IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO. 06-3157

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

RUDOLPH GEORGE STANKO,

Defendant-Appellant.

BRIEF OF APPELLEE

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

The Honorable Joseph Bataillon, United States District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee

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SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

Rudolph Stanko was convicted on charges of being a felon in possession of firearms and ammunition in violation of Title 18, United States Code, Section 922(g)(1). The predicate felony was for Conspiracy to Violate the Federal Meat Inspection Act (FMIA) and various FMIA violations.

Stanko argued his prior conviction fell under the unfair trade practice exemption of Title 18, United States Code, Section 921(a)(20)(A). The district court found the exemption did not apply to Stanko's prior conviction. Stanko appeals that finding. Stanko also appeals the district court's denial of a requested jury instruction and his request for grand jury records.

Three Amicus Curiae briefs were filed in support of Stanko's appeal. The brief submitted by The Second Amendment Foundation argues the District Court erroneously interpreted 18 U.S.C. § 921(a)(20)(A) such that it did not encompass Stanko's previous conviction for violations of the Federal Meat Inspection Act.

The Gun Owners Foundation argues the Indictment charging Stanko was fatally defective and the jury instructions omitted an element of the offense.

Fully Informed Jury Association argues 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."

The United States submits the briefs submitted by the parties sufficiently apprise the Court of the facts and the issues in this case. Should this Court decide oral argument is necessary, the United States requests 15 minutes.

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JURISDICTIONAL STATEMENT

The decision below was reached by the Honorable Joseph Bataillon, United States District Court Judge, for the District of Nebraska, in case number 8:05CR93.

The grounds on which jurisdiction of the Court below was founded is 18 U.S.C. § 3231. Sentencing was held on August 3, 2006, and the final judgment below was docketed on August 15, 2006. (Filing No. 300).

Mr. Stanko timely filed his Notice of Appeal on August 23, 2006. (Filing No. 305). This Court has jurisdiction pursuant to Title 28 U.S.C. §1291 to hear this appeal.

STATEMENT OF THE ISSUES

I. Whether the Purpose of the Federal Meat Inspection Act Is to Safeguard the Public Against Adulterated Meat.

Cudahy Packing Co. v. McBride, 92 F.2d 737 (8th Cir. 1937).

D&W Food Centers, Inc., v. Block, 786 F.2d 751 (6th Cir. 1986).

II. Whether Stanko's Conviction for Conspiracy to Commit a Violation of the Meat Inspection Act Counts as a Previous Felony Conviction Subject to the Felon-in-Possession Law Set out in Title 18, United States Code, Section 922(g)(1).

United States v. Claybourne, 415 F.3d 790 (8th Cir. 2005).

United States v. Morris, 139 F.3d 582 (8th Cir. 1998).

III. Whether Exceptions Under Title 18, United States Code, Section 921(a)(20)(A) Are a Question of Law to Be Decided by the District Court Not the Jury.

United States v. Bartelho, 71 F.3d 436 (1995).

IV. Whether the District Court Gave the Proper Jury Instruction for a Violation of Title 18, United States Code, Section 921(g).

Eighth Circuit Model Jury Instruction 6.18 [Felon in Possession of Firearm] (2006 Ed.).

V. The District Court Did Not Err in Denying Stanko's Motion for Grand Jury Records.

United States v. Broyles, 37 F.3d 1314 (8th Cir. 1994).

United States v. Warren, 16 F.3d 247 (8th Cir. 1994).

United States v. Warren, 16 F.3d 247 (8th Cir. 1994).

STATEMENT OF THE CASE

I. Nature of the Case.

On March 10, 2005, Rudolph George Stanko was charged by criminal complaint in the District of Nebraska with being a felon in possession of firearms and ammunition in violation of Title 18, United States Code, Section 922(g)(1). (Filing No. 1). On March 21, 2005, a federal grand jury sitting in the District of Nebraska returned a two count indictment against Stanko alleging possession of firearms and ammunition by a felon. (Filing No. 14). The indictment specified Stanko's prior felonies as Conspiracy To Violate the Federal Meat Inspection Act, from the U.S. District Court for the District of Colorado and Bank Fraud, from the U.S. District Court for the District of Nebraska. (Id.).

On April 1, 2005, Stanko filed a Motion and Brief for Access to Grand Jury Materials Relating to the Grand Jury's Composition, the Defendant's Alleged Bank Fraud Conviction and the government's Representation of Stanko's Felon Status: Challenge to the Constitutionality of Rule 6(e). (Filing No. 21). In his motion, Stanko sought grand jury materials alleging the grand jury may have been misled regarding the factual basis for the indictment. (Filing No. 21, p. 3). In his motion, Stanko claims his Meat Inspection Act conviction is exempted under the "unfair trade practice exception" set out at 18 U.S.C. § 921(g)(20) and that the jury

should have been alerted to this fact. (Id.). Stanko also filed an Affirmative Defense Motion and Brief for Declaratory Judgment that the Defendant is not a Convicted Felon under the Gun Control Act and for Dismissal with Prejudice. (Filing No. 22). The United States filed a Brief in Opposition to Defendant's Motions on April 25, 2005. (Filing No. 44).

United States District Court Judge Joseph F. Bataillon denied Stanko's request in each of these instances. (Filing No. 47). On May 8, 2005, Stanko filed an interlocutory appeal from the denials of his motions. (Filing No. 48). The appeal was docketed in the United States Court of Appeals for the Eighth Circuit as Case number 05-2281. This Court dismissed the appeal for lack of jurisdiction. (Mandate issued September 26, 2005, Filing No. 62).

By Memorandum and Order issued December 9, 2005, the district court addressed the following motions: Petition for a bill of particulars, Filing Nos. 78 and 79; motion to change venue and for a hearing, Filing Nos. 66 and 87; motion to reassert challenge to indictment and for a hearing, Filing Nos. 83 and 84; motion to obtain grand jury transcripts, Filing No. 89; and motion to dismiss, Filing No. 93; and the government's motions: motion for a special setting, Filing No. 72; motion to deny declaratory judgment, Filing No. 98; motion to deny change of venue, Filing No. 99; motion to deny motion for bill of particulars,

Filing No. 100; and motion to deny grand jury transcripts, Filing No. 101. (Filing No. 106). The district court denied Stanko's request for grand jury transcripts finding "Nothing in the grand jury transcript will assist the court in determining the merits" of Stanko's affirmative defense. (Id. at p. 4 of 6). The district court further stated "whether the Federal Meat Inspection Act felony applies in this case is a legal argument that will be presented at trial." (Id.). In response to Stanko's request for a declaratory judgment, the district court referred to its May 4, 2005 order wherein it informed Stanko he was free to raise the issue at trial. (Id. at p. 5 of 6). The district court noted Stanko's affirmative defense that he was not a convicted felon for purposes of the Gun Control Act has been rejected previously by the District Court of Montana. (Id. at FN1.).

