No. 06-3157

In The
United States Court of Appeals
for the Eighth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RUDOLPH GEORGE STANKO,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Nebraska

BRIEF *AMICUS CURIAE* OF GUN OWNERS FOUNDATION IN SUPPORT OF APPELLANT AND REVERSAL

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DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), it is hereby certified that the *amicus curiae,* Gun Owners Foundation, is a nonstock, nonprofit corporation having no parent corporation, and that there is no publicly held corporation owning any portion of, or having any financial interest in, Gun Owners Foundation.

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INTEREST OF THE AMICUS CURIAE

Gun Owners Foundation ("GOF") was established as a nonprofit corporation in the Commonwealth of Virginia in 1983. GOF engages in nonpartisan research, study, analysis and education regarding, *inter alia*, the ownership and use of firearms, and engages in public interest litigation in defense of human and civil rights secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues. GOF is exempt from federal income tax as an organization described in section 501(c)(3) of the Internal Revenue Code, and is classified as a public charity.

GOF fulfills its educational/public interest litigation mission through a variety of projects, including the submission of briefs in federal and state legal actions presenting significant questions of law. GOF has filed *amicus curiae* briefs in other federal litigation involving constitutional or statutory issues, including briefs in United States district courts, United States courts of appeal and the United States Supreme Court. This brief is intended to assist the United States Court of Appeals for the Eighth Circuit with respect to its analysis of whether the underlying indictment was fatally defective, as well as whether the appellant, as one accused of a federal crime, was deprived of his Fifth Amendment rights to indictment by a Grand Jury and to Due Process of Law, and of his Sixth

Amendment right to jury trial in the court below.

STATEMENT OF THE CASE

Rudolph George Stanko stands convicted of two counts of a three-count indictment. In each of the two counts, Mr. Stanko was charged with a violation of 18 U.S.C. Section 922(g)(1). A common element of the crimes charged in both counts is that Mr. Stanko had "previously been convicted of a crime, to wit: Conspiracy to Violate the Federal Meat Inspection Act ... punishable by imprisonment for a term exceeding one year." Neither count, however, contained any allegation that the specified crime was also **not** a crime involving "regulation of business practices" similar to "offenses pertaining to antitrust violations, unfair trade practices, restraints of trade," as required by the statutory definition of "crime punishable by imprisonment for a term exceeding one year." *See* 18 U.S.C. Section 921(a)(20)(A).

Prior to trial, Mr. Stanko sought "dismissal" of the indictment on the ground that "the indictment upon which [Counts I and II are] based does not set forth the essential elements of an offense":

> To be valid, an indictment must allege that the defendant performed acts which, if proven, constituted a violation of the law that he or she is charged with.... The applicability of 18 U.S.C. § 921(a)(20) acts as a bar to Stanko's prosecution for being a felon in possession of a firearm. [Trial Record, Document 22, pp. 1, 9 (April 1, 2005).]

The trial court denied Mr. Stanko's request.

After trial, Mr. Stanko proposed that the jury be instructed on all of the "essential elements" of the crimes charged in Counts I and II, including the following:

> [T]he term "crime punishable by imprisonment for a term of one (1) year" does not include: 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. 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. [Trial Record, Document No. 261, p. 4, Defendant's Proposed Instruction No. 11 (April 21, 2005).]

The trial court refused Defendant's proposed instruction, omitting any mention of the "business regulation" exclusion from 18 U.S.C. Section 921(a)(20)(A)'s definition of "a crime punishable by imprisonment for a term exceeding one year." Trial Record, Document No. 269, pp. 13-14, Instruction No. 10 (April 21, 2005).

On appeal, Mr. Stanko has identified three distinct issues. *See* Appellant's Brief, Statement of the Issues. This brief *amicus curiae* addresses issues numbered 2 and 3, but in reverse order: (A) Whether Counts I and II of the indictment legally charged Mr. Stanko with the crime of violation of 18 U.S.C. Section 922(g)(1), as required by the Fifth Amendment right to indictment by a

Grand Jury; and (B) whether Mr. Stanko was also deprived of his Sixth Amendment right to trial by jury on every element of the offense.

For the reasons stated below, it is submitted that Mr. Stanko was neither constitutionally nor legally charged in Counts I and II of violations of 18 U.S.C. Section 922(g)(1), nor was every element of the offenses charged in Counts I and II properly presented to the trial jury to be proven beyond a reasonable doubt.

ARGUMENT

I. THE INDICTMENT CHARGING MR. STANKO WITH A VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 922(g)(1) WAS FATALLY DEFECTIVE.

