IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 4:06CR337CEJ(MLM)
	)	
GARY STEPHEN KAPLAN,	)	
	)	
Defendant.	)	

DEFENDANT GARY KAPLAN'S MOTION TO DISMISS COUNT 13 OF THE SUPERSEDING INDICTMENT AND INCORPORATED MEMORANDUM OF LAW

INTRODUCTION

The Wagering Paraphernalia Act, 18 U.S.C. § 1953, is a narrowly crafted statute designed to criminalize the interstate transportation of items used or designed or adapted for use in gambling.[1] In Count 13 of the Superseding Indictment, Kaplan is charged with violating the Act by transporting "laptop computers and software" in interstate commerce. Superseding Indictment ¶ 40. But the Act cannot be read so broadly that it would ban the transportation of a general-purpose device like a laptop computer. Moreover, the application of the Act to prohibit the transportation of "software," without any further description as to why the software is deemed in violation of the Act, infringes on the First Amendment. Finally, the exceedingly vague and imprecise language of Count 13 violates Kaplan's constitutional right to adequate notice of the charges against him, because it is unclear how the items described in Count 13

[1] The Act states: "Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined under this title or imprisoned for not more than five years or both." 18 U.S.C. § 1953(a).

relate to bookmaking. For all these reasons, the Court should grant this motion to dismiss Count 13 of the Superseding Indictment.

ARGUMENT

I. COUNT 13 FAILS TO STATE A VIOLATION OF § 1953.

A. The Scope Of § 1953.

Enacted in 1961 on the same day as the Wire Act (18 U.S.C. § 1084), The Wagering Paraphernalia Act has typically been applied to tangible pieces of wagering paraphernalia that would be readily identifiable as falling under the statute. *See, e.g., United States v. Fabrizio*, 385 U.S. 263, 271 n.8 (1966) (paper acknowledgment or registration of lottery ticket purchase was wagering paraphernalia under § 1953); *United States v. Baker*, 364 F.2d 107 (3d Cir.) (sending materials concerning sweepstakes in the Republic of Haiti violated statute). As the Supreme Court put it:

> Section 1953 has a narrow, specific function. It erects a substantial barrier to the distribution of certain materials used in the conduct of various forms of illegal gambling. By interdicting the flow of these materials to and between illegal gambling businesses, the statute purposefully seeks to impede the operation of such businesses.

Erlenbaugh v. United States, 409 U.S. 239, 246 (1972). Though some tangible objects that are clearly related to gambling, such as betting slips, obviously fall under the Act, courts have struggled to identify which intangible and general-purpose items are covered, particularly in light of advances in computer technology.

For example, in *Pic-A-State Pa., Inc. v. Pennsylvania*, Civ. A. No. 1:CV-93-0814, 1993 WL 325539, at *3 (M.D. Pa.), *rev'd on other grounds*, 42 F.3d 175 (3d. Cir 1994), the court, noting that "[c]riminal statutes are to be strictly construed," considered whether § 1953 could be applied to computer transmissions and answered that question in the negative, concluding that

the Wire Act was enacted to cover gambling activity conducted via computer and wire communications, while § 1953 was enacted to prohibit the transportation of tangible objects. The court said it was not persuaded "that Congress intended the terms of § 1953 to be stretched to address wire communications, especially when, on the very same day that Congress enacted § 1953, it also enacted § 1084, a provision explicitly addressed to wire communications." *Id.*

The Ninth Circuit also considered the circumstances under which computer software can be prohibited by the Act. *See United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990). The defendants in *Mendelsohn* were convicted under § 1953 of mailing a computer disk containing a gambling-related software program from Las Vegas to California. *Id.* at 1184. The program, Sports Office Accounting Program ("SOAP") was specially designed to assist illegal bookmaking:

> SOAP provided a computerized method for recording and analyzing bets on sporting events . . . Once copied into the computer, SOAP could be used to record and review information about game schedules, point spreads, scores, customer balances, and bets. A SOAP user could calculate changing odds and factor in a bookmaker's fee to bets. The operator could quickly erase all records, although the records could be retrieved by using another special program.