A Superseding Indictment was filed on September 21, 2005. (Filing No. 58). The Superseding Indictment removed the allegation that Mr. Stanko had been convicted of bank fraud in the United States District Court for the District of Nebraska. (Id.).

An evidentiary hearing was held on December 28 and 29, 2005, on Stanko's various motions. (Transcript at Filing No. 217 hereinafter "Mtr."). During the hearing, counsel for Stanko requested a preliminary ruling on whether Stanko's previous conviction is a felony subject to the felon-in-possession law. (Filing No.

186, p. 10). He specifically argued Stanko is not a convicted felon under the law of the gun control act. (Mtr. 223-224). Both parties filed post-hearing briefs on the issue. (Filing Nos. 176 and 177). By Order filed January 10, 2006, the district court found the "exception set forth in 18 U.S.C. § 921(a)(20) does not apply to defendant's previous conviction." (Filing No. 186, p. 11).

A Second Superseding Indictment was filed on February 24, 2006 (Filing No. 220) adding a third count. Count III charged Stanko with unlawful transportation of a firearm in violation of Title 18, United States Code, Sections 922(a)(3) and 924(a)(1)(D). (Id.).

On April 4, 2006, Stanko filed a Motion to Dismiss the indictment for unlawful method of grand and petit jury selection (Filing No. 241) and a Motion to Dismiss the indictment based on a speedy trial violation. (Filing No. 242). An evidentiary hearing was held on April 10, 2006. (Minute Entry at Filing No. 245; Transcript at Filing No. 307 hereinafter "Mtr2."). During the hearing, the district court allowed Stanko to again present argument concerning his belief his conviction for violating the Meat Inspection Act is not a qualifying crime within the meaning of the Gun Control Act. (Mtr2. 141-148).

By Order dated April 10, 2006, Stanko's motions to dismiss were denied. (Filing No. 248). Stanko filed a motion for an interlocutory appeal on April 14,

2006. (Filing No. 252). The same day, the district court denied Stanko's motion. (Filing No. 253).

On April 14, 2006, a Memorandum and Order was issued responding to Stanko's "contention that his underlying conviction does not constitute a felony which would prohibit him from carrying a firearm." (Filing No. 250, p. 1). The district court reiterated its previous Order dated January 10, 2006 (Filing No. 186), wherein it found Stanko's conviction was not encompassed under the exception set out in 18 U.S.C. § 921(a)(20)(A). (Filing No. 250, p. 3 of 5).

Trial commenced on April 17, 2006. A discussion regarding jury instructions was had prior to voir dire. (Trial Transcript, hereinafter "Tr." 7-28). Following a four day trial, the jury found Stanko guilty of Counts I and II. (Filing No. 271). He was acquitted of Count III. (Id.).

Stanko appeared for sentencing on August 3, 2006. (Minute Entry at 292). He was sentenced to 72 months on counts I and II to run concurrently. (Filing No. 300). A three year term of supervised release was ordered. A $200 special assessment and jury costs of $5,143.63 were imposed. (Id.). Stanko timely filed his Notice of appeal on August 23, 2006. (Filing No. 305).

STATEMENT OF THE FACTS

A federal grand jury sitting in the District of Nebraska returned a three count superseding indictment against Stanko alleging possession of firearms and possession of ammunition by a felon, and unlawful transportation of a firearm. (Filing No. 220). The indictment specified Stanko's prior felony as Conspiracy To Violate the Federal Meat Inspection Act, from the U.S. District Court for the District of Colorado. (Id.). The main thrust of Stanko's pretrial arguments and his defense at trial was that he is not a prohibited person for purposes of 18 U.S.C. § 922(g) because his 1985 conviction for conspiracy to violate the Federal Meat Inspection act (FMIA) does not qualify as a felony conviction under the Gun Control Act.

A certified copy of the Colorado Indictment and the Judgment were introduced at several hearings. (Mtr. 10; Mtr2. 13). At trial, as evidence of Stanko's prior conviction, the United States introduced "a self-authenticating certified copy of the Indictment and Conviction from the District of Colorado." (Tr. 358:11-25, 374:12-375:22, Exhibit 14). The Exhibit showed eight of the fifteen counts were dismissed prior to trial. Stanko and co-defendants were convicted by a jury on all seven of the remaining counts. United States v. Cattle King Packing Co., Inc. et al., 793 F.2d 232 (10th Cir. 1986).

A Colorado jury found Stanko guilty of the following counts as set out in indictment:

Count I — From on or about June 1, 1981, to December 30, 1983, in the State and District of Colorado and elsewhere, the defendants, RUDOLPH G. "BUTCH" STANKO, HENRY L. STANKO, JR., GARY WADERICH, JAMES THOMAS BAMRICK, DANE WHITE and CATTLE KING PACKING CO., INC., doing business as Nebraska Beef Processors, willfully and knowingly did combine, conspire and confederate and agree together with each other, and with other persons to the Grand Jury known and unknown, to commit with the intent to defraud, the following offenses, to wit: to violate Sections 605, 610 and 611 of Title 21, United States Code.

Count III — On or about February 12, 1983, within the State and District of Colorado, CATTLE KING PACKING CO., INC., doing business as Nebraska Beef Processors, RUDOLPH G. "BUTCH" STANKO, HENRY L. STANKO, JR., and GARY WADERICH, defendants, caused, with the intent to defraud, approximately 15,900 pounds of meat food product of cattle which had been issued from and returned to CATTLE KING PACKING CO., INC., an official establishment, to enter said establishment without having the meat food products examined and reinspected by a federal meat inspector or any other authorized federal employee, in violation of Title 18, United States Code, Section 2 and Title 21, United States Code, Sections 605, 661(c) and 676(a), and Title 9, Code of Federal Regulations, Section 325.10.

