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Could Ignorance with Your Firearm Be Safer? United States v. Harris, 959 F.2d 246 (D.C. Cir.), cert. denied, 113 S. Ct. 362 (1992)

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COULD IGNORANCE WITH YOUR FIREARM BE SAFER?

United States v. Harris, 959 F.2d 246 (D.C. Cir.), *cert. denied*, 113 S. Ct. 362 (1992)

In *United States v. Harris*,[1] the United States Court of Appeals for the District of Columbia Circuit held that to convict under 26 U.S.C. § 5861(d)[2] the government must prove that the defendant knowingly possessed or received a "firearm," as defined in the National Firearms Act.[3]

Lamar Harris and Richard Smith participated in an illegal drug distribution in Washington, D.C.[4] In exchange for drugs, Harris and Smith received a gym bag containing ten guns,[5] including a MAC-10.[6] They were subsequently arrested and charged with possession of an automatic weapon without a permit in violation of § 5861(d).[7]

After hearing the evidence, the district court charged the jury that it

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1. 959 F.2d 246 (D.C. Cir.), *cert. denied*, 113 S. Ct. 362 (1992).

2. Section 5861 provides, in relevant part, that "[i]t shall be unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 26 U.S.C. § 5861 (1988).

3. 959 F.2d at 261. 26 U.S.C. § 5845(a) defines "firearm" for purposes of § 5861. Section 5845 provides that:

> The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; . . . (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in [18 U.S.C. § 921]); and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

26 U.S.C. 5845(a) (1988).

4. The other defendants were Michael Palmer, Gary Wyche and Donald Johnson . Palmer headed the drug-trafficking organization, while the other defendants played supporting roles. The organization imported cocaine from New York City and distributed it in Washington, D.C. 959 F.2d at 249.

5. *Id.* In addition to convictions stemming from the illegal exchange, the defendants were also convicted of employing weapons to intimidate their competition and to protect their operation against the police. *Id.* at 248.

6. *Id.* An acquaintance of Harris and Smith had exchanged weapons for drugs on several occasions. Prior to the transfer in question, he became a government informant and tipped off the federal agents. *Id.* A MAC-10 is a machine gun and thus a "firearm" for purposes of the National Firearms Act. *See supra* note 3.

7. 959 F.2d at 249. Harris and Smith were also charged with possession and use of firearms "during and in relation" to a drug distribution offense under 18 U.S.C § 924(c). *Id.* The court's interpretation of the § 924(c) mens rea requirement is beyond the scope of this Comment. For a discussion of 18 U.S.C. § 924(c), see 959 F.2d at 258-59.

could convict Harris and Smith under § 5861(d) if it found that the defendants knowingly possessed a firearm and that the firearm was in fact a machine gun.[8] The jury returned a guilty verdict.[9] On appeal, Harris and Smith argued that the government had to prove that they had knowledge of the gun's automatic firing capability.[10] The court of appeals agreed and overturned the § 5861(d) convictions.[11] The court held that § 5861(d) requires the defendants to know that they were receiving a "firearm" as defined in the Act.[12]

The Supreme Court interpreted § 5861(d) in *United States v. Freed*.[13] There, the government indicted the defendants for possessing and conspiring to possess unregistered hand grenades in violation of § 5861(d).[14] The district court dismissed the indictment because the conspiracy and the possession charges did not allege scienter.[15] The Supreme Court reversed.[16] The Court reasoned that although the presence of a "vicious will" is usually a requirement for criminal responsibility,[17] the procedure contained in the National Firearms Act was a public safety measure that dispensed with the necessity for knowledge that the weapon was

8. 959 F.2d at 258.

9. *Id.*

10. *Id.*

11. *Id.* at 261. However, the court determined that no remand was necessary. The government conceded that insufficient evidence was presented to show that Smith knew that the weapon was a machine gun; accordingly, the court should have acquitted Smith on the § 5861(d) charge. Because Harris's sentence on the § 5861(d) conviction ran concurrently with his other sentences, the government did not seek his retrial. *Id.*

12. *Id.* *See supra* note 2. The court rejected Harris and Smith's claim that the Due Process Clause requires the government to prove knowledge of the MAC-10's automatic capabilities. 959 F.2d at 258. The court stated that there is no constitutional requirement that every element of an offense dealing with highly dangerous devices or substances have *scienter*. *Id.* at 258. This Comment will not address the due process issues.

