

### 3 – Illegal Gambling Business Act

The Illegal Gambling Business Act was enacted as part of the Organized Crime Control Act of 1970. This Act was designed to be a companion to other laws, such as the Federal Wire Act, in targeting a source of income for organized crime. Unlike the Federal Wire Act, the Illegal Gambling Business Act is designed to assist states in enforcing their laws with regard to interstate gambling activities and is dependent on a predicate state offense.

#### 18 U.S.C. §1955 the Statute

Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section—

(1) “illegal gambling business” means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

(2) “gambling” includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of \$2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as

applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1986, as amended, any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

## 18 U.S.C. §1955 Statute Discussion Questions

What does the Illegal Gambling Business Act prohibit?

1. Does it prohibit people from placing wagers?
2. What does it mean to “conduct” an illegal gambling business?
  - Does it prohibit staking chairs or being a waitress in an illegal sports book?

### **18 U.S.C. §1955 Elements**

- Conducting, financing, managing, supervising, directing or owning...
- Illegal Gambling Business
  - i. an operation conducted by five or more persons
  - ii. in "violation of the law of the State or political subdivision in which it is conducted"
  - iii. that operates for a period exceeding thirty days, or earns gross revenue of \$2,000 in any single day.

## WHO IS THE SUBJECT OF THE ACT?

### THE BOX OPINION

United States Court of Appeals, Fifth Circuit.  
UNITED STATES of America, Plaintiff-Appellee,  
v.  
Henry Floyd BOX, Defendant-Appellant.  
**No. 74-4195.**

May 3, 1976.

Appeal from the United States District Court for the Western District of Louisiana.

Before BROWN, Chief Judge, and GOLDBERG and RONEY, Circuit Judges.  
GOLDBERG, Circuit Judge:

Henry Floyd 'Red' Box was convicted by a jury of violating 18 U.S.C. s 1955, the federal antigambling statute. On appeal, Box argues that the evidence was insufficient to support this verdict. We agree and therefore reverse the conviction.

Federal agents conducted an extensive investigation of several bookmaking operations in the Shreveport-Bossier City area during the 1973 football season, culminating in simultaneous raids on the last day of the season. A one-count indictment filed on April 25, 1974, charged appellant Box and ten other persons with the operation of an illegal gambling business in violation of 18 U.S.C. s 1955.[FN1]The indictment named three unindicted principals as having been involved in the same illegal gambling business. One of the defendants was granted a continuance and severance, due to the death of his counsel Six others entered pleas of nolo contendere or guilty prior to trial. Trial of the four remaining defendants began on September 30, 1974. The guilty plea of one of these was accepted on October 4, 1974. Later the same day the jury returned a verdict of guilty as to Box and the other two. Only Box has appealed.

FN1. 18 U.S.C. s 1955 provides in part as follows:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years, or both.

(b) As used in this section-

(1) 'illegal gambling business' means a gambling business which-

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) Involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

(2) 'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

Louisiana Revised Statutes, s 14:90, provides as follows:

Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.

Whoever commits the crime of gambling shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

Our review of the evidence and application of the law in this case require an understanding of the general nature of a bookmaking operation, and so we preface our consideration of the issues here with a very brief summary on that subject.

## THE NATURE OF A BOOKMAKING OPERATION

This section might be subtitled, 'How to Succeed in Gambling Without Really Gambling,' because a successful bookmaker makes his profit not from winning bets, but rather from collecting a certain percentage of the amount bet that losing bettors are required to pay for the privilege of betting.[FN2]This percentage, 10% in the Shreveport area, is called 'juice' or 'viggerish,' and its effect is to require a bettor to risk \$110 in an attempt to win \$100. So that betting odds can remain even on each game, a bookmaker normally has a 'line'-on each game on which he is taking bets, one team will be favored by a certain number of points, called the 'point spread.'[FN3]

FN2. This discussion is limited to the type of bookmaking operation, specializing on football or other sporting events, which was the subject of the 1973 Shreveport-Bossier City investigation. Sources of authority for this discussion are the testimony of several 'experts,' including admitted bookmakers, at this trial, and opinions in other cases dealing with similar bookmaking operations.

FN3. For further explanations of the concepts of 'line' and 'point spread,' see *United States v. Joseph*, 5 Cir. 1975, 519 F.2d 1068, 1070 n. 2,cert. denied, 1976, -- U.S. --, 96 S.Ct. 1103, 47 L.Ed.2d 312 (44 U.S.L.W. 3471, 1976); *United States v. Thomas*, 8 Cir. 1975, 508 F.2d 1200, 1202 n. 2,cert. denied, 1975, 421 U.S. 947, 95 S.Ct. 1677, 44 L.Ed.2d 100.See generally *United States v. Pepe*, 3 Cir. 1975, 512 F.2d 1129;*United States v. Bobo*, 4 Cir. 1973, 477 F.2d 974,cert. denied, 1975, 421 U.S. 909, 95 S.Ct. 1557, 43 L.Ed.2d 774.

In an ideal situation, a bookmaker would have bets from bettors exactly balanced on each contest, so that no matter which team 'wins' (read: beats the point spread), the bookmaker is assured a definite percentage of the amount bet. That is, he would collect 110% of the amount he would be required to pay. With a multitude of bets each week, this ideal of perfectly balanced books cannot be achieved. When the bets placed with a bookmaker on a certain contest become very unbalanced on one side, however, there are certain measures the bookmaker might take to lessen the incumbent risk.[FN4]He can refuse to take further bets on that side, hoping enough bets will be placed on the other side to effect some rough balance. Alternatively, he can adjust his 'line' on the contest, thus making the underbet side more attractive.[FN5]

FN4. The ever-present possibility that the individual in the adjacent booth of the restaurant is Agent Beinler, see *infra*, prevents this riskminimizing enterprise from becoming tediously dull.

FN5. See *United States v. Schaefer*, 8 Cir. 1975, 510 F.2d 1312 n. 7, cert. denied, 1975, 421 U.S. 978, 95 S.Ct. 1980, 44 L.Ed.2d 470; *Thomas*, *supra* note 3, 508 F.2d at 1202 n. 2. The adjustment of line is apparently disfavored as a solution, because it may result in two local bookmakers offering a significantly different point spread on an event. This would offer local bettors an opportunity for a 'middle'-two bets placed on different teams with two bookmakers which together could not lose more than 10% of one of the bets, and, if the actual point difference were in the middle, might both be won. See *id.*; *United States v. Schullo*, D.Minn.1973, 363 F.Supp. 246, 250, *aff'd* in *Thomas*, *supra*. Avoiding possibilities for 'middles' is one reason for the constant exchange of line information among bookmakers.

Another common solution to the bookmaker's problem of grossly unbalanced bets on a game is the 'lay off' bet. By this device, a bookmaker whose customers had bet \$10,000 on Dallas \$ 6 and only \$6000 on Pittsburgh - 6 would himself seek to make a \$4000 bet on Dallas \$ 6 with another individual.[FN6] This bet would have the effect of 'laying off' \$4000 of the \$10,000 the bookmaker's customers had bet on Dallas, leaving the bookmaker in the net position of having \$6000 bet with him on each side. Normally, the bookmaker would look to another bookmaker to make this bet, and would be required to give up the same favorable 11 to 10 odds which he had received from the Dallas bettors. Indeed, several cases dealing with s 1955 have in dicta defined a lay off bet as a 'bet between bookmakers.'[FN7] It seems clear, however, that the individual accepting a lay off bet from a bookmaker need not be another bookmaker.[FN8] That individual could be part of a professional 'lay off' operation, an organization dealing only with bookmakers rather than with retail customers, and having sufficient capital so that risk-taking at 11 to 10 odds posed little problem. On the other hand, the individual could be a mere bettor who wanted to bet \$4000 on Dallas \$ 6, but was told by his bookmaker that no more such bets were being taken and was invited by the bookmaker to accept instead a wager in which the bettor received 11 to 10 odds for agreeing to bet on Pittsburgh. The point of all this is that a 'lay off' bet should be defined solely in relation to the occupation and the purpose of the person making the bet-the occupation and motives of the person accepting the bet are irrelevant to the definition.

FN6. Apparently, Dallas \$ 6 was the most common point spread on the 1976 Super Bowl. For a number of Dallas supporters, then, the closing touchdown which brought the Cowboys within four points represented more than a last futile hope. Other explanations and illustrations of layoff betting are given in the cases cited in note 23, *infra*.

FN7. See, e.g., *United States v. Guzek*, 8 Cir. 1975, 527 F.2d 552, 555 n. 5; *Thomas*, *supra* note 3, 508 F.2d at 1202 n. 2; *Schaefer*, *supra* note 5, 510 F.2d at 1311 n. 5; *United States v. Sacco*, 9 Cir. 1974, 491 F.2d 995, 998 & n. 1 (*en banc*).

FN8. The cases cited note 7 all involved bookmakers making lay off bets with other bookmakers, so the possibility that a bookmaker might make a lay off bet with someone else was never considered.

We do not warrant the foregoing as constituting all the structural information a lay person (as distinct from a lay off person) would need to organize his or her own business, but we think it sufficient for our purposes, and we turn now to the case before us.

#### THE EVIDENCE RELATING TO BOX

During this five day trial, twenty-one witnesses testified and several kilograms of evidence were introduced. The testimony of the only four witnesses who had any knowledge concerning Box may be summarized as follows:

F.B.I. Agent Beinmer testified that Lombardino, a bookmaker, visited the Guys & Dolls Billiard Parlor, an establishment owned by Box, on three separate Tuesdays during the 1973 football season. Beinmer believed Tuesday to be 'payoff day' in the bookmaking operations he had been investigating. Beinmer had obtained and executed search warrants on the homes or places of business of eight of the defendants, but had been unsuccessful in his attempt to obtain a warrant on the home ad place of business of Box. Beinmer's principal informant, whose information was the basis for the search warrant affidavit, described the other defendants who were named in the affidavit as 'bookmakers' and described Box only as a 'bettor.'<sup>[FN9]</sup>It was through the testimony of Agent Beinmer that the government introduced the telephone toll records, discussed below.

FN9. Several separate warrants were issued, but all were based on a single lengthy affidavit by Agent Beinmer in which he described information he had obtained from his surveillance and his confidential sources.

Messina, a bookmaker who had been granted immunity by the government in return for his testimony, testified that he himself had never 'laid off' bets to Box, but that he had personal knowledge that Cook had done so.

Cook, a bookmaker also given immunity, testified that he had occasionally 'laid off' bets with Box and with several of the other defendants. Cook explained that when he lost such a bet to Box or one of the others, he would pay the winner an extra 10% in excess of the amount bet. Cook testified that Box, as a customer, also placed bets with Cook in which Cook received this 10% advantage. Cook did not consider Box a bookmaker and knew of no one who did. He related that Box had been free to take or reject bets offered by Cook, and he described Box only as a bettor.

