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NO. 32-08

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IN THE

**United States Court of Appeals**  
FOR THE NINETEENTH CIRCUIT

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NICK HUME  
Appellant,

v.

UNITED STATES OF AMERICA  
Appellee.

**On appeal from the United States District Court  
for the Eastern District of New Amsterdam**  
*The Honorable Kelly Preston, United States District Judge*

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**BRIEF FOR APPELLANT**

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Andrew P. Connors

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## **QUESTION PRESENTED**

1. Whether a defendant can be convicted under 18 U.S.C. § 922(g)(1), via aiding and abetting liability, for helping a person come into possession of a firearm if the defendant did not know that the person whom he helped had been convicted of a felony.

## **STATEMENT OF THE CASE**

### **A. Statement of the Facts**

The appellant, Nick Hume, has maintained a friendship with Bones Darley since childhood. (R. at 8-3, ¶ 11). In early February of 2008, Bones met with Mr. Hume. (R. at 8-3, ¶ 10). Bones appeared distressed. *Id.* Mr. Hume inquired why he looked so “strung out,” and Bones explained that he feared reprisal from someone that he had “made war on.” *Id.* Concerned for his friend’s safety, Mr. Hume suggested that Bones obtain a firearm for self-defense. (R. at 8-3, ¶ 11). Bones was unsure of whether he should obtain a firearm, since he claimed to have recently served a “three-month stint in [jail] for [a] misdemeanor assault.” (R. at 8-3, ¶ 12). Unbeknownst to Mr. Hume, however, Bones had actually been convicted of a felony. (R. at 8-3, ¶ 8; 8-14). Bones also claimed that he could not afford to purchase a firearm. (R. at 8-3, ¶ 12). Mr. Hume told his friend not to worry about the expense, and he purchased his friend a firearm. (R. at 8-3, ¶ 13, 15). Mr. Hume made Bones promise that he would use the firearm properly, and Bones agreed. (R. at 8-3, ¶ 13-14.) Accordingly, Mr. Hume gave the firearm to his friend to provide for his self-defense. (R. at 8-3, ¶ 16). Unfortunately, Bones later used the firearm to commit a crime. (R. at 8-4).

### **B. Procedural History**

18 U.S.C. § 922(g)(1) makes it a crime for a convicted felon to possess a firearm, and 18 U.S.C. § 2(a) makes it a crime to aid and abet someone in the commission of a crime against the United States. On March 4, 2008, the United States brought a criminal indictment against Nick Hume, alleging that Mr. Hume had aided and abetted Bones Darley, as set forth in § 2(a), in

possessing a firearm in violation of § 922(g)(1). (R. at 8-2, ¶ 3). The indictment failed to allege that Mr. Hume knew that Bones Darley was a convicted felon. (R. at 8-2). Further, the government never showed that Mr. Hume had knowledge of Bones Darley’s felony conviction during its case-in-chief. (R. at 8-7). Thus, on August 27, 2008, Mr. Hume moved for a judgment of acquittal, arguing that he must have known that Bones Darley was a convicted felon to convict him as an accessory<sup>1</sup> under §§ 2(a) and 922(g)(1). (R. at 8-7). On September 8, 2008, the district court denied Mr. Hume’s motion. (R. at 8-17). The trial court found as a matter of fact that Mr. Hume did not know that Bones Darley was a convicted felon. (R. at 8-14). It also held that the law did not require the government to show that Mr. Hume had the specific intent to help a convicted felon obtain a firearm. Id. On September 12, 2008, a jury found Mr. Hume guilty. (R. at 8-18). On September 17, 2008, the district court entered a final judgment of guilt and sentenced Mr. Hume to five years in prison. (R. 8-19). This appeal followed. (R. at 8-21 – 8-22).

### **SUMMARY OF THE ARGUMENT**

The district court erred when it denied Mr. Hume’s motion for judgment of acquittal based on the erroneous holding that the government did not need to demonstrate that Mr. Hume had the specific intent to help a convicted felon obtain a firearm. This Court should examine the law as a whole – § 2(a), § 922(g)(1), and the associated punishment provision in § 924(a)(2) (the “applicable criminal law”) – to determine the level of scienter it requires.<sup>2</sup> In that light, the law requires the government to show that an alleged accessory specifically intended to commit the

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<sup>1</sup> This brief uses the term “accessory” interchangeably with “aider and abettor” or like terms. See BLACK’S LAW DICTIONARY, *accessory* (8th ed. 2004).