Count IV — On or about May 9, 1983, within the State and District of Colorado, CATTLE KING PACKING CO., INC., doing business as Nebraska Beef Processors, GARY WADERICH, HENRY L. STANKO, JR., and RUDOLPH G. "BUTCH" STANKO, defendants, sold and offered for transportation, within the State of Colorado, with the intent to defraud, to

Nobel/Sysco Food Services Company, Denver, Colorado, meat food products of cattle which were capable of use as human food, and which were misbranded, as defined by Title 21, United States Code, Section 601(m)(1), because the labeling was false or misleading, in that the stamped production dates were false, in violation of title 21, United States Code, Sections 610(c), 661(c) and 676 (a).

Count VI On or about May 11, 1983, within the State and District of Colorado, CATTLE KING PACKING CO., INC., doing business as Nebraska Beef Processors, RUDOLPH G. "BUTCH" STANKO, HENRY L. STANKO, JR., and GARY WADERICH, defendants, caused, with the intent to defraud, approximately 2,400 pounds of meat food product of cattle, which had been issued from and returned to CATTLE KING PACKING CO., INC., an official establishment, to enter said establishment without having the meat food products examined and reinspected by a federal meat inspector or any other authorized federal employee, in violation of Title 18, United States Code, Section 2 and Title 21, United States Code, Sections 605, 661(c) and 676(a), and Title 9, Code of Federal Regulations, Section 325.10.

Count IX On or about August 10, 1983, within the State and District of Colorado, CATTLE KING PACKING CO., INC., doing business as Nebraska Beef Processors, RUDOLPH G. "BUTCH" STANKO, HENRY L. STANKO, JR., and GARY WADERICH, defendants, sold, in commerce, to California Provisions, Vernon, California, meat food products of cattle that were represented as course ground beef weighing approximately 9,838 pounds, that were capable of use as human food and which were adulterated, as defined in Title 21, United States Code, Section 601(m)(3), because the products were, in whole or in part, putrid, unsound, unhealthful, unwholesome or otherwise unfit for human food, in violation of Title18, United States Code, Section 2 and Title 21, United States Code, Sections 610(c) and 676(a).

Count XII On or between May 1, 1983, through June 30, 1983, in the State and District of Colorado, CATTLE KING PACKING CO., INC., doing business as Nebraska Beef Processors, RUDOLPH G. "BUTCH" STANKO, HENRY L. STANKO, JR., GARY WADERICH, Gary M. Tuck and Bruce L. Ryan, who are named but not charged in this indictment, prepared articles of cattle at CATTLE KING PACKING CO., INC., with the intent to defraud, which were capable of use as human food, which were adulterated as defined in as defined in Title 21, United States Code, Section 601(m)(4), in that such articles were prepared, packed or held under insanitary conditions, whereby they may have become contaminated with filth or whereby they may have been rendered injurious to health, to wit: plastic cry-o-vac tubes used for packaging of meat food product were poked with holes to allow gas to escape from the tube, in violation of Title 18, United States Code Section 2 and Title 21, United States Code, Sections 610(a), 661(c) and 676(a).

Count XIII On or about March 14, 1983, within the State and District of Colorado, CATTLE KING PACKING CO., INC., doing business as Nebraska Beef Processors, RUDOLPH G. "BUTCH" STANKO, HENRY L. STANKO, JR., James Thomas Bamrick and GARY WADERICH, defendants, sold and offered for transportation, in commerce, with the intent to defraud, to Fairfield Farm Kitchens, Capitol Heights, Maryland, a subsidiary of the Marriott Corporation, fresh inside rounds weighing approximately 10, 473 pounds which were capable of use as human food, and which were misbranded, as defined by Title 21, United States Code, Section 601(n)(1), because the labeling was false or misleading, in that the stamped production dates were false, in violation of Title 18, United States Code Section 2 and Title 21, United States Code, Sections 610(c) and 676(a), and Title 9, Code of Federal Regulations, Section 317.8.

(Trial Transcript p. 358, 374-75 [Exhibit 14]).

SUMMARY OF ARGUMENT

An evidentiary hearing was held on December 28 and 29, 2005, regarding: motions to withdraw, Filing Nos. 103 and 107; motions to suppress, Filing Nos. 125, 133, and 138, and plaintiff's objections to the motions to suppress, Filing No. 150; defendant's motion to correct erroneous docket sheet, Filing No. 162; motion for complete discovery, filing No. 164; and miscellaneous matters. (Filing No. 186, p. 1 of 12). Both parties submitted post-hearing briefs. (Filing Nos. 176 and 177). By Order filed January 10, 2006, the district court issued its opinion. (Filing No. 186).

The district court stated it had "reviewed the record, evidence, case law, and briefs, including the brief filed by the defendant in opposition to the gun act felony, Filing No. 183." (Filing No. 186, p. 1 of 12). The district court noted it had been "supplied with a certified copy of the defendant's conviction, and the conviction has been upheld on appeal. United States v. Cattle King Packing., Inc., 793 F.2d 232 (10th Cir. 1986)." (Id.). The district court found:

> The Colorado District Court jury convicted Mr. Stanko pursuant to a Federal Meat Inspection Act for multiple violations of 18 U.S.C. § 371 and 21 U.S.C. §§ 601-624, and§ 661-680, which included counts for having more than 15,000 pounds of meat inspected with the intent to defraud, misbranding meat with an intent to defraud, preparing adulterated meat with intent to defraud, and misbranding meat with the intent to defraud. The Colorado District Court

> sentenced defendant on October 11, 1984; he reported to prison on August 13, 1986; and he was released on December 12, 1991.
>
> * * *

The court has reviewed this exception to the felony conviction rule and preliminary rules that the felony exists for unfair trade and antitrust convictions. The court finds the exception set forth in 18 U.S.C. § 921(a)(20) does not apply to defendant's previous conviction. Congress intended to exclude "offenses relating to antitrust violations and similar business offenses." Conference Rep. No. 1956, 9th Cong. 2d Sess. 29 reprinted in 1968 U.S. Code Cong. & ad. News 4410, 4426, 4428. Defendant's previous conviction was based on the fraudulent distribution of adulterated meat products, the fraudulent misbranding of meat shipments, and circumvention of meat inspection laws. Accordingly, the court makes a preliminary finding that 18 U.S.C. § 921(a)(20) is not applicable in this case.