Stewart, a bookmaker, testified that Box was one of his customers, i.e., a bettor. No one asked Stewart the direct question, 'Is Box a bookmaker?', but the prosecutor asked that question of Stewart concerning every other defendant remaining on trial when Stewart testified, and received an affirmative answer in each case. Stewart testified that Box

placed bets with him, and that he (Stewart) placed bets for Box with other bookmakers. It was through Stewart that the betting slip testimony was introduced. Stewart testified that he made bets with two other bookmakers in which he gave the others 11 to 10 odds-some of these were 'lay off' bets, and some were bets Stewart made because he liked the team. Stewart did not testify that he ever made such bets with Box.

The two items of documentary evidence which related to Box were as follows:

The Telephone Toll Records. No wiretaps or pen registers were used in this case, but the Government introduced at trial several long distance telephone records, including those of the telephone at Box's house and the telephone at Guys & Dolls, Box's establishment. These records showed that during the period of the investigation (autumn, 1973), 20 calls were made from Box's home and 223 calls were made from Guys & Dolls to one Price, a Baton Rouge bookmaker.

The Betting Slips. The simultaneous raids conducted on the last day of the 1973 football season yielded, inter alia, large numbers of betting slips which had been used in the Stewart operation. Most of these slips were marked in a similar simple manner, e.g., G.B. \$ 14 \$ 200 (translated, the bettor had wagered \$200 that the score of Green Bay plus fourteen points would be greater than that of Green Bay's opponent). In the lower right hand corner a name, a set of initials, or a number would appear, indicating the individual making the bet. Finally, an indication of the result was added, e.g., '\$ 200' (the bettor won), or '-220' (the bettor lost and was required to pay the additional 10%).

A smaller number of these slips were marked in a second, distinct, fashion, e.g., G.B. \$ 14 \$ 330/300. On these, the results would be recorded as \$ 330 or -300. The testimony of Stewart on this point was quite confused, but it could be inferred that the slips marked in this second fashion represented bets in which he was giving 11 to 10 odds to the person with whom he was betting. Of the five individuals whose names or initials appeared on Stewart's slips marked in this second fashion, four were clearly bookmakers. The fifth was Box. The seized slips represented about \$230,000 of Stewart bets and approximately \$3800 of this amount was comprised of slips labeled 'Box' and marked '330/300', '550/500', or the like.

#### STANDARDS FOR SUFFICIENCY

In reviewing the evidence upon which the jury based its verdict of guilty, we of course examine the evidence in the light most favorable to the government. *Glasser v. United States*, 1942, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; *United States v. Warner*, 5 Cir. 1971, 441 F.2d 821. When the conviction is based upon circumstantial evidence, our question becomes whether the jury could reasonably conclude that the evidence excluded all reasonable hypotheses of innocence. *United States v. Gomez-Rojas*, 5 Cir. 1975, 507 F.2d 1213, 1221; *United States v. Squella-Avendano*, 5 Cir. 1973, 478 F.2d 433, 436.

## WAS BOX A BOOKMAKER?

If we were to find that the jury could reasonably conclude that Box was a bookmaker (engaged in a business with the other defendants), our analytical task would be at an end, for the statute in express terms covers bookmakers.[FN10] Even viewing the evidence most favorably to the Government, however, we are convinced that the jury could not reasonably reach such a conclusion. This evidence must be regarded as consistent with the hypothesis that Box was not a bookmaker.

FN10. See 18 U.S.C s 1955(b)(2), quoted in note 1, supra. A bookmaker is not in violation of the statute, of course, unless the jurisdictional requisites in s 1955(b)(1) are met.

The only direct testimony on this matter clearly categorizes Box as a bettor rather than a bookmaker. Of course, the jury might not have credited this testimony, although we note that Cook and Stewart had no hesitation in labeling the other defendants as 'bookmakers'. The fact remains that there is no evidence in this record upon which an opposite conclusion, i.e., that Box was a bookmaker, could be based. Bookmakers have customers. The names of over 150 bettors were seized during the raids, numerous bettors were interviewed by the FBI, and bettors who were customers of each of the other defendants on trial testified, but no evidence was introduced relating to any 'customers' Box might have.

The testimony of Cook and the betting slips of Stewart indicate that Box on occasion accepted 'lay off' bets from two bookmakers.[FN11]The Government argues that since a lay off bet must be defined as a bet between two bookmakers, Box was a bookmaker simply because he accepted lay off bets. As explained above, we reject the premise of this argument—a lay off bet is one placed by a bookmaker, but the individual accepting the bet need not be a bookmaker.

FN11. Although Stewart did not so testify, the similarity of the Box slips marked '330/300' or the like with those which probably represented Stewart's lay off bets with other bookmakers could indicate that Box accepted \$3800 in bets from Stewart in which Box received 11 to 10 odds. An explanation more consistent, perhaps, with Stewart's testimony would be that these slips represented the bets Stewart made for Box with Cook. Under Glasser, however, we must take the view most favorable to the Government, so we assume that Stewart was giving favorable odds to Box.

An additional characteristic of a bookmaker is that she distributes a 'line.' There is no testimony that Box ever distributed a line, either to customers or to bookmakers. Finally, we note the calls made from Box's telephones to Price. Assuming the jury could conclude that Box himself made all 223 calls to Price from the Guys & Dolls phone, it cannot be said that this number of calls in that direction is inconsistent with the hypothesis that Box was merely a heavy bettor, placing bets with Price.

## S 1955 AND NONBOOKMAKERS

Having established that Box cannot be labeled a bookmaker, we have not yet shown him to be within an unassailable hypothesis of innocence, because s 1955 clearly was meant to proscribe some bookmaking-related activities of individuals who were not themselves bookmakers. The legislative history indicates that s 1955 applies generally to persons who participate in the ownership, management, or conduct of an illegal gambling business. The term 'conducts' refers both to high level bosses and street level employees.[FN12]

FN12. See H.R.Rep. No. 1549, 91st Cong., 2d Sess. (1970), 1970 U.S.Code Cong. & Admin.News at p. 4029 ('House Report'). The language refers specifically to s 1911, but it has been held to apply as well to s 1955. See *United States v. Becker*, 2 Cir. 1972, 461 F.2d 230, 232, vacated and remanded on other grounds, 1974, 417 U.S. 903, 94 S.Ct. 2597, 41 L.Ed.2d 208.

This reflects an intent to reach employees of large bookmaking operations, and that intent has been followed in cases affirming s 1955 convictions of runners, telephone clerks, salesmen, and watchmen.[FN13] On the other hand, individuals who are only bettors or customers of bookmakers clearly are not within the scope of the statute.[FN14] The case before us cannot be fit easily into either of these two categories. No evidence supports the theory that Box was an employee of other bookmakers; yet, Box's acceptance of lay off bets arguably makes him more important to the operation of a bookmaking business than would be a mere customer. Our question, then, is in what circumstances can an individual who accepted lay off bets from bookmakers be convicted under s 1955? The language of the statute does not resolve this, so we turn again to the legislative history.

FN13. See *Becker*, supra; *United States v. Hunter*, 7 Cir. 1973, 478 F.2d 1019. See also *United States v. Harris*, 5 Cir. 1972, 460 F.2d 1041, cert. denied, 1972, 409 U.S. 877, 93 S.Ct. 128, 34 L.Ed.2d 130; *United States v. Ceraso*, 3 Cir. 1972, 467 F.2d 653.

FN14. See House Report at p. 4029; S.Rep. No. 91-617, 91st Cong., 1st Sess. 70-75, 155-56 (1969) ('Senate Report'); *United States v. Curry*, 5 Cir. 1976, 530 F.2d 636; Thomas, supra note 3, 508 F.2d at 1205 (explaining a change in the wording of the original bill made so that customers clearly would be excluded).

Clearly, the dominant concern motivating Congress to enact s 1955 was that large-scale gambling operations in this country have been closely intertwined with large-scale organized crime, and indeed may have provided the bulk of the capital needed to finance the operations of organized crime.[FN15] The target of the statute was large-scale gambling operations-local 'mom and pop' bookmaking operations were to be left to state law.[FN16] In this connection, the requirements of dollar volume (\$2000 gross on any day) or duration (30 days or more), and number of participants (5), were drafted into the legislation.[FN17] These requirements are such that relative small-fry can conceivably be ensnared in the statutory strictures,[FN18] but apparently Congress was of the opinion that the size of gambling operations was often much larger than could be proved, and that

law enforcement officials needed some flexibility in order effectively to combat the largescale operations.[FN19]

FN15. See House Report, *supra* note 12; Senate Report, *supra* note 14; 115 Cong.Rec. 5873 (1969) (remarks of Sen. McClellan); 116 Cong.Rec. 603 (remarks of Sen. Allot), and 35294-95 (remarks of Rep. Poff) (1970).

FN16. See Hearings on S. 30 and related proposals before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess., ser. 27 at 325-26 ('House Hearings') (Report of Committee on Federal legislation of New York City Bar Association); 116 Cong.Rec. 589-91 (1970) (remarks of Sen. McClellan); Thomas, *supra* note 3. 508 F.2d at 1205.

FN17. See 18 U.S.C. s 1955(b)(1), quoted in note 1, *supra*; 116 Cong.Rec. 603 (1970) (remarks of Sen. Allot); House Hearings at 84 (testimony of Sen. McClellan); *United States v. Bridges*, 5 Cir. 1974, 493 F.2d 918.

FN18. See House Hearings at 325-26.

FN19. See Senate Report at 73; 116 Cong.Rec. 603 (1970) (remarks of Sen. Allot); Sacco, *supra* note 7, 491 F.2d at 1000.

For our purposes, of course, the question is whether Box falls within the statutory terms. If he does, the absence of a showing that he was connected with a truly large-scale gambling operation or with organized crime avails him not. Our review of the general purposes of the Act as expressed in the legislative history is intended only to provide guidance in this situation for which the application of the statutory terms is not immediately apparent.

There are indications in the legislative history of a concern that one way in which large-scale organized crime profited from bookmaking operations was to act as a regular market for lay off bets from local bookmakers.[FN20]Remarks of supporters of the bill demonstrate that the Congress was aware of the general function of lay off betting. For example, Senator McClellan stated: [FN21]

FN20. See Thomas, *supra* note 3, 508 F.2d at 1205, quoting testimony of Attorney General Mitchell at House Hearings and The President's Commission Report on The Challenge of Crime in a Free Society at 189 (1967).

FN21.115 Cong.Rec. 5873 (1969).

. . . (describing a lottery operation) The gambler thus seldom gambles. In addition he hedges his bet by a complicated layoff system. . . .

(A bookmaker) has at least the virtue of exploiting primarily those who can afford it. Yet he seldom gambles either. He gives track odds or less without track expenses, pays no taxes, is invariably better capitalized or 'lays off' a certain percentage of his bets with other gamblers . . .

Nothing in the legislative history, however, deals with the question of whether the recipient of a lay off bet, on that basis alone, should be convicted under the statute.[FN22]

FN22. The silence of the statute and the legislative history on this matter can be contrasted with s 1831(a)(2) of President Nixon's proposed Revised Criminal Code, not accepted by Congress, under which one who received a lay off bet would be in violation of an express statutory provision. See 13 Crim.L.Rep. 3015 (1973).