13. 401 U.S. 601 (1971).

14. *Id.*

15. *Id.* at 604-05. The Court addressed the scienter requirement for the registration status of the weapon, not the scienter requirement for the characteristics of the gun itself. *Id.* at 607-10.

The district court had also held that the amended Act of 1968 violated the Self-Incrimination Clause of the Fifth Amendment. *Id.* at 604-05. This argument is beyond the scope of this Comment. For a discussion of the Fifth Amendment infirmities in the National Firearms Act prior to 1968, see *Freed*, 401 U.S. at 604-06; Haynes v. United States, 390 U.S. 85, 95-100 (1968).

16. 401 U.S. at 610.

17. *Id.* at 607. "The presence of a 'vicious will' or *mens rea* was long a requirement of criminal responsibility. But the list of exceptions grew, especially in the expanding regulatory area involving activities affecting public health, safety, and welfare." *Id.* (citations omitted). *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 3.8 (1986) (discussing the explosion of strict liability crimes).

unregistered.[18]

The circuit courts have disagreed over the proper interpretation of the *Freed* case.[19] In *United States v. Ross*,[20] the Seventh Circuit upheld a

18. 401 U.S. at 609. The Court distinguished cases like Morissette v. United States, 342 U.S. 246 (1952) (finding defendant could not be convicted of taking government property without knowledge that the property belonged to the government); Lambert v. California, 355 U.S. 225 (1957) (finding unconstitutional a local ordinance making it a crime for a felon to remain in Los Angeles for more than five days without registering with the chief of police); United States v. Dotterweich, 320 U.S. 277 (1943) (refusing to hold a corporate officer liable for shipping misbranded and adulterated drugs in violation of the Food and Drug Act when he had no knowledge of any wrongdoing). The Court implicitly reasoned that in the first two cases, the defendants could not have reasonably anticipated government regulation. In the latter case, the defendant's business was heavily regulated, making it reasonable to foresee the imposition of governmental standards. Therefore in *Dotterweich*, it was permissible to hold the defendant strictly liable as a public safety measure. The Court found that the *Freed* case was analogous to *Dotterweich* as a public safety measure and thus no specific evil intention was necessary. 401 U.S. at 609. The Court premised this conclusion by observing that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act" and thus would be aware of the high probability of federal regulation. *Id.*

In his concurrence, Justice Brennan noted that prior provisions of the National Firearms Act replaced by the current § 5861(d), were interpreted to require a defendant to know the items he possessed were firearms. *Id.* at 614 (Brennan, J., concurring). Justice Brennan reasoned that because Congress did not reject the holdings of these cases when amending § 5861(d), Congress must have intended to require the government to prove that the defendant knew that the weapons were hand grenades. *Id.*

The legislative history of the National Firearms Act does not indicate the knowledge required for a conviction. Congress sought to make it difficult for gangsters to obtain certain types of weapons. *See, e.g.*, S. REP. NO. 1303, 86th Cong., 2d Sess. 3 (1960), *reprinted in* 1960 U.S.C.C.A.N. 2111, 3112 ("The primary purpose of that act was to make it more difficult for the gangster element to obtain certain types of weapons."); HOUSE COMM. ON WAYS AND MEANS, INTERNAL REVENUE CODE OF 1954, H. REP. NO. 1337, 83d Cong., 2d Sess. (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4542 ("[T]he clearly indicated congressional intent [was] to cover under the National Firearms Act only such modern and lethal weapons, except pistols and revolvers, as could be used readily and efficiently by criminals or gangsters.").

Prior to the *Freed* decision, provisions of the National Firearms Act replaced by the present § 5861(d) were uniformly interpreted to require only that the defendant knew he possessed a gun. "By the lower court decisions at the time that requirement [§ 5861(d)] was written into the Act the only knowledge required to be proved was knowledge that the instrument possessed was a firearm." 401 U.S. at 606. *See* Sipes v. United States, 321 F.2d 174, 179 (8th Cir.), *cert. denied*, 375 U.S. 913 (1963); Bryan v. United States, 373 F.2d 403, 405 (5th Cir. 1967) (scienter is not an element of the offense); United States v. Decker, 292 F.2d 89, 90 (6th Cir.) ("scienter is not involved"), *cert. denied*, 368 U.S. 834 (1961).

