Stanko was denied his right to have every element of the offense heard by the jury.

## CONCLUSION

The District Court's failure to instruct the jury on the "business regulation exclusion" element of the predicate crime — upon which a violation of 18 U.S.C. Section 922(g)(1) must rest — is, therefore, reversible error. For the reasons stated, the judgment of conviction in the District Court should be vacated, and the case reversed and remanded with appropriate instructions to dismiss the indictment.

Respectfully submitted,

By:

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this document was drafted by the latest version of Microsoft Word, in verdana, size 14 font. It has been saved on the attached 3-1/2" disk, formatted virus free.

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Alexander L. Roots

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading was mailed to the following counsel of record on

\_\_\_\_\_, 2006.

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