(Filing No. 186, pp. 10-11 of 12).

During an evidentiary hearing on April 10, 2006, Stanko reiterated his argument that the issue of whether he has the underlying convictions that qualify for the prohibition under the Gun Control Act requires submission to a jury. (Mtr2. 8). The United States reasserted its position that whether Stanko's underlying convictions qualify is an issue of law for the court to decide. (Mtr2. 9-10). On April 12, 2006, the district court issued a Order and Memorandum finding

> Although in some respects the allegations against the defendant in the Colorado case could be considered unfair trade practices, the gravamen of these charges are issues of food safety and fraud, not unfair trade practices. The court agrees with the analysis in the Meldish and Dreher opinions and concludes that defendant's conviction does not rely on whether his crime affected the consumer or competition.

(Filing No. 250, p. 5 of 5).

Trial commenced on April 17, 2006. Prior to voir dire, Stanko preserved his argument that he is entitled to trial by jury on the application of 21, United States Code, Section 921(g)(20). (Tr. 7:6-14). At the jury conference, Stanko objected to Instruction 11 which instructed the jury on the elements of "Count I: Felon in Possession of a Firearm." (Tr. 16). Stanko argued against the use of the term "felon" because "it is itself an emotion-charged term that prejudices the defendant." (Tr. 16:11-20). Stanko further argued, the elements of proof were misstated and that he was entitled to a submission to the jury on the exception to the act. (Tr. 16:21-25). The district court overruled Stanko's objections.

The jury returned a verdict of guilty as to Counts I and II. Stanko was acquitted on Count III.

ARGUMENT

I. THE PURPOSE OF THE FEDERAL MEAT INSPECTION ACT IS TO SAFEGUARD THE PUBLIC AGAINST ADULTERATED MEAT.

A. Standard of Review.

This Court reviews a district court's interpretation of a statute de novo. United States v. Millot, 433 F.3d 1057, 1060 (8th Cir. 2006). The classification of

a prior conviction is a question of law we review de novo. United States v. Martinez-Villalva, 232 F.3d 1329, 1332 (10th Cir.2000).

B. Argument.

Contrary to Stanko's argument, a violation of the Federal Meat Inspection Act (FMIA) is not necessarily an unfair trade practice. Indeed, this Court found the FMIA has, as its stated purpose, the enforcement of standards throughout meat packing plants. Cudahy Packing Co. v. McBride, 92 F.2d 737, 739-740 (8th Cir. 1937).

Shortly after FMIA's enactment, the Supreme Court stated in Pittsburgh Melting Co v. Totten, 248 U.S. 1, 2, 4-5, 39 S. Ct. 3, 2, 2, 3 (1918), "The [Meat Inspection Act] provides an elaborate system of inspection of animals before slaughter, and of carcasses after slaughter and of meat-food products, with a view to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products in interstate and foreign commerce."

The policy of the Federal Meat Inspection Act, as amended by the Wholesome Meat Act of 1967, as stated in 21 U.S.C. § 601 (1970) "is above all to protect the health and welfare of consumers." G.A. Portello & Co., Inc. v. Butz, 345 F. Supp. 1204, 1208 (D.D.C. 1972). See also, The Original Honey Baked

Ham Company of Georgia, Inc. v. Glickman, 172 F.3d 885, 887 (D.C. Cir. 1999) (The purpose of the Meat Inspection Act is "ensuring that meat and poultry products are 'wholesome, [and] not adulterated,' all to the end of protecting the 'health and welfare of consumers' and the market for wholesome and unadulterated products."); Michigan Meat Association et al., v. Bock, 514 F. Supp 560, 562 (W.D. Mich. 1981) ("The primary purpose of the Wholesome Meat Act is to benefit the consumer and to enable him to have a correct understanding of and confidence in meat products purchased. Prohibitions against mislabeling are an integral part of this purpose."); Baur v. Veneman, 352 F.3d 625, 634 -636 (2d Cir. 2003) (The purpose of the FMIA statutes is to "ensure the safety of the nation's food supply and to minimize the risk to public health from potentially dangerous food and drug products.").

Stanko's 1984 conviction for conspiracy to violate the Meat Inspection Act as well as multiple violations of the FMIA was not for unfair trade practices. The case involved fraudulent conduct. The underlying facts of Stanko's conviction involved, in part, Cattle King[1] reworking and reshipping unhealthy adulterated meat in that the bags "containing the meat were 'puffy' with gas caused by

[1]Rudolph Stanko started the company, Cattle King, in 1981 and was an officer and shareholder of the corporation at the time of conviction. Cattle King, 793 F.2d at 234.

spoilage" and that the "bags were 'poked' to let the gas escape." Cattle King, 793 F.2d at 238. While Cattle King may have benefitted economically from the crime, it was due in great part, because they mixed "inedible scrap" meat with edible meat to enhance "the poundage of the salable meat" as well as reselling meat products that were "unfit for human consumption." Id. at 237-238.

Although the Federal Meat Inspection Act and the Stockyards Act both regulate "packers" in some fashion, they have very different purposes. In D&W Food Centers, Inc., v. Block, 786 F.2d 751 (6th Cir. 1986), the Sixth Circuit discussed those differences:

> [A]lthough the Stockyards Act's definition of 'packer' is similar to that in the FMIA, the statutes have quite different purposes. The FMIA is a public health statute, aimed at preventing the use in commerce of meat and meat food products which are adulterated.... 21 U.S.C. § 603(a) (1982).

Id. at 755. (internal quotations omitted). "In contrast, the Stockyards Act is a fair trade practices law, and 'the chief evil' at which it was aimed was 'the monopoly of the packers, enabling them unduly and arbitrarily to ...' injure consumers and suppliers by controlling pricing." Id. (quoting Mahon v. Stowers, 416 U.S. 100, 106, 94 S. Ct. 1626, 1629, 40 L.Ed.2d 79 (1974)).

In the instant case, the district court properly determined Stanko's 1984 Colorado conviction included "counts for having more than 15,000 pounds of

meat inspected with the intent to defraud, misbranding meat with an intent to defraud, preparing adulterated meat with intent to defraud, and misbranding meat with the intent to defraud." (Filing No. 186, p. 10 of 12).