The phenomenon of lay off betting has been a factor in a large number of cases which have construed s 1955.[FN23]In almost every case, the question has been whether the exchange of lay off bets, usually in addition to the exchange of line information, could be enough to link two separate bookmaking operations into one business for the purposes of meeting the s 1955 jurisdictional requirement of five participants in one business.[FN24] The answer has in every case been affirmative-the regular direct exchange of lay off bets and line information can connect otherwise independent gambling operations, which alone would be illegal under state but not federal law (because less than five participants were involved), into one business. Further, the case law supported by legislative history establishes that an individual who is in the business of providing a regular market for a large volume of lay off bets should also be considered to be part of the gambling operation he services.[FN25]Finally, it seems clear that, at least in this circuit, a professional gambler who accepts bets in the nature of lay off bets and, additionally, provides line information to the same bookmaking operation can be convicted as part of that operation under s 1955.[FN26]

FN23. See, e.g., Guzek, supra note 7; Joseph, supra note 3; Schaefer, supra note 5; Thomas, supra note 3; *United States v. Bohn*, 8 Cir. 1975, 508 F.2d 1145, cert. denied, 1975, 421 U.S. 947, 95 S.Ct. 1676, 44 L.Ed.2d 100; *United States v. DeCesaro*, 7 Cir. 1974, 502 F.2d 604; *United States v. McHale*, 7 Cir. 1974, 495 F.2d 15; Sacco, supra note 7; Schullo, supra note 5; *United States v. Ciamacco*, W.D.Pa.1973, 362 F.Supp. 107, aff'd 3 Cir., 491 F.2d 751.

FN24. Of the ten cases cited in note 23, six (Guzek, Schaefer, Thomas, Bohn, McHale, and Schullo) fall into the category of a bookmaker exchanging lay off bets and line information with another bookmaker. In Joseph, the recipients of the bets (which, although the Court did not term them 'lay off bets,' were used 'as a means by which the . . . bookmakers could increase, decrease or eliminate their risk on a particular event,' 519 F.2d at 1071) were characterized as 'professional gamblers' and did indeed supply line and other gambling information to the bookmakers. In Sacco, the 'lay off bettor' was said to be a bookmaker who placed bets with the other bookmaker, but there was no mention of the exchange of line information. DeCesaro held that an affidavit alleging, inter alia, that several bookmakers had laid off bets with the head of a 'lay-off bookmaking operation' was sufficient to support a finding of probable cause in a wiretap application. Ciamacco involved a 'numbers' racket (where

no line information is used), in which the central figure was clearly in the business of accepting lay off bets at special rates from other numbers bet-takers.

FN25. See *United States v. Thomas*, supra note 7, at 1206:

Petrangelo aided the Wolk operation by providing a regular and consistent market for Wolk's lay off betting. . . .

. . . a jury could conclude that in providing a regular market for Wolk's lay off bets, Schullo assisted the Wolk operation in the balancing of its books . . . .

. . . (I)solated and casual lay off bets and an occasional exchange of line information may not be sufficient to establish that one bookmaker is conducting or financing the business of a second bookmaker.

(emphasis added). See also Schaefer, supra note 5, 510 F.2d at 1315-16 & n. 4 (Lay, J., dissenting) (arguing that the exchange of lay-off bets and line information should be insufficient to connect two bookmakers under s 1955 unless proof of an agreement or regular market is adduced); Ciamacco, supra note 23 (evidence showed that the central figure had an agreement with several bookmakers who laid off bets with him whereby he would rebate a percentage of his profits from handling their DeCesaro, supra note 23.

FN26. See *Joseph*, supra note 3.

The cases establish, then, that one who accepts lay off bets can be convicted if any of the following factors is also present: evidence that the individual provided a regular market for a high volume of such bets, or held himself out to be available for such bets whenever bookmakers needed to make them; evidence that the individual performed any other substantial service for the bookmaker's operation, as, for example, in the supply of line information; or evidence that the individual was conducting his own illegal gambling operation and was regularly exchanging lay off bets with the other bookmakers. Our review of the legislative history, and our adherence to the doctrine that statutes mandating penal sanctions are to be strictly construed, convinces us that one of the listed factors, or other evidence that the defendant was an integral part of the bookmaking business, is necessary before an individual who accepts lay off bets can be convicted under the statute.[FN27] Evidence establishing only that a person received occasional lay off bets from bookmakers cannot be considered inconsistent with the possibility that the individual was for all practical purposes only a bettor.[FN28]

FN27. See *Iannelli v. United States*, 1975, 420 U.S. 770, 798, 95 S.Ct. 1284, 1300, 43 L.Ed.2d 616, 635 (Brennan, J., dissenting):

In *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 965 (1955), this Court held that in criminal cases, 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.'

*Iannelli* was a 5-4 decision in which the majority held that Wharton's Rule did not preclude separate convictions for 1) conspiracy to violate s 1955 and 2) a substantive violation of s 1955, growing out of the same circumstances. The majority found a clear congressional intent that prosecutors should retain the option of prosecuting under either or both counts.-i.e., the majority felt that Congress had declared its will.

For other cases discussing the doctrine that penal statutes are to be read strictly, see *Bridges*, supra, note 17, 493 F.2d at 922-23 and cases there cited; *Simpson v. Simpson*, 5 Cir. 1974, 490 F.2d 803, 809, cert. denied, 1974, 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141 (' . . . (C)riminal statutes must be strictly construed, to avoid ensnaring behavior that is not clearly proscribed.')

FN28. Cf. *Joseph*, supra note 3, 519 F.2d at 1071:

A person who performs a necessary function other than as a mere customer or bettor in the operation of illegal gambling 'conducts an illegal gambling business.' *United States v. Jones*, 9 Cir. 1974, 491 F.2d 1382, 1384.

In these circumstances, we do not feel that the cases finding 'lay off bettors' within the scope of s 1955 are dispositive.[FN29]If dicta in these cases can be read to indicate that a 'lay off bettor,' as the recipient of a lay off bet, is on that basis alone a part of an illegal gambling operation, we reject such dicta as being based on an erroneous assumption regarding the nature of lay off betting. We stress again that the recipient of a lay off bet need not be a bookmaker, but rather might be any individual willing to accept a single bet. s 1955 was directed at the professionals-the persons who avoided gambling themselves, but profited from the gambling of others.[FN30]Although a heavy bettor might be a crucial source of revenue for a bookmaking operation, the statute was meant to exclude bettors. Gambling becomes a federal case only when a person is charged with more than betting, and evidence that a person accepted lay off bets, without more, is insufficient to expel that person from s 1955's sanctuary of bettordom.

FN29. Cf. *Joseph*, supra note 3, 519 F.2d at 1068;*DeCesaro*, supra note 23, 502 F.2d at 611;*McHale*, supra note 23, 495 F.2d at 18;*Sacco*, supra note 7, 491 F.2d at 998, 1004.

FN30. Assistant Attorney General Mark Wilson, who was primarily responsible for drafting the section of the bill which became s 1955, testified before the House Subcommittee as follows:

The whole intent and purpose of this bill is aimed at the proprietor, the professional, and not the bettors.

House Hearings at 191.

The question remaining, then, is whether the evidence relating to Box, viewed most favorably to the Government, could sustain a jury finding that one of the additional factors noted above was present in this case. Such a jury finding would in effect be a conclusion that the evidence was inconsistent with any hypothesis of innocence. In reaching this conclusion, of course, the jury is limited to evidence in the record and supportable inferences therefrom. If a conclusion that all hypotheses of innocence have been excluded by the evidence could be reached only as a result of speculation or assumptions about matters not in evidence, then the jury verdict must be overturned.

The evidence against Box shows that he accepted lay off bets of undetermined amounts from Cook on a number of occasions, and that in one week he may have accepted \$3800 in lay off bets from Stewart. These are the only two pieces of evidence which distinguish

Box in any way from the 'mere bettor' so clearly excluded from the statute's scope. We do not find any reasonable basis in the evidence upon which the jury could conclude that Box was an integral part of these bookmaking operations. While the volume of bets with Stewart was substantial, no evidence indicates that Box regularly accepted lay off bets from Stewart. There is no evidence on amounts from Cook, and while Cook's testimony could support a conclusion that Box accepted lay off bets on several occasions, that testimony flatly contradicts any suggestion that Box held himself out to be a regular market for such bets upon which local bookmakers could depend.[FN31]As we have already noted, no evidence supports the suggestion that Box was himself a bookmaker, or that he provided line or other gambling information to bookmakers.

FN31. The only evidence on this point is the testimony of Cook, who indicated that when he bet with Box, it was a 'free and voluntary thing' and that Box was 'free to take the bet or not take the bet' (the phrases are from questions posed by defense counsel.) Again, the jury need not have credited Cook on this issue, but there was no evidence on which to base an opposite conclusion.

[Box may have gamboled with the gamblers, but he has not been shown to be a gaming entrepreneur. Nothing indicates that he solicited the lay off bets that he accepted. Box was a customer of bookmakers and was perhaps a bargain-seeking bettor, but the record does not permit him to be cast in a role as a necessary or integral part of a gambling operation. The testimony of admitted bookmakers, the multiplicity of phone calls and the shower of betting slips suggest only that Box bet with continuity and in magnitude, and on occasion received a discount when the professionals with whom he dealt needed to lay off a bet. We conclude, then, that the jury could not reasonably find the evidence inconsistent with the hypothesis that Box was simply a heavy bettor who on occasion received favorable odds in bets with bookmakers.[FN32]For purposes of s 1955, this hypothesis is one of innocence.

FN32. Perhaps Box was a valued customer who was occasionally given a 'right of first refusal' when his bookmakers needed to make a lay off bet. Alternatively, the bookmakers may have on occasion turned to Box when other bookmakers had bets unbalanced in the same direction on a certain event, and thus were unwilling to accept lay off bets. In any event, no evidence could support an inference that Box ever placed lay off bets himself- indeed, the evidence indicates that if Box were to place lay off bets, he would simply be negating the only 11 to 10 action he received. As we have noted, s 1955 places sanctions on those in the gambling business, and not on mere gamblers. Nothing in the evidence contradicts the proposition that Box was an inveterate gambler.

Since we thus have concluded that the evidence in this case was insufficient to support a verdict of guilty, we need not reach any of the other eleven points argued by appellant.[FN33]The conviction of Box is reversed, the sentence is vacated, and the case is remanded to the district court for entry of a judgment of acquittal.

FN33. Several of these eleven points are clearly meritless, but others would warrant serious consideration. Particularly troublesome is the nature of the Government's theory

through which the eight separate bookmaking operations (that includes the 'Box operation') are said to constitute a single business for the purposes of s 1955. Although the exchange of lay off bets and line information has frequently been held sufficient to connect two bookmaking operations into one business, see note 23 supra, no case has been called to our attention in which the connections were nearly so indirect as in the case at bar. For example, to connect Box and co-defendant Skrnich, a bookmaker in Opelousas, Louisiana, one has to go through the Cook operation, with which Box was said to be connected, to the Bonomo-Glorioso operation, with which the Cook operation was said to be connected, to Skrnich, with whom the Bonomo-Glorioso operation was said to be connected. That Box and Skrnich were engaged together in a single business is open to serious question. When asked whether, under the Government's theory in this case, every bookmaker in the country might be charged in one single-count indictment, counsel for the Government responded, 'That's an intriguing possibility.'