<sup>2</sup> Although unmentioned in the district court’s opinion, § 924(a)(2) should play a role in this court’s analysis of the applicable criminal law. § 924(a)(2) makes it a criminal offense to *knowingly* violate § 922(g), and makes it punishable by a fine or up to ten years in prison, or both. 18 U.S.C. § 924(a)(2) (2009). Accordingly, the text of the applicable criminal law includes the requirement of the principal to “knowingly violate[]” it. Id.

act proscribed by § 922(g)(1) in order to convict him of a crime. Accordingly, the accessory must *know* the necessary facts underlying the criminal offense – namely, that the principal is a convicted felon. This court should interpret the law to require specific intent because (1) Congress did not intend to dispense with this requirement; (2) a contrary construction of the law substantial constitutional question; and (3) at the very least, the law is so ambiguous that the rule of lenity should apply. Accordingly, this court should reverse.

**Congressional Intent.** The American rule of statutory construction places great emphasis on the intent of the legislature. Accordingly, the U.S. Supreme Court has repeatedly instructed the federal courts to presume that a criminal law requires a person to have the specific intent to carry out the acts it proscribes in order to convict the person of a crime, unless Congress expressly disclaims the requirement. Here, Congress intended to require a person to have the specific intent to transfer a firearm to a convicted felon in order to convict the person of a crime. This intent is apparent from (1) Congress' failure to expressly dispense with the requirement and (2) the overall statutory scheme. Accordingly, this court should interpret the applicable criminal law to require the government to prove that a person had specific intent in order to convict him as an accessory to the crime set forth in § 922(g)(1).

**Substantial Constitutional Question.** Where a court can interpret a statute in two ways – one constitutional and another that gives rise to a substantial constitutional question – the court should interpret the statute so that it avoids the constitutional question. The Fifth Amendment to the U.S. Constitution forbids the federal government from depriving a person of his liberty without due process. A deprivation of due process occurs, among other instances, when a person is convicted of a crime based on someone's unlawful status and the person did not have notice of the unlawful status. Here, Mr. Hume did not have notice of Mr. Darley's unlawful status. Hence,

interpreting the applicable criminal law as a strict liability crime gives rise to a substantial constitutional question under the Fifth Amendment. Therefore, this court should interpret the law to require specific intent in order to avoid this constitutional question.

**Rule of Lenity.** At the very least, the applicable criminal law is ambiguous, and hence the rule of lenity should apply in favor of Mr. Hume. Where a court can interpret a criminal law in one of two ways, and it is unclear which interpretation should apply, the court should choose the interpretation that favors the criminal defendant. Even assuming that some evidence suggests that Congress intended to create a strict liability crime, the existence of evidence to the contrary renders the law ambiguous. Therefore, this court should apply the rule of lenity in favor of Mr. Hume by interpreting the law to require an accessory to specifically intend to help a convicted felon obtain a firearm.

For these reasons, this court should reverse.

### **STANDARD OF REVIEW**

The question before this Court is a purely legal issue, and hence it should review it *de novo*. See McCreary C'ty of Ky. v. ACLU, 545 U.S. 844, 867 (2005). Further, this Court should not disturb the district court's factual finding that Mr. Hume did not know that Bones Darley was a convicted felon, because that finding is not clearly erroneous. See Bank of Nova Scotia v. United States, 487 U.S. 250, 261 (1988).

### **ARGUMENT**

#### **I. The district court erred when it applied the derivative approach over the purposive intent approach.**

The district court erred when it concluded that the applicable criminal law does not require an alleged accessory to know that he is helping a convicted felon obtain a firearm in order to convict the accessory of a crime. The court correctly relied on the U.S. Supreme Court's

well-established standard for aiding and abetting liability, which states that an alleged aider and abettor must “in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.” Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (quoting United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)).

