Federal Gaming Law

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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?

U.S. v. Box

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 Beinner, 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 Pittsburg - 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 Beinner 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. Beinner believed Tuesday to be 'payoff day' in the bookmaking operations he had been investigating. Beinner 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. Beinner'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.'[FN9]It was through the testimony of Agent Beinner 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 Beinner 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'd3 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 primarly 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 IGBA prohibits conducting an illegal gambling business. The word conducting can have many meanings. In the context of criminal gambling law, be prepared to discuss what you believe is conduct sufficient to be conducting an illegal gambling business.

Low level employees

U.S. v. Merrell

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

Volunteers

The Follin Opinion

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 us 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.FN7Id. 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.

Third Party Service Providers

The Mick Court Opinion

United States Court of Appeals,
Sixth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Robert MICK, Defendant-Appellant.
No. 99-4349.

Argued May 4, 2001.
Decided and Filed Aug. 29, 2001.
Rehearing En Banc Denied Nov. 13, 2001.

Defendant was convicted in the United States District Court for the Northern District of Ohio, James S. Gwin, J., of conducting illegal gambling business, of using facility of interstate commerce for illegal purposes, of money laundering, and of knowingly engaging in monetary transactions using criminally derived property. He appealed. The Court of Appeals, Gilman, Circuit Judge, held that: (1) information proffered with respect to officer's request for warrant to search alleged bookmaker's residence, while weaker than that offered in support of warrant to search trailer which allegedly housed bookmaking operation, was still sufficient; (2) decision to admit customer balance sheets and wager records recovered from site of alleged illegal gambling operation was not abuse of discretion; (3) layoff bettors could be regarded as persons helping to "conduct" illegal gambling operation, who could be counted in order to satisfy five-or-more participant requirement of federal gambling statute; and (4) defendant was not entitled to downward sentencing departure based on his alleged "acceptance of responsibility."

Affirmed.

Judges; DUGGAN, District Judge. FNPage

FNPage The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

GILMAN, Circuit Judge.

Robert Mick was convicted on one count of conducting an illegal gambling business, in violation of 18 U.S.C. § 1955, one count of using a facility of interstate commerce for illegal purposes, in violation of 18 U.S.C. § 1952(a)(3), fifty-nine counts of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i), and eleven counts of knowingly engaging in monetary transactions using criminally derived property worth more than $10,000, in violation of 18 U.S.C. § 1957. He was subsequently sentenced to spend 57 months in prison, serve 36 months of supervised release, and pay $7,100 as a special assessment. In this appeal of his conviction and sentence, Mick **Page558** challenges the issuance of a search warrant covering his house and trailer, the admission of evidence discovered as a result of the search, the admission of his tax returns and gambling records at trial, the sufficiency of the evidence relating to the illegal gambling business conviction, and several sentencing issues. For the reasons set forth below, we **AFFIRM** Mick's conviction and sentence.

I. BACKGROUND

A. Factual background

Robert Mick is an admitted bookmaker who resided on Westwood Street in Alliance, Ohio. According to the testimony of Mick's girlfriend, Harriet Brodzinski, Mick had been a bookmaker since at least the time that they started dating in 1984. Bookmaking in fact provided the sole source of their income since the late 1980s, when Mick sold a bar that he had owned. Up until May of 1997, he ran his bookmaking business out of a trailer located at 1505 East State Street in Alliance. The trailer had several telephone lines, all of which were listed in Brodzinski's name. At least one of these lines was used to support a facsimile machine. During the period between March 20, 1997 and May 18, 1997, the FBI, pursuant to a court order, ran a pen register on each of these lines. Based on this surveillance, the register traced over 3,400 telephone calls on the facsimile machine (98% were outgoing calls), 4,000 calls on one telephone line, and over 2,400 calls on the third (90% of the telephone calls were incoming).