Id. The court also found that defendants "knew that most customers used SOAP for illegal bookmaking." *Id.*

The *Mendelsohn* defendants raised two issues that are relevant here. First, they argued that SOAP was protected by the First Amendment and therefore its distribution could not be punished under § 1953. *Id.* at 1185. Second, they claimed that § 1953 should not be interpreted so broadly that it banned SOAP, because "Congress could not have intended to ban from interstate commerce every item used in a bookmaking business, from pencils to coffeemakers." *Id.* at 1187.

Considering the First Amendment argument, the court agreed with defendants that the software program was speech, but found that the speech was not protected because "SOAP was to be used as an integral part of a bookmaker's illegal activity, helping the bookmaker record, calculate, analyze, and quickly erase illegal bets." *Id.* at 1185. Accordingly, the court found that the speech incited a lawless act that was likely to occur, and therefore was not protected speech under *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

> Although a computer program under other circumstances might warrant first amendment protection, SOAP does not. SOAP is too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection. No first amendment defense need be permitted when words are more than mere advocacy, so close in time and purpose to a substantive evil to become part of the crime itself.

Id. at 1186 (quoting *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985)). Since SOAP was "an integral and essential part of ongoing criminal activity," it was not entitled to First Amendment protection. *Id.*

In response to the defendants' argument that the statute should be narrowly construed to avoid banning "generic items," the court pointed out that SOAP was far from a generic item; in fact, it was "narrowly targeted for use in bookmaking." *Id.* at 1187. "The few, if any legal uses of SOAP by large bettors do not immunize SOAP's major, illegal use from the reach of § 1953." *Id.* The court, perhaps reflecting on SOAP's capability to instantly delete data, then recover it later, compared the program to flash paper, "an instantly combustible paper that is used both by magicians to entertain and by illegal bookmakers to record bets on a medium that may quickly be destroyed in the event of a police raid." *Id.* Thus, the defendants' sale of SOAP was covered by § 1953 because the program was "narrowly targeted" for use in illegal gambling. *Id.* Where software is not so "narrowly targeted," it is not prohibited by § 1953.

18 U.S.C. § 1953 does not apply to all items that are used in bookmaking, as it would if terms like "paraphernalia" and "device" were given the broadest possible meaning. An object as mundane and inoffensive as a wristwatch is certainly a "device,"[2] but surely the interstate transportation of wristwatches does not violate § 1953. *See* 3 SUTHERLAND STATUTORY CONSTRUCTION § 73:12 (5th ed. 2000) (interpretation of gaming statutes) ("Courts will avoid any construction of the statutory language which leads to an absurd result"). As a result, courts like the Ninth Circuit have, with good reason, limited the items that fall under the Wire Act to those items that have as their primary purpose the advancement of illegal gambling activity or those items "narrowly targeted" for use in illegal gambling.

This narrower reading of the Act is consistent with the requirement that criminal statutes should be construed narrowly—an ancient principle known as the rule of lenity. Indeed, "[t]he rule that penal laws are to be construed strictly is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). The rule of lenity holds that penal statutes should be strictly construed against the government and in favor of the persons on whom penalties are sought to be imposed. *See* 3 SUTHERLAND STATUTORY CONSTRUCTION § 59:3; *see also, e.g., United States v. McCall*, 439 F.3d 967 (8th Cir. 2006); *United States v. Chipps*, 410 F.3d 438 (8th Cir. 2005); *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980).

Under the rule of lenity, statutory language is to be given its ordinary meaning, but any reasonable doubt about the meaning is to be resolved in favor of the defendant. *Sutherland* § 59:3 (collecting cases). The rule is considered a tie-breaker in favor of the defendant when

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[2] *See, e.g.,* MERRIAM-WEBSTER ONLINE DICTIONARY, *at* http://www.m-w.com/dictionary/Device, definition 1(f) of "device" (a device is "a piece of equipment or a mechanism designed to serve a special purpose or perform a special function < an electronic *device* >").

there is an unresolved ambiguity. *United States v. White*, 888 F.2d 490, 497 (7th Cir. 1989). This ensures that defendants receive adequate notice, thereby serving the constitutional right to due process. *United States v. Montgomery*, 14 F.3d 1189 (7th Cir. 1994). Thus, before a person can be punished, his conduct must be plainly and unmistakably within the statute sought to be applied. 3 SUTHERLAND STATUTORY CONSTRUCTION § 59:3 (collecting cases).

