UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, V. KURT JOHNSON, DALE SCOTT HEINEMAN Defendants.	No. 05-cr-00611-WHA **MOTION TO DISMISS THE INDICTMENT**

Defendants move this Court to dismiss the Superceding Indictment for failing to state an offense, failing to reach the conduct of defendants, lacking congressional intent and guidance, and for the statutes being unconstitutionally vague. This Court has jurisdiction to hear this motion under rule 7, 12(e), and 48(a) as applied in United States v. Vetere, 1988 U.S. Dist. Lexis 12284. In light of the recent rulings of the Supreme Court, Black v. United States, 561 U.S. _____ June 24, 2010, Skilling v. United States, 561 U.S. _____ June 24, 2010, United States v. O'Brien, 560 U.S. ____ May 24, 2010, and Weyhbrauch v. United States, 561 U.S. _____ June 24, 2010, this motion is timely and necessary to rectify the miscarriage of justice.

The Superceding Indictment alleges violations of 18 U.S.C. §1341 - 35 counts and 18 U.S.C. §1349 - 1 count. Each count avers "a scheme and artifice to

defraud financial institutions and lenders..." A clear reading of this indictment makes obvious that "lenders" was made a synonym when described as "financial institutions" possessed with the same property claim targeted as the object of the "scheme and artifice to defraud."

A. 18 U.S.C. §§ 1341 and 1349 fail to state an offense

18 U.S.C. 1349 is not a stand alone statute. It borrows its scienter and sentencing from other fraud statutes. In this case it is the mail fraud statute 18 U.S.C. 1341. In that 1341 fails to state an offense 1349 would automatically suffer the same fate.

In Sorich v. United States, 129 S.Ct. 393 (2009) Justice Scalia wrote that 18 U.S.C. 1346 fails to give "fair warning of the conduct that makes it a crime;" 1346 is not irrelevant in that it is an attachment that was appended to 1341 as a response by Congress to the ruling of McNally v. United States, 483 U.S. 350 (1987) to clarify 1341.

Exposed now by the Golconda of fall-out from the recent Supreme Court decisions directly affecting this case, See, O'Brien id., Black, id., Skilling id., and Weyhbrauch, id., is the fact that 1346 did not fix 1341 but brought to light it's failure to state an offense.

The American Criminal Justice System is built upon the principle that the government's interest "is not that it shall win the case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). In United States v. Santos, 128 S.Ct. 2020 (2008), it was the government who brought the court's attention to United States v. Scialabba, 282 F.3d 475 (7th Cir. 2002)(Santos' brief in the Supreme Court at 5).

It is also obligated to give effect to every word Congress Used. See Stone v. INS, 131 Led2d 465 (1995), Reiter v. Sonotone Corp., 60 Led2d 931 [4,5], and United States v. Menasche, 99 Led 615 [10] (citing cases). Further, not to add or change these words but remain faithful to the statutory text. United States v. Stevens, 130 S.Ct. 1577 (2010), United States v. Rodriquez, 170 Led2d 719

(2008); there being no constructive offenses, Fasulo v. United States, 71 Led 443, 445-46 (1926); Bowers v. United States, Lexis No. 62795 (6th Dist. 7-21-2009).

Congress enated three prohibitions in the mail fraud statute, section 1341, of Title 18, United States Code, and each clause of the statute proscribes a distinct sort of "scheme or artifice." The first clause, which prohibits "any scheme or artifice to defraud," derives from the original mail fraud statute enacted in 1872. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323. The second clause which prohibits scheme "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," was added in 1909. Act of March 4, 1909. ch. 321, § 215, 35 Stat. 1130. The third clause, which prohibits schemes to use the mails to distribute counterfeit money, was enacted in 1889. Act of March 2, 1889, ch. 393, § 1, 25 Stat. 873. See Jed S. Rakoff, the federal mail fraud statute (part 1), 18 Dug. L. rev. 771, 779-821 (1980).

In McNally, id., the Supreme Court was concerned with the first clause of section 1341. McNally held that a "scheme or artifice to defraud," within the meaning of the statute, must be aimed at depriving a victim of a right to money or property, as opposed to "intangible rights," such as the right to have public officials perform their duties honestly." id. at 358. The Court rested that conclusion on the common understanding of the term "to defraud" at the time that the original mail fraud statute was enacted. id. at 358-59.

In response to McNally, Congress enacted section 1346, which provides that "the term 'scheme or artifice to defraud' includes a scheme or artifice to defraud another of the intangible right of honest services." pub, L. 100-690, Title VII, § 7603(q), 102 Stat. 4508. As modified by section 1346, the first clause of section 1341 now encompassed certain schemes to deprive a victim of something other than money or property. id. at n.z., narrowed in Skilling to bribes and kickbacks.