The two-month sampling of Mick's telephone activity in his trailer indicated that he was sending out more than 50 transmissions on his fax machine each day, and receiving over 100 daily telephone calls, most of which were of a short duration. In an attempt to maximize the bettors who would utilize his bookmaking service, Mick had Cheryl Stoiber, a friend from Louisville, Kentucky, who knew that Mick was a bookmaker, maintain an extra telephone line in her home. Mick placed a call-forwarding service on this line, which allowed bettors from Louisville to make a local telephone call that would be automatically patched through to his trailer in Alliance. Stoiber received no compensation for allowing this line to remain in her house, but Mick paid for the line by having Brodzinski periodically send her $200 checks, which Stoiber would use to pay each telephone bill. When the money would run out, she would call Mick, who would then send another check in the mail.

Brodzinski testified that she and Mick would answer the telephones each day and write down bets that were being placed by various customers. Although Brodzinski and Mick usually answered the telephone themselves, Mick's two sons, Robert and Shawn, also took calls from bettors at various times. Each bet was eventually entered into their computer, after which the handwritten records would be shredded. Bets could be placed on any major sporting event, particularly football, baseball, and basketball. There were two types of people who would call in bets: individual bettors and bookmakers. Both would place bets for themselves, but the latter also placed what are known as “layoff bets.” A layoff bet is made when a bookmaker has received various bets on a particular sporting event that cumulatively favors one of the participants. The bookmaker would then call Mick and bet for the team that had less bets placed by his clients, thus balancing out or “laying off” his risk.

At any given time, Mick had between 30 and 40 individual bettor clients and at least 9 bookmaker clients. Brodzinski named approximately 9 customers who regularly called in layoff bets, but it is unclear how she knew that they were actually bookmakers.**Page559** Although she stated that she knew a layoff bet was being placed because “usually it was a bigger bet than a bettor would make,” and because of the characteristic time of the telephone call, she later admitted that, other than Mick's statements to her about who was a bookmaker, she had seen no evidence indicating that they were bookmakers laying off bets.

Based on the testimony of Brodzinski and several of the bookmakers, the government painted a picture at trial of an intricate gambling business, of which Mick and his trailer were at the epicenter. Mick paid $5,000 a year to receive a line service from Don Best Sports, which provided up-to-the-minute information on odds, statistics, game information, and other details of interest to those who bet on sporting events. Indeed, with his lineservice and the multiple telephone calls from bettors and bookmakers requesting line information and placing bets, the government established that Mick was at the center of a “continuous stream of information.”

Mick's gambling enterprise stretched into the community beyond his trailer and telephone lines. During the football season, for example, Mick would prepare “parlay slips” (weekly schedules of games and point spreads) and have them distributed to interested customers of the M & M Sports Club in Sebring, Ohio, a bar owned by Donald Campbell. Each customer would have to pay for the parlay slips, from which Campbell received a cut.

Another of Mick's friends, Vernon Thomas, was the owner of B.J.'s Car Wash in Alliance. Thomas was one of Mick's regular bettors, and he placed his bets from BJ's on a daily basis. He and a group of other bettors would often convene in the backroom of the car wash to place bets with Mick, as well as receive line information from him. At one point, Mick even gave Thomas a facsimile machine, which Thomas and his friends used to place their bets.

In February of 1995, the Stark County Sheriff's Office and the Canton branch of the state police began investigating reports that they had received regarding Mick's gambling enterprise. For several years, the Canton Criminal Intelligence Unit, and eventually the FBI, performed spot checks and surveillance of Mick's activities. Based on the surveillance summaries for the days when Mick was being observed, his typical pattern was to leave his home, go directly to his trailer, and then drive around Alliance and Sebring visiting various locations, including the M & M Sports Club and BJ's Car Wash. On at least two occasions, men were observed leaving M & M counting money at the same time that Mick was inside. Officers also examined M & M's trash, where they discovered parlay sheets and betting slips.

On May 27, 1997, Michael Mihok, a special agent with the FBI, prepared an affidavit in support of a request for a warrant to search Mick's house, trailer, and safety deposit box. The affidavit contained information provided by three confidential informants. According to the affidavit, "Source 1" informed Mihok that Mick was operating a gambling business out of his trailer, which included six bookmakers who worked for Mick, as well as Mick's sons and girlfriend. Source 1 also told Mihok that Mick was providing line information to other bookmakers and distributing parlay sheets around the county. Finally, Source 1 said that Mick had a lineservice and a computer on which Mick kept his records.

