

UNIVERSITY of **HOUSTON** | LAW CENTER

**ANDREWS KURTH  
MOOT COURT**

**NATIONAL CHAMPIONSHIP**

2016  
Competition Problem

*EMMALINE BORNE*, Petitioner

v.

*UNITED STATES OF AMERICA*, Respondent

**IN THE  
SUPREME COURT  
OF THE UNITED STATES**

**No. C15-1359-1**

**OCTOBER TERM 2015**

***EMMALINE BORNE*, Petitioner**

**v.**

***UNITED STATES OF AMERICA*, Respondent**

**ORDER GRANTING WRIT OF CERTIORARI**

PER CURIAM:

The petition for a writ of certiorari from the United States Court of Appeals for the Fourteenth Circuit is hereby granted.

IT IS ORDERED that the above-captioned matter be set down for argument in the 2016 term of this Court, said argument to be limited to the following issues:

- I. Can an individual be charged under 26 U.S.C. § 5845(f)(3) for making an explosive device by designing and fabricating firearm parts on a 3D printer?
- II. Can a person be prosecuted under 18 U.S.C. § 2339B for making plans to meet an individual of a known foreign terrorist organization in order to show and demonstrate potentially dangerous computer code to that individual?

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTEENTH CIRCUIT**

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**EMMALINE BORNE**

**Petitioner**

Case No. 15-1359

**v.**

**UNITED STATES OF AMERICA**

**Respondent**

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**Decided October 1, 2015**

Before Judges Luccio, Ramirez, and Morgan.

**Luccio, Circuit Judge, for the Court.**

**Ramirez, Circuit Judge joining.**

1. Petitioner, Emmaline Borne, files this appeal from her conviction entered by the United States District Court for the Central District of New Tejas in favor of respondent, the United States of America. For the reasons stated below, we affirm.

**I. BACKGROUND FACTS**

**A. Fiona Triton and Emmaline Borne apply to study abroad at the University of Mithallery located in the Country of Azran.**

2. On October 13, 2011, Emmaline Borne and Fiona Triton, 17-year-old high school seniors at Harrisburg High School in Harrisburg, New Tejas, met after class with their physics teacher, Mrs. Adalida Ascot. They discussed a potential pre-college study abroad program called “Technical Promise” that would allow each of the girls to receive six college science credit hours prior to their enrollment at New Tejas State University. Technical Promise was first pioneered ten years ago as an initiative between New Tejas State and the University

of Misthallery in the European nation of Azran. The program is designed to promote science, technology, engineering, and mathematics to select high school students prior to their enrollment in college. The program's goal is to encourage more students to major in these fields in college. Prior to the October 13, 2011, meeting, Ms. Borne and Ms. Triton were not particularly close friends but knew each other from several classes they attended together.

3. Mrs. Ascot was one of the original students selected to participate in Technical Promise and had a long history of encouraging her students to apply. Mrs. Ascot, Ms. Borne, and Ms. Triton originally met for approximately ninety minutes in order to discuss the benefits of the program and the application process. Following the meeting, Ms. Borne and Ms. Triton met with their respective families and discussed the program. Over the next week, Ms. Borne and Ms. Triton secured their respective parents' consent to apply for Technical Promise and began filling out their applications.

4. As part of the application process, Ms. Borne and Ms. Triton each met with Mrs. Ascot individually to discuss their interest in Technical Promise and their reasons for wanting to study abroad in Azran. Ms. Borne conveyed that she was deeply interested in learning computer programming because of her love of playing computer games. She wanted to learn computer programming so she could one day develop her own computer game. It turned out that Ms. Borne and Mrs. Ascot played a few of the same computer games, particularly a popular on-line game called "Wars of the Masquerade" (WOM). During the application process, it became apparent that both Ms. Borne and Mrs. Ascot could benefit each other in WOM as each excelled at different portions of the game. Mrs. Ascot contacted Ms. Borne's parents about inviting Ms. Borne to join her guild in the game. Ms. Borne's parents,

who also played WOM, agreed to let Ms. Borne join the guild, as long as they could as well. Mrs. Ascot agreed and the entire Borne family joined Mrs. Ascot's guild.

5. Ms. Triton expressed that she was interested in Technical Promise because of her interest in chemistry and that ultimately she hoped to major in chemical engineering at New Tejas University, like her father. Ms. Triton did not have any interest in computer games and declined Ms. Borne and Mrs. Ascot's invitation to play WOM.

6. The girls' applications were completed and submitted on November 21, 2011. The application packet for each student contained a glowing recommendation from Mrs. Ascot, their respective grades, and their early acceptance to New Tejas University.

7. Between late November and early February 2012, Ms. Triton and Ms. Borne became closer friends and would often socialize with each other as they found they had many things in common. The girls eventually agreed to become roommates in college since they were each accepted into the honors dorm at New Tejas University.

8. Additionally, Mrs. Ascot began meeting one-on-one with Ms. Borne after school in order to tutor Ms. Borne in learning how to program in C++, a computer skill that Ms. Borne wanted to acquire to have a leg up on the competition in college. During these meetings between November and early February 2012, Mrs. Ascot and Ms. Borne discussed computer games, internet culture, and possible future career opportunities for Ms. Borne. Mrs. Ascot even had dinner a few times with Ms. Borne and her parents since they were excited that their daughter had such a good mentor and role model in her life.