Beyond genuine dispute each distinct clause has the term "scheme" which -- except for honest services -- following Skilling, Black, and Weyhbrauch is

rendered unconstitutionally vague. This is because, to save section 1346 from vagueness the Supreme Court interpreted scheme or artifice to defraud to mean bribes and kickbacks. This provided notice, gave guidance to law enforcement, prosecutors, juries, and foreclosed personal predilections. They also plainly established that absent a particular type of conduct the statute in this case must be vacated on the ground that they fail to define the conduct they prohibit.

1. 1341 lacks Congressional intent and guidance

"A penal code is void for vagueness if it fails to 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited' or fails to establish guidelines to prevent 'arbitrary and discriminatory enforcement' of the law.'" City of Chicago v. Morales, 527 U.S. 41, 64-65 (1999)(quoting Kolendar v. Lawson, 461 U.S. 352 (1983)). Of these, "the more important aspect of the vagueness doctrine 'is...the requirement that the legislature establish minimal guidelines to govern law enforcement." Id. at 358 (quoting Smith v. Goguen, 415 U.S. 566, 574(1974)).

These concerns are nothing new as far back as United States v. Reese, 92 U.S. 214(1875) the Supreme Court has recognized the dangers in a vague penal statute. The statutes on this case, as applied, have no more than a general meaning that permit the government "to cast a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." Id. at 221.

The Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on these freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression. See generally M. Bassionuni, SUBSTANTIVE CRIMINAL LAW 53(1978). As generally stated:

> The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness the ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Kolender, 461 U.S. at 357. See also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489(1982); Smith v. Goguen, 415 U.S. 566(1974); Grayned v. City of Rockford, 408 U.S. 104(1972); Papchristou v. City of Jacksonville, 405 U.S. 156(1972); Connally v. General Construction Co., 269 U.S. 385, 391-92(1926)(citing cases).

Section 1346 added "Honest Services" as a definite addition to be included in an absent list with the controlling statute 18 U.S.C. § 1341. "When 'include' is utilized, the participle including typically indicates a partial list." Bloate v. United States, ____S.Ct.____,2010 WL 757660, at *13 (U.S. Mar. 8, 2010)(quoting BLACK'S LAW DICTIONARY 831(9th ed. 2009)(emphasis in Black's Law). "A scheme or artifice to defraud" throughout section 1346 supposedly clarified a particular elemental category, Congress categorically ignored the fact that the list they were amending was blind to law enforcement and that enforcement was left to their personal predilections to divine a list. What we have is the hypothetical statute prohibiting anything bad discussed by Justice Scalia during the oral argument for Skilling operating in reality. See Skilling v. United States, Oral Argument Transcript, pp, 44 lns. 11-26.

Title 18 U.S.C. §§ 1341 and 1349 as presently drafted and construed by the courts, contain no standard of determining what constitutes a scheme to defraud, or for that matter any element applicable here that makes it a crime. As such, these statutes vest virtually complete discretion in the hand of law enforcement, federal prosecutors, and jurors following their personal predilections.

This indictment rest upon unconstitutionally vague statutes which vest discretion outside of Congress to imagine what conduct fits into "a scheme or artifice to defraud".

This indictment adds no clarity to a statute which fails to list the conduct with any scheme or artifice to defraud. Does it prohibit ponzi schemes, security schemes, telemarketing schemes, or a debt elemination scheme? No answer can be produced absent the injection of some personal predilection.

Congress was advised in Skilling and McNally to speak more clearly than it has. This court and prosecutor have been advised not to invent their own crimes by adding words that are absent. See Stevens id., and United States v. whitley, 529 F.3d 150, 157 no. 5(2nd Cir. 2008)(quoting United States v. Rodriquez, 553 U.S. 377, 128 S.Ct. 1788, 1789(2008)). If Congress has failed to provide the guidance the duty rest upon the prosecutors and courts to use the statute responsibly.

The problem with lack of definiteness is not the missing definitions per se but that due process cannot be obtained out of the vagueness because law enforcement has not been able to implement any standards of review that assure congressional intent governs.

2. Statutes and indictment did not reach to defendants' conduct.

This court held the prosecution only to a burden to prove a scheme. No legal perimeters of the scheme or detail characteristics were presented in the indictment or offered into evidence. The scheme was a specter undefined in reality. No demarcation to separate it from fantasy or a myriad of other specters. A mere tag of "debt elimination scheme" elucidated no conduct from Congress that reached the conduct of defendants. A mere parroting of the statute in this indictment was not sufficient to express the prohibited conduct. See United States v. Resendez-Ponce, 594 U.S. 102(2007) 127 S.Ct. at 789.