In Counts I and II of the indictment below, Mr. Stanko was charged with having violated 18 U.S.C. Section 922(g)(1). In order to convict under this section, the government must prove, among other things, that Mr. Stanko had been convicted of "the requisite predicate offense" — that is, "a crime punishable by imprisonment for a term exceeding one year." *See* United States v. Ramos, 961 F.2d 1003, 1005 (1st Cir. 1992).

At issue on this appeal is whether the predicate crime — conspiracy to violate the Federal Meat Inspection Act — **as alleged** in Counts I and II of the indictment constituted "a crime punishable by imprisonment for a term exceeding one year," as defined in 18 U.S.C. Section 921(a)(20)(A). If not, then Counts I

and II of the indictment were insufficient as a matter of law — having omitted therefrom an essential element of the offense — and, consequently, were fatally flawed. *See* United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999).

A. The Definition of the Predicate Crime in 18 U.S.C. Section 922(g)(1) Has Two Distinct Components.

The statute in question, 18 U.S.C. Section 922(g)(1), prohibits the possession "in or affecting commerce [of] any firearm or ammunition; or [the receipt of] any firearm or ammunition which has been shipped or transported in interstate or foreign commerce" by any person "who has been **convicted** in any court of, **a crime punishable by imprisonment for a term exceeding one year.**" (Emphasis added.) For the purpose of chapter 44 of Title 18, United States Code, of which 18 U.S.C. Section 922(g)(1) is a part, 18 U.S.C. Section 921(a)(20)(A) defines "[t]he term 'crime punishable by imprisonment for a term exceeding one year' ... **not** [to] include" (emphasis added):

> [A]ny 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**.... [18 U.S.C. Section 921(a)(20)(A) (emphasis added).]

The plain language of the 18 U.S.C. Section 921(a)(20)(A) definition demonstrates that the term "crime punishable by imprisonment for a term exceeding one year" contains both a positive and a negative component. The

positive component is that the predicate offense must be a "crime punishable by imprisonment for a term exceeding one year." The negative component is that the offense — even though punishable by imprisonment for a term exceeding one year — must **not** be one "pertaining to antitrust violations, unfair trade practices, restrains of trade, **or other similar offenses related to the regulation of business practices.**" *Id.* (Emphasis added.)

Counts I and II of the indictment against Mr. Stanko contained the mere allegation that Mr. Stanko had been convicted of the crime of "Conspiracy to Violate the Federal Meat Inspection Act ... punishable by imprisonment for a term exceeding one year." *See* Trial Record, Document No. 269, pp. 13-14, Instruction No. 10. While this language fulfilled the requirement that the positive component of the predicate offense be alleged in the indictment, it did not fulfill the requirement that the negative component also be alleged in the indictment, as issued by the Grand Jury.

B. Both Components of the Predicate Offense are Elements of the Offense Defined in 18 U.S.C. Sections 922(g)(1) and 921(a)(20)(A).

It might be argued by the Government that, while: (a) the positive component of the definition of the predicate offense — "crime punishable by imprisonment for a term exceeding one year" — is an element of the 18 U.S.C.

Section 922(g)(1) violations charged in Counts I and II of the indictment; (b) the negative component contained in 18 U.S.C. Section 921(a)(20)(A) constitutes an affirmative defense and, thus, need not be pled in the indictment. However, such an argument is neither supported by precedent nor by the language of the statute nor by any overriding principle of American criminal jurisprudence.

In United States v. Flower, 29 F.3d 530 (10th Cir. 1994), the U.S. Court of Appeals for the Tenth Circuit faced the question whether the definition of "a crime punishable by imprisonment for a term exceeding one year" as defined in 18 U.S.C. Section 921(a)(20(A) constituted either: (a) an affirmative defense to a charge of a violation of 18 U.S.C. Section 922(g)(1), as the Government contended; or (b) a required delineation of "what constitutes a predicate felony conviction in § 922(g)(1) cases," as the defendant argued. *Id.*, 29 F.3d at 534. The court ruled against the Government on this question:

> Nothing in the plain language of §§ 922(g)(1) or 921(a)(20) suggests that the § 921(a)(20) definition constitutes an affirmative defense. In fact, the title to 18 U.S.C. § 921 is "Definitions." The beginning of § 921(a)(20) states that: "[t]he term 'crime punishable by imprisonment for a term exceeding one year" does not include ...." Section 921(a)(20)'s effect is **narrowly to delineate which prior convictions properly may be used in a § 922(g)(1) case as predicate convictions."** [*Id.*, 29 F.3d at 534 (emphasis added).]