9. On February 8, 2012, Ms. Borne and Ms. Triton were accepted into Technical Promise at the University of Misthallery and began making preparations for their study abroad

experience. They would leave for Azran on June 4, 2012 and return home on August 10, 2012. Both girls were elated with their acceptance.

**B. Clive Allen releases information about the National Security Agency's domestic monitoring activities and flees to Azran.**

10. Clive Allen was a consultant hired by the National Security Agency (NSA) in June 2009. Mr. Allen specialized in database design and management. His expertise enabled him to design predictive queries that could comb through large databases to find patterns or connections that would otherwise be missed. Unbeknownst to the NSA, Mr. Allen was part of a notorious hacktivist duo known as "Dixie Millions." Dixie Millions has reportedly been responsible—and in some cases has taken responsibility—for numerous hacks or hack attempts of the United States Milnet, CIA, FBI, the IMF, Interpol, Google, foreign banks, and other government and business interests around the globe.

11. On November 22, 2011, Clive Allen released millions of documents he illegally stole from the NSA to the *Darknet* through The Onion Router (TOR) protocol using his TOR client. The *Darknet* is generally used by hacktivist groups and individuals to subvert the law, although some individuals claim that the *Darknet* has legitimate uses such as free global communication and knowledge. When Clive Allen released the documents, he revealed himself to be the "Millions" of Dixie Millions, as he planned to "set millions of secrets free." Mr. Allen then dropped off the grid and disappeared. For weeks, United States law enforcement agencies searched for, but failed to find, Mr. Allen despite a full-blown nationwide manhunt. On December 30, 2011, the United States Secretary of State declared Mr. Allen a criminal and Dixie Millions a foreign terrorist organization (FTO).<sup>1</sup> From December 2011 to March 2012, numerous websites across the internet would be hacked and

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<sup>1</sup> Neither party challenges the validity of Dixie Millions being declared a foreign terrorist organization.

forced to display the message: “Dixie will make sure that millions follow Millions. We watch the Watchmen. –Love, Dixie Millions.” A scandalous document dump always followed each message.

12. Finally, on March 20, 2012, Mr. Allen released a video stating that he had retired and planned to live out the remainder of his days in Azran. The Azran government then released a statement saying that it had granted asylum to Mr. Allen and any attempt to capture him on Azranian soil would be considered an act of war. The following day, the United States government and the Azran government began negotiating for Mr. Allen’s arrest and extradition to the United States. During the talks it was revealed that Mr. Allen had given the Azranian government several documents showing the NSA had recorded private communications between the Azranian Ambassador to the UN and the Azranian Prime Minister. Ultimately, talks between the two countries proved fruitless, and the United States seemed content to let Mr. Allen remain in Azran.

13. During the Azran discussions, United States authorities simultaneously began looking for the “Dixie” half of Dixie Millions in an attempt to exert pressure on Mr. Allen to return to the United States. As part of its search, the United States began targeting past college classmates and other known associates of Mr. Allen, who had been a student at the University of Msthallery in Azran from 1998 to 2002. At this time, authorities have yet to locate Dixie or confirm Dixie’s true identity.

**C. Fiona Triton and Emmaline Borne prepare for their trip to the University of Msthallery in Azran.**

14. Ms. Triton and Ms. Borne spent most of March and April 2012 finishing their school work early so they could graduate and prepare for their upcoming trip. On April 3, 2012, Ms. Triton’s father, Hershel Triton, bought a brand new do-it-yourself 3D printing kit so

he could experiment with making objects out of plastic filaments. Mainly, Mr. Triton bought the kit as a way to test out new plastic filament formulas because he thought he could create a better version. He hoped to sell the new filament online as a side business to help fund his retirement accounts. Mr. Triton hoped to design a plastic filament flexible enough to pass through the printer but resilient enough to withstand a greater amount of wear and tear than current filaments. Mr. Triton believed his experience in chemical engineering for a major American weapons manufacturer would help make his idea very profitable.

15. During a sleepover with Ms. Triton on April 21, 2012, Ms. Borne saw the 3D printer and struck up a conversation with Mr. Triton about how it worked. Mr. Triton was more than happy to show off his new acquisition and went into a long explanation about how the machine worked and the issues he was having with the software. Intrigued by the machine, Ms. Borne asked if she could try to solve some of his software issues. In exchange for her help, she asked to use the machine to print a 3D model of her on-line character from WOM. Mr. Triton, intrigued by the offer of free help, quickly agreed.

16. Ms. Borne looked at the printer code and discovered an error that caused the positioning of the extruder on the 3D printer to be off by less than half a centimeter. Ms. Borne realized that this error would cause the 3D printer to print an imperfect curve. She began working on a solution but quickly became stuck. Since she had a meeting scheduled with Mrs. Ascot on April 26, 2012, she decided to bring the code to Mrs. Ascot to get her help finding a solution to the problem.