19. In United States v. Debartolo, the First Circuit discussed a similar subsection of § 5861 and held that the government need prove only that the defendant knew he possessed a "firearm" within ordinary meaning of the word. 482 F.2d 312, 317 (1st Cir. 1973). In *Debartolo*, the defendant was convicted of aiding and abetting the transfer of a firearm in violation of § 5861(e) of the National Firearms Act. *Id.* at 313. The court found that the government need only prove that the defendant knew the object involved was a gun in its everyday sense. *Id.* at 313-14. The defendant admitted that he knew the weapon was a shotgun, but claimed that he did not know that it was under 18 inches in length. *Id.* at 314. The court held that the former knowledge was sufficient for conviction.

prior line of precedent and required the government to prove only that the defendant knew the weapon was a firearm in the general sense of the word.[21] First, the court concluded that the language of § 5861(d) did not contain a knowledge component, but that § 5861(*l*) required scienter.[22]

Id. at 317. The First Circuit interpreted *Freed* to hold that a person involved in the sale or transfer of a dangerous device has notice of the likelihood of the regulation and so acts at his or her own peril. *Id.* at 316. The court found support for its holding in United States v. International Minerals Corp., 402 U.S. 558, 565 (1971) ("But where, as here and as in *Balint* and *Freed*, dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."). The First Circuit reasoned, therefore, that "the Government need not prove that a defendant knows he is dealing with a . . . weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation." *Id.* Therefore, one who knew he was transferring a shotgun was guilty of a violation regardless of whether he knew the shotgun was under 18 inches long. *Id.* The court acknowledged that *Freed* assumed the Government would have to prove the defendant knew the grenade was a grenade. However, since *all* grenades are "firearms" under the Act, the Supreme Court did not have to decide whether the defendant had to inspect to see whether the grenade was of the type regulated. Thus, the rationale of *Freed* did not dictate a different result. *Id.* at 316. The court saw no difference between the duty of one possessing a hand grenade, as occurred in *Freed*, to ascertain if it *is* registered, and of one, knowingly transferring a shotgun, to ascertain if it *must be* registered. *Id.* at 316.

The court's analysis was correct. The holding in both situations is that the nature of the defendant's activity is sufficiently dangerous to alert him to the need for further investigation. In either case, mistake of law would not be a valid defense. A defendant could not escape criminal liability by arguing he was not aware of the registration requirement. However, mistake of fact would be a valid defense. A defendant could successfully argue that he did not know the item he possessed was a grenade or the item he transferred was a shotgun. Whether a defendant could further argue that while he did know that the item he possessed was a gun, he did not know that it possessed the characteristics making it a "firearm" under the Act, is the issue on which the circuits split. Here, the First Circuit held that the defendant could not. The court found that since a person who knows he is dealing with a gun of some kind is sufficiently alerted to the possibility of regulation, the mistake of fact defense was not necessary. 482 F.2d at 316. Although this case did not specifically address § 5861(d), there is no reason to expect that the analysis would have been any different had that section been at issue. The *Harris* case itself cites *DeBartolo* as supporting the view that knowledge that the weapon is a "firearm" in the general meaning of the term is required for § 5861(d). 959 F.2d at 260.

20. 917 F.2d 997 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1078 (1991).

21. 917 F.2d at 999. The Seventh Circuit's holding echoed its decision in United States v. Ranney, 524 F.2d 830 (7th Cir. 1975). Judge Manion dissented, urging the court to overrule the *Ranney* decision and to require the government to show that the defendant knew the weapon he possessed was a "firearm" as defined by the Act. *Id.* at 1004 (Manion, J., dissenting). Judge Manion argued that because the proscribed conduct was possessing a "firearm" as defined by the Act, knowledge that the weapon was a "firearm" in its ordinary sense had no connection to the proscribed conduct. In addition, "strange consequences" could result under the majority's holding. For example, a defendant who possessed a hand grenade could argue that he did not know he had a firearm in the ordinary sense and thus escape criminal liability. *Id.* at 1003.