In like manner, the "effect" of 18 U.S.C. Section 921(a)(20)(A) is to "narrowly delineate which prior" **offenses** "properly may be used in a Section 922(g)(1) case as a predicate" **offense**. Thus, like the definition of "predicate convictions," the definition of "predicate offenses" contained in Section 921(a)(20)(A) is an element of the offense, not an affirmative defense. *See* Flower, 29 F.3d at 535.[1]

Finally, although this reading of the definition contained in 18 U.S.C. Section 921(a)(20)(A) would require the Government to prove a "negative," the U.S. Supreme Court has observed that "the requirement of proving a negative is [not] unique in our system of criminal jurisprudence." Mullaney v. Wilbur, 421

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[1] Indeed, had Congress intended the negative component of the predicate offense necessary for conviction of a violation of 18 U.S.C. Section 922(g)(1) to be an affirmative defense, it could have denominated that component an "exception" to the ordinary meaning of "crime punishable by imprisonment for more than one year." But it did not. Congress's choice not to use "exception" language in 18 U.S.C. Section 921(a)(20) contrasts sharply with its deliberate selection of such language in 18 U.S.C. Section 921(a)(33), which defines the term "misdemeanor crime of domestic violence." There, the definitional subsection (A) is preceded by the phrase, "Except as provided in subparagraph (C)," thus rendering the issue of whether someone has been convicted of a misdemeanor crime of domestic violence to be an affirmative defense, not an element of the offense. *See* United States v. Hartsook, 347 F.3d 1, 5-6 (1st Cir. 2003). [Because there is no subparagraph C in 18 U.S.C. Section 921(a)(33), the exception has been read to apply to subparagraph B on the ground that it must have been a typographical error. *See* United States v. Hartsook, 347 F.3d 1, 6, n.7 (1st Cir. 2003).]

U.S. 684, 702 (1975). Thus, there is "no unique hardship on the prosecution that would justify requiring the defendant to carry the burden of proving a fact so critical to criminal culpability." *Id.*

C. The Failure to Allege the Negative Component of the Predicate Offense Required for a Violation of 18 U.S.C. Section 922(g)(1) Renders Counts I and II of the Indictment Fatally Defective.

As an element of the offense, the full definition — including both the positive and negative components — of the term, "crime punishable by a term exceeding one year," must be alleged in the indictment. *See* United States v. Resendez-Ponce, 425 F.3d 729 (9th Cir. 2005), *cert. granted*, __ U.S. __, 74 L.W. 3584 (2006). In Resendez-Ponce, the Government attempted to justify its having omitted an "explicit" allegation of an overt act, an element of the offense defined in 18 U.S.C. Section 1326, as having been "implicitly" contained in the overall indictment. *See*, *id.*, 425 F.3d at 731-32. In similar manner, the Government in this case could argue that, by explicitly stating the exact predicate crime on which the prosecution was relying, the negative component was implicitly alleged. If the Government were to make such an argument here, it might assert — as the Government did in Resendez-Ponce — that the indictment was sufficient, because Mr. Stanko was "'sufficient[ly] advise[d] of what it is he's charged with.'" *See*, *id.*

425 F.3d at 732. There would be two problems with this argument.

First, as the Resendez-Ponce court ruled, "[f]ailure to allege an essential element of the offense is a fatal flaw not subject to mere harmless error analysis":

> The purpose of this rule is to secure the basic institutional purpose of the grand jury, by ensuring that a defendant is not 'convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him.'" [*Id.*, 425 F.3d at 732.]

Second, the language of the indictment specifying that Mr. Stanko had been convicted of conspiracy to violate the "Federal Meat Inspection Act" does not even imply that the crime charged is **not** an offense relating to the regulation of business practices "similar to" federal or state offenses "pertaining to antitrust violations, unfair trade practices [or] restraint of trade," as provided in 18 U.S.C. Section 921(1)(20)(A). To the contrary, on its face the language suggests that the conviction pertained to the regulation of business practices. *See* Transcript of Proceedings, pp. 3-4 (April 10, 2006). Furthermore, whether such an offense is similar to the offenses named in 18 U.S.C. Section 921(a)(20)(A) depends upon "what is implied by *facts* out-side the four corners of the indictment," not by "what is implied by the *language* of the *indictment*, itself." *See* United States v. Resendez-Ponce, 425 F.3d at 732 (italics original), and Transcript of Proceedings, pp. 4-5 (April 10, 2006).

Defendant Stanko's request that the indictment be dismissed on the ground that Counts I and II "do[] not set forth the essential elements of an offense" was erroneously denied, and for that reason alone his conviction should be reversed.

II. MR. STANKO WAS DENIED HIS SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

A. The Trial Court's Jury Instructions Erroneously Omitted the Element of the Predicate Offense Defined in 18 U.S.C. Section 921(a)(20)(A).