17. During the meeting on April 26, 2012, Mrs. Ascot realized that Ms. Borne was on to something and that, with a little extra help, Ms. Borne would have the code necessary to print a perfect curve on the 3D printer. While Mrs. Ascot and Ms. Borne worked on the coding

to solve the problem, they began chatting casually about a recent hack pulled off by Dixie Millions of the WOM database. The hack revealed that the developers of the game were illegally selling their user lists to third party advertisers. Ms. Borne asked Mrs. Ascot what she thought about Dixie Millions. Mrs. Ascot stated that a good hacker should never harm innocent individuals and should only hack systems to expose “flaws and frauds.” Mrs. Ascot also told Ms. Borne that she found Mr. Allen to be an admirable person and that “Dixie” must be extremely clever to have escaped capture for so long. Ms. Borne asked if Dixie Millions would be considered “Black Hat Hackers,” and Mrs. Ascot said, no, they were really “White Hat Hackers.” Ms. Borne asked if Mrs. Ascot planned to cancel her account with WOM because the developers were selling users’ personal information. Mrs. Ascot responded that she thought her character, “Flatline Molly,” should be retired. Ms. Borne expressed surprise that Mrs. Ascot would quit playing after investing years into the game. Mrs. Ascot replied that Ms. Borne had re-inspired her to focus on her own coding projects instead of playing on-line games. Mrs. Ascot further commented that one day she hoped people would realize all the good Dixie Millions was doing in the world.

18. At the end of their meeting, Mrs. Ascot told Ms. Borne that, in order to finish coding the correction to the curve problem, Mrs. Ascot would need to take the code home with her to finish during non-school hours. Ms. Borne was thrilled to have the solution almost completed and agreed to give Mrs. Ascot the code so she could finish the corrections. That weekend, Ms. Borne went to the prom; Mrs. Ascot finished the code.

19. On May 1, 2012, Mrs. Ascot gave Ms. Borne the perfected code. Ms. Borne contacted Mr. Triton and arranged to have dinner with the Tritons so that she could show him

the code and they could try it out. Ms. Borne indicated to the Tritons that she alone came up with the solution to the coding error.

20. The following evening after dinner, Mr. Triton, his daughter, and Ms. Borne installed the new code and printed out a test model. The model came out flawlessly, and the trio agreed to spend the following weekend printing out different models using Mr. Triton's new plastic filaments.

21. On May 3, 2012, while surfing on the internet, Mr. Triton came across plans to design and print a handgun on a 3D printer. Mr. Triton stated that while he had no interest in firearms or guns for his own personal use, he believed that if he could develop a plastic filament that could successfully withstand the intense heat generated by the discharge of multiple bullets, he would have an extremely valuable product, one that might allow him to retire even sooner than he hoped. He downloaded the handgun plans and saved them on a portable digital storage unit commonly known as a "jump drive," "USB stick," or "thumb drive." The USB he used was solid gold in color.

22. On May 4, 2012, Mrs. Ascot, Ms. Borne, and Ms. Triton had a final meeting together regarding Technical Promise. During the meeting, Mrs. Ascot expressed how proud she was of Ms. Borne and Ms. Triton and how excited she was that they were embarking on the same adventure that changed her life a decade ago. Mrs. Ascot told both girls that to excel in Azran they should bring any projects they were currently working on for their Technical Promise professors to review. The professors loved to help students with projects and were open to the process of collaborative learning. She then told the two girls to always wear the "White Hat" and follow their dreams. This was a common catchphrase Mrs. Ascot used regularly in front of her students.

23. On May 5, 2012, Ms. Borne visited the Triton home, and she and Mr. Triton began to experiment with the 3D printer's capabilities. During the experiments, Ms. Borne said they should print a perfect cylinder to demonstrate how well the software functioned. Mr. Triton realized this demonstration could be useful for his firearm tests and agreed to Ms. Borne's suggestion. They utilized the standard plastic filament that was commercially available for 3D printers. They designed and printed a 6½-inch tall, ½-inch diameter cylinder. By way of explanation, during the 3D printing process, a flat layer of material is initially printed on the platform of the printer. The actual 3D model then adheres to this layer, which provides stability to the product during the remainder of the printing process. This initial layer of material is known as a raft. In order to support the cylinder, Ms. Borne suggested to Mr. Triton that they print a thicker raft than usual so that the cylinder would be extremely stable during the printing process.

24. After twelve hours, the 3D printer finished printing the cylinder. It looked perfect. Mr. Triton used calipers to test the printed product and verified that it was essentially a perfect cylinder. He planned to remove the raft from the cylinder with a pair of shears, but Ms. Borne asked him to stop and leave the raft attached to the cylinder. She stated that it made the finished product look like a "trophy." Ms. Borne then told Mr. Triton that she had stopped playing WOM and no longer wanted a model of her character. Instead, she asked Mr. Triton if she could have the printed "trophy" cylinder. Mr. Triton gladly gave Ms. Borne the cylinder and printed another one for himself.

25. Throughout May 2012, Mr. Triton and his daughter worked on his new formula for a stronger plastic filament. While his daughter was a novice chemist, Mr. Triton valued her

help because it allowed him to spend quality time with his daughter, and he had a free lab assistant.

26. During their work, Mr. and Ms. Triton hit a stumbling block in creating the formula. Ms. Triton told her dad about Mrs. Ascot's recommendation that she bring her ongoing projects to the professors at Azran because they loved to help students. She thought they could help solve the problem with the formula. Mr. Triton was very hesitant about this proposal because he feared someone would steal his idea. Ultimately, he declined his daughter's suggestion. However, Ms. Triton secretly downloaded the plastic filament formula from the family computer and planned to take it with her to Azran, despite her father's wishes. Ms. Triton just wanted to help out her family. She downloaded the formula onto a USB drive that was shaped like a famous cartoon robot.