Based upon this finding, the district court properly determined Stanko's "previous conviction was based on the fraudulent distribution of adulterated meat products, the fraudulent misbranding of meat shipments, and circumvention of meat inspection laws. Accordingly, the court [made] a finding that 18 U.S.C. § 921(a)(20) is not applicable in the case." (Filing No. 186, pp. 10-11 of 12). This Court should reach the same conclusion and affirm the district court.

II. STANKO'S CONVICTION FOR CONSPIRACY TO COMMIT A VIOLATION OF THE MEAT INSPECTION ACT COUNTS AS A PREVIOUS FELONY CONVICTION SUBJECT TO THE FELON-IN-POSSESSION LAW SET OUT IN 18 U.S.C. § 922(G)(1).

A. Standard of Review.

This Court reviews a district court's interpretation of a statute de novo. United States v. Millot, 433 F.3d 1057, 1060 (8th Cir. 2006).

B. Argument.

Stanko and amici argue his prior felony conviction does not qualify as a predicate felony for 18 U.S.C. § 922(g)(1). He specifically argues his conviction

falls under the exemption set out in 18 U.S.C. § 921(a)(20)(A) for unfair business practices. His argument is without merit and should be denied.

Under 18 U.S.C. § 922(g)(1) it is unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. The term "crime punishable by imprisonment for a term exceeding one year" is defined under 18 U.S.C. § 921(a)(20)(A) as not including 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 and his amici argue that in order to establish a violation of section 922(g)(1), the government must prove not only that the defendant has a prior felony conviction, but that the conviction at issue is not one which falls into the section 921(a)(20)(A) exception. However, *every* Circuit—including the Eighth Circuit—has held that there are three essential elements that must be proved beyond a reasonable doubt for a section 922(g)(1) conviction: (1) that defendant previously was convicted of a felony; (2) that he possessed a firearm; and (3) that

the firearm traveled in or affected interstate commerce. See, United States v. Moye, 454 F.3d 390, 395 (4th Cir. 2006); United States v. Newsom, 452 F.3d 593, 608 (6th Cir. 2006); United States v. Amante, 418 F.3d 220, 221 n.1 (2d Cir. 2005); United States v. Claybourne, 415 F.3d 790, 795 (8th Cir. 2005); United States v. Wright, 392 F.3d 1269, 1273 (11th Cir. 2004); United States v. Colonna, 360 F.3d 1169, 1178 (10th Cir. 2004); United States v. Morris, 349 F.3d 1009, 1013 (7th Cir. 2003); United States v. Beasley, 346 F.3d 930, 933-34 (9th Cir. 2003); United States v. Daugherty, 264 F.3d 513, 515 (5th Cir. 2001); United States v. Dodd, 225 F.3d 340, 344 (3d Cir. 2000); United States v. Harrison, 204 F.3d 236, 238 (D.C. Cir. 2000) (finding two elements; a felony conviction and transported in interstate commerce); United States v. Hernandez, 146 F.3d 30, 33 n.3 (1st Cir. 1998). These are the elements as set forth in 18 U.S.C. § 922(g)(1).

If Stanko's position were to prevail, the government would not only have to prove the three elements listed above, but also have to prove the nonexistence of all of the exceptions found in section 921(a)(20)(A): ie. the previous felony conviction was not one pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses; the felony conviction was not pardoned; the felony conviction was not set aside; the felony conviction was not expunged; and the defendant's civil rights had not been restored. These

"exceptions" are not elements of the offense, but are part of the legal definition of "conviction for a term exceeding one year." See, United States v. Morris, 139 F.3d 582, 584 (8th Cir. 1998) ("18 U.S.C. § 921(a)(20) … defin[es] the felon-in-possession offense"); see also, United States v. Bartelho, 71 F.3d 436, 440 (1st Cir. 1995) (concluding that the exception found in 18 U.S.C. § 921(a)(20)(A) is merely a legal definition for the phrase "conviction for a term exceeding one year" in 18 U.S.C. § 922(g)(1)). As a legal definition, the exception is a question of law for the court to decide rather than a separate and essential element of the violation which requires jury determination. United States v. Bethurum, 343 F.3d 712 (5th Cir. 2003).

Moreover, courts that have encountered the issue have held the exceptions listed in section 921(a)(20)(A) to be affirmative defenses. See, United States v. Stockett, 157 Fed. Appx. 920, 923 (7th Cir. 2005) (unpublished) ("Several circuits have held that § 921(a)(20) is essentially an affirmative defense that must be raised by the defendant before the government has any obligation to prove the continuing validity of a conviction."); United States v. Hartsock, 347 F.3d 1, 7 (1st Cir. 2003) (discussing similar provision in section 921(a)(33)(B)); United States v. Osborne, 173 F.3d 853 (Table); 1999 WL 123588, at 1 (4th Cir. Mar. 9, 1999) (discussing restoration of civil rights); United States v. Jackson, 57 F.3d 1012,

1015-16 (11th Cir. 1995) (holding government had no obligation to prove inapplicability of statutory exceptions in 922(g)(1) prosecution). The burden to prove an affirmative defense to a section 922(g)(1) charge is on the defendant. See, United States v. Poe, 442 F.3d 1101, 1103-04 (8th Cir. 2006) (Affirming district court and rejecting defendant's argument that the court erred by refusing the give a jury instruction on his justification defense to the 922(g)(1) charge, noting that a "district court has broad discretion when formulating jury instructions.")

A. Exception Set Forth in 18 U.S.C. § 921(a)(20)(A).

Whether the exception in 18 U.S.C. § 921(a)(20)(A) applies is a question of law which the defendant must raise before the government has any obligation to prove the conviction is not precluded from the statute. United States v. Stockett, 157 Fed.Appx. 920 (7th Cir. 2005). Stanko requested that the court apply the exception in 18 U.S.C. § 921(a)(20)(A) to his Federal convictions. The court found that Stanko's prior Federal felony convictions did not come under the exception in 18 U.S.C. § 921(a)(20)(A).

The exception set forth in 18 U.S.C. § 921(a)(20)(A) is directed towards illegal restraint of trade, monopolies, and anti-competitive forces in the marketplace. See, United States v. Meldish, 722 F.2d 26, 27-28 (2d Cir. 1983).