The second informant, "Source 2," also told Mihok that Mick was a bookmaker and was delivering parlay sheets out of his trailer. Source 2, like Source 1, stated that Mick had a lineservice in his trailer, which Mick used to provide information to **Page560** "most of the bookmakers in Stark County." With respect to the reliability of these two sources, Mihok's affidavit only said that they had both "proven to provide accurate information in the past."

According to Mihok's affidavit, the third informant, Cooperating Witness 1 (CW 1), had "direct knowledge" of Mick's bookmaking activity. Mihok's basis for claiming that CW 1 was a reliable witness was that

> CW 1 is not a member of the criminal element and has never been involved in any criminal activity. CW 1 has not provided information to any law enforcement agency in the past as CW 1 has had no involvement with law enforcement. CW 1 has had a steady job for over 11 years and is a model citizen. CW 1's only motive to provide this investigation [sic] is to assist law enforcement in this investigation.

According to the affidavit, CW 1 was at BJ's Car Wash when a friend of his engaged in betting with Thomas. Although CW 1 did not witness the actual transaction, his friend filled him in on all of the details, including the statement that Thomas "was one of Mick's bookmakers." CW1's friend further told him that Thomas had a wagering log, that some of his bettors were police officers, and that the bookmaking enterprise was run out of a trailer.

The affidavit also included information beyond that provided by these three informants. A detailed description of the results from the pen register was provided. The results of the surveillance were set forth, detailing Mick's travels between his home, the trailer, the sports bar, and the car wash. According to the affidavit, "[s]urveillances at [M & M] revealed Mick was meeting with approximately seven to ten people [and] ... was observed carrying items into the location and his associates were observed coming out of this location, counting money in their hands." The affidavit also described the examination of M & M's trash. Agent Mihok summarized Mick's visits to BJ's Car Wash, his meetings with "known gamblers or bookmakers," and the exchange of documents between Mick and his associates.

Finally, the affidavit contained Agent Mihok's knowledge about the common practices of those who operate gambling businesses. According to Mihok's affidavit, they typically maintain detailed ledgers and records,

conceal large amounts of currency in their residences or places of business and, finally, use computer hardware and software to store the data that has been collected throughout their business dealings.

Based on this fifteen-page affidavit, the magistrate judge issued a search warrant for Mick's trailer, home, and safety deposit box. The search conducted pursuant to the warrant yielded vast amounts of money and evidence. In Mick's home on Westwood Avenue, the FBI discovered bank records, gambling records, and almost $550,000 in cash. The search of the trailer yielded more gambling records, as well as computer hardware, telephone equipment, and utility bills. In Mick's safety deposit box, the officers found $127,000 in cash, four silver bars, a gold coin, and a special-print ten-dollar bill.

B. Procedural background

On April 21, 1999, Mick was charged in a 72-count indictment. One count alleged the violation of 18 U.S.C. § 1955, which prohibits a person from conducting an illegal gambling business. Another count charged Mick with using a facility of interstate commerce to further a criminal purpose, in violation of 18 U.S.C. § 1952(a)(3). The remaining 70 counts charged Mick with money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) (59 counts), and **Page561** engaging in monetary transactions in criminally derived property worth more than $10,000, in violation of 18 U.S.C. § 1957 (11 counts).

Mick filed a motion to suppress evidence on June 21, 1999, challenging the fruits of the search detailed above and the introduction of his tax records and returns. Following a suppression hearing, the district court declined to exclude the evidence procured from the search. On the first day of trial, July 19, 1999, the court denied the remainder of Mick's motion.

At trial, Mick admitted to being a bookmaker. His primary defense was a challenge to the government's evidence on a key element of a § 1955 conviction-the requirement that the gambling business "involve[ ] five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business." 18 U.S.C. § 1955(b)(1)(ii).

The government's proof focused primarily on the testimony of Brodzinski, Campbell, Stoiber, Thomas, and various other bookmakers, as well as voluminous documentary evidence. After the government rested, Mick renewed his objections and moved for acquittal, all of which were overruled or denied.