27. During this same period of time, Ms. Borne began to actively research Clive Allen. She took Mrs. Ascot's advice and focused exclusively on her own projects, ultimately deciding she wanted to be a "White Hat Hacker" and become a force for good in the universe. Ms. Borne viewed Mr. Allen as an excellent role model of the ultimate "White Hat Hacker." Clive Allen had become a folk hero to many people on the internet sites that Ms. Borne visited. Based on her earlier conversations, Ms. Borne believed that Mrs. Ascot would be proud of her for choosing to model herself after Clive Allen, a person she believed that Mrs. Ascot admired. Also, since she would be in Azran, Ms. Borne hoped to find Clive Allen, meet him, and get his advice on her career path.

28. Ms. Borne began to visit sites in the *Darknet* using her own TOR client to search for information on Mr. Allen. Her search turned up a list of recent places where Mr. Allen had allegedly been seen in Azran. Ms. Borne created a spreadsheet that listed each

location where Mr. Allen had been spotted. Each entry also contained a brief description of the disguise he was wearing when he was seen (everything from clothing to wigs). In reviewing the data, she deduced a pattern to Mr. Allen's activities: For each Tuesday that fell on a prime number date, Mr. Allen was seen at a café on the University of Misthallery campus. The next Tuesday that fit the pattern would be June 5, 2012. Ms. Borne knew she would be in Azran by then so she could stake out the same café in hopes of spotting Mr. Allen and introducing herself. Ms. Borne put a calendar event into her smartphone for June 5, 2012 so she would not miss the date. She labeled the entry, "Meet Clive Allen at Cafe."

29. On June 3, 2012, Ms. Triton and Ms. Borne began packing for their trip to Azran. Ms. Triton packed her clothes, toiletries, and a USB drive, shaped like a famous cartoon robot, loaded with her father's plastic filament formula. Ms. Borne packed her clothes, toiletries, a purple-colored thumb drive with her modified curve code, and the proof her code worked – the cylinder she had printed at the Triton's house. She also included the spreadsheet of Mr. Allen's daily locations. She planned to show Mr. Allen these items to prove her hacker credentials in the hopes that he would be so impressed he would agree to mentor her. Ms. Borne then used one of her computer games to design a character to look like one of the disguises that Mr. Allen was spotted wearing in Azran. She printed a picture of this Allen character look-alike and put it in her pocket so she could reference it at the café.

30. Ms. Borne packed her things in a duffle bag that the Bornes normally used for camping. Inside a small, waterproof, interior pocket of the duffle bag was a small pack of matches the family stored for camping emergencies. Lastly, Ms. Borne packed all of her toiletries in the duffle bag. She planned to check the duffle bag at the airport because she

believed this would allow her to take an 11-ounce full-size can of hairspray to Azran. Ms. Borne claimed to need the hairspray to keep her hair stylish in the higher humidity of Azran.

31. As she was packing, Ms. Borne's mother came to her room and told her that she could not take her to the airport the next morning as planned. Mr. and Mrs. Borne had to leave immediately to drive to the city where Mr. Borne's mother lived because she had fallen and was in the hospital. Mrs. Borne told her daughter that arrangements had been made for her to spend the night with the Tritons, and Mr. Triton would take both girls to the airport the next day for their trip to Azran.

32. During the sleepover, both girls were too excited to sleep and talked extensively about their plans and hopes for their upcoming trip. Ms. Triton told Ms. Borne how she hoped to learn enough to help her father perfect his formula. Ms. Borne told Ms. Triton that she hoped to find a mentor.

33. At 8:15am the next morning, Mr. Triton, Ms. Triton and Ms. Borne left for the airport.

**D. Hershel Triton drives himself, Fiona Triton and Emmaline Borne to the airport.**

34. During the drive to the airport, Mr. Triton put a golden-colored USB drive into the vehicle's radio. He had secretly filled it with music for the girls for their trip. The USB drive contained the girls' favorite music tracks and classical standards to which he believed the girls should be exposed. The musical USB drive was a going-away present that he hoped would help the girls if they got homesick.

35. As the trio listened to the music loudly in the car, Mr. Triton accidentally rolled through a stop sign approximately two miles from the airport. Unfortunately, Mr. Triton did not see the Harrisburg police car positioned near the intersection. The police officer turned on the lights and siren and pulled out to follow Mr. Triton's vehicle. Mr. Triton at first did not

hear the siren over the loud music and drove almost half a mile before he noticed the flashing lights and pulled over.

**E. Mr. Hershel Triton stopped by Officer Smith for running a stop sign and his subsequent arrest.**

36. As Mr. Triton sat in his vehicle, Officer Smith – a fifteen year veteran of the Harrisburg Police Force – stepped out of his squad car and approached Mr. Triton’s vehicle. In his written report of the traffic stop, Officer Smith noted that Mr. Triton was respectful at all times and turned over his driver’s license and insurance information promptly and politely. Mr. Triton expressed to Officer Smith that he was taking his daughter and her friend to the airport for an “advanced study abroad program” in Azran, that he knew he did “wrong,” and that he just wanted the traffic stop to go as quickly as possible so he could get the girls to the airport on time for their flight.

37. Officer Smith returned to his squad car and ran a routine check on Mr. Triton based on his driver’s license number. According to the Harrisburg Police Department records, Mr. Triton had been cited for speeding approximately two years ago. Mr. Triton apparently thought his attorney had properly handled the original ticket, but the attorney never filed the required paperwork with the City of Harrisburg to get the case dismissed. Unbeknownst to Mr. Triton, a warrant had been issued for his arrest. As this was an active warrant round-up period for Harrisburg, Officer Smith was required by the department to arrest any drivers he stopped who had outstanding warrants. Officer Smith informed Mr. Triton of the issue and stated that he would be placed under arrest.