Congress' intention was to exclude "offenses relating to antitrust violations and similar business offenses" and not every offense relating to business within the exception contained in 18 U.S.C. § 921(a)(20)(A). Conference Rep. No. 1956, 90th Cong. 2d Sess. 29 reprinted in 1968 U.S. Code Cong. & Ad. News 4410, 4426, 4428. The legislative history of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L.No. 90-351, 82 Stat. 197, June 19, 1968, which was repealed and replaced by the Gun Control Act of 1968, also refers to "commercial-type crimes" as those Congress intended to be excluded. S.Rep.No. 1097, 90th Cong., 2d Sess., at 113 (1968).

As an initial matter, Stanko was convicted of conspiracy under 18 U.S.C. § 371. To prove conspiracy, the government must show: (1) an agreement or understanding between two or more persons to commit a crime and (2) an overt act by one of the conspirators in furtherance of the agreement. See, United States v. Wang, 964 F.2d 811, 813 (8th Cir. 1992). There is simply no requirement that the agreement or act involve antitrust violations or restraints of trade. The penalty, if convicted, is up to five years imprisonment. Since the conspiracy conviction is a crime punishable by imprisonment for a term exceeding one year, and the exception in 18 U.S.C. § 921(a)(20)A) does not apply, the conspiracy conviction is clearly a prohibiting conviction under 18 U.S.C. § 922(g)(1). See, Dreher v.

United States, 115 F.3d 330, 332-33 (5th Cir. 1997) (A violation of section 371 "in no way depend[s] on whether [it has] an effect upon competition, [it is not an offense that is] excluded from the § 921(a)(20) definition of 'crimes punishable by imprisonment for a term exceeding one year.'")

Stanko's other predicate felony convictions were for multiple violations of the FMIA (21 U.S.C. §§ 605, 610, 611, 661, 676). None of these convictions is an exception under 18 U.S.C. § 921(a)(20)(A). The convictions involved issues of food safety and fraud, not antitrust violations, unfair trade practices or restraints of trade. Stanko's convictions included failing to have meat inspected, with the intent to defraud; misbranding meat products, with the intent to defraud; failing to have meat re-inspected, with the intent to defraud; preparing adulterated meat packed in unsanitary conditions, with the intent to defraud; and misbranding meat products, with the intent to defraud. Misbranding or adulterating meat is not similar to acts designed to repress competition. See, e.g.,United States v. Meldish, 722 F.2d 26 (2d Cir. 1983).

Stanko's convictions do not come under the exception to 18 U.S.C.§ 922(g)(1). For his convictions to be considered antitrust violations, Stanko must prove that the convictions were for monopolizing the market or unlawfully restraining competition. For his convictions to be considered unfair trade practice

violations, Stanko must prove that the essence of his predicate convictions was for unfair competition practices. For his convictions to be considered restraint of trade violations, Stanko must prove that the convictions were for restricting competition or price fixing. The fundamental rule of statutory construction provides that the plain meaning of the words is given the greatest weight in statutory interpretation. Browder v. United States, 312 U.S. 335, 336 (1941).

Additionally, for a conviction to be considered a "similar offense" under the exception in 18 U.S.C. § 921(a)(20)(A) it must be similar in nature to antitrust, or restraint of trade, or unfair trade practices and relate to the regulation of business practices. Simply because a crime was committed for a "business purpose" is insufficient to make it a "similar offense." See, e.g., United States v. Kruckel, 1993 WL 765648 (D.N.J. 1993) (unpublished opinion) (filing false tax returns not "similar offense" under § 921(a)(20)(A)); Dreher, 115 F.3d at 332-333 (mail fraud and conspiracy to commit mail fraud are not excluded as prohibiting crimes by 18 U.S.C. § 921(a)(20)(A) because the substantive charges "in no way depend on whether they have an effect upon competition"); United States v. Oldroyd, No. 97-30354, 1998 U.S.App.LEXIS 17501 (9th Cir. 1998) (harboring illegal alien employee not excluded as prohibiting crime by 18 U.S.C. § 921(a)(20)(A)); but

see United States v. McLemore, 792 F. Supp. 96, 98 (S.D. Ala. 1992) (rolling back odometers was a trade offense).[2]

B. Lenity and Void-for-Vagueness.

Words in a statute must be construed in their ordinary and common meanings absent congressional directives to the contrary. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 388 (1993). The statute clearly states the elements of the crime in 18 U.S.C. § 922(g)(1), and the definition of "crime punishable by imprisonment for a term exceeding one year" is plainly stated in 18 U.S.C. § 921(a)(20(A).

The court in United States v. Smith, 171 F.3d 617, 621-22 (8th Cir. 1999) held that to determine whether a criminal statute is vague the court must determine "whether 'men of common intelligence must necessarily guess at its meaning and differ as to its application.' " For a conviction under 18 U.S.C. § 922(g)(1) the Government must prove: (1) that he previously was convicted of a felony; (2) that he possessed a firearm; and (3) that the firearm traveled in or affected interstate

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[2]The Dreher court noted that "the plain meaning of the term 'offenses' in the context of the statute is the charged violation of law, not the facts underlying the violation of law" and that the outcome in McLemore resulted from the government's decision to charge McLemore with a Title 15 offense, which is defined as an unfair trade practice. 115 F.3d at 332. Here, as in Dreher, Stanko's underlying conviction was for a Title 18 offense.

commerce. Persons of reasonable intelligence do not have to guess as to the meaning and application of this statute.

It should also be noted, Stanko was aware he was a prohibited person. Upon his completion of supervised release for the Colorado conviction, Stanko received a letter from the United States Probation Office which stated:

> We would caution you, should you desire to own, use, or possess a firearm, that even though you are no longer on supervision, you are still bound by the provisions of the Federal Gun Control Act unless relief is granted by the designee of the Secretary of Treasury.

(Tr. 533-535:9, Exhibit 20). Even after receiving that letter, Stanko testified at trial in the instant case the question of whether he could own a gun was a "gray area." (Tr. 535:12-536:10). Stanko testified that because he wanted a definitive declaration that he could own a firearm, he filed a declaratory judgment action in the state of Montana. (Tr. 536-537). The magistrate ruled against Stanko's request for an order that he was not a prohibited person under The Gun Control Act. (Tr. 537:16-25). The district court in the district of Montana also ruled that Stanko was prohibited based on the language of the Federal Gun Control Act. (Tr. 538). Stanko appealed, and the Ninth Circuit ruled that it did not have jurisdiction to hear the case as the question posed was based on a hypothetical scenario. United States v. Stanko, 65 F.3d 176 (9th Cir. 1995) (unpublished). The Ninth Circuit

reversed the decision and remanded with instructions for the district court to dismiss for lack of jurisdiction. (Tr. 593-596, Exhibits 111 through 119[3]).