Mick called two witnesses in his defense. First, he presented James Ritchie, a tax preparer and former IRS auditor who had been assisting Mick with his tax returns since 1994. Ritchie testified that Mick had complied with the Internal Revenue Code's requirement that an excise tax be paid on all wagers accepted. Second, Mick presented a gambling expert, Michael Cohen, who said that it was impossible to discern from the betting records whether a bet was from an individual bettor or a bookmaker.

On July 21, 1999, the jury returned a guilty verdict on all 72 counts. A presentence investigation report was then prepared, to which Mick filed various objections. He was sentenced on October 26, 1999 to spend 57 months in prison, serve 36 months on supervised release, and pay $7,100 as a special assessment. Mick now appeals his conviction and sentence. Specifically, he challenges the constitutionality of the search warrant and claims that the district court erred when it denied his motion to suppress the fruits of the searches in question. Mick also challenges the admission of certain handwritten business records into evidence, the government's use of his tax returns to impeach Ritchie, the sufficiency of the evidence to support the first count relating to an illegal gambling business, and the district court's application of the United States Sentencing Guidelines.

Although Mick does not specifically challenge the other 71 counts on which he was convicted, he notes in his brief that they are all based on the underlying gambling conviction. *See*18 U.S.C. § 1952(a)(3) (prohibiting the use of interstate facilities to further an illegal activity); 18 U.S.C. § 1956(a)(1)(A)(i) (criminalizing the intentional concealment of illegally obtained property); 18 U.S.C. § 1957 (criminalizing transactions in criminally derived property worth more than $10,000). A reversal of his § 1955 conviction,

therefore, would require that all of the remaining convictions be vacated as well.

II. ANALYSIS

....

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D. Mick's enterprise satisfied the statutory definition of an "illegal gambling business"

[15] Mick next challenges the sufficiency of the evidence supporting the jury's conclusion that his activities constituted an "illegal gambling business" pursuant to 18 U.S.C. § 1955. In our review of his claim, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original). We may not, however, "weigh the evidence, consider the credibility of witnesses or substitute our judgment for that of the jury." *United States v. Hilliard,* 11 F.3d 618, 620 (6th Cir.1993).

An illegal gambling business is defined as an enterprise that

(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.

18 U.S.C. § 1955(b)(1). Mick conceded at trial that his bookmaking activities violated Ohio law, and he does not dispute that his business fell within both prongs of subsection (iii) above. Instead, Mick claims that there was insufficient proof to show, beyond a reasonable doubt, that his business "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business."

[16] Mick misstates this circuit's interpretation of the five-person jurisdictional requirement. He cites *United States v. Murray,* 928 F.2d 1242 (1st Cir.1991), for the proposition that the government must prove that "at all times during some thirty day period at least five persons were involved in conducting the gambling operation." Mick fails to note, however, that our court has interpreted § 1955(b)(1) differently. In 1974, fifteen years before *Murray,* this court held that "[t]he statute, 18 U.S.C. § 1955(b)(1)(iii) clearly makes the thirty day requirement a part of the definition of illegal gambling business *and not* a specific requirement as to the duration of individual participation by persons involved in such business." *United States v. Mattucci,* 502 F.2d 883, 889 (6th Cir.1974) (emphasis added). The five-person requirement can therefore be satisfied at any point during the thirty days, regardless of the duration of a person's involvement in the business, so long as his or her participation is either regularly helpful or "necessary to the operation of the gambling enterprise." *United States v. King,* 834 F.2d 109, 113 (6th Cir.1987).

[17][18] In considering whether a person's involvement constitutes sufficient "conduct" to be counted as one of the five people required to satisfy § 1955, this court has held that "Congress intended the word conduct to refer to both high level bosses and street level employees." *Mattucci,* 502 F.2d at 888 (counting the doorman in a gambling club as one of the jurisdictional five) (internal quotation marks omitted). The Fifth Circuit has even gone so far as counting a line service, similar to the one provided by Don Best Sports, as one of the jurisdictional five. *See United States v. Heacock,* 31 F.3d 249, 252 (5th Cir.1994). Most importantly, this court has held that layoff bettors may be considered as part of the requisite five members, so long as their dealings with the gambling business are "regular" and **Page569** not just based on "one contact." *See King,* 834 F.2d at 113-14.