REVERSED.

## **DISCUSSION**

Does the Illegal Gambling Business Act reach bettors?

When does one become more than a mere bettor?

## **CONDUCTS A GAMBLING BUSINESS**

### **The Merrell Court Opinion**

United States Court of Appeals,

Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Buster MERRELL, Defendant-Appellant.

No. 82-1182.

Argued Jan. 18, 1983.

Decided March 4, 1983.

Defendant was convicted in the United States District Court for the Eastern District of Michigan, Robert E. DeMascio, J., of conducting an illegal gambling business, and he appealed. The Court of Appeals, Contie, Circuit Judge, held that: (1) actions of defendant, who acted as waiter and janitor in gambling house, aided gambling operation, and therefore his conviction was proper, and (2) persons who regularly aid gambling enterprises are subject to prosecution under statute for conducting an illegal gambling business, even though their conduct may not be strictly necessary to success of such businesses.

Affirmed.

Before, KENNEDY, CONTIE and WELLFORD, Circuit Judges.

CONTIE, Circuit Judge.

Buster Merrell appeals his conviction under 18 U.S.C. § 1955 for conducting an illegal gambling business. He was sentenced to two years probation. We affirm.

The facts are undisputed. Between May 11, 1979 and April 19, 1980, government agents undertook surveillance of 19733 Omira, Detroit, Michigan. The authorities suspected that illegal gambling was occurring on the premises. After photographing and videotaping activity transpiring outside the address, the agents legally planted a video camera and microphone within the house and tapped two telephones. The videotape,

which was the main prosecution evidence at trial, clearly indicated that an illegal dice game was being operated every Monday and Friday night during the time period in question.

On April 19, 1980, government agents raided the premises and arrested Merrell and others. Thirteen persons were charged with violating both 18 U.S.C. § 1955, conducting an illegal gambling business, and 18 U.S.C. § 371, conspiracy to commit the underlying substantive offense. Trial of all defendants commenced on December 14, 1981. Three days into the proceedings, eight defendants pleaded guilty. They were the lessor of the premises, the game operator, three dealers and three watchmen/doormen. The remaining five, including Merrell, waived their right to a jury trial.

The district court acquitted four of the defendants on both counts because they were mere bettors whose actions were not proscribed by section 1955. Although Merrell was acquitted of conspiracy, he was convicted of the substantive offense. The district court found that appellant performed several jobs which aided the gambling operation. For instance, Merrell regularly served coffee to bettors during gambling sessions. Immediately after these sessions, he usually stacked tables and chairs, swept the floors, cleaned ash trays and replaced the tables and chairs in preparation for future sessions. The sole issue raised on appeal is whether section 1955 makes criminal the waiters' and janitors' functions performed by the defendant. [Footnote 1. The record does not indicate whether Merrell was compensated for his services. The point is insignificant because the government need not prove that appellant was paid in order to obtain a conviction. *United States v. Rowland*, 592 F.2d 327 (6th Cir.1979).]

The Supreme Court has stated that section 1955 "proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor." *Sanabria v. United States*, 437 U.S. 54, 70 n. 26, 98 S.Ct. 2170, 2182, 57 L.Ed.2d 43 (1978). The courts of appeals have also recognized that only customers are outside the purview of the statute. See, e.g., *United States v. Leon*, 534 F.2d 667, 676 (6th Cir.1976); *United States v. Reeder*, 614 F.2d 1179, 1182 (8th Cir.1980). Section 1955 covers both "high level bosses and street level employees." 1970 U.S.Code Cong. & Ad.News 4007, 4029. Thus, this circuit has held that runners, telephone clerks, salesmen, dealers, doormen and watchmen "conduct" gambling businesses within the meaning of the statute. *Leon*, supra at 676. Since performing janitorial and service functions is not mere gambling, [*Foot Note 2 - The record reflects that in addition to his other activities, Merrell did gamble. The Sanabria exception to criminal liability only applies, however, to those whose sole role is that of bettor. Persons who wager and otherwise participate in the operation may be prosecuted because the contrary result would encourage a subterfuge, i.e., all participants could avoid liability by placing an occasional bet. See*

*United States v. Colacurcio*, 659 F.2d 684, 688 (5th Cir.1981).] the question is whether Merrell's actions constitute "participation" in an illegal enterprise under the Sanabria test.

Merrell contends that his conduct does not amount to participation. He relies primarily on *United States v. Boss*, 671 F.2d 396 (10th Cir.1982), in which the tenth circuit held that waitresses whose sole function was to serve drinks both to dance hall patrons and to gamblers in an adjacent room were not subject to prosecution under section 1955. The Boss court reasoned that the statute only reached conduct strictly necessary to the operation of a gambling business. To extend the statute further allegedly might ensnare persons that Congress never intended. Since a gambling enterprise can operate without waitresses serving drinks to bettors, the waitresses were not conducting a gambling business within the meaning of the statute.

Merrell argues that under the Boss necessity test, runners, dealers, guards and the like may be prosecuted because such persons either are integral to the efficient operation of a gambling enterprise or provide security and protection. A gambling business could not long operate without them. Conversely, such an enterprise could easily function without the services of waiters or janitors. Merrell therefore asserts that the conviction should be reversed.

The major flaw in appellant's argument is that the strict necessity test has only been adopted by the Boss court. The prevailing rule is that one "conducts" a gambling business if that person performs any act, duty or function which is necessary or helpful in operating the enterprise. See *United States v. Colacurcio*, 659 F.2d 684, 688 (5th Cir.1981); *United States v. Tucker*, 638 F.2d 1292, 1296 (5th Cir.), cert. denied, 454 U.S. 833, 102 S.Ct. 132, 70 L.Ed.2d 111 (1981); *United States v. Greco*, 619 F.2d 635, 638 (7th Cir.1980); *United States v. Reeder*, 614 F.2d 1179, 1182 n. 2 (8th Cir.1980); *United States v. Bennett*, 563 F.2d 879, 882 n. 4 & 883 (8th Cir.1977). Merrell's actions clearly aided the gambling operation involved here. By serving coffee, appellant helped the bettors to continue wagering without interruption. See *Tucker*, supra at 1296; *Bennett*, supra at 883. By cleaning up and preparing the gambling area for future sessions, appellant helped to provide an attractive place for bettors to congregate in order to wager. In light of the authorities from the fifth, seventh and eighth circuits, we hold that persons who regularly aid gambling enterprises should be subject to prosecution under section 1955 even though their conduct may not be strictly necessary to the success of such businesses. [*Foot Note 3 - The fifth circuit stated in Tucker, supra that persons employed by gambling enterprises on a continuous basis, and whose duties require them directly to serve gamblers, are subject to prosecution under section 1955. Appellant's*

*conduct fits that description.]* Since the Boss case ruled to the contrary, we decline to follow it.

Upholding the district court's judgment will not result in future convictions of persons that Congress never intended. The record clearly indicates that appellant regularly and consistently performed his duties. That fact distinguishes this case from the situation in which, for example, a mere bettor serves a drink or helps to clean up in an isolated instance. Secondly, and unlike the situation in Boss, Merrell regularly worked for an enterprise whose sole purpose was to promote illegal wagering. Consequently, appellant cannot reasonably claim that he unknowingly or unwittingly facilitated gambling.

Since appellant knowingly and regularly aided the gambling business in question, the district court acted properly in convicting him. Accordingly, the judgment is AFFIRMED.

## **POST MERRELL DISCUSSION QUESTIONS**

1. Where should the line be drawn for conducting an illegal gambling business?
2. For an illegal online gambling business, discuss whether the following activities could be or should be considered conducting an illegal gambling business:
  - a. Providing credit card services
  - b. Providing funds transfer services
  - c. Acting to place advertisements for the online site
  - d. Taking and running advertising for an online sportsbook
  - e. Purchasing publicly traded stock in an online sportsbook operating out of the U.K.
  - f. Providing software for an online sportsbook
  - g. Providing accounting software for an online sportsbook

United States Court of Appeals, Fifth Circuit.  
UNITED STATES of America, Plaintiff-Appellee,

v.

Karin D. FOLLIN, John H. Stewart, Broadus V. Stewart, Jr., Donald L. Mason, and Christopher H. Crawford, Defendants-Appellants.

**No. 91-1550.**

Dec. 3, 1992.

HARMON, District Judge:

This is an appeal of convictions for operating an illegal gambling business and conspiring to do so in violation of 18 U.S.C. §§ 1955 & 2, and 18 U.S.C. §§ 371 & 2. John H. Stewart (“Stewart”), Broadus V. Stewart, Jr. (“Stewart Jr.”), Donald L. Mason (“Mason”), and Karin D. Follin (“Follin”) appeal their convictions, arguing insufficiency of evidence, inadmissibility of evidence and failure to extend immunity to a defense witness. Christopher H. Crawford appeals from both his conviction and his sentence. We affirm the appellants' convictions and Crawford's sentence in all respects.

I.

A. The Jurisdictional Five

Between September 27, 1990, and November 7, 1990, a gambling investigation was conducted by the FBI, the Mississippi Attorney General's Office and the Criminal Investigation Bureau of the Mississippi Highway Patrol. Officers undertook surveillance of an illegal gambling casino operating at Stewart Lodge in Canton, Mississippi. In furtherance of the investigation, Officer Bullock visited the casino eight times during that period. He observed four men, Stewart, Stewart Jr., Crawford, and Mason, operating blackjack and craps tables. Also present at the Lodge was Follin.

A sixth person, later identified as Herbert McMullen, assisted with the craps table and at times stood watch on October 24, 1990. Stewart Jr., who normally worked the tables, was not present on that night. That night Bullock observed approximately fifteen to eighteen thousand dollars change hands during the time he was in the illegal casino.

Title 18 U.S.C. § 1955 requires proof that five or more persons were participating in an illegal gambling operation and that either the business was in substantially continuous operation for thirty days or more, or that the operation had gross revenues of two thousand dollars or more in a single day. *U.S. v. Aucoin*, 964 F.2d 1492, 1499 (5th Cir.1992).

Stewart, Stewart Jr., Crawford, and Mason do not dispute their role in the operation, but contest the application of the criminal gambling statute. They contend that as the only operators of the casino the government cannot convict them under a statute that requires an illegal gambling business to “involve five or more persons FN1 who conduct, finance, manage, supervise, direct, or own all or part of such business.” 18 U.S.C. §

1955(b)(1)(ii). They argue that Follin, the fifth defendant convicted with them, was merely a bettor.

FN1. The case law often refers to the “five or more person” standard as the “jurisdictional five” requirement.