However, the district court incorrectly adopted the “derivative approach” when it interpreted the applicable criminal law as a strict liability crime. The derivative approach proposes that the law only requires the aider and abettor to have the same *mens rea* as the principal. (R. at 8-14.) Hence, the district court reasoned that §§ 922(g)(1) and 924(a)(2) only require the government to show that the principal knowingly acquired a firearm, so the court further suggested that the government only needed to show that Mr. Hume knowingly gave Bones Darley a firearm. (R. at 8-17.) To support this conclusion, the district court relied on other federal courts that concluded that the derivative approach should apply to § 922(g)(1); however, those courts gave no analysis to support their conclusions. See, e.g., United States v. Canon, 993 F.2d 1439 (9th Cir. 1993). Yet other federal courts cited by the district court found accessory liability under § 922(g)(1) because the accessory had already engaged in blatantly criminal activity, like robbery. See, e.g., United States v. Moore, 936 F.2d 1508 (7th Cir. 1991).

As the Ninth Circuit recognized after Canon, there is a distinct difference between the imposition of criminal liability upon a convicted felon and an accessory under § 922(g)(1), since a court can impute knowledge of unlawful status to the convicted felon, but cannot impute the same knowledge to the alleged accessory. United States v. Graves, 143 F.3d 1185, 1188 n.3 (9th Cir. 1998). With that same distinction in mind, the Sixth Circuit has considered accessory liability in light of U.S. Supreme Court precedent that instructs the federal courts to impute a

specific intent requirement to criminal laws that are silent on the issue. See United States v. Hill, 55 F.3d 1197, 1201-06 (6th Cir. 1995). Hence, this Court should consider the applicable criminal law as a whole and interpret it accordingly, as set forth in further detail below.

**II. This court should interpret the applicable criminal law to require an accessory to have the specific intent to help a convicted felon obtain a firearm because Congress did not intend to dispense with this requirement.**

The U.S. Supreme Court has long held that “[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.” Staples v. United States, 511 U.S. 600, 604 (1994) (quoting Liparota v. United States, 471 U.S. 419, 425 (1985)). “Thus, we have long recognized that determining the mental state required for commission of a federal crime requires ‘construction of the statute and . . . inference of the intent of Congress.’” Id. at 605 (quoting United States v. Balint, 258 U.S. 250, 253 (1922)). In accordance with this rule of statutory construction, the U.S. Supreme Court has repeatedly held that a federal court must presume that Congress intended to require a criminal defendant to have the specific intent to perform the acts proscribed by a criminal law in order to convict him of a crime, unless Congress expressly disclaims the requirement. United States v. X-Citement Video, Inc., 513 U.S. 64, 68 (1994) (citing Morrisette v. United States, 342 U.S. 246 (1952)).<sup>3</sup> Accordingly, the government must demonstrate that Congress expressly dispensed with this requirement in order to convict the defendant of committing the proscribed acts without showing an accompanying *mens rea*. Id. Congress can dispense with a specific

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<sup>3</sup> See also Staples, 511 U.S. at 602 (“we must construe the statute in light of the background rules of the common law . . . in which the requirement of some *mens rea* for a crime is firmly embedded.”); Liparota, 471 U.S. at 425 (“Absent indication of contrary purpose in the language or legislative history of the statute, [it] requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations.”); United States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978) (“Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.”) Morrisette, 342 U.S. at 250 (quoted in the first paragraph of Part I.A, supra.)

intent requirement by constructing a “public welfare” offense that seeks to regulate an area affecting public health, safety, or welfare. Morrisette, 342 U.S. at 252. However, a law is not a “public welfare” offense when it (1) has common law roots, (2) criminalizes traditionally lawful conduct, or (3) provides a harsh criminal penalty, as it does in this case.<sup>4</sup> Further, even if this Court concludes that a statute exhibits characteristics of a “public welfare” offense, this court should still determine congressional intent by carefully examining the overall statutory scheme. The U.S. Supreme Court strongly disfavors a strict textual reading of a particular statute. See F.C.C. v. NextWave Pers. Commc’ns Inc., 537 U.S. 293, 311 (2003) (citing Kirby v. United States, 74 U.S. 482, 485 (1868)). By reading a particular statutory provision in light of the overall statutory scheme, this Court can avoid unreasonable and absurd interpretations that run contrary to congressional intent.