38. Officer Smith asked Mr. Triton when the girls needed to be at the airport. Mr. Triton responded that their flight left in two hours. Mr. Triton told Officer Smith that his wife worked just ten minutes away and asked if he could call her to pick up the girls to finish

transporting them to the airport. Officer Smith agreed and let Mr. Triton make the call before arresting Mr. Triton and placing him in the back of his squad car. Officer Smith asked the girls to remain in Mr. Triton's car, and they all waited for Mrs. Triton to arrive.

**F. The arrest of Emmaline Borne.**

39. As they waited for Mrs. Triton, Officer Smith remained next to Mr. Triton's vehicle, a newer model SUV. He noticed the duffle bag on Ms. Borne's lap and the luggage belonging to Ms. Triton. He also noted that the girls were visibly upset and were afraid they would miss their flight. Officer Smith apologized to the girls and tried to console them when they began to sob. Officer Smith promised he would personally escort them to the airport when Mrs. Triton arrived so that they would arrive on time, which calmed the girls down.

40. As they continued to wait, Ms. Borne's cell phone chimed an alert sound. Ms. Borne pulled out her cell phone, which flashed the calendar reminder: "Meet Clive Allen at Cafe." Officer Smith was standing close enough to the vehicle where Ms. Borne was sitting to see the phone's screen and the calendar reminder. He was very startled by the entry because, just the week before, the Harrisburg Police Department had received a memo from the FBI alerting local law enforcement agencies that the wanted hacker and terrorist, Clive Allen, was believed to have an associate operating in the Harrisburg area.

41. Officer Smith immediately Mirandized both girls and arrested them on suspicion of aiding and abetting a known fugitive. Officer Smith also requested immediate back-up over his radio. Shortly after the girls were arrested, Mrs. Triton arrived with a co-worker. Officer Smith informed Mrs. Triton that her husband, daughter and daughter's friend were all under arrest. He asked Mrs. Triton to remain at the scene for questioning. Bewildered, Mrs. Triton agreed, and they all waited for approximately five minutes until back-up arrived.

42. The Harrisburg Police escorted everyone to the local police station and holding facility and obtained the necessary search warrants for Mr. Triton's vehicle and the girls' luggage and persons. With warrants in hand, the police conducted a search and discovered the following items: In Ms. Triton's luggage, the officers found the cartoon robot USB drive containing Mr. Triton's formula. In Ms. Borne's luggage, they found the matches, hairspray, the 3D-printed cylinder, a purple USB drive containing the curve code, the spreadsheet tracking Mr. Allen, and the picture of the Mr. Allen computer-generated character. Finally, the police officers searched the gold USB drive with the music tracks and discovered plans for a 3D-printed gun on the thumb drive. Mr. Triton claimed he had deleted that file to make room for the music. The Harrisburg police then called in the FBI.

43. When the FBI arrived, they expanded the investigation to include all individuals who came into contact with Ms. Triton and Ms. Borne within the past year, including Mrs. Ascot. The FBI discovered that Mrs. Ascot had hurriedly quit her job at Harrisburg High School upon learning of the girls' arrest in the local newspaper. Mrs. Ascot and her husband then fled their home, and the FBI has not yet located the couple.

44. Charges were subsequently filed by the U.S. Attorney against Mr. Triton, Ms. Triton and Ms. Borne.

45. Mr. Triton and Ms. Triton, on the advice of counsel, agreed to cooperate and turn over all information they had against Mrs. Ascot. They agreed to plea bargains with the U.S. Attorney in exchange for their full cooperation with any and all investigations into Mrs. Ascot, Mr. Allen, and/or anything involving Dixie Millions.

46. Ms. Borne, against the advice of her first counsel, refused to cooperate, proclaiming that she and Mrs. Ascot were innocent. An internet grassroots campaign raised

money for Ms. Borne to hire another attorney to represent her against the criminal charges. When sufficient funds were raised (and against the advice of her original counsel and her parents), Ms. Borne hired new counsel and proceeded to trial. As part of her legal strategy, Ms. Borne refused bail so that her trial moved more quickly through the South East New Texas District Court Docket.

**G. The trial of Emmaline Borne.**

47. During Ms. Borne's trial, the prosecution offered testimony from FBI agents specializing in monitoring *Darknet* activities who presented records of Ms. Borne's activities on the *Darknet*. The agents claimed that Ms. Borne was interested in meeting members of Dixie Millions and, more specifically, Mr. Allen. However, during the agents' cross-examination, the record reflects that they admitted Ms. Borne also wanted to meet with other hacker groups and that her goal appeared to be convincing these groups not to "exploit bank, financial, and government security flaws," because "that totally ruins people's lives." Rather, she urged these groups to focus on helping keep data safe and suggested they only reveal "malicious corporate and government lies that hurt people."

48. Also during the trial, the record reflected that the FBI was nearly certain that Mrs. Ascot was in fact the hacker "Dixie" of Dixie Millions and that her teaching record showed a pattern of her students being mistakenly arrested as hackers or suspected hackers. Since the FBI has been unable to locate Mrs. Ascot, she did not testify at Ms. Borne's trial. Ms. Borne further testified that at no point did Mrs. Ascot reveal to her that she was Dixie or directly encourage her to meet with Mr. Allen. However, Ms. Borne did confess that she thought it would be "pretty cool" if Mrs. Ascot was Dixie because that meant she would have been mentored by one of the world's "elite White Hat Hackers."