III. Exceptions Under § 921(a)(20)(A) Are a Question of Law to Be Decided by the District Court Not the Jury.

A. Standard of Review.

The classification of a prior conviction is a question of law reviewed de novo. United States v. Martinez-Villalva, 232 F.3d 1329, 1332 (10th Cir.2000).

B. Argument.

Stanko and amici argue whether Stanko's prior conviction is a predicate conviction for 18 U.S.C. § 922(g)(1) was a fact issue for the jury to decide. His argument is without merit as case law establishes the decision on whether a conviction is properly considered a predicate to an offense is to be made by the district court. Whether the prior felony falls under an exception is not an element of the offense of being a felon in possession.

As previously stated in Argument II, courts have concluded the exceptions found in 18 U.S.C. § 921(a)(20)(A) are merely a legal definition for the phrase "conviction for a term exceeding one year" in 18 U.S.C. § 922(g)(1). Bartelho, 71 F.3d at 440. The significance of 18 U.S.C. § 921(a)(20)(A)'s definitional nature is

[3]Exhibits 111 through 119 were not received into evidence. (Tr. 686:14).

that the trial judge bears the responsibility of determining as a matter of law whether a prior conviction is admissible in a 18 U.S.C. § 922(g)(1) case. See, FED. R. EVID. 104; United States v. Akins, 276 F.3d 1141, 1145 (9th Cir. 2000); Flower, 29 F.3d at 535; Bartelho, 71 F.3d at 440; United States v. Dunn, 142 Fed. Appx. 822, 823-824 (5th Cir. 2005); Daugherty, 264 F.3d at 514; Hartsock, 253 F. Supp. 2d at 35; Thompson, 134 F. Supp. 2d at 1230-31. This is true even though the trial judge's ultimate decision to admit or not to admit a prior conviction may require a factual showing.

In a case raising a similar issue, the district court in United States v. Bethurum, 343 F.3d 712 (5th Cir. 2003) required the government to prove to the jury as an additional element of a 18 U.S.C. § 922(g)(9) violation that Bethurum also knowingly and intelligently waived his rights to counsel and a jury trial when he pleaded guilty to his prior domestic violence misdemeanor. The Circuit Court reversed and held that those courts which have considered the question have unanimously concluded that the requirements of 18 U.S.C. § 921(a)(33)(B)(i) are part of the legal definition of a "misdemeanor crime of domestic violence" to be decided by the court as a matter of law rather than a separate and essential element of a violation of 18 U.S.C. § 922(g)(9) which must be proved to the jury beyond a reasonable doubt. See, Akins, 276 F.3d at 1146 ("Because 18 U.S.C. §

921(a)(33)(B)(i)(I) is a legal definition, its application presents a question of law to be decided by the trial judge."); Hartsock, 253 F.Supp2d at 34-35 (rejecting the reasoning employed by the district court in Bethurum and holding that "while the question of whether those rights [to counsel and a jury trial] have been intelligently and knowingly waived may be more fact intensive, the ultimate resolution of the issue still involves a question of law that must be determined by the judge"); United States v. Pfeifer, 206 F. Supp. 2d 1002, 1007-08 (D.S.D. 2002) (ruling as a matter of law on the 18 U.S.C. § 921(a)(33)(B)(i) waiver question); United States v. Thompson, 134 F. Supp. 2d 1227, 1231 (D. Utah 2001)("Because of the intensive factual and legal examination required to determine whether Defendant knowingly and intelligently waived his right to counsel when he plead guilty to battery . . . the court should conduct such a determination prior to trial.").

Furthermore, in other cases involving weapons-related offenses under 18 U.S.C. § 922(g), courts have treated questions regarding the definitions in 18 U.S.C. § 921(a) as purely legal questions. See, Beecham v. United States, 511 U.S. 368, 370-71 (1994) (choice-of-law clause in 18 U.S.C. § 921(a)(20) defines the legal rule for determining what constitutes a conviction under 18 U.S.C. § 922(g)); Daugherty, 264 F.3d at 514 ("The question whether a felony conviction may serve

as a predicate offense for a prosecution for being a felon in possession of a firearm pursuant to 18 U.S.C. § 922(g)(1) is purely a legal one.").

In the present case, the district court considered Stanko's pretrial argument that his conviction for violating the Meat Inspection Act did not qualify as a felony under 18 U.S.C.§ 921(a)(20). After receiving evidence and hearing argument, the district court properly made the determination the "exception set forth in 18 U.S.C. § 921(a)(20) does not apply to defendant's previous conviction." (Filing Nos. 185, 250). See, Flowers, 29 F.3d at 535 ("it is the trial judge's responsibility to determine as a matter of law whether a prior conviction is admissible in a § 922(g)(1) case.").

IV. THE DISTRICT COURT GAVE THE PROPER JURY INSTRUCTION FOR A VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 921(G).

A. Standard of Review.

"A district court has broad discretion when formulating jury instructions, and a defendant is entitled to a requested instruction only if it correctly states the law and is supported by the evidence." United States v. Poe, 442 F.3d 1101, 1103 (8th Cir. 2006). This Court reviews de novo whether there is sufficient evidence to support the submission of an instruction. Id.

B. Argument.

Stanko and amici argue the district court erred in failing to instruct the jury on the unfair trade exemption and, as a result, Stanko was wrongfully convicted by a jury that did not properly consider each element of the offense.

The district court in the present case held two hearings at which time Stanko presented argument that his FMIA conviction is exempted under the "unfair trade practice exception" set out at 18 U.S.C. § 921(g)(20). The district court determined Stanko's conviction was not exempted and properly instructed the jury on the elements of the offense.