Section 1955 “proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor.” *Sanabria v. United States*, 437 U.S. 54, 70 n. 26, 98 S.Ct. 2170, 2182 n. 26, 57 L.Ed.2d 43 (1978) (emphasis supplied).

Section 1955's coverage is broad. All persons providing services that are necessary or helpful to the gambling operation come within its scope. *United States v. Colacurio*, 659 F.2d 684, 688 (5th Cir.1981), cert. denied, 455 U.S. 1002, 102 S.Ct. 1635, 71 L.Ed.2d 869 (1982); *United States v. Tucker*, 638 F.2d 1292, 1295 (5th Cir.1981), cert. denied, 454 U.S. 833, 102 S.Ct. 132, 70 L.Ed.2d 111 (1981)... [A]ctivities exceed[ing] those of “mere bettors” ... fall outside section 1955's “sanctuary of bettordom.” *United States v. Box*, 530 F.2d [1258], 1276 [ (5th Cir.1976) ].

*United States v. Jones*, 712 F.2d 115, 120-21 (5th Cir.1983). The design of “section 1955 is ‘to bring within federal criminal legislation not all gambling, but only that above a certain minimum level....’ ” *U.S. v. Tucker*, 638 F.2d at 1297 (citing *United States v. Bridges*, 493 F.2d 918, 922 (5th Cir.1974)). Yet, the clear intent of Congress was to include all those who “participate in the operation of a gambling business, regardless [of] how minor their roles.” *Id.* at 1296 (citing *United States v. Joseph*, 519 F.2d 1068, 1071 (5th Cir.1975), cert. denied, 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed.2d 312 (1976)). See also *United States v. Rieger*, 942 F.2d 230, 234 (3rd Cir.1991).

Unlike the other defendants Follin did not operate a gambling table, and she was not a paid employee.FN2 She was observed, however, serving drinks, cooking steaks, wiping off kitchen counters, and examining the dice. On several occasions she wagered bets.FN3

FN2. The government need not prove that Follin was compensated in order to obtain a conviction for her role in the gambling activity. *United States v. Merrell*, 701 F.2d 53, 54 n. 1 (6th Cir.), cert. denied, 463 U.S. 1230, 103 S.Ct. 3558, 77 L.Ed.2d 1415 (1983) (citing *United States v. Rowland*, 592 F.2d 327 (6th Cir.1979)).

FN3. Follin gambled with her own money on a few occasions, but the record reflects that on most occasions she did not gamble. Follin neither received chips from the operators, nor did she receive chips from other gamblers. However, she would roll the dice for others and keep the proceeds if she won.

Bullock's notes only mention that Follin examined the dice on one occasion. On the stand Bullock tried to attribute another such episode to Follin, but, although he was familiar with Follin, he called her in his notes an “unidentified white female.” Defendants contend that that incident cannot be attributed to Follin. At trial Bullock also testified to other acts performed by Follin, which were not mentioned in his investigative notes. Defendants

hotly contested this testimony because Bullock's notes are very detailed, and it would be uncharacteristic for the investigator to have omitted such facts from them.FN4

FN4. Their argument must fail since “[i]ssues of credibility, the weight of the evidence, and conflicts in evidence are matters for the jury.” *United States v. Ortega-Chavez*, 682 F.2d 1086, 1091 (5th Cir.1982) (citing *United States v. Parr*, 516 F.2d 458, 464 (5th Cir.1975)).

The appellants maintain that Follin's activities were no different from those of the other bettors. All patrons, it is argued, would get each other drinks, cook steaks, and examine the dice should they fall nearest that person; as a mere bettor Follin cannot be used to trigger the jurisdictional requirements of the statute since she did not conduct or direct the illegal gambling operation. The central issue involved in this appeal is whether the jury could have found, under the facts presented, that Follin was not a mere bettor, but in fact was helpful to gambling operations. The government's response is that Folin, unlike other bettors, was present at the casino from its inauguration until its operations were terminated. The Government further contends that any individual, regardless of the standard practice in the game room at the time, who consistently performs duties so as to facilitate the gambling operation is subject to prosecution under § 1955.

Appellants' arguments to the contrary, it is clear that through her aggregate conduct Follin was more than a “mere bettor” and subject to prosecution under federal gambling statutes. Follin could be used to establish the jurisdictional five requirement.

Appellants rely on *United States v. Merrell*, 701 F.2d 53 (6th Cir.), cert. denied, 463 U.S. 1230, 103 S.Ct. 3558, 77 L.Ed.2d 1415 (1983), and *United States v. Boss*, 671 F.2d 396 (10th Cir.1982).FN5 Their reliance on these cases is misplaced. The facts of this case closely approximate those in *Merrell*. In the instant action the jury heard testimony that Follin wagered bets, served drinks, cooked steaks for those in attendance, and cleaned the kitchen on occasion. In *Merrell*, the defendant served coffee during gambling operations, but also stacked tables, swept the floors, and cleaned ash trays. 701 F.2d at 54. The Sixth Circuit, relying on our seminal decision in *United States v. Tucker*, found that when a defendant serves coffee, thereby enabling bettors to continue wagering without interruption, the defendant's actions clearly aided the gambling operation. *United States v. Merrell*, 701 F.2d at 55 (citing *Tucker*, 638 F.2d at 1296). The *Merrell* Court held that “persons who regularly aid gambling enterprises should be subject to prosecution under section 1955 even though their conduct may not strictly be necessary to the success of such businesses.” *United States v. Merrell*, 701 F.2d at 55. The Sixth Circuit indicated that those who regularly and consistently perform functions that aid illegal gambling can be distinguished from mere bettors who serve drinks or clean up in isolated instances. *Id.* **No bright line can be drawn as to what is “necessary or helpful” in all instances; such a determination depends on the facts in a given situation and the evidence presented to the jury.** The evidence supports the jury's determination that Follin's activities went beyond the realm of a mere bettor. Looking at the testimony in a light most favorable to the verdict, there is evidence that Follin engaged in activities that were helpful to the operation of the casino. We have determined that the statute proscribes any

degree of participation in a gambling operation except participation as a mere bettor. *United States v. Tucker*, 638 F.2d 1292, 1295 (5th Cir.1981), cert. denied,454 U.S. 833, 102 S.Ct. 132, 70 L.Ed.2d 111 (1981). Viewing the evidence in the light most favorable to the Government “a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.” *United States v. Bell*, 678 F.2d 547, 549 (5th Cir.1982), aff'd,462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983); *United States v. Zapata-Alvarez*, 911 F.2d 1025, 1026 (5th Cir.1990).

FN5.*United States v. Boss*, has not been followed by those circuits using the necessary or helpful test. See *United States v. Hammond*, 821 F.2d 473, 476 (8th Cir.) (individual conducted illegal gambling business by supplying paper to bettors and allowing phone to be used in gambling operation), cert. denied,484 U.S. 986, 108 S.Ct. 502, 98 L.Ed.2d 501 (1987); see also *United States v. Merrell*, 701 F.2d at 55.

#### B. Immunity and McMullen's Photograph

In order to controvert testimony that McMullen was present on October 24, the appellants produced Robert Tadlock who swore that McMullen was not present in Canton on October 24, 1990, but at the time was enroute with him from Frisco City, Alabama.

A photograph was taken of McMullen and tendered to the defense the morning of trial. Crawford moved to exclude the photo from evidence because the government's failure to notify him of the photograph's existence was unfairly prejudicial. The district court, viewing the objection as technical, overruled the motion.

McMullen was initially listed as a witness for the prosecution. When the government did not call him to testify, the defense sought to call him. McMullen then invoked his Fifth Amendment rights and refused to testify. The appellants argue that the district court should have extended immunity to McMullen and ordered him to testify.

Stewart, Stewart Jr., Crawford, and Mason also seek a judgment of acquittal or a new trial because the trial court refused to hold an evidentiary hearing on McMullen's invocation of his Fifth Amendment privilege.

We need not discuss at length appellants' arguments relating to the admission of the photograph and the district court's determination not to extend immunity to McMullen since, using twenty-twenty hindsight, this portion of the case was not ultimately essential to the jury's determination. This is so because the jury rendered a verdict against each of the five appellants. Since each of the five appellants was convicted of operating or conducting a gambling business the jurisdictional five requirement was established; when the jury found Follin guilty of conducting a gambling business, the government's need to establish a sixth § 1955 person evaporated.

During the course of deliberations the jury delivered three notes to the Court.FN6 The defense asserts that the very substance and nature of the notes tend to show that the jury

was struggling with their task. The jury then returned a guilty verdict against all five defendants.

FN6. The first question read: “If we do find five persons guilty of the two charges but one is not listed, does this mean that [we] find all of the five listed guilty?” The second jury question read: “If we find one or more persons to be guilty on the evidence presented, does it mean that any of the other persons are guilty by association?” The last question read: “If we find the man in the picture is the fifth person but we can't ID?” The appellants have no quarrel with the responses of the trial judge.

The jury's questions demonstrate that, while during their deliberation they considered McMullen's application to the case, the jury was ultimately satisfied that the requirements of the statute were met. They evidenced their satisfaction by convicting all five defendants.

Nevertheless, the district court did not err. The question in this case is whether the district court properly investigated the legitimacy and scope of the privilege as it extended to McMullen, and then having sustained the privilege protection, did the district court err in not granting McMullen immunity. The standard of review for the invocation of a Fifth Amendment privilege is whether the trial court abused its discretion. *United States v. Metz*, 608 F.2d 147, 156 (5th Cir.1979), cert. denied, 449 U.S. 821, 101 S.Ct. 80, 66 L.Ed.2d 24 (1980). In light of the fact that McMullen was apprehensive at the prospect of being prosecuted the district court, having heard testimony on the subject, did not err in allowing McMullen to invoke the privilege inasmuch as “an accused's right to compulsory process must give way to the witness' Fifth Amendment privilege not to give testimony that would tend to incriminate him.” *United States v. Boyett*, 923 F.2d 378, 379 (5th Cir.), cert. denied, 502 U.S. 809, 112 S.Ct. 53, 116 L.Ed.2d 30 (1991) (citing *United States v. Khan*, 728 F.2d 676, 678 (5th Cir.1984)).

District Courts have no inherent power to grant immunity. A district court may not grant immunity simply because a witness has essential exculpatory evidence unavailable from other sources. *United States v. Thevis*, 665 F.2d 616, 638-41 (5th Cir.), cert. denied, 456 U.S. 1008, 102 S.Ct. 2300, 73 L.Ed.2d 1303 (1982). However, judicially ordered immunity may be sanctioned to stem governmental abuse. See *United States v. Thevis*, 665 F.2d at 640-41. Appellant argues that McMullen should have been granted immunity because his refusal to testify was the result of prosecutorial misconduct. Brief of Appellant Christopher Crawford at p. 25. The record does not support the appellants' allegations. The trial court addressed counsel on this very issue and defense counsel replied that he was not pressing forward with the allegation. This claim does not warrant further discussion. The trial court did not err in failing to extend immunity to McMullen.