49. Messages sent through Ms. Borne’s Twitter account were also submitted as evidence at trial, including a “tweet” that stated: “With one wish, I wish all guns would blow up.#guncontrol.” This message appeared in response to the gun-related death of a classmate of Ms. Borne. Additionally, evidence showed that Ms. Borne would re-tweet articles that were pro-Dixie Millions.

50. An FBI ballistics expert testified at trial that Mr. Triton’s plastic filaments formula on the cartoon robot USB drive, combined with the gun plans on the golden USB drive, would create a device that – at first glance – appeared to fire a bullet. Subsequent testing on models of the resulting device showed that the device would actually always blow up when fired, causing significant bodily harm or death to the user of the device and anyone standing in close proximity to the user. The ballistics expert also demonstrated that the contents of the girls’ luggage, including the hairspray, matches, 3D-printed cylinder, and other miscellaneous items, could be used to make a bomb. The expert also testified that it was her opinion that a bright teenager could obtain the knowledge on the internet to create such a device.

51. Following the trial, Ms. Borne was convicted under 26 U.S.C. § 5845(f)(3) and sentenced to twelve months in prison. Ms. Borne was also convicted under 18 U.S.C. § 2339B and sentenced to fifteen years in prison. The sentences were to be served concurrently.

## **II. DISCUSSION**

### **A. Application of 26 U.S.C. § 5845(f)(3).**

52. Ms. Borne asserts that her conviction under 26 U.S.C. § 5845(f)(3) is improper because the correct standard was not applied. Ms. Borne alleges that 26 U.S.C. § 5845(f)(3) should be read to have a subjective standard as outlined in *United States v. Oba*, 448 F.2d 892 (9th Cir. 1971). This is an issue of first impression for the Fourteenth Circuit.

53. 26 U.S.C. § 5845(f)(3) was passed as part of the Gun Control Act of 1968 and is colloquially known as Title 1 of the U.S. Federal Firearms Law, whereas the reincorporated provisions of The National Firearms Act of 1934 are known as Title 2. The purpose of these statutes is to regulate the firearms industry and firearm owners through Congress' power to regulate interstate commerce.

54. We reject all of the arguments advanced by Ms. Borne that the items found in her possession were not in the stream of commerce.<sup>2</sup>

55. In analyzing the court precedent, we find a circuit split on the proper standard for conviction under § 5845(f)(3). The circuits generally have found three different standards for conviction: an objective standard, a subjective standard, or a mixed standard. In our research, we found that this case is very similar to the analysis in *Staples v. United States*, 511 U.S. 600 (1994). We agree that a *mens rea* requirement must be present in the statute in order to give it full meaning; however, we reject Ms. Borne's request for use of a subjective standard because such a standard is too simplistic to cover the threat of dangerous firearms after recent terror attacks in New York and Boston.

56. Rather, we would apply a mixed standard, as outlined in *United States v. Rushcamp*, 526 F.2d 1380 (6th Cir. 1975), to prevent the ambiguities of a purely subjective standard or the limitations of an objective standard. In looking at the facts of this case, Ms. Borne argues that the objective nature of the 3D gun plans, the hairspray, and the plastic filament formula do not constitute a weapon. Instead, each item has social applications, including the advancement of societal knowledge. While we acknowledge this may be true, we find that the court must dig deeper. A failure to look past the possible objective use of individual items leads to potentially absurd results, as any weapon or explosive device might

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<sup>2</sup> This issue was not challenged by Ms. Borne in her writ of certiorari.

be reduced to its individual components, each of which could in turn be deemed innocuous. Further, nearly any device could arguably relate to the “advancement of societal knowledge” as the phrase itself is so overbroad as to be meaningless. Undoubtedly, the Trinity Test performed as part of the Manhattan Project furthered societal knowledge of atomic energy, but it would be ridiculous to claim an atomic bomb is not a weapon.

57. Ms. Borne next argues that her motivations for having these items was not to create a weapon but rather to get the approval of her “role model” whom she wanted to meet. While this may be true, we are troubled by this implication in our modern world plagued by terrorism. Terrorists often attempt – very successfully – to recruit innocent and naïve individuals to help them in their terrorist plots. Additionally, terrorists attempt to cover up their actions in the most inconspicuous ways and by using disassembled, ordinary household items to create homemade weapons to carry out their intended mayhem. The use of pressure-cooker bombs comes to mind as a vivid example. We find that the prosecution proved that Ms. Borne had expressed a previous interest in exploding guns and that she fully intended to turn over some of the items needed to create just such a weapon to Mr. Allen and Dixie Millions. We therefore must look at the intentions of these two central figures. In this case, we defer to the U.S. State Department, which has declared Dixie Millions an FTO. Given such a designation, we determine the motivations of Dixie Millions’ members impure by default. Further, the fact that Ms. Borne idealized Dixie Millions shows that she has, at the very least, terrorist sympathies that require heightened scrutiny of her actions.

58. Lastly, we look at how readily the items in Ms. Borne’s possession could be assembled into an explosive device. The prosecution showed at trial that Ms. Borne had matches, the plastic cylinder and the hairspray, which were all the tools needed to make a

primitive pipe bomb. Additionally, we find the 3D gun plans to be, in their own right, a completed bomb designed to cause death or serious bodily harm to the individual holding the device and people in the user's immediate vicinity. The fact that the plans are just "ones and zeros" is immaterial to us because with the proper equipment the intended device could be mass-produced in a matter of hours. We must accept that we live in a world where digital items can be made into tangible items in the blink of an eye, and the law must keep pace with these realities. Additionally, we are unpersuaded that this is a dysfunctional gun. Whether the explosive device is functional or dysfunctional has no bearing on our analysis. *See U.S. v. Hamrick*, 43 F.3d 877, 881 (4th Cir. 1995). With dangers of both technology and terrorism looming in these facts, we see no reason to disturb the judgment of the lower court.