3. The prosecution obtained this indictment upon unlawful theories and irresponsible use of the statutes.

AUSA Keller who worked the grand jury infected this indictment with "Honest Services" as a property loss to financial institutions being affected and

controlling which he claimed was defined by the statute. This was an irresponsible and unconscionable use of the statutes that prevented the Fifth Amendment reasonable doubt standard from availing. Honest services has now been confined to bribes and kickbacks. Defendants never had a duty to any of the alleged victims and never approached any conduct that reached bribes and kickbacks.

The requesting of instruction to the petite jury is not the mend for erroneous instruction provided to the grand jury. Confusion prevailed and the premise to indict was unlawful, unguided, and governed by predilection alone. The statutes are indeterminate and the prosecution used this void of vagueness to entice imaginations and predilections to indict and convict. See. Coates v. Cincinnati, 402 U.S. 611, 614 (1971).

4. New Law was created.

The prosecution deviated from the statutory language which reads "any scheme or artifice to defraud". In their indictment they did not parrot this text but created new law by fiat when they made the averment of every count a "scheme and artifice to defraud". The merger of the disjunctive elements is not faithful to the statutory text, and reduces their burden by allowing the disjunctive elements to be proven in the conjunctive. This is different than pleading conjunctively and proving disjunctively. It is an executive amendment to legislative text that changes the very nature of the offense away from Congressional intent. Though they were not faithful to the statutory text they were clearly faithful to their amendment when they expressed it consistently throughout this indictment. Clerical error or a type-o claim would be disingenuous. See Bowers v. United States, id. and United States v. Hunter, 558 F.3d 495, 502-503 (2009).

This amendment enhanced the government's freedom to operate in a standardless sweep with the ability to roam through any theory adaptable to circumstance. Without reins from Congress they behaved like wild horses let

loose upon the plains of an unconstitutionally vague (lawless) indictment.

Justice Black in Gregory v. City of Chicago, 394 U.S. 156(1969), voiced a concern against entrusting lawmaking "To the moment-to-moment Judgment" of the prosecutors. id. at 165-169.

B. Financial Institutions is a vague amendment.

In 2002 Congress added the "aggravated" amendments to the mail fraud statute that added elements and increased severity of sentences. One for disaster relief fraud and one for financial institutions. O'Brien in a 9-0 decision emphatically declared by principle that the financial institution characteristic of the victim as applied to the mail fraud statute was not just a sentencing factor (rebuffing the claims of Alsup and Hall), but a fact that availed itself in due process to the reasonable doubt standard.

The scheme expressed as prohibited was directed at financial institutions. The statute being vague as to the conduct of a scheme was not cured by adding a victim characteristic that is completely devoid of definitiveness. Nowhere in the statute before amended or in the amendment is the definition of a financial institution offered by Congress. Defendants were subjected to mere predilection of the prosecutors, judge, and juries. Not only were they not put on any notice of what to defend but got to experience the old bait and switch with changing definitions for the indictment, then trial, and then sentencing. The scheme absent a provable victim with a property right whether tangible or intangible can never arise to activate the mail fraud statute. Defrauding financial institutions under the current mail fraud statute is a legal impossibility. Any conviction would therefore violate all the canons of constitutional avoidance including Absurdity.

1. The Amendment Lacks Guidance.

In the indictment before redactions the government offered up a possible definition for financial institution by referencing 18 U.S.C. § 20. There were 9 possible definitions in this section. Which of the nine would have

governed is irrelevant because Congress explicitly did not point to this section for guidance. If one looks to the statutory construction, even of the amendments it is easy to tell Congress knows how to point to another section for definitive reference since that was their practice in the disaster relief section. Without any expressed guidance law enforcement, juries, and judges resort to personal predilections instead of demanding Congress speak more clearly than it has. Defendants now languish in a prison of predilection without any notice of the conduct that was supposedly prohibited, where to find those answers, and subjected to the whims of various divisions of government to characterize their behavior under transitory standards outside the intent of Congress. There is no way of supplying a definition for financial instituion without inventing a new law and violating the separations of powers doctrine.

2. Victim Characteristics.

In O"Brien, it was determined that the characteristics of the weapon are an element of the offense, subject to Grand Jury scrutiny and a verdict beyond-a-reasonable-doubt by a jury. The Supreme Court had "repeatedly held, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence. See Cunningham v. California, 127 S.Ct. 856, 863-64(2007); Shepard v. United States, 544 U.S. 13, 24(2005)("[A]ny fact other than prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant."); Sattazahn v. Pennsylvania, 537 U.S. 101,111(2003)("put simply, if the existence of any facts (other than a prior conviction) that iscreases the maximum punishment that may be imposed on a defendant, that fact...constitutes an element. And must be found by a jury beyond a reasonable doubt.").