Turning to the admissibility of the photograph Crawford argues that the district court abused its discretion because it allowed the Government to introduce a photograph of McMullen that was not presented to defense counsel until the morning of the trial. He contends the photograph should be excluded as its receipt into evidence violated the discovery order and prejudiced his defense.

The standard of review on appeal for the admissibility of evidence is whether the trial court abused its discretion. *United States v. Westmoreland*, 841 F.2d 572, 578 (5th Cir.), cert. denied, 488 U.S. 820, 109 S.Ct. 62, 102 L.Ed.2d 39 (1988); *United States v. Stephenson*, 887 F.2d 57, 59 (5th Cir.1989), cert. denied, 493 U.S. 1086, 110 S.Ct. 1151, 107 L.Ed.2d 1054 (1990). Although the photograph was taken on the Saturday prior to the Monday trial commencement, the developed photograph was not given to the prosecutor until Monday morning. It was then immediately proffered to defense counsel. The discovery order provided for continuing discovery of items which came into the government's possession. The district court did not abuse its discretion by permitting the Government to introduce the photograph of McMullen since the record demonstrates that as soon as it came into the prosecutor's possession, the prosecutor provided the photograph to the defense.

## II.

### Sentencing Guidelines

Crawford objects to his sentence arguing that he was entitled to receive a two point offense level reduction as a minor participant and that two D.U.I. convictions should not have been used to enhance his criminal history category.

Our review of a sentence under the guidelines is “confined to determining whether a sentence was ‘imposed in violation of the law’ or ‘as a result of an incorrect application of the sentencing guidelines.’ ” *United States v. Nevarez-Arreola*, 885 F.2d 243, 245 (5th Cir.1989) (citing 18 U.S.C. § 3742(e)). We affirm applications of the guidelines when they are based on factual findings that are not clearly erroneous. *Id.* “A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole.” *United States v. Sanders*, 942 F.2d 894, 897 (5th Cir.1991).

*United States v. Shipley*, 963 F.2d 56, 58 (5th Cir.), cert. denied, 506 U.S. 925, 113 S.Ct. 348, 121 L.Ed.2d 263 (1992).

#### 1. Minor Participant

The court's finding that Crawford was not merely a minor participant was not clearly erroneous. Trial testimony reflects that Crawford held various positions in the enterprise. Crawford was present in the casino every night and took part in the operation by working the craps table, dealing blackjack, and admitting bettors to the casino. He is not entitled to a reduction. A defendant's participation is not minor unless he is “substantially less culpable than the average participant.” U.S.S.G. § 3B1.2, Comment. (backg'd.). The record contains ample support for the court's finding that Crawford was not a minor participant. We will not disturb that finding.

## 2. Criminal History Score

Crawford's second objection to the sentencing guidelines is that his two uncounseled misdemeanor DUI convictions should not have been used to increase his criminal history category. We have recognized that the sixth amendment guarantee of counsel is one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *United States v. Eckford*, 910 F.2d 216, 218 (5th Cir.1990), reh'g denied, 915 F.2d 695 (5th Cir.1990) (quoting *Powell v. Alabama*, 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 158 (1932)). The sixth amendment, however, requires only that "no indigent criminal defendant be sentenced to a term of imprisonment unless the Government has afforded him the right to assistance of counsel." *Id.* at 218 (emphasis in original) (quoting *Scott v. Illinois*, 440 U.S. 367, 374, 99 S.Ct. 1158, 1162, 59 L.Ed.2d 383 (1979)). "Thus, conviction of an uncounseled criminal defendant is constitutionally permissible, so long as the defendant is not sentenced to a term of imprisonment." *Id.*

Crawford relies on the four concurring opinions in *Baldasar v. Illinois*, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980), for the proposition that a court cannot use an uncounseled misdemeanor conviction to enhance a punishment. Justice Blackmun's independent concurrence noted that enhancement for an uncounseled misdemeanor conviction is improper where the misdemeanor offense is punishable by a period of more than six month's imprisonment. *Id.* at 230.

We have since determined that *Baldasar* is of little guidance given the inconsistencies of the opinion and the slim majority. *United States v. Eckford*, 910 F.2d at 219 (citing *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 345 (7th Cir.1983), cert. denied, 465 U.S. 1068, 104 S.Ct. 1419, 79 L.Ed.2d 745 (1984)). In *Wilson v. Estelle*, 625 F.2d 1158 (5th Cir.1980), cert. denied, 451 U.S. 912, 101 S.Ct. 1985, 68 L.Ed.2d 302 (1981), we determined that a defendant's two prior uncounseled misdemeanor convictions, for which he received no term of imprisonment, were valid for all purposes.FN7*Id.* at 1159;*United States v. Eckford*, 910 F.2d at 220. *Baldasar* was basically limited to the premise that "a prior uncounseled misdemeanor conviction may not [be] used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term." *United States v. Eckford*, 910 F.2d at 220 (quoting *Wilson v. Estelle*, 625 F.2d at 1159 n. 1).FN8

FN7. We note that an uncounseled conviction is not necessarily constitutionally invalid since, for example, the defendant may have waived the right to counsel. Yet, if a defendant shows that a conviction was previously ruled constitutionally invalid it may not be counted in the criminal history score. U.S.S.G. § 4A1.2, comment (n. 6). We have previously held that the application note 6 "allows a district court, in its discretion, to inquire into the validity of prior convictions at sentencing hearings." *United States v. Canales*, 960 F.2d 1311, 1315 (5th Cir.1992).

After reviewing the statements of the district court at the sentencing hearing, it is obvious that the court did not allow the challenge. The court found Crawford's argument, that his previous DUI convictions were constitutionally invalid, not well taken. Since "a court is only required to exclude a prior conviction from the computation of the criminal history category if the defendant shows it to 'have been previously ruled constitutionally

invalid,”*United States v. Canales*, 960 F.2d at 1315 (emphasis in original), the district court did not err when it ruled, citing *Eckford*, that the second DUI conviction could not be constitutionally invalid since there was no imprisonment.

FN8. Calculating Crawford's criminal history by relying on a prior uncounseled misdemeanor is permissible; it is an entirely different issue than the one raised in *Baldasar*. In the case at hand, the court used an uncounseled DUI conviction to determine a criminal history category for a crime that was a felony; it was not used to enhance a misdemeanor into a felony. *United States v. Castro-Vega*, 945 F.2d 496, 500 (2nd Cir.1991), petition for cert. filed, No. 91-6933 (January 8, 1992).

In *Eckford*, two prior uncounseled misdemeanor convictions with maximum penalties of not more than six month's imprisonment, but no actual incarceration, were used to increase the defendant's maximum potential sentence by four months. *United States v. Eckford*, 910 F.2d at 217. Crawford's case can only be distinguished from *Eckford* in that Crawford's second misdemeanor DUI conviction carried a maximum sentence of a year imprisonment. *United States v. Eckford*, 910 F.2d at 219 n. 8. Under Blackmun's concurrence in *Baldasar*, the trial court could not use the second uncounseled conviction to increase the criminal history level. However, Crawford received a two day suspended sentence for his second DUI conviction, and under the sentencing guidelines a sentence of imprisonment does not include any portion of a sentence that was suspended. U.S.S.G. § 4A1.2(b)(2).

III.

For the reasons discussed above, the judgment and sentence of the trial court is **AFFIRMED**.

## Wagering Paraphernalia Act

The Wagering Paraphernalia Act is another statute that was a part of the 1961 federal legislative package designed to cut off those activities that profited organized crime and to assist the states in enforcing their gambling laws. The Wagering Paraphernalia Act, codified as 18 U.S.C. §1053, generally prohibits the interstate transportation of gambling materials.

### 18 U.S.C. §1953 the Statute

#### Interstate transportation of wagering paraphernalia

(a) 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.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation

of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication, or (4) equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law, or (5) the transportation in foreign commerce to a destination in a foreign country of equipment, tickets, or materials designed to be used within that foreign country in a lottery which is authorized by the laws of that foreign country.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) For the purposes of this section (1) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and (2) "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision thereof (other than the United States, its territories or possessions).

(e) For the purposes of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests.

## The Mendelsohn Case Court Opinion

United States Court of Appeals,  
Ninth Circuit.  
UNITED STATES of America, Plaintiff-Appellee,  
v.  
Martin MENDELSON, Defendant-Appellant.  
UNITED STATES of America, Plaintiff-Appellee,  
v.  
Robert BENTSEN, Defendant-Appellant.  
Nos. 88-5073, 88-5076.

Argued and Submitted Oct. 13, 1989.

Decided Feb. 20, 1990.

Defendants were convicted in the United States District Court for the Central District of California, David V. Kenyon, J., of conspiring to transport and aiding and abetting the interstate transportation of wagering paraphernalia, and they appealed. The Court of Appeals, Canby, Circuit Judge, held that: (1) computer program to aid in sports bookmaking was not protected speech, and applicable statute was not substantially overbroad; (2) disk containing program was not "similar publication" within meaning of statutory exception, and disk was "device" within meaning of statute; (3) violation of statute did not require specific intent to violate the law; and (4) defendant's statement to detective constituted limited waiver of attorney-client privilege.

Affirmed.

CANBY, Circuit Judge:

Martin Mendelsohn and Robert Bentsen appeal convictions for conspiring to transport and aiding and abetting the interstate transportation of wagering paraphernalia, in violation of 18 U.S.C. § 371, 1953. The item they transported was a computer disk containing a program to aid in bookmaking. Both defendants were sentenced to three years probation. We affirm the judgments.

## BACKGROUND

Mendelsohn and Bentsen mailed a computer floppy disk from Las Vegas, Nevada to California, to one Michael Felix, an undercover policeman posing as a bookmaker. The disk was encoded with a computer program called SOAP (Sports Office Accounting Program).

SOAP provided a computerized method for recording and analyzing bets on sporting events. The floppy disk had limited storage capacity; the instructions consequently directed the user to copy the program from the floppy disk onto the hard disk of a computer, and then to use the hard disk to run the computer operation and store data. 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.

Bentsen demonstrated the SOAP program to Felix and offered future assistance. SOAP advertisements promised unlimited telephone support to customers. The defendants knew that most customers used SOAP for illegal bookmaking. The defendants also sold SOAP to bettors and tried unsuccessfully to sell it to legal sports bookmakers and to game companies.

## DISCUSSION

### 1. The First Amendment Defense

The defendants contend that SOAP is speech protected by the first amendment. They compare it to an instruction manual for a computer. They note that computer programs have qualified under the copyright laws as literary works and works of authorship. See *Apple Computer, Inc. v. Formula Int'l, Inc.* 725 F.2d 521 (9th Cir.1984); 17 U.S.C. § § 101, 102(a).

Mendelsohn proposed an instruction informing the jury that it could not convict unless it found that "it was the intent of one or both of the defendants and the tendency of the computer program at issue here to produce or incite any lawless act, which was in fact likely to occur...." This proposed instruction tracks language in *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23

L.Ed.2d 430 (1969) ("[A] State [may not] ... proscribe advocacy of ... law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.")