59. Therefore, we uphold Ms. Borne's conviction under 26 U.S.C. § 5845(f)(3).

**B. Application of 18 U.S.C. § 2339B.**

60. Ms. Borne further asserts that 18 U.S.C. § 2339B violates her constitutionally-protected rights under the First Amendment. Specifically, she claims that the statute violates her freedom of speech and her right of association. She makes these challenges that the law is unconstitutional under both a strict scrutiny standard and also on an as-applied basis specific to her circumstances. Further, she alleges that there is insufficient evidence that she intended to give any support to Dixie Millions.

61. We find Ms. Borne's strict scrutiny argument unpersuasive as this issue was already decided in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). Further, we decline to re-perform an analysis under the test laid out in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

62. Therefore, we look to Ms. Borne's argument that the law is unconstitutional as applied to her. While this argument is novel, we ultimately find it to be unpersuasive. First,

Ms. Borne alleges that all of her actions were done independently of Dixie Millions and therefore, under the *Humanitarian Law Project* standard, she should be found not guilty.

63. Hackers occupy a unique niche among groups that engage in terrorist activities. Unlike traditional terrorist groups that are often limited to specific geo-political locations and issues, hackers or hacktivists can be anywhere and everywhere. These groups thrive on their anonymity and revel in their lack of formal structures. In looking at the writings of Dixie Millions, one of the group's primary goals is to encourage others to follow in their footsteps by creating havoc and chaos across the globe through the internet. Ms. Borne fits the exact profile of a member of Dixie Millions. Further, her argument attempts to parse out language stating she is free to join Dixie Millions but is not free to engage in any criminal activity at the behest of Dixie Millions. She further argues that, since she has not yet engaged in any criminal act on behalf of Dixie Millions, she is unable to be prosecuted under 18 U.S.C. § 2339B.

64. Unfortunately for Ms. Borne, whether she is a member of Dixie Millions is irrelevant because we find that she was already engaged in activities designed to further the goals of Dixie Millions, making her membership status moot. The prosecution proffered ample circumstantial evidence of the link between Dixie Millions and Ms. Borne. This includes evidence that: (1) her teacher and mentor, Mrs. Ascot, was likely the hacktivist Dixie; (2) Ms. Borne was planning to bring computer code to Dixie Millions that consisted of the code to print a perfect cylinder; (3) the formula for advanced plastic filament; and (4) the plans for a 3D-printed gun that would enable Dixie Millions to, at the very least, profit financially. From those profits, Dixie Millions could further engage in their terroristic activities such as spreading havoc in the global financial markets. There are many unknowns between the

mentoring “assistance” given by Mrs. Ascot and the serendipitous “discoveries” made by an intrepid teenage girl that give this Court pause.

65. We are persuaded that events like the *Stuxnet* virus represent a brand new terroristic threat to the United States and that these cyberterrorism threats are not materially different from bombs placed by 20<sup>th</sup> century terrorists. Just because cyberterrorists do not conform to the practices of traditional terrorists does not mean they can escape punishment. While we fully respect the First Amendment rights and protections to which Ms. Borne is entitled, we find Ms. Borne’s claims unpersuasive that the government has impermissibly attempted to equate rhetorical support with material support. “Material” is not limited to the realm of the tangible. Rather the focus must be on whether the FTO benefitted from the behavior of the individual. The First Amendment sets forth fundamental rights and deserves deference and protection. However, the laws of the United States and the Constitution are not a suicide pact. Therefore, we cannot allow our First Amendment jurisprudence to be perverted to protect terrorists.

66. Second, we find Ms. Borne’s argument unpersuasive that all of the computer code available to her and intended for Dixie Millions is harmless on its face and/or was easily available to Dixie Millions without her assistance. Just like the plaintiffs in *Humanitarian Law Project*, Ms. Borne can allege that her motives are innocent and pure, but this argument misses the purpose of the statute. The statute was passed in an attempt to de-legitimize foreign terrorist groups and to prevent them from being enriched, even if that enrichment is inadvertent. Courts have found that giving charitable aid to the children of a terrorist organization enables the terrorists. Similarly, Ms. Borne giving code to Dixie Millions that the group might have obtained through other means would save the organization time and money,

which is time or money that Dixie Millions is now free to spend on their terroristic plans. Further, Ms. Borne's argument that the computer code on its face is not material support within the plain meaning of 18 U.S.C. § 2339B is eviscerated by even the dissent's acknowledgement in *Humanitarian Law Project* that computer code meets the standard of material support.

67. The next frontier in the war on terror will not be stopping people from bombing buildings but rather preventing theft of digital information that can be manipulated to cause untold suffering to countless American citizens. While we may feel sympathy for Ms. Borne and acknowledge her punishment as severe, we cannot in good conscience reverse the lower court when the facts indicate she knowingly intended to bring valuable resources to a known terrorist group.