Courts addressing whether the exemption under § 921(a)(20)(A) is an element have rejected the notion finding, instead, the section is "merely a legal definition for the phrase 'conviction for a term exceeding one year.'" Bartelho, 71 F.3d at 440. Relying on United States v. Flower, 29 F.3d 530 (10th Cir. 1994), the Bartelho court found the "significance of § 921(a)(20)(A)'s definitional nature is that the trial judge bears the responsibility of determining as a matter of law whether a prior conviction is admissible in a § 922(g)(1) case." Id. See also, United States v. Poe, 442 F.3d 1101, 1103-04 (8th Cir. 2006) (Affirming district court and rejecting defendant's argument that the court erred by refusing the give a

jury instruction on his justification defense to the 922(g)(1) charge, noting that a "district court has broad discretion when formulating jury instructions.")

As explained, the classification of Stanko's FMIA conviction as a predicate to the § 921(g)(1) offense was properly made by the district court. Once that determination was made, the district court properly instructed the jury on the elements of a violation of Title 18, United States Code, Section 921(g) as charged in the Second Superseding Indictment.

The 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.). The model jury instruction set out three elements for the offense of 18 U.S.C. § 921(g):

> One, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year;
>
> Two, the defendant thereafter knowingly [possessed] [received] a firearm, that is (describe weapon); and
>
> Three, the firearm was transported across a state line at some time during or before the defendant's possession of it.

Jury Instruction No. 11, provided to the jury in the present case, clearly instructed the jury on the elements as set forth above. (Filing No. 269, p. 15 of 31).

Stanko and amici cite United States v. Gaudin, 515 U.S. 506 (1995) and Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993) in support of their argument. In Gaudin, the Supreme Court held the district court erred in failing to submit the issue of materiality of a statement to the jury. It was uncontested that a conviction under 18 U.S.C. § 1001 "requires the statements be 'material' to the Government inquiry, and that 'materiality' is an element of the offense that the Government must prove." Gaudin, 515 U.S. at 509.

This is not true in the present case. The issue of whether a prior felony conviction can be used as a predicate is not an element of the offense of being a felon in possession and as such, Gaudin is of no support.

In Sullivan, the question presented was "whether a constitutionally deficient reasonable-doubt instruction may be harmless error." Id. at 476. The Sullivan Court refers to an earlier ruling in Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328 (1990) as being controlling in the disposition of Sullivan. In Cage, the district court instructed the jury as to "reasonable doubt" stating,

> This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty,* raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is

> required is not an absolute or mathematical certainty, but a *moral certainty*.

Id. at 40. (emphasis in original). The Sullivan Court held the district court's reasonable doubt jury instruction was not harmless error and precluded the defendant from receiving his Sixth Amendment right to jury trial. Sullivan, 508 U.S. at 278.

In the instant case, there was no semblance to a directed verdict as the jury was required to follow the model jury instruction given and determine if Stanko had the required prior felony conviction. They did so and this Court should affirm the conviction.

V. THE DISTRICT COURT DID NOT ERR IN DENYING STANKO'S MOTION FOR GRAND JURY RECORDS.

On April 1, 2005, Stanko filed a Motion and Brief for Access to Grand Jury Materials Relating to the Grand Jury's Composition, the Defendant's Alleged Bank Fraud Conviction and the Government's Representation of Stanko's Felon Status: Challenge to the Constitutionality of Rule 6(e). (Filing No. 21). In his motion, Stanko sought grand jury materials alleging the grand jury may have been misled regarding the factual basis for the indictment. (Filing No. 21, p. 3). Stanko claimed his Meat Inspection Act conviction is exempted under the "unfair trade

practice exception" set out at 18 U.S.C. § 921(g)(20) and that the grand jury should have been alerted to this fact. (Id.).

Stanko argues on direct appeal the text of the indictment "is barren of any mention of the full statutory definition provided by Congress in 18 U.S.C. § 921(a)(20)(A)" and as a result the flaws render the indictment and conviction fundamentally defective. (Appellant's brief, p. 26-27). Stanko's claim is without merit and should be denied.

Federal Rule of Criminal Procedure 6(e)(3)(C) permits disclosure of grand jury matters under certain circumstances. It is well established, however, that a defendant must show a "particularized need" for the information before the Court will consider releasing it. United States v. Broyles, 37 F.3d 1314, 1318 (8th Cir. 1994), cert. denied, 514 U.S. 1056 (1995); United States v. Sileven, 985 F.2d 962, 965 (8th Cir. 1993). More than a "bare allegation that the records are necessary to determine if there may be a defect in the grand jury process" is necessary to constitute a particularized need. See, United States v. Warren, 16 F.3d 247, 253 (8th Cir. 1994).

After carefully reviewing the motions, briefs in support and in opposition, the evidence, the record, and the relevant case law, the district court denied Stanko's motion. (Filing No. 106). The district court noted the government had

filed a superseding indictment after it determined Stanko's bank fraud conviction had been reduced to a misdemeanor, (Filing No. 106 pp. 3-4 of 6). The district court further noted Stanko contended in his motion that "a person convicted of an antitrust, unfair trade practice, or other business regulation offense is not considered a convicted felon for purposes of a felon in possession charge." (Filing No. 106, p. 4 of 6). The district court found:

> that whether the Federal Meat Inspection Act felony applies in this case is a legal argument that will be presented at trial. Nothing in the grand jury transcript will assist the court in determining the merits of this argument. Consequently, defendant's motion for the grand jury transcript, Filing No. 89, is denied, and the government's motion, Filing No. 101, is granted.

(Filing No. 106, p. 4 of 6). The district court properly determined the question of whether Stanko's FMIA conviction applied to the present case was not an issue for the grand jury to determine. See, United States v. Warren, 16 F.3d 247, 253 (8th Cir. 1994) citing United States v. Zangger, 848 F.2d 923, 925 (8th Cir.1988) ("prosecutor is under no obligation to give the grand jury legal instructions"); accord United States v. Larrazolo, 869 F.2d 1354, 1359 (9th Cir.1989) (prosecutor has no duty to outline the elements of the crime as long as the elements are at least implied and the instructions are not flagrantly misleading).

CONCLUSION

For the foregoing reasons, the United States respectfully requests this court affirm the sentence of the Defendant, Rudolph George Stanko.

Respectfully submitted,

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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 Appellee's Brief has been scanned for viruses, using Trend Micro Officescan, and is virus-free. The brief was created using WordPerfect 9.
Dated this 8th day of December, 2006.

s/ Frederick D. Franklin
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CERTIFICATE OF SERVICE

The undersigned hereby certifies 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, properly addressed and postage prepaid, this 8th day of December, 2006

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