22. 917 F.2d at 1000. Section 5861(*l*) provides that "it shall be unlawful to make, or cause the making of, a false entry on any application, return, or record required by this chapter, knowing such

Second, the court asserted that *Freed*'s holding, which dispensed with a knowledge requirement regarding the registration status of a "firearm," implied that a mental state as to the status of the weapon as a "firearm" was also unnecessary.[23] Third, the court noted that statutes prohibiting inaction typically contain no mens rea element in order to foster compliance with the law and to achieve statutory purposes.[24] Fourth, the court found that an anomaly would result if the statute required knowledge of the weapon's characteristics as a "firearm," as defined by the Act. Those who learned the statutory scheme but then failed to comply would go to jail, while those who remained ignorant of the scheme would be immune from prosecution.[25] In conclusion, the court stated that once a person knows that he or she possesses a device which is, in reality, regulated, it better serves Congress' intent for the person to bear the burden of compliance.[26]

The Fifth Circuit disagreed with the Seventh Circuit in *United States v. Anderson*.[27] Anderson was arrested and convicted for possession of

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entry to be false." 26 U.S.C. § 5861(*l*) (1988). The court stated that "[o]rdinarily courts do not interpolate requirements of a kind that have been included in some subsections and omitted in their neighbors." 917 F.2d at 1000.

23. 917 F.2d at 1000.

24. *Id.* at 1001. The court observed that the only way for registration to occur is to place the initiative on the owner to investigate. Otherwise, no reason would exist for an owner to investigate because any of the outcomes would be more onerous than merely "turn[ing] a blind eye." *Id.*

25. *Id.* The court noted that this was not a "sound approach." *Id.*

26. *Id.* The court stated that knowledge of an object as a dangerous device puts those in possession of such an object on notice to inquire and justifies placing the risk of non-compliance on the possessor. *Id.*

The Eighth Circuit agrees. In United States v. Morgan, 564 F.2d 803 (8th Cir. 1977), the court held that general knowledge that the item was a firearm constituted sufficient intent for criminal liability under § 5861(d). 564 F.2d at 806. However, the court's decision is questionable because several of the cases upon which it relied, *i.e.* United States v. Vasquez, 476 F.2d 730 (5th Cir. 1973) and United States v. Cowper, 503 F.2d 130 (6th Cir. 1974), *cert. denied*, 420 U.S. 930 (1975), have been subsequently disputed. *See infra* notes 47-48 and accompanying text. The Eighth Circuit recently reaffirmed *Morgan*. *See* United States v. Matra, 841 F.2d 837 (8th Cir. 1988).

The Fourth, Tenth and Eleventh Circuits have adopted the same position. In United States v. Shilling, 826 F.2d 1365 (4th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988), the court, following the *Morgan* rule, stated that the government need not prove the defendant knew the weapon was a "statutory" firearm. 826 F.2d at 1367-68. In United States v. Mittleider, 835 F.2d 769 (10th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988), the court held that the government is not required to prove actual knowledge of a weapon's capabilities. 835 F.2d at 774. In United States v. Gonzalez, 719 F.2d 1516 (11th Cir. 1983), *cert. denied*, 465 U.S. 1037 (1984), the court stated that the government need not prove that the defendant knew the weapon in his possession was a "firearm" within the meaning of the statute. 719 F.2d at 1522.

27. 885 F.2d 1248 (5th Cir. 1989). A panel of the Fifth Circuit had affirmed Anderson's conviction under instructions requiring the jury to find that he knew the guns were firearms in the

two automatic weapons and parts of silencers in violation of § 5861.[28] The Fifth Circuit reversed Anderson's conviction because of an erroneous jury instruction, which required only that the defendant have knowledge that the guns he possessed were firearms in the general sense.[29] In reaching this conclusion, the court was concerned with the possibility that one who possessed a gun which, to all outward appearances, did not resemble a statutory "firearm" could be convicted if the gun had been altered to an automatic capability either by design or by the effects of use and wear.[30] The court reasoned that Congress could not have intended to imprison the owner of an ordinary pistol merely because the gun had been modified to be fully automatic without the owner's knowledge.[31] Therefore, the court ruled that the government was required to prove that the defendant knew the weapons he possessed were "firearms" under the Act and not "firearms" within the general meaning of the term.[32]

