

September 28, 2005

The Honorable Salem Vincent Ahto
Morris County Superior Court
P.O. Box 910
Court and Washington Streets
Morristown, NJ 07963-0910

**Re: State v. Nicholas Drakos
Indictment No. 04-10-01323-I
Motion to Dismiss Indictment**

Dear Judge Ahto:

As Your Honor is aware, this office represents the defendant, Nicholas Drakos with regard to the above-captioned matter. Kindly accept this letter brief in opposition to the State's Brief of September 9, 2005. For purposes of this brief the Defendant relies upon the Statement of Facts contained within the previously submitted legal brief dated July 21, 2005. (See **Exhibit A**).

POINT ONE

THE PROMOTION OF LEGAL IS NOT A CRIMINAL VIOLATION AND INTERNET GAMBLING IS NOT CRIMINALIZED UNDER NEW JERSEY LAW

A. The Promotion of Legal Gambling Is Not A Crime

The State fails to acknowledge defendant's argument that the promotion of unsanctioned "legal" gambling occurs throughout the State of New Jersey every day; thus, such advertising or promotion of gambling must not be criminal. Since, internet gambling is not expressly prohibited in New Jersey, the promotion of internet gambling is not an illegal activity and must fall under the same spectrum of exceptions as other legal gambling advertisements.

The State argues that N.J.S.A. 2C:37-2 only forbids activities associated with gambling and not the game itself. However, there must be a recognized connection between the legitimacy of the game and the promotion or advertisement. They cannot be viewed in a vacuum. For example, the promotion of legal gambling is conspicuous and inherently acceptable; whereas, the promotion of illegal gambling associated with loan sharks or bookies are not conspicuously advertised or acceptable.

As previously argued, the promotion of "legal" gambling constantly bombards the State of New Jersey through advertisements on TV, magazines, and the internet. Such advertisements are prominently displayed for gambling at Atlantic City Casino's. (**See Exhibit B**). In addition, all sorts of lotteries and scratch off tickets are advertised not only for New Jersey games, but for surrounding States as well. Also, shown on local television stations are promotions for gambling in other states such as various casinos in Las Vegas, Reno or the Foxwoods in Connecticut.

However, such solicitors are not prosecuted because they promote gambling for legitimate gambling places. The State cannot construe N.J.S.A. 2C:37-2 to apply wherever it sees fit. The State argues that N.J.S.A. 2C:37-2 prohibits all forms of promoting gambling. That is counterintuitive because as stated above the promotion of gambling is engrained throughout many advertising mediums. Such promotions and advertisements are continuously bombarding the people of New Jersey.

B. Internet Gambling is Legal in New Jersey Because There is no Express Legislative or Judicial Prohibitions

The defendant is not arguing that he only promoted internet gambling on the internet as the State asserts. The defendant is arguing that it is irrelevant where internet gambling is promoted because internet gambling is legal. As stated, the promotion of legal gambling is not illegal in New Jersey and the New Jersey Legislature has not enacted legislative provisions that expressly criminalize internet gambling. Moreover, there is no judicial decision in New Jersey that explicitly prohibits internet gambling.

Additionally, the State cites N.J.S.A. 2C:37-4.1 (the prohibition of shipboard gambling) and N.J.S.A. 2C:37-6 (prohibition of other State lotteries) in support of its argument that unless authorized, gambling is prohibited. However, this is contrary to the State's argument. These statutes actually support the defense's argument that if gambling is not expressly prohibited then it is not illegal. The legislature's intent is clear to expressly outlaw shipboard gambling and the participation of gambling in other State's lotteries. The New Jersey legislature has expressly prohibited different types of gambling that is legal in some States. However, the legislature has not acted here to address the

legality of internet gambling. The strict dictate of due process compels the legislature to act; silence cannot be construed to hold one in violation of criminal laws.

As stated previously, other States such as Illinois and Wisconsin have enacted specific provisions within their legislative bodies that specifically prohibit internet gambling.

In particular, the Wisconsin legislature has expressly outlawed Internet gambling. They enacted chapter 945.03 (7) of their criminal statute to address this particular issue, which reads as follows:

A wire communication facility for a transmission of a communication which entitles the recipient to receive money or credit as a result of a bet, internet gambling qualifies as commercial gambling and is therefore illegal in Wisconsin.

The State also cites 18 U.S.C.A. §1955 (b) (i) for the definition that an illegal gambling business is one in which violates the law of a State in which it is conducted. This alone highlights the weakness in the State's case because they have to rely on federal laws since New Jersey Law does not prohibit internet gambling. Again, there is no express violation of law that the State can point to that supports their argument. The State also points to 18 U.S.C.A. §1084. However, this invokes questions of jurisdiction and elements of interstate and foreign commerce, in which the State has not provided any evidence in support of.

Neither the New Jersey Legislature, nor the judiciary has explicitly outlawed internet gambling. Since the legislature has not acted similar to other States in expressly outlawing internet gambling within their State borders, there is currently no legislative prohibition in New Jersey. In addition, the Court in In Re: Mastercard International Inc.,

has held that debts incurred through internet gambling are legal debts. Logic dictates that internet gambling must be legal if it can result in legal debts.

Here Mr. Drakos was charged with promoting gambling. However, the gambling he may have promoted took place over the internet. Since internet gambling is not expressly outlawed the promotion of it cannot result in criminal charges. At no time did Mr. Drakos actually place bets for anyone. Similar to the credit card companies, Mr. Drakos helped voluntary participants fund accounts so that they could later log on to the internet and place their bets strictly through the website. This activity is not prohibited by law and therefore, the indictment should be dismissed.

POINT TWO

AN ESSENTIAL ELEMENT OF PROMOTING GAMBLING IS THAT TYPE OF GAMBLING BEING PROMOTED MUST BE ILLEGAL

The defendant argues that knowledge is an element of the offense in promoting gambling. Even though the statute states “any form of gambling activity” it must not encompass legal gambling because there are prominent and constant promotions for legal gambling throughout the State.

As stated above, the promotion of gambling cannot be severed from the legality of the type of game. Empirically the promotion of legal gambling facilities and types of games they host must be legal. Thus, knowledge of the illegality of the type of gambling is an essential element to the charge of promoting illegal gambling.

POINT THREE

THE STATES PROPOSED JURY INSTRUCTION IS FATALY FLAWED

In Section (1) of the States' proposed jury instruction, they propose to instruct the jury as follows:

(1) The defendant engaged in conduct,
which materially aided any form of
gambling activity.

This instruction is so ambiguous that it would encompass the promotion of legal gambling, which is inherently legal. The State must show that illegal gambling was materially aided.

Also Section (2) of the States proposed jury instruction states as follows:

(2) And that said conduct was done
knowingly. The First element that the State
must prove is that the defendant engaged in
conduct, which materially aided any form of
gambling activity.

Again, this instruction is too ambiguous because it states any form of gambling activity, but the gambling activity must be illegal for this instruction to be correct. That is an additional element that the State must prove.

CONCLUSION

It is clear the legislature has criminalized other forms of gambling, but has failed to do so for internet gambling. As such, it is not the role of the court to legislate where the legislature has failed to do so. It is therefore respectfully requested that Counts One, Two and Three be dismissed.

Respectfully submitted,

HANLON, DUNN & ROBERTSON

By: _____
Gerard E. Hanlon, Esq.

GEH:tw
cc: Melanie Smith, Assistant Prosecutor
Nicholas Drakos