**A. This court should presume that Congress did not intend to dispense with a specific intent requirement because the applicable criminal law has common law roots, criminalizes traditionally lawful conduct, and provides a harsh criminal penalty.**

In 1952, the United States Supreme Court emphatically stated,

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morrisette, 342 U.S. at 250. “As the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation.” Id. at 252. Hence, federal courts must presume

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<sup>4</sup> See infra Part I.A. Although the Court should view these as factors as opposed to elements, the presence of any one of the factors strongly suggests that Congress did not intend to dispense with specific intent.

that Congress intended to require a person to have the criminal intent to commit the acts proscribed by a statute. Id.<sup>5</sup>

Congress dispenses with specific intent in a criminal statute when it creates a “public welfare” offense that seeks to regulate an area affecting public health, safety, or welfare. Id. However, Congress does not construct a “public welfare” offense when it creates a statute that has common law roots. Id. In Morissette, the government charged the defendant with the theft and conversion of United States property. Id. at 248. The defendant argued that he believed that the United States had abandoned the property, and hence the government could not convict him of the crime because he lacked the specific intent to permanently deprive another of his property. Id. at 248-49. The government countered that the law only required it to show that the defendant intended to take the property. Id. at 249. The U.S. Supreme Court held that the government had to show that the defendant had the specific intent to *steal* the property, because the statute making conversion of government property a crime adopted the common law crime of conversion, and hence it had roots in the common law. Id. at 273. The Court therefore reasoned that it could “find no grounds for inferring any affirmative instruction from Congress to eliminate intent from any offense with which the defendant was charged.” Id.

Further, a law is typically not a “public welfare” offense when it criminalizes traditionally lawful conduct and provides for a harsh criminal penalty. Staples, 511 U.S. at 616-19. In Staples, the government charged Harold Staples with the unlawful possession of a machine gun that was not registered. Id. at 602. For this infraction, the law provided for imprisonment up to ten years. Id. at 602-03. Staples argued that he did not know that the firearm

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<sup>5</sup> The Court has also applied the presumption to laws that do not match the common law crimes, but that are “akin to the common-law offenses against the ‘state, the person, property, or public morals.’” X-Citement Video, 513 U.S. at 71-72 (quoting Morissette, 342 U.S. at 255).

in his possession was a machine gun as defined by the law. *Id.* at 603-04. In contrast, the government argued “that Congress intended the Act to regulate and restrict the circulation of dangerous weapons.” *Id.* at 606. Hence, the government claimed that the act was a “public welfare” offense that imposed “a form of strict criminal liability” that did “not require [Staples] to know the facts that [made] his conduct illegal.” *Id.* The U.S. Supreme Court held that the law required the government to show that Staples knew that he possessed a machine gun, substantially relying on *Morrisette* and its reasoning. *Id.* at 619-20. The court further held that “where . . . dispensing with *mens rea* would require the defendant to have knowledge only of *traditionally lawful conduct*, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement.” *Id.* at 618-19 (emphasis added). “In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply.” *Id.*

**1. § 2(a) has roots in the common law consistent with the presumption of specific intent and inconsistent with a “public welfare” offense.**

First, like the statute in *Morrisette*, 18 U.S.C. § 2(a) has roots in the common law; hence, the applicable criminal law is not a “public welfare” offense that dispenses with specific intent. § 2(a) states, “Whoever commits an offense against the United States or *aids, abets, counsels, commands*, induces or *procures* its commission, is punishable as a principal.” 18 U.S.C. § 2(a) (2009) (emphasis added). As Judge (later Justice) Learned Hand explained in *Peoni*, “The substance of that formula goes back a long way.” *Peoni*, 100 F.2d at 402. As early as the 14th century, the common law made a person guilty of a crime if the person “*procured, counselled, commanded* or *abetted* [a] felony.” *Id.* (internal citations and quotations omitted; emphasis added). As Justice Hand noted, Sir William Blackstone, in his commentaries on the common law of England, “described an accessory as ‘he who in any wise *commands* or *counsels* another to

commit an unlawful act.” Id. (quoting 4 WILLIAM BLACKSTONE, \*36-37). Thus, Congress essentially used the same language as the common law when it codified accessory liability in § 2(a). It also incorporated the common law understanding of accessory liability when it made an accessory subject to the same punishment as a principal. See 4 WILLIAM BLACKSTONE, COMMENTARIES, \*39 (“the general rule of the ancient law . . . is this, that accessories shall suffer the same punishment as their principals.”)