The district court rejected the defendant's First Amendment defense, ruling that [t]he acts for which Defendants have been indicted are too close in time and substance to the ultimate criminal conduct, making a defense based on the First Amendment inapplicable. There is no evidence in this case that any speech by Defendants was directed to ideas or consequences other than the commission of a criminal act. This is not a situation in which Defendants were addressing themselves, for example to the unfairness of state or federal gambling laws.

The defendants were entitled to their proposed instruction if it was "supported by law and ha[d] some foundation in the evidence." *United States v. Escobar de Bright*, 742 F.2d 1196, 1198 (9th Cir.1984) (emphasis in original). For a first amendment instruction to meet these requirements, there must be some evidence that the defendants' speech was informational in a manner removed from immediate connection to the commission of a specific criminal act. See *United States v. Freeman*, 761 F.2d 549, 551 (9th Cir.1985) cert. denied, 476 U.S. 1120, 106 S.Ct. 1982, 90 L.Ed.2d 664 (1986) (First Amendment defense for defendant who gave false tax information at seminars).

The defendants rely upon *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir.1983), cert. denied 466 U.S. 980, 104 S.Ct. 2363, 80 L.Ed.2d 835 (1984), where the defendant gave seminars instructing others how to set up tax shelters of questionable legality, but did not set up the tax shelters himself. We stated that, under those circumstances, the defendant could assert a first amendment defense. *Id.* at 1428. We find *Dahlstrom* distinguishable. Here, Mendelsohn and Bentsen did not use SOAP to instruct bookmakers in legal loopholes or to advocate gambling reform. They furnished computerized directions for functional use in an illegal activity. There was no evidence that the defendants thought Felix was going to use SOAP for anything other than illegal bookmaking. On the contrary, the defendants knew that 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.

The question is not whether the SOAP computer program is speech, but whether it is protected speech. "Where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone." *United States v. Freeman*, 761 F.2d at 552 (no first amendment defense when defendant helped file a false income tax return); see also *United States v. Aguilar*, 883 F.2d 662, 685 (9th Cir.1989) (defendants showed alien where and how to cross border illegally); *United States v. Schulman*, 817 F.2d 1355 (9th Cir.), cert. denied, 483 U.S. 1042, 108 S.Ct. 362, 97 L.Ed.2d 803 (1987) (defendant reported false loans stemming from financing transactions); *United States v. Solomon*, 825 F.2d 1292 (9th Cir.1987), cert. denied 484 U.S. 1046, 108 S.Ct 782, 98 L.Ed.2d 868 (1988) (defendant helped create and manage illegal tax shelters); *United States v. Kelley*, 864 F.2d 569 (7th Cir.) cert. denied, 493 U.S. 811, 110 S.Ct. 55, 107 L.Ed.2d 23 (1989) (defendant sold tax shelters, participated in closings, and received commissions).

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 as to become part of the crime itself." *United States v. Freeman*, 761 F.2d at 552. We conclude that the SOAP computer program was just such an integral and essential part of ongoing criminal activity. The district court did not err in rejecting the defendant's proposed jury instruction based on the first amendment.

## 2. Overbreadth

The defendants argue that 18 U.S.C. § 1953 is overbroad because it proscribes "knowing" interstate transport of wagering paraphernalia, but does not require that the distributor "intend" to incite illegal activity, thus proscribing some protected speech. To invalidate a statute on this ground, the overbreadth must be substantial in comparison with the statute's legitimate sweep. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 2917, 37 L.Ed.2d 830 (1973); see also, *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (upholding a statute that prohibited distribution of obscene material despite arguably impermissible applications).

Section 1953 provides in part: "Whoever ... knowingly carries or sends in interstate ... 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; ... shall be fined ... or imprisoned...." The statute exempts "any newspaper or similar publication." Nearly all of the wagering paraphernalia covered by Section 1953 is easily identifiable and unprotected by the first amendment. The overbreadth, if it exists, is far from substantial. We will not invalidate this statute simply because "there are marginal applications in which ... [it] would infringe on First Amendment values." *Parker v. Levy*, 417 U.S. 733, 760, 94 S.Ct. 2547, 2563, 41 L.Ed.2d 439 (1974).

### 3. The "Newspaper or Similar Publication" Exception

The district court ruled that SOAP was not a "newspaper or similar publication" under the exception to 18 U.S.C. § 1953. The exception was "primarily designed to exclude ... a newspaper or other publication containing racing results or predictions." H. Rep. No. 968, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.Code, Cong. & Admin.News 2634, 2636. "Similar publication" has not been fully defined, but it does include publications containing betting news, race results, and predictions of the outcome of races or games. *United States v. Kelly*, 328 F.2d 227 (6th Cir.1964). One can envision a computer disk containing such information, but SOAP did not. SOAP did not bring the bookmaker any news of the betting world. It contained no information about races, games, bets, or even betting strategy. Rather, SOAP helped computerize the bookmaker's system of keeping records and making bets. Classifying SOAP as a publication similar to a newspaper requires a stretch of the statutory language beyond the possible intention of Congress. The district court did not err in its ruling.

### 4. A Device Designed for Use in Bookmaking

The district court instructed the jury that, "A computer disk encoded with a software program is a device within the meaning of 18 United States Code § 1953." The defendants contend that this definition was erroneous, and that the district court should have given the defense instruction that a "device" includes only "an object or thing upon which information regarding one or more bets are (or are intended to be) written or otherwise recorded." Bets could be recorded on SOAP, but generally were not because the SOAP disk

had little space for recording information. SOAP instructions directed the user to copy SOAP onto his computer's hard disk, and then record the bets.

"Device" is not defined by statute or by case law. The defendants urge a narrow interpretation of "device" under the principle of ejusdem generis, on the theory that "device" is a general word following a list of more specific words which describe items used to record illegal bets. The defendants' argument fails because "device" follows a number of equally general, non-defined and non-specific words in § 1953, such as "paraphernalia," "paper," and "writing."

Although Congress heard testimony regarding items used to record bets, such as blank lottery tickets, bookmaker's records, and flash paper, it did not limit § 1953 to those or similar items. On the contrary, Congress employed broad language to "permit law enforcement to keep pace with the latest developments ..." because organized crime has shown "great ingenuity in avoiding the law." S.Rep. No. 589, 87th Cong., 1st Sess., p. 3. Congress intended Section 1953 to ban the interstate commerce of records of bets and accounts, "and other material utilized in a bookmaking operation." H.Rep. No. 968, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.Code, Cong. & Admin.News 2634, 2635. The district court did not err, therefore, in instructing that a computer disk with a program was a "device," even though bets would not necessarily be recorded on it.

The defendants next argue that there was insufficient evidence to convict, because the prosecution did not prove that SOAP was designed for "substantially exclusive" use in illegal bookmaking. Section 1953 broadly proscribes devices "used, or to be used, ... or designed for use in ... bookmaking." The defendants offer no authority for the requirement of "substantially exclusive" use or design, but contend that Congress could not have intended to ban from interstate commerce every item used in a bookmaking business, from pencils to coffeemakers.

Whatever merit the defendants' argument may have with regard to such generic items as pencils, it does not encompass their computer program that was far more narrowly targeted for use in bookmaking. The few, if any, legal uses of SOAP by large bettors do not immunize SOAP's major, illegal use from the reach of § 1953. In this respect, the erasable feature of SOAP is comparable 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. Flash paper may not be sent in interstate commerce if intended for use in illegal gambling. See *United States v. Scaglione*, 446 F.2d 182 (5th Cir.1971). Neither, we conclude, may SOAP. [Foot Note 2 - . *The defendants point out that selling gaming devices without any further participation in illegal gambling is insufficient for prosecution under 18 U.S.C. § 1952, a companion statute which requires intent to facilitate the illegal activity. United States v. Gibson Specialty Co.*, 507 F.2d 446, 451 (9th Cir.1974); 18 U.S.C. § 1952; *contra United States v. Rogers*, 788 F.2d 1472, 1476 (11th Cir.1986) (defendant need not associate with illegal venture for the purpose of advancing it; he need only make illegal activity easy or less difficult). Unlike § 1952, however, § 1953 does not explicitly require such intent. See *United States v. Fabrizio*, 385 U.S. 263, 265, 87 S.Ct. 457, 459, 17 L.Ed.2d 351 (1966) (government need not allege participation in illegal gambling to prosecute under § 1953).] Under this construction of § 1953, it follows that there was sufficient evidence so that "any rational trier of fact could have found" that SOAP was a device used or designed to be used in illegal bookmaking. See *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

##### 5. Specific Intent to Violate the Law

For the substantive offense, the district court gave a standard jury instruction defining the term "knowingly." The district court rejected the defendants' proposed instruction that, in order to convict, the jury must find that the defendants acted "purposely intending to violate the law."

Congress prohibited "knowing" interstate transportation of gambling paraphernalia. 18 U.S.C. § 1953. "Knowing" usually connotes a general intent crime, especially when the words "willfully" or "with intent to" are absent. *United States v. Flores*, 753 F.2d 1499, 1505 (9th Cir.1985) (en banc). Consequently, the only court to face this issue held that a violation of § 1953 does not require specific intent to violate the law. *United States v. Marquez*, 424 F.2d 236, 240 (2nd Cir.), cert. denied, 400 U.S. 828, 91 S.Ct. 56, 27 L.Ed.2d 58 (1970) (noting that the case involved obvious gambling paraphernalia and defendants not unaware of possible law violations); see also *United States v. Kohne*, 358 F.Supp. 1053 (W.D.Penn.1973) (no knowledge that act is unlawful is required for 18 U.S.C. § 1955, a related statute prohibiting illegal gambling

operations). We agree, and decline to impose this heightened mens rea requirement urged by the defendants.

The defendants rely on dicta in *United States v. Erlenbaugh* suggesting that mere knowing transportation of a writing would be insufficient to convict a "wholly innocent person" who was unaware that the writing's contents were designed for use in bookmaking. *Erlenbaugh v. United States*, 409 U.S. 239, 247-248, 93 S.Ct. 477, 482-483, 34 L.Ed.2d 446 (1972) (holding that the newspaper exception to § 1953 did not apply to a companion statute). The defendants, however, are not such "wholly innocent person[s]," and the instruction they requested went far beyond the suggestion in *Erlenbaugh*. The defendants knew quite well what SOAP contained, because they designed it, marketed it, and instructed others on its use. They may or may not have known that selling SOAP outside of Nevada was illegal, but the statute does not require that knowledge. The district court did not err in rejecting the defendants' requested intent instruction.

#### 6. The Testimony of Mendelsohn's Former Attorney

Mendelsohn told Detective Felix that his attorney said that selling SOAP was legal. He later told Felix that his attorney said he did not know what would happen if Mendelsohn sold SOAP interstate. Over defendants' objections, the district court found a limited waiver of the attorney/client privilege and permitted Mendelsohn's former attorney, Raby, to testify. Raby testified that he told Mendelsohn that sending SOAP outside Nevada violated federal law.