Elements of a crime must be charged in the indictment and proved to a jury beyond a reasonable doubt. Hamling v. United States, 418 U.S. 87,117(1974);

Jones v. United States, 526 U.S. 227(1999). Sentencing factors or characteristics attributed to the offender, on the other hand, can be proved to a judge at sentencing by a preponderance of the evidence. See McMillian v. Pennsylvania, 477 U.S. 71, 91-92(1986).

Subject to constitutional constraints, whether a given fact is an element of a crime itself or a sentencing factor is a question for Congress. When Congress is not explicit, as is often the case because it seldom directly addresses the distinction between sentencing factors, elements, or their characteristics, courts look to the provision and the framework of the statute to determine whether a fact, (or now its characteristics) is an element or sentencing factor. After O'Brien, in examining whether victims and monies are characteristics of 18 U.S.C. §§ 1341, 1349 and therefore elements, the analysis must begin with an examination of congressional intent. Beyond genuine disput "money" is an element of the statutes involved here. The question answered in O'Brien now settles whether "victims" is a characteristic of the "money" element and therefore off the table as a sentencing factor or one of its characteristics. First, the statutory language is neutral, requiring an examination of "five factors directed at determining congressional intent: (1) language and structure, (2) tradition, (3) risk and fairness, (4) severity of the sentence, and (5) legislative history.

The District court already made a finding that there were no financial institutions proven. It was not a sentencing factor as presumed. Needed to be defined so that the reasonable doubt standard could avail, and was clearly a characteristic of the offense for the jury to consider.

CONCLUSION

When the "Text, Structure, and History fail to establish that the government's position is unambiguously correct -- we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." United States v. Granderson, 511 U.S. 29, 54(1994). The rule of lenity is grounded in two

fundamental principles. First, Due process "mandate[s] that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." Dunn v. United States, 442 U.S. 100, 112(1979). It is uncontestable that even had defendants been familiar with these statutes they would have been able to discern that their conduct was criminal. Second, "Legislators and not the Courts should define criminal activity." Huddleson v. United States, 415 U.S. 814, 831(1974).

It would be difficult for the government to argue against defendants' position since prosecutors have argued post-trial that indictments were void due to missing elements. See Benton v. Maryland, 396 U.S. 784(1969); and Ball v. United States, 163 U.S. 662(1896). Trials have been aborted mid-way when the prosecutor realized it had failed in the framing of the indictment, Illinois v. Somerville, 410 U.S. 475, 485(1973). In other words, when an element has the potential to be misinterpreted, and the incorrect interpretation cause a conviction of the defendants, to be convicted of a crime invented by the government, the indictment fails.

Due process was undermined at every turn by the lack of definition of the elements and characteristics within these statutes; the standardless sweep of invention and interpretation enjoyed by the prosecution; the ignorance and confusion fostered upon the Grand and Petite juries; the lack of notice; and an indictment that failed to perform its lawful function.

AFFIRMATION

We, the defendants, declare and state that the foregoing is true, correct, and not intended to mislead. As to those facts based upon information or belief we believe them to be true.

Respectfully Submitted and affirmed,

August 2, 2010

//ss//
DALE SCOTT HEINEMAN

KURT JOHNSON

CERTIFICATE OF SERVICE
(Prison Mail Box Rule)

I, KURT JOHNSON, hereby certify that I served a true and correct copy of the following: MOTION TO DISMISS THE INDICTMENT

which is deemed filed at the time it was delivered to prison authorities (Internal Prison Mail System) for forwarding, by placing same in a sealed, postage pre-paid envelope, ((See, Houston v. Lack, 487 U.S.266 (1988)(Prison Mailbox Rule)), addressed to:

Brigid Martin AUSA
450 Golden Gate Av.
San Francisco, CA 94102

Filed this 4th day of August, 2010
Under 28 U.S.C. §1746

Respectfully Submitted,

⇔13177-081⇔
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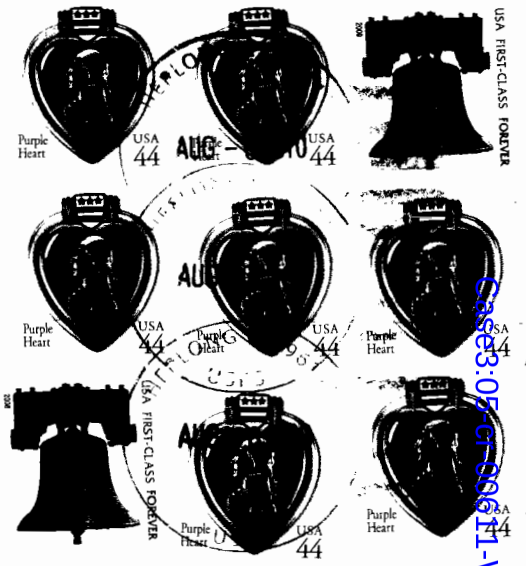

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