Where Congress borrows common law terms carrying the accumulated knowledge of “centuries of legal practice, it presumably knows and adopts the cluster of ideas . . . attached to each term. . . . In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.” Morrisette, 342 U.S. at 250. Hence, Congress knew what it was doing when it used very particular, well-established terms of art in § 2(a). It intended to root the statute in the common law, including the common law requirement of specific intent. See Morrisette, 342 U.S. 244 (noting that the common law requires the state to show a “vicious will” to convict someone of a crime.) See also BLACK’S LAW DICTIONARY, *mens rea* (8th ed. 2004) (“*mens rea* is the second of two essential elements of every crime at common law.”) Therefore, this Court should presume that Congress did not intend to dispense with specific intent.

**2. This court should presume that the applicable criminal law includes a specific intent requirement because it criminalizes traditionally lawful conduct involving the long-held right of self-defense.**

Second, like the statute in Staples, the applicable criminal law makes a crime of traditionally lawful activity, and hence this further suggests that Congress intended to require specific intent. Just as it did in Staples, the government ignores the fact that “there is a long tradition of widespread lawful gun ownership by private individuals in this country.” Id. at 610. Thus, “despite their potential for harm, guns generally can be owned in perfect innocence.” Id. at

619. It makes little sense to conclude that Congress would seek to criminalize the countless number of firearms transactions that occur regularly and lawfully within this country. Accordingly, the construction of the applicable criminal law to require specific intent “is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct.” Liparota, 471 U.S. at 426.<sup>6</sup> This is not a trivial notion. “[T]he right of the people to keep and bear Arms” has a deep tradition in the United States. See U.S. CONST. amend. II. Included in that tradition is the inherent right to use firearms in exercising the right of self-defense. See District of Columbia v. Heller, 128 S.Ct. 2783 (2008). Where the plain meaning of a criminal statute conflicts with a deeply held tradition of the American people, the court should interpret the statute in light of the tradition. See Holy Trinity Church v. United States, 143 U.S. 457 (1892) (where the U.S. Supreme Court held that a law that restricted any foreign labor did not apply to a foreign Christian minister, based on the long-held religious traditions of the American people.) Accordingly, this Court should interpret the law to require an accessory to have specific intent.

**3. This court should presume that the applicable criminal law includes a specific intent requirement because it provides a harsh criminal penalty.**

Third, like the statute in Staples, the applicable criminal law provides for a harsh criminal penalty consistent with the presumption of specific intent and inconsistent with a “public welfare” offense. In Staples, the statute provided for imprisonment up to ten years. Staples, 511 U.S. at 602-03. Although Mr. Hume was sentenced to five years in prison – a harsh penalty in

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<sup>6</sup> In 1971, The U.S. Supreme Court found intent to dispense with a scienter requirement where Congress enacted a statute requiring the registration of hand grenades, reasoning that hand grenades are an inherently dangerous item that supported the interpretation of the statute as a “public welfare” offense. See United States v. Freed, 401 U.S. 601 (1971). However, in 1994 the Court held that a firearm is not an inherently dangerous item as understood by the “public welfare” theory, reasoning that one can hardly compare a hand grenade to a firearm. Staples, 511 U.S. at 610.

itself – the applicable criminal law allowed the district court to sentence Mr. Hume **up to ten years**. See 18 U.S.C. § 924(a)(2). Hence, the applicable criminal law provides the same penalty as the statute in Staples. Further, the law does not provide for the low sentence typical of a “public welfare” offense. See, e.g., United States v. Dotterweich, 320 U.S. 277, 281 (1943) (where a “public welfare” offense punished the misbranding of food and drugs as a misdemeanor). Accordingly, the harsh penalty provided by the law reinforces the conclusion that this Court should presume that Congress did not intend to dispense with specific intent.