The Sixth Circuit reached a similar result in *United States v. Williams*.[33] The court held that the government had to prove the defendants' knowledge of the characteristics of the weapon subjecting it to regulation.[34] The court reasoned that the characteristics of a sawed-off

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general sense as opposed to knowing that they were automatic weapons. United States v. Anderson, 853 F.2d 313 (5th Cir. 1988). However, the panel majority urged that the case be reheard en banc in order to reexamine Fifth Circuit precedent, 853 F.2d at 317-21. The court granted the motion for a rehearing en banc. 885 F.2d at 1249.

28. *Id.*

29. *Id.* at 1249-50. The court held the proper instruction for a jury is the defendant must have knowledge that the weapon was a "firearm" under the Act. *Id.* at 1255.

30. *Id.* at 1251.

31. *Id.* at 1254. The court observed that millions of Americans possess normal revolvers, semi-automatic pistols, hunting rifles, or shotguns. Congress could not have intended to subject this number of law-abiding and well-intentioned citizens if, unknown to them, these items were modified to be fully automatic. *Id.*

32. *Id.* at 1249. The court's decision overruled United States v. Vazquez, 476 F.2d 730 (5th Cir.), *cert. denied*, 414 U.S. 836 (1973), which held that it was not necessary for the government to prove that the defendant knew the weapon he possessed was a "firearm" within the meaning of the statute. Under *Vasquez*, proof that the defendant possessed an item which he knew was a "firearm" within the general meaning of the term established scienter. 476 F.2d at 732.

33. 872 F.2d 773 (6th Cir. 1989). Defendants DeFeyter and Williams were convicted of transferring an unregistered fully automatic weapon in violation of 26 U.S.C. § 5861(e). *Id.* They appealed, claiming that the Act required knowledge that the item possessed was a fully automatic weapon. *Id.* at 773-74.

34. *Id.* at 777. The court noted that its decision was not inconsistent with an earlier decision of the Sixth Circuit, United States v. Cowper, 503 F.2d 130 (6th Cir. 1974), *cert. denied*, 420 U.S. 930 (1975). The court characterized language in *Cooper* merely requiring knowledge of the weapon as a "firearm" in its general sense as dictum, observing that the defendant in that case had knowledge of the weapon's automatic capability. 872 F.2d at 777.

shotgun or short-barrel rifle indicate the likelihood of regulation; an otherwise conventional firearm, internally modified, does not alert the owner to its automatic status.[35] The court concluded that Congress could not have intended the harsh consequences resulting from holding such an owner criminally liable.[36]

In *United States v. Harris*,[37] the United States Court of Appeals for the District of Columbia Circuit held that a § 5861(d) conviction requires that the defendant know that he possessed a "firearm" within the meaning of the statute.[38] First, the court reasoned that Congress had decided to require registration of only certain types of guns under the Act.[39] Adopting a standard that the defendant must realize merely that the object in question is a gun of any type necessarily would expand Congress' registration requirement to all guns.[40]

35. *Id.* at 775-76 (citing United States v. Herbert, 698 F.2d 981, 986-87 (9th Cir.), *cert. denied*, 464 U.S. 821 (1983)).

36. *Id.* at 776. Therefore, the court found that when there are no external indications on the weapon indicating the likelihood of regulation, a jury instruction that specific knowledge of automatic capability was necessary. *Id.* at 777. The court also stated that the rule of lenity should apply to § 5861(d) to require knowledge that the weapon is a "firearm" within the meaning of the Act. *Id.* (quoting United States v. Anderson, 853 F.2d 313, 319 (5th Cir. 1988)). The rule of lenity requires strict construction of statutes in favor of the defendant. *See generally* LAFAVE & SCOTT, *supra* note 17, § 2.2.