[19] Based on this court's interpretation of the degree of "conduct" necessary to be counted in the jurisdictional requirement of five participants, there is overwhelming evidence to support the jury's conclusion that § 1955 was satisfied. Mick does not dispute that he, Brodzinski, and at least one of his sons can be counted towards the jurisdictional five. There was also abundant evidence supporting the jury's conclusion that bookmakers such as Frank Birch, Richard Gothot, Andrew Schneider, and Eugene Smith placed regular layoff bets with Mick. Furthermore, Mick's agreements with Campbell (who distributed parlay sheets for Mick) and Stoiber (who allowed Mick to utilize a telephone line out of her house) were sufficiently regular and helpful to his gambling business to permit the jury to count them as well. Indeed, the summary above is actually an incomplete listing of all the people who regularly aided Mick's gambling enterprise. We therefore find no merit in Mick's challenge to the jury's conclusion that his activities constituted an "illegal gambling business" pursuant to 18 U.S.C. § 1955.

...

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** Mick's conviction and sentence.

152 F.3d 443

UNITED STATES of America, Plaintiff-Appellee,
v.
James TRUESDALE; Ronald Hamilton; Richard E. Jones; Sandra Milner, Defendants-Appellants.

No. 97-10773.

United States Court of Appeals,
Fifth Circuit.

Aug. 24, 1998.

Delonia Anita Watson, Dallas, TX, for Plaintiff-Appellee.

Kenneth Frederick Hense, McGlynn, Reed, Hense & Pecora, Point Pleasant, NJ, Cheryl B. Wattley, Dallas, TX, for Truesdale.

Edgar A. Mason, Dallas, TX, for Hamilton.

Michael P. Carnes, David Michael Walsh, Dallas, TX, for Jones.

Robert Reddick Smith, Jr., Dallas, TX, for Milner.

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Appeals from the United States District Court for the Northern District of Texas.

Before GARWOOD, JONES and WIENER, Circuit Judges.

GARWOOD, Circuit Judge:

Defendants-appellants James Truesdale (Truesdale), Ronald Hamilton (Hamilton), Richard E. Jones (Jones), and Sandra Milner (Milner) (collectively appellants) were convicted on multiple counts for their involvement in a gambling operation. Finding that there is insufficient evidence supporting the convictions, we reverse on all counts.

Facts and Proceedings Below

This case arises from a sports wagering operation that accepted bets in the Caribbean, but conducted some of the financial transactions related to those bets in the Dallas, Texas, area. The participants were indicted on various conspiracy, money laundering, travel in aid of racketeering, and gambling counts related to their involvement in this bookmaking operation. They were all convicted on multiple counts and sentenced to prison terms ranging from 15 to 46 months.

Jones was the head of an international sports wagering service, variously known as Spectrum or World Sportsbook (WSB), that operated in the Dominican Republic, Jamaica, and Dallas. WSB maintained offshore offices in order to provide a way for people in the United States to place bets on sporting events without running afoul of domestic gambling laws. In Jamaica and the Dominican Republic, a properly licensed company that complies with local laws can legally operate a bookmaking service, like WSB, as long as the service does not accept bets from local individuals. In Dallas, however, bookmaking is illegal under the laws of the State of Texas.

The offshore operation began in 1990 when Jones formed Spectrum SA in the Dominican Republic for the purpose of accepting international phone bets. Spectrum was formed with the assistance of a local attorney who filed the necessary paperwork and helped Spectrum obtain a license from the Dominican government that allowed it to accept wagers on sporting events via international phone calls. To facilitate this business, Spectrum had an office in the Dominican Republic, with eight phones and desks, that was staffed during regular business hours with persons who would answer the phones and process the wagers.