**B. This court should require an accessory to have specific intent under the applicable criminal law because Congress intended this result when it enacted § 922(d)(1).**

Further, Congress has unambiguously expressed its intent to provide criminal liability only where a person knowingly gives a convicted felon a firearm. 18 U.S.C. § 922(d)(1) (2009). § 922(d)(1) makes it “unlawful for any person to sell or otherwise dispose of any firearm to any person knowing or having cause to believe that such person . . . has been convicted . . . [of] a crime punishable by imprisonment for a term exceeding one year.” 18 U.S.C. § 922(d)(1) (2009). “As the text of the statute indicates, one cannot be criminally liable under § 922(d) without knowledge or reason to know of the transferee's status.” United States v. Xavier, 2 F.3d 1281, 1286 (2d Cir. 1993). Since § 922(g)(1) matches the language of § 922(d)(1), it follows that “proof of knowledge (or reasonable cause to believe) of an ex-felon's status is a required element for conviction, as an aider and abettor, under Section 922(g)(1).” Id. As the Fifth Circuit has explained, “it is the purchaser's status as a felon which makes the activity criminal. If the aider and abettor does not know this fact, it is difficult to say he shared in the criminal intent of the principal.” United States v. Murray, 988 F.2d. 518, 522 (5th Cir. 1993). Thus, this Court should hold that the applicable criminal law requires an accessory to have specific intent.

**III. The applicable criminal law requires an accessory to have the specific intent to help a convicted felon obtain a firearm because the contrary interpretation raises a substantial question under the Fifth Amendment to the United States Constitution.**

Additionally, this Court should interpret the law to require an alleged accessory to have specific intent because a contrary interpretation would give rise to a substantial constitutional question. This Court should construe “a statute . . . so as to avoid substantial constitutional questions.” X-Citement Video, 513 U.S. at 69. The Fifth Amendment to the United States Constitution forbids the federal government from depriving a person of his “life, liberty, or property, without due process of law.” U.S. CONST. amend. V. A criminal law runs afoul of due process when it convicts a person based on someone’s unlawful status and the person did not have notice, or knowledge, of that status. See X-Citement Video, 513 U.S. at 78; Lambert v. California, 355 U.S. 225, 228-30 (1957). Hence, foregoing specific intent in this case gives rise to a substantial constitutional question. Id. Accordingly, this court should construe the applicable criminal law to include specific intent in order to avoid this question.

**A. Lack of notice in this case gives rise to a substantial constitutional question that this Court should avoid by interpreting the applicable criminal law to require knowledge.**

A criminal statute that hinges on a person’s unlawful status must provide an alleged offender with the “opportunity to avoid the consequences” of the statute by requiring the offender’s “actual knowledge of [the person’s unlawful status] or proof of the probability of such knowledge.” Lambert, 355 U.S. at 229-30. In Lambert, the City of Los Angeles made it a crime for a convicted felon to be in the city for more than five days without registering with authorities. Id. at 226. According to California, the law did not require a person to have knowledge of his unlawful status in order to have criminal liability. Id. at 227. However, the U.S. Supreme Court held that “actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can

stand.” Id. at 229. “As Holmes wrote in *The Common Law*, ‘A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.’” Id. at 229 (quoting OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 50 (1881)). Accordingly, the Court viewed lack of notice as a severe burden that ran afoul of due process. Id.

Further, this rule extends to laws that make a person criminally liable based on the unlawful status of another. See X-Citement Video, 513 U.S. at 78. In X-Citement Video, the government charged several defendants with the interstate transportation of pornography containing minors, in violation of a federal statute. Id. at 65-66. The statute did not explicitly require the defendants to know the age of the pornographic performers. Id. at 68. The U.S. Supreme Court held that despite the plain grammatical reading of the statute, it would presume that Congress intended scienter to apply to all elements of the offense. Id. at 77-78. In addition to evaluating the intent of Congress, the Court also noted that its precedents “suggest that a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts.” Id. at 78. It therefore concluded that it had “to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress.” Id.