Defendant Mendelsohn argues that there was no waiver because he did not truthfully disclose the advice his attorney gave him and he did not disclose a significant portion of attorney-client communication. He also questions the testimony's relevance, and if relevant, he argues that it was more prejudicial than probative. Defendant Bentsen claims prejudice by admission of the testimony against Mendelsohn, and appeals the denial of his motion for severance and mistrial.

We review *de novo* whether there has been a waiver of privilege. *United States v. Zolin*, 809 F.2d 1411, 1415 (9th Cir.1987). We review the district court's evidentiary rulings for abuse of discretion. *United States v. Kessi*, 868 F.2d 1097, 1107 (9th Cir.1989).

We agree with the district court that Mendelsohn's statement to Felix constituted a limited waiver of the attorney-client privilege. See *Weil v. Investment/Indicators*, 647 F.2d 18, 24-25 (9th Cir.1981). Mendelsohn's intent or lack of intent to waive the attorney-client privilege is not dispositive. *Id.* Nor do we believe that the waiver is ineffective because Mendelsohn may have misstated what his attorney told him.

The district court was careful to confine the attorney's testimony to the subject of Mendelsohn's limited waiver. This case is therefore distinguishable from those in which a limited waiver was urged as a ground for opening a much larger field. See *In re Dayco Corp.*, 99 F.R.D. 616 (S.D. Ohio 1983) (release of two-page findings did not warrant discovery of entire report); *In re von Bulow*, 828 F.2d 94, 102-103 (2nd Cir.1987) (extrajudicial disclosure of privileged communications in a book did not waive privilege beyond "matters actually revealed"). The district court did not err with regard to the waiver.

Nor did the district court abuse its discretion in its other rulings related to the attorney's testimony. The testimony was relevant to show, among other things, unlawful intent in forming a conspiracy. See Fed.R.Evid. 401. The probative value could properly be found to outweigh any prejudice to Mendelsohn, under the standard of Fed.R.Evid. 403.

Finally, the admission of the evidence against Mendelsohn did not require a severance and a mistrial for Bentsen. The defendants proposed no jury instruction limiting the effect of the attorney's testimony, and none was given. The jury, however, could reasonably separate the evidence as it related to the two defendants, in light of the relative lack of complexity of the trial and the weight of the evidence against each defendant. *United States v. Catabran*, 836 F.2d 453, 460 (9th Cir.1988); *United States v. DeRosa*, 670 F.2d 889 (9th Cir.), cert. denied, 459 U.S. 993, 103 S.Ct. 353, 74 L.Ed.2d 391 (1982).

#### CONCLUSION

As to both defendants Mendelsohn and Bentsen, we affirm the judgments of the district court.

AFFIRMED.

## Travel Act

The Travel Act is another statute that was a part of the 1961 federal legislative package designed to cut off those activities that profited organized crime and to assist the states in enforcing their gambling laws. The Travel Act has the ability to elevate a wide variety of state offenses, including gambling crimes, to federal offenses.

The Travel Act, codified as 18 U.S.C. §1052, generally prohibits travel or the use of any facility in interstate or foreign commerce to promote, manage, further or carry on any business enterprise involving illegal gambling.

## 18 U.S.C. §1952 the Statute

Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to--

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform--

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both;

or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in

violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Attorney General.

## **DISCUSSION**

Is the travel act limited to gambling businesses?

Do you believe the travel act applies to bettors that cross state lines to engage in placing illegal wagers?

Does the travel act apply to businesses that conduct illegal gambling while actively pursuing residents of other states to participate?

## The Rewis Court Opinion

Supreme Court of the United States

James Wintforded REWIS and Mary Lee Williams, Petitioners,

v.

UNITED STATES.

No. 5342.

Argued Jan. 19, 1971.

Decided April 5, 1971.

Mr. Justice MARSHALL delivered the opinion of the Court.

In this case, petitioners challenge their convictions under the Travel Act, 18 U.S.C. s 1952, which prohibits interstate travel in furtherance of certain criminal activity.FN1 Although the United States Court of Appeals for the Fifth Circuit narrowed an expansive interpretation of the Act, the Court of Appeals affirmed petitioners' convictions. For the reasons stated below, we reverse.

FN1.Title 18 U.S.C. s 1952 (1964 ed. and Supp. V) provides:

'(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to-

'(1) distribute the proceeds of any unlawful activity; or

'(2) commit any crime of violence to further any unlawful activity; or

'(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

'and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

'(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.'

Petitioners, James Rewis and Mary Lee Williams, were convicted along with two other defendants in the United States District Court for the Middle District of Florida.FN2 Their convictions arose from a lottery, or numbers operation, which petitioners admittedly ran in Yulee, Florida, a small community located a few miles south of the Georgia-Florida state line. Petitioners are Florida residents, and there is no evidence that they at any time crossed state lines in connection with the operation of their lottery. The other two convicted defendants are Georgia residents who traveled from their Georgia homes to place bets at petitioners' establishment in Yulee.

FN2. Petitioners were convicted of eight substantive violations under s 1952 and of conspiracy to violate the section. Petitioner Rewis was sentenced to five years' imprisonment on each count, to run concurrently. Petitioner Williams was sentenced to three years' imprisonment on each count, to run concurrently, subject to parole under 18 U.S.C. s 4208(a)(2). Petitioner Rewis was also convicted of two counts of having failed to purchase a wagering tax stamp. These latter two convictions were reversed by the Court of Appeals under the intervening decisions of this Court in *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), and *Grosso v. United States*, 390 U.S. 62,88 S.Ct. 716, 19 L.Ed.2d 906 (1968).

The District Court instructed the jury that mere bettors in a lottery violated Florida law, and that if the bettors traveled interstate for the purpose of gambling, they also violated the Travel Act. Presumably referring to petitioners, the District Court further charged that a defendant could be found guilty under the aiding and abetting statute, 18 U.S.C. s 2, FN3 without proof that he personally performed every act constituting the charged offense. On appeal, the Fifth Circuit held that s 1952 did not make it a federal crime merely to cross a state line for the purpose of placing a bet and reversed the convictions of the two Georgia residents because the evidence presented at trial was insufficient to show that they were anything other than customers of the gambling operation.FN4 However, the Court of Appeals upheld petitioners' convictions on the ground that operators of gambling establishments are responsible for the interstate travel of their customers. 418 F.2d 1218, 1222.

FN3.18 U.S.C. s 2 provides:

'(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

'(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.'

FN4.418 F.2d 1218. The Government has not sought review of that part of the Court of Appeals decision reversing the conviction of the two Georgia residents.

*We agree with the Court of Appeals that it cannot be said, with certainty sufficient to justify a criminal conviction, that Congress intended that interstate travel by mere customers of a gambling establishment should violate the Travel Act.*FN5 But we are unable to conclude that conducting a gambling operation frequented by out-of-state bettors, by itself, violates the Act. Section 1952, prohibits interstate travel with the intent to 'promote, manage, establish, carry on, or facilitate' certain kinds of illegal activity; and the ordinary meaning of this language suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity. **Legislative history of the Act is limited, but does reveal that s 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another.**FN6 In addition, we are struck by what Congress did not say. Given the ease with which citizens of our Nation are able to travel and the existence of many multi-state metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of-state customers. In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies. **It is not for us to weigh the merits of these factors, but the fact that they are not even discussed in the legislative history of s 1952 strongly suggests that Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State. In short, neither statutory language nor legislative history supports such a broad-ranging interpretation of s 1952. And even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, Bell v. United States, 349 U.S. 81, 83, 75**

**S.Ct. 620, 99 L.Ed. 905 (1955).**

FN5. Both parties correctly concede that the questions in this case are solely statutory. No issue of constitutional dimension is presented.

FN6. Incorporated in the Senate report (S.Rep. No. 644, 87th Cong., 1st Sess., 2-3, dated July 27, 1961) the following appears:

'The bill, S. 1653, was introduced by the chairman of the committee, Senator James O. Eastland, on April 18, 1961, on the recommendation of the Attorney General, Robert F. Kennedy, as a part of the Attorney General's legislative program to combat organized crime and racketeering.

'The Attorney General testified before the committee in support of the bill, S. 1653, on June 6, 1961, and commented:

"We are seeking to take effective action against the racketeer who conducts an unlawful business but lives far from the scene in comfort and safety, as well as against other hoodlums.

"Let me say from the outset that we do not seek or intend to impede the travel of anyone except persons engaged in illegal businesses as spelled out in the bill. \* \* \*

"The target clearly is organized crime. The travel that would be banned is travel 'in furtherance of a business enterprise' which involves gambling, liquor, narcotics, and prostitution offenses or extortion or bribery. Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise.'

"Our investigations also have made it quite clear that only the Federal Government can shut off the funds which permit the top men of organized crime to live far from the scene and, therefore, remain immune from the local officials."

*The Government concedes as much, but offers an alternative construction of the Travel Act-that the Act is violated whenever the operator of an illegal establishment can reasonably foresee that customers will cross state lines for the purpose of patronizing the illegal operation or whenever the operator actively seeks to attract business from another State. The first half of this proposed interpretation-reasonable foreseeability of interstate patronage-does not merit acceptance. Whenever individuals actually cross state*

lines for the purpose of patronizing a criminal establishment, it will almost always be reasonable to say that the operators of the establishment could have foreseen that some of their customers would come from out of State. So, for practical purposes, this alternative construction is almost as expansive as interpretations that we have already rejected. In addition, there is little, if any, evidence that Congress intended that foreseeability should govern criminal liability under s 1952.

*There may, however, be greater support for the second half of the Government's proposed interpretation-that active encouragement of interstate patronage violates the Act.* Of course, the conduct deemed to constitute active encouragement must be more than merely conducting the illegal operation; otherwise, this interpretation would only restate other constructions which we have rejected. Still, there are cases in which federal courts have correctly applied s 1952 to those individuals whose agents or employees cross state lines in furtherance of illegal activity, see, e.g., *United States v. Chambers*, 382 F.2d 910, 913-914 (CA6 1967); *United States v. Barrow*, 363 F.2d 62, 64-65 (CA3 1966), cert. denied, 385 U.S. 1001, 87 S.Ct. 703, 17 L.Ed.2d 541 (1967); *United States v. Zizzo*, 338 F.2d 577, 580 (CA7 1964), cert. denied, 381 U.S. 915, 85 S.Ct. 1530, 14 L.Ed.2d 435 (1965), and the Government argues that the principles of those decisions should be extended to cover persons who actively seek interstate patronage. Although we are cited to no cases that have gone so far and although much of what we have said casts substantial doubt on the Government's broad argument, there may be occasional situations in which the conduct encouraging interstate patronage so closely appropriates the conduct of a principal in a criminal agency relationship that the Travel Act is violated. *But we need not rule on this part of the Government's theory because it is not the interpretation of s 1952 under which petitioners were convicted. The jury was not charged that it must find that petitioners actively sought interstate patronage.* And we are not informed of any action by petitioners, other than actually conducting their lottery, that was designed to attract out-of-state customers. As a result, the Government's proposed interpretation of the Travel Act cannot be employed to uphold these convictions.

Reversed.

Mr. Justice WHITE took no part in the decision of this case