B. The Items Described In Count 13 Are Not Prohibited By 18 U.S.C. § 1953.

Count 13 alleges Defendant transported "laptop computers and software, used, and to be used and adapted, devised and designed for use in bookmaking" in interstate commerce. These general allegations do not describe the type of paraphernalia anticipated by § 1953. Almost any piece of computer equipment or software could be used, adapted, devised or designed for use in bookmaking.

For example, the Microsoft software program Excel could be used by a bookmaker to track wagers, but if a laptop containing Excel were transported in interstate commerce, there would be no violation of § 1953. Similarly, the Microsoft program Internet Explorer could be used by a bookmaker or better to access a website that posts odds on sporting events or that accepts wagers on sporting events, but transporting a laptop containing Internet Explorer would not violate § 1953. Count 13 does not allege that "narrowly targeted" gambling-specific software like the SOAP program described in *Mendelsohn* was transported. It does not allege that the laptop computers were the devices used to conduct gambling between the United States and foreign countries. It does not even allege that the primary purpose of the laptops and software was to conduct wagering activity.

The Government cannot be permitted to simply list any general-purpose item and then quote the language "used, or to be used, or adapted, devised or designed for use in" bookmaking

from § 1953 to support a violation of the statute. Without a more specific allegation describing how the laptops and software were designed for or used to conduct wagering activity, there is no indication that § 1953 was violated.

C. Applying § 1953 To The Items Described In Count 13 Would Violate The First Amendment.

Mendelsohn discussed the First Amendment as it relates to wagering paraphernalia under § 1953. The court held SOAP was not entitled to First Amendment protection because it was "too instrumental in and intertwined with the performance of criminal activity." 896 F.2d at 1186. But *Mendelsohn* also made clear that a computer program may be entitled to First Amendment protection in other circumstances. *Id.* In short, software and computers that are not an "integral and essential part of ongoing criminal activity" are entitled to First Amendment protection.

Software programs are speech. "Computer programs are not exempted from the category of First Amendment speech simply because their instructions require use of a computer. A recipe is no less 'speech' because it calls for the use of an oven, and a musical score is no less 'speech' because it specifies performance on an electric guitar." *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 447 (2d Cir. 2001); *see also Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003). As speech, software and laptop computers are protected by the first amendment unless they are designed to incite or produce imminent lawless action and are likely to incite or produce such action. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

The allegations that "laptop computers and software" in Count 13 are wagering paraphernalia under § 1953 are inconsistent with the First Amendment. The indictment gives

no indication that the software or laptops were created to incite or produce imminent lawless action or that they are likely to incite or produce such action, and therefore the protection of the First Amendment prevents the items from being prohibited criminal paraphernalia under § 1953.

Unlike SOAP in *Mendelsohn*, which was "narrowly targeted" for bookmaking and was an integral part of illegal bookmaking activity, general-purpose software and laptop computers have a multitude of uses with no connection to the bookmaking. The Government's decision to interpret the Paraphernalia Act to reach general-purpose computers and software (a reading of the statute that is unprecedented in its breadth) would therefore violate the First Amendment.

III. THE INDICTMENT FAILS TO PROVIDE ADEQUATE NOTICE OF THE CHARGES IN COUNT 13.

A. An Indictment Must Provide Adequate Notice To Protect The Defendant's Constitutional Rights.

The concerns regarding the scope of 18 U.S.C. § 1953 and its relationship with first amendment concerns must also be read in conjunction with the overarching requirement that an indictment provide adequate notice to satisfy the Constitution. The indictment must "provide adequate notice of the crime charged so as to enable the accused to properly prepare his defense." *United States v. Mooney*, 417 F.2d 936, 938 (8th Cir. 1969); *see also Hamling v. United States*, 418 U.S. 87, 117 (1974) (an indictment must "contain[ ] the elements of the offense charged and fairly inform[ ] a defendant of the charge against which he must defend").