Like the laws in Lambert and X-Citement Video, the applicable criminal law in this case gives rise to a substantial constitutional question if this court interprets it to allow for the conviction of Mr. Hume without specific intent. As the Supreme Court noted in Lambert, due process requires a person to have notice of his unlawful status in order to convict him of a crime. Lambert, 355 U.S. at 229-30. The court later held in X-Citement Video that this principle extends to circumstances where the conviction hinges on another’s unlawful status – precisely the circumstances presented in this case. Like the defendants in X-Citement Video that did not

know of the unlawful status of the minors in their pornographic films, Mr. Hume did not know of the unlawful status of his friend, Bones Darley.<sup>7</sup> Hence, this Court should avoid the substantial question inherent in the government's construction of the applicable criminal law by interpreting the law to require an accessory to have the specific intent to help a convicted felon obtain a firearm.

Further, this line of reasoning does not establish a defense of ignorance of the law, as the government may suggest. See Liparota, 471 U.S. at 436. As the Supreme Court explained in Lambert, “The rule that ignorance of the law will not excuse is deep in our law.” Lambert, 355 U.S. at 228 (internal quotations and citation omitted.) However, the proposition that Mr. Hume had to know of Bones Darley's unlawful status is a defense based on a mistake of fact, which is quite different from a mistake of law. Hence, a defense based on mistake of fact is permissible and appropriate in this case. See Lambert, 355 U.S. at 228-30.

**IV. At the very least, the applicable criminal law is so ambiguous that this Court should apply the rule of lenity in favor of Mr. Hume.**

Even if this Court believes that there is some evidence that Congress intended to create a strict liability crime when it enacted the applicable criminal law, this Court should still interpret the law to require specific intent, because the co-existence of evidence in favor of each interpretation renders the law ambiguous, and hence this Court should apply the rule of lenity in Mr. Hume's favor. “[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” Liparota, 471 U.S. at 427 (quoting Rewis v. United States, 401 U.S. 808, 812

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<sup>7</sup> The district court held as a matter of fact that Mr. Hume did not know of Bones Darley's unlawful status. (R. at 8-14). This Court should not disturb that finding because it is not clearly erroneous. See Bank of Nova Scotia, 487 U.S. at 261. Further, the government failed to and could not prove that Mr. Hume should have known of Mr. Hume's unlawful status. Bones told Mr. Hume that he was convicted of a misdemeanor and imprisoned for three months. (R. at 8-3, ¶ 12). This falls far short of the year of imprisonment required under § 922(g)(1), and hence Mr. Hume had no reason to know that Bones Darley was a convicted felon.

(1971)). “Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.” Id. (citing United States v. Bass, 404 U.S. 336, 348 (1971)).

In Liparota, the applicable statute was ambiguous regarding whether a defendant had to know of the underlying facts and circumstances that made his purchase of food stamps illegal. Id. at 434. The U.S. Supreme Court held that the defendant had to know of the underlying facts and circumstances that made his conduct illegal, based in part on the rule of lenity. Id. at 427-34. The Court reasoned that Congress probably did not intend to dispense with a specific intent requirement, and the rule of lenity further convinced the Court that it should interpret any ambiguity in the law in favor of the criminal defendant. Id. at 427-28.

Like the criminal statute in Liparota, there is at least some indication that Congress did not intend to dispense with specific intent in the applicable criminal law in this case. Hence, even if this Court believes that there is some indication that Congress intended to construct a strict liability crime, there is still evidence that it did not intend to do so, thus rendering the statute ambiguous. Accordingly, this court should apply the rule of lenity in favor of the criminal defendant by interpreting the applicable criminal law to require the alleged accessory to have the specific intent to help a convicted felon obtain a firearm.

### **CONCLUSION**

For the foregoing reasons, this Court should reverse the district court and acquit Mr. Hume of the charge of aiding and abetting the crime set forth under 18 U.S.C. § 922(g)(1).

*/s/Andrew P. Connors/*

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