As demonstrated in Part I above, the predicate offense upon which a charge of violation of 18 U.S.C. Section 922(g)(1) is based requires proof of two elements: (1) the offense is a "crime punishable by imprisonment for a term exceeding one year"; and (2) the offense is not one "pertaining to antitrust violations, fair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." The trial court, however, omitted from the jury instructions the second element of the predicate offense (as defined in 18 U.S.C. Section 921(a)(20)(A)), instructing the jury that it could convict Mr. Stanko of a violation of 18 U.S.C. Section 922(g)(1), as charged in Counts I and II of the indictment, which simply required a finding that the predicate crime is simply "a crime punishable by imprisonment for a term exceeding one year." *See* Trial Record, Document No. 269, pp. 15-16, Instructions 11 and 12.

Thus, the trial court erroneously rejected defendant's proposed Instruction No. 11 which reads, in pertinent part, as follows:

> In order to convict Defendant of the crimes alleged in Counts I and II, the Government must prove, beyond a reasonable doubt, the Defendant's prior felony conviction is a crime "... punishable by imprisonment for a term exceeding one (1) year," as that term is defined in the Federal Gun Control Act.
>
> As defined in the Federal Gun Control Act, the term "crime punishable imprisonment for a term exceeding one (1) year" does not include:
>
> > 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.
>
> 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 offense relating to the regulation of business practices, you must find the Defendant not guilty. [Trial Record, Document No. 261, p. 4, Instruction No. 11.]

B. The Trial Court's Failure to Instruct the Jury on the 18 U.S.C. Section 921(a)(20)(A) Element of the Predicate Offense Was Reversible Error.

In United States v. Flower, the court of appeals ruled that it is the trial judge's responsibility, as a matter of law, to determine whether the "predicate felony conviction" has been "factually" proved by the Government. *See id.*, 29 F.3d at 535. But that ruling was made in 1994, prior to the United States Supreme

Court's decision in United States v. Gaudin, 515 U.S. 506 (1995). In Gaudin, the Court ruled that the Sixth Amendment of the United States Constitution "gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of **every element of the crime with which he is charged."** *Id.,* 515 U.S. at 522-23 (emphasis added). In so ruling, the Court rejected the Government's contention that the right to jury trial "applies to *only the factual components* of the essential elements." *Id.*, 515 U.S. at 511 (italics original). Rather, the Court ruled that the trial jury has the "responsibility at trial ... to find the *ultimate* facts beyond a reasonable doubt," even when the element has a legal component. *Id.*, 515 U.S. at 511-15.

Applying the Gaudin principle to this case, it was for the jury, not the judge, to decide whether, as an element of the offense, the predicate crime alleged in Counts I and II came within the "business exclusion" defined by 18 U.S.C. Section 921(a)(20)(A). While the trial court was responsible for ruling on the admissibility of evidence on that question, it could not substitute its evidentiary rulings for a jury decision on every element of the offense. *Compare* Gaudin, 514 U.S. at 519-21 *with* Flower, 29 F.3d at 535-36.

Indeed, according to Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993), the effect of the trial court's failure to submit the "business regulation

exclusion" — embodied in 18 U.S.C. Section 921(a)(20)(A) — to the jury was tantamount to a directed verdict on that element by the trial court. As Justice Scalia explained in Sullivan:

> The [Sixth Amendment] right includes ... as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." ... Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may **not direct a verdict for the State**, no matter how overwhelming the evidence. [*Id.*, 508 U.S. at 277 (emphasis added).]

Additionally, as Justice Scalia pointed out, the Fifth Amendment Due Process guarantee that every element of a crime charged be proved beyond a reasonable doubt could not be trumped by a trial judge without depriving the defendant of "the jury verdict required by the Sixth Amendment ... of guilty beyond a reasonable doubt." *Id.*, 508 U.S. at 277-78.

The trial court's refusal 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.

CONCLUSION

For the reasons stated, Mr. Stanko's conviction on Counts I and II of the indictment should be vacated, and the case reversed and remanded with appropriate instructions to dismiss the indictment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief Amicus Curiae of Gun Owners Foundation in Support of Appellant and Reversal complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 3,438 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

3. This brief has been prepared in a proportionally spaced typeface using WordPerfect version 10.0.0.990 in 14-point Times New Roman.

CERTIFICATE REGARDING DIGITAL VERSION OF BRIEF

IT IS HEREBY CERTIFIED that, pursuant to Circuit Rule 28A(d), a digital version of this brief has been furnished to the Court on a CD, that the file copied to the CD has been scanned for viruses, and that it is virus-free.

_____
John S. Miles

Dated: _____

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief Amicus Curiae of Gun Owners Foundation in Support of Appellant and Reversal, was made, this 2nd day of November, 2006, by e-mailing a digital version of the brief to counsel for each of the parties and by depositing hard copies thereof in the United States Mail, First-Class, postage prepaid, addressed to the following:

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