### **III. CONCLUSION**

68. In conclusion, we affirm the lower court's findings and ruling.

**AFFIRMED.**

#### **Morgan, Circuit Judge, dissenting:**

69. For the reasons discussed below, I respectfully dissent.

### **I. DISCUSSION**

#### **A. Application of 26 U.S.C. § 5845(f)(3).**

70. On this issue I am simply at a loss on where to start. The majority is so terrified of technology and terrorism that they would see a smart and talented high school girl severely punished for what she *might* do. This simply cannot be the law.

71. As to whether or not we should apply Ms. Borne's request to use a subjective standard, I agree with the majority that we should not. But that is where our agreement ends.

In looking through the law, the objective standard applied by *United States v. Posnjak*, 457 F.2d 1110 (2d Cir. 1972) stands out as effectuating the will of Congress and having the additional benefit of being easy to apply. While it is a strict liability standard, the objective standard gives weight to the goal of 26 U.S.C. § 5845(f)(3), which was designed to prevent individuals from evading prosecution under 26 U.S.C. § 5845(f)(1) or 26 U.S.C. § 5845(f)(2) by disassembling military hardware and carrying the individual – ostensibly harmless – components separately through security check points only for those components to be reassembled into the complete weapon at the intended target. This law was not intended to broaden the scope of devices covered under 26 U.S.C. § 5845(f). As other courts have noted, 26 U.S.C. § 5845(f) as a whole was designed to operate precisely and with limited flexibility. *United States v. Johnson*, 152 F.3d 618, 627 (7<sup>th</sup> Cir. 1998). Since the items discussed in this case do not fit the criteria of 26 U.S.C. § 5845(f)(1) or 26 U.S.C. § 5845(f)(2) because they are not a disassembled version of a weapon, I see no reason to find Ms. Borne guilty.

72. As to Ms. Borne's subjective purpose and her supposed terrorist ties, I further see no reason to overly complicate the matter. This is simply a young woman who was likely manipulated by a person she trusted and is, at worst, a misguided, mixed-up teenager with a case of hero worship. We cannot allow fear to dictate the law nor can we punish someone based on what that person could do in the future.

**B. Application of 18 U.S.C. § 2339B.**

73. It is absurd to think that Ms. Borne had any intention of supporting Dixie Millions. At best, the evidence supports the claim that she intended to meet with Mr. Allen in order to learn more about the man himself. The Constitution at its most fundamental core protects the rights of its citizens to acquire knowledge, to associate with individuals, and to engage in speech without interference from the government. There are boundaries to these

freedoms, but the boundaries must be clear and precise, else we run the risk of criminalizing otherwise innocent behavior. Ms. Borne may be guilty of exercising immature judgment, but that is not and should not be a crime requiring her to be locked away in prison for fifteen years. The prosecutor and the majority are so terrified of what *could* possibly happen that they totally forget that criminal law is supposed to punish people for what *has* happened. The dissent in *Humanitarian Law Project* was correct; if we allow the application of hypotheticals to invade our First Amendment analysis, we run the risk of eliminating all of our previous protections. While the Courts should always defer to the Government's expertise in foreign affairs, we simply cannot allow the Government's word to be the only requirement needed to punish an individual for his or her prospective behavior. That the Government says Ms. Bourne's actions may possibly, eventually, result in terrorism is not by itself enough evidence to convict her for aiding an FTO.

74. Further, the majority's attempt to provide meaning to coordinated activities versus independent activities is a meaningless distinction. The majority wishes us to believe that hackers, because of their anonymous and secretive nature, are somehow unique in the determination of what constitutes coordinated behavior. Just because a hacker group suggests that they are adding members or encourages online attacks does not automatically make the actions of one hacker coordinated with the actions of another hacker.

75. Lastly, I am troubled that the majority simply ignores in this instance the due process concerns under the Fifth Amendment. A criminal statute must define itself with (1) "sufficient definiteness that ordinary people can understand what conduct is prohibited" and (2) "in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In this case, I believe that Ms. Bourne was not

and could not be put on notice that her conduct was prohibited. We encourage our youth to seek knowledge and to take advantage of every opportunity, but here we are suggesting that Ms. Bourne should have tempered her desire for knowledge because of some vague generalized fear that a foreign national living free overseas may do something nefarious. This by definition is arbitrary. I would sustain Ms. Bourne's as-applied challenge. I would also consider that this case shows the faults in *Humanitarian Law Project* and sustain Ms. Bourne's 18 U.S.C. § 2339B facial challenge.

76. Additionally, I am concerned that the majority is all too ready to see Mr. Allen and Dixie Millions as one and the same entity. This treatment by the majority is caused by their view that hackers are "different" than innocent individuals who can maintain concurrent dual identities as an individual and as a part of a group (such as members of a band or football team). But if we are to believe Ms. Borne, who claims that she simply wanted to meet Mr. Allen, then can we assert she was really meeting Dixie Millions? Does Mr. Allen not retain an identity separate from Dixie Millions? According to the majority, he does not; however, I believe that Mr. Allen must be considered a separate entity. Therefore, an analysis should be performed on whether he, as a separate individual, is an FTO under 18 U.S.C. § 2339B.

77. Since there are still issues of fact to be resolved, I would at least remand this case to the lower court for additional fact finding. However, since there are numerous problems present and a clear break in the application of the law as discussed above, I would instead rule that Ms. Borne be granted a new trial which must properly follow the correct interpretation of the relevant statutes.

## **II. CONCLUSION**

78. In conclusion, I would reverse the lower court and grant a new trial to Emmaline Borne.