The Ninth Circuit agrees with the Sixth Circuit. In United States v. O'Mara, 963 F.2d 1288 (9th Cir. 1992), the court explained that the general rule does not require mens rea when the nature of appearance of the weapon puts the owner on notice of possible regulation. 963 F.2d 1291. However, if the defendant possesses a weapon which does not indicate its special attributes (for example, an internal modification), a jury instruction requiring knowledge of specific characteristics is proper. *Id.* Because the defendant's weapon bore external markings of its automatic capabilities, he was not entitled to the special instruction. *Id.*

37. 959 F.2d 246 (D.C. Cir.), *cert. denied*, 113 S. Ct. 362 (1992).

38. *Id.* at 261. The court rejected the government's argument that a defendant is absolutely liable for possessing a proscribed "firearm" as long as he has knowledge that he possesses a gun of any type. *Id.* at 260. The court's ruling contradicts United States v. Mayo, 498 F.2d 713 (D.C. Cir. 1974), which held that "the offenses proscribed by [the National Firearms Act] require no specific intent or knowledge." 498 F.2d at 718.

39. 959 F.2d at 259. *See supra* note 3 for text of 26 U.S.C. § 5845.

40. 959 F.2d at 260. If the court accepted the government's argument that so long as a defendant has knowledge that he possesses a gun of any type, the defendant is absolutely liable for possessing or proscribed firearm, it "would implicitly expand Congress' negative judgment concerning the possession of certain particularly dangerous guns to all guns."

The Supreme Court has required knowledge of a duty to register or probability of such knowledge for a conviction under a regulatory scheme. Lambert v. California, 355 U.S. 225, 229 (1957). If a defendant did not know of his duty to register the weapon in the national registry, his actions must have given him notice of the possibility of regulation. In requiring only that the defendant have knowledge that he possessed some kind of gun, the court would be stating that such knowledge would be sufficient to alert the possessor to the possibility of regulation. In doing so, the court would

Second, the court found that the "specific knowledge" standard would better serve the goal of criminal law to punish only truly culpable conduct.[41] The court relied on *Liparota v. United States*,[42] which held that when the government prosecutes a defendant for a food stamp violation it must prove that he knew his conduct was prohibited by statute or regulations.[43] The court cited language from *Liparota* which indicated that construing a statute to require a specific mens rea is appropriate to avoid criminalizing apparently innocuous conduct.[44] The court concluded that the actions in *Liparota* and *Harris* were similar and that the government's interpretation of § 5861(d) would result in criminalizing acts completely innocent on their face despite the actor's ignorance of the illegal nature of his actions.[45]

Finally, the court refused to infer a congressional intent to draw a line between a person who knowingly possesses a gun but does not know it is a "firearm" within the meaning of the Act and someone who possesses a "firearm" within the meaning of the Act but does not even realize it is a gun.[46]

The Court of Appeals for the District of Columbia Circuit correctly held that § 5861(d) convictions require specific knowledge. First, the court accurately determined that the *Freed* decision was not on point because it dealt with a mistake-of-law defense, while the *Harris* court had to decide whether a mistake-of-fact defense exists for § 5861(d) viola-

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impart a negative judgment to gun possession in general. However, because Congress only required registration of certain firearms, it did not consider gun possession in general to be sufficiently dangerous.

41. 959 F.2d at 260. The court acknowledged the circuit split on the issue and then followed the lead of the Fifth, Sixth and Ninth Circuits, finding that "the reasoning of the Fifth, Sixth, and Ninth Circuits comports better with the traditional understanding of the criminal law as punishing only truly culpable conduct." *Id.*

42. 471 U.S. 419 (1985).

43. *Id.* at 426.

44. 959 F.2d at 261. The language approved was:

> [T]he failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law. This construction is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct.

471 U.S. at 426.

45. 959 F.2d at 261.