The *meaningful* notice requirement is based upon the Sixth Amendment's guarantee that a defendant be informed of the government's accusations against him. *See United States v. Stuckey*, 220 F.3d 976, 981 (8th Cir. 2000) (explaining that the Sixth Amendment guarantees the defendant's right to adequate notice, that is, "to be informed of the nature and cause of the

accusation"). If a particular fact is at the core of a criminal offense, an indictment that omits that fact is fatally defective. *Russell v. United States*, 369 U.S. 749, 764 (1962) ("Where guilt depends so crucially upon such a specific identification of fact, [the Supreme Court has] uniformly held that an indictment must do more than simply repeat the language of the criminal statute."); *see also Forgy v. Norris*, 64 F.3d 399, 402-03 (8th Cir. 1995) (reversing burglary conviction because the charging document failed to give defendant adequate notice of the crime charged); *United States v. Yefsky*, 994 F.2d 885, 893 (1st Cir. 1993) (indictment failed to give defendant adequate notice, because it did not articulate the plan used to defraud); *United States v. Curtis*, 506 F.2d 985, 992 (10th Cir. 1974) (reversing mail fraud convictions because indictment failed clearly to state "the nature or character of the scheme or artifice relied upon, or the false pretenses, misrepresentations or promises forming a part of it").

The indictment must also be specific enough to protect the defendant's Fifth Amendment right to assert double jeopardy in subsequent cases. *See Mooney*, 417 F.2d at 938 (the indictment "must be so worded as to protect against possible threats of double jeopardy"); *Hewitt v. United States*, 110 F.2d 1, 6 (8th Cir. 1940) (the indictment must be "sufficiently specific to avoid the danger of [defendant] again being prosecuted for the same offense"). Consequently,

> It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, – it must descend to particulars."

Russell, 369 U.S. at 765 (quoting *United States v. Cruikshank*, 92 U.S. 542, 558 (1876)); *see also United States v. Zangger*, 848 F.2d 923, 925 (8th Cir. 1988) (stating that "[i]f an essential

element of the charge has been omitted from the indictment, the omission is not cured by the bare citation of the charging statute" and holding indictment insufficient).

The constitutional requirement of particularity also ensures that the defendant is tried based only on evidence approved by the grand jury. *Stirone v. United States*, 361 U.S. 212, 217 (1960). The rationale here is clear. First, a vague indictment permits the prosecution to disregard the findings of the grand jury and roam free at trial fitting the charges to the evidence as it emerges. "A cryptic form of indictment" that fails to identify the essential elements and facts of an offense "requires the defendant to go to trial with the chief issue undefined." *Russell*, 369 U.S. at 766. "It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Id.*; *United States v. Opsta*, 659 F.2d 848, 850 (8th Cir. 1981) (holding that where the language of "the statute alone does not set forth all the essential elements of the offense, the indictment is insufficient which simply tracks the language of the statute" and dismissing indictment because the grand jury may not have considered all the elements); *United States v. Camp*, 541 F.2d 737, 740 (8th Cir. 1976) (stating that "[o]nly the words of the indictment give evidence of whether the grand jury considered and included within the offense charged the essential element[s]" and finding indictment insufficient despite citation to the statute).

B. The Allegations In Count 13 Fail To Provide Adequate Notice.

Count 13 does not provide enough particularity for Kaplan to understand the allegations against him, making it impossible to defend against the allegations. Therefore, Count 13 violates the constitution and must be dismissed.

Count 13 gives absolutely no indication of why the "laptop computers and software" at issue are wagering paraphernalia. Paragraph 34, which is incorporated into Count 13, gives even less specificity about the charged conduct:

> It was also part of the conspiracy that the members and associates of the GAMBLING ENTERPRISE transported gambling equipment across State and national borders, in aid of the ENTERPRISE and its operations.

Once again, the Government's language is so imprecise that Kaplan is left to ponder what the Government meant by the term "gambling equipment." Clearly "laptop computers" and "software" are not generally considered wagering paraphernalia or gambling equipment. For items to be considered gambling paraphernalia, they must be "narrowly targeted" to gambling activity; no such relationship is described in Count 13. Kaplan is not able to prepare a defense to Count 13 because it is impossible even to guess why these items are alleged to be wagering paraphernalia, and therefore the Count violates Kaplan's constitutional right to adequate notice of the charges against him and must be dismissed.

Respectfully submitted,

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I certify that on August 13, 2007, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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