46. *Id.* at 261. The court found no difference of culpability between the two situations because the United States has a "background of widespread lawful gun use." *Id.* Society does not attach a moral stigma to the possession of a normal gun. Neither case would alert a person to the possibility of regulation.

tions.[47] Second, the court's holding comports with the traditional criminal law notion that moral blameworthiness is a prerequisite for criminal liability.[48] The Supreme Court has consistently held that a defendant must have notice of the probability of governmental regulation before a regulatory statute can apply.[49] By requiring knowledge of a gun's special characteristics, the *Harris* court ensured that the defendant must be conscious of the possibility of a criminal penalty.[50] Specific knowledge is particularly important when the external characteristics of the weapon do not alert the owner to its true capabilities.[51] When the objective circumstances do reveal the special characteristics of the weapon, the defendant's notice of possible regulation may be sufficient to establish knowledge.[52]

The circuits that have held that specific knowledge is not required

47. *Id.* at 260-61. The court noted that while *Freed* described grenades as "highly dangerous weapons" which put a defendant on notice as to the possibility of regulation, the *Freed* court assumed that the defendant knowingly possessed a grenade. *Id.* at 260. If the defendant did not know what the object was, he could not know its dangerous qualities and would not be alerted to the need to ascertain whether possession is regulated. *Id.*

The *Freed* Court held that the defendant need not have an evil intention because grenades are sufficiently dangerous to alert the defendant to the probability of regulation. 401 U.S. at 609. Thus, the government did not have to allege knowledge of the registration requirement. *Id.*

This is an important distinction. *All* hand grenades are "firearms" under the Act. *See supra* note 3. Thus, it was irrelevant whether the defendant knew the hand grenade which he possessed contained the qualities subjecting it to regulation. An overly broad reading of *Freed* has led to the confusion and split of opinion in the circuit courts. 959 F.2d at 260. For a discussion of the mistake defense, see LAFAVE & SCOTT, *supra* note 17, § 5.1.

48. 959 F.2d at 260 ("We think the reasoning . . . compares better with the traditional understanding of the criminal law as punishing only truly culpable conduct."). *See* Ann Hopkins, Comment, *Mens Rea and the Right to Trial by Jury*, 76 CAL. L. REV. 391 (1989) (asserting that by the time the framers wrote the Constitution, mens rea meant the moral blameworthiness necessary for a finding of criminal guilt). *Id.* at 394. *See generally* LAFAVE & SCOTT, *supra* note 17, § 1.2.

49. Lambert v. California, 355 U.S 225, 229 (1957) ("We believe that actual knowledge of the duty to register or proof of the probability of such knowledge . . . [is] necessary before a conviction under the ordinance can stand."); United States v. International Minerals Corp., 402 U.S. 558, 565 (1971) ("But where, as here . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.").

50. 954 F.2d at 260-61.

51. One could argue that because gun ownership is regulated, anyone in possession of a firearm in the general sense is aware that he is engaging in a dangerous activity. Thus, the Supreme Court's mandate is achieved without the specialized knowledge instruction. *See supra* note 49. This argument fails when the defendant does not know of the weapon's special characteristics. Possession of what appears to be an ordinary firearm would *not* alert the defendant to the criminality of his conduct or to the probability of further regulation.

52. The court did not decide whether possession of a gun with clear external characteristics of automatic capabilities would be sufficient to establish knowledge. 959 F.2d at 261.

have given too broad a reading to the *Freed* case.[53] Once it is clear that *Freed* is not dispositive of the issue in *Harris*, the history of the Act[54] and Supreme Court pronouncements support the *Harris* decision.[55] *Harris* is an example of the growing trend to require specific knowledge and has already created an impact in the Tenth Circuit.[56] It should become the universal interpretation of § 5861(d) in the future.

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53. The *Freed* Court did not decide that knowledge of a weapon's special characteristics was irrelevant. *See supra* note 47.

54. The legislative history clearly indicates that the National Firearms Act covered only those weapons which the gangster element used or could easily obtain. Congress did not require registration for other guns. *See supra* note 13.

55. *See supra* note 49.

56. In United States v. Staples, 971 F.2d 608 (10th Cir. 1992), a panel of the Tenth Circuit upheld United States v. Mittleider, 835 F.2d 769 (10th Cir.1987), *cert. denied*, 485 U.S. 980 (1988), and held that the defendant need only know that he possessed a "firearm" within its everyday sense for a conviction. *Id.* at 612-13. However, Judge Ebel called for a rehearing en banc to consider whether the court should overrule *Mittleider*. *Id.* at 620 (Ebel, J., concurring). Judge Ebel noted the trend in the law which requires the government to prove knowledge of the characteristics of the weapon that make it subject to registration. *Id.* at 617-18.