Later, the operation was moved to Jamaica because Jamaica had lower phone rates. In Jamaica, a new corporation was formed with the assistance of a local attorney who filed the required paperwork, making the operation legal under Jamaican law. WSB's office in Jamaica, like its office in the Dominican Republic, was set up with desks and multiple telephones

for the purpose of receiving bets from offshore. The Jamaican office was staffed by persons from the Dominican Republic, Jamaica, and the United States.

Bettors in the United States could place bets at these foreign offices through toll-free numbers that WSB had set up. There were several toll-free numbers assTruociated with the wagering service. Some of these numbers terminated at locations in the Dallas area, while others terminated in the offshore office of WSB.

The numbers that terminated in the Dallas area were "information only" lines and were not used to accept bets. Two of these information-only lines terminated at Jones's and Truesdale's homes. A potential bettor would first have to call one of these information lines. Thereafter a member of the operation would send an information packet to the bettor explaining the operation. The information packages gave general information about WSB, payoff information, information on how to set up a wagering account, etc. These information packages listed, among other things, two information-only numbers for contacting WSB.

Before a bettor could place bets, he would first have to send money to open a betting account with WSB. To open an account or to replenish an existing account, bettors would wire money via Western Union or send it with Federal Express. Two gamblers testified at trial that they made their checks payable to S.K. Milner. The government also presented evidence that Truesdale and

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Hamilton would go to the Western Union office to pick up the money transfers and deposit the money in various bank accounts belonging to Truesdale, Jones, or Milner, in the Dallas-Fort Worth area.

Not all bettors were required to pay up front. Those that did not maintain betting accounts with WSB would mail large amounts of cash to Jones, listing Milner as the return addressee. Milner was listed as the return addressee so that if the packages got lost in the mail they would still reach a member of the operation. Postal inspectors seized several of these packages; Jones admitted that two of the packages were gambling proceeds and a third was money connected to gambling.

Once a betting account had been opened with WSB, a bettor could call the information lines to get balance information about his account. However, he could only place a bet by calling one of the betting lines in the Dominican Republic or Jamaica. The payoffs to winners were made from

accounts in the Dallas-Fort Worth area belonging to Truesdale and Hamilton.

In addition to their involvement with WSB's financial transactions and information lines, Hamilton and Truesdale both maintained their own sports information telephone lines through which they promoted WSB by advertising the wagering service and giving out information-only toll-free numbers to call. In exchange for this advertisement, they were given fifty percent of the profits that WSB derived from bettors that they brought in.

Milner was even more involved in the organization. In addition to mailing out information packages, Milner also received money from bettors. Milner also had access to Jones's bank account and post office box, which were used for WSB-related business. And she handled many of the accounting matters related to the bettors' accounts.

Jones, as the head of WSB, traveled frequently to Jamaica to oversee the operation. He could also monitor the operation from his home in Dallas where he had access to the betting information. From his home in Texas he could access the Jamaican computer to view betting information. The computer in Jones's home was equipped with a modem that not only allowed him to view information, but also allowed Jones to input information directly into the Jamaican computer.

On December 8, 1992, Jamaican police, with the cooperation of United States law enforcement personnel, searched WSB's Jamaican office. After the search in Jamaica, the operation was moved back to the Dominican Republic and continued there.

On June 18, 1993, law enforcement officials moved to shut down the WSB organization in Dallas. The search of Jones's home revealed that Jones maintained an office in his home that contained a computer, office-size photocopier, shredding machine, two desks, multi-line telephone, a fax machine, and a bank of televisions. A safe was found in the floor of the master bedroom. Agents seized documents, including a tally sheet indicating that more than $2 million were wagered from April 15, 1993, to June 15, 1993. They also found some black ashes floating in the toilet. While the agents were searching the home, the phone rang several times with callers asking for "line information" and checking their deposits. Three of the callers also asked to place bets.

When agents searched Hamilton's home they found a tally sheet of bets placed with the operation similar to the sheet from Jones' home. The agents also received a call from a person wanting to know the line on a sporting event, and when asked whether he wanted to place a bet, he replied "Yes." The agents also seized a list of bettors.

At Truesdale's and Milner's residences the agents seized numerous WSB documents, cashiers checks, and Western Union transfer receipts and money order receipts totaling $473,114.

The appellants were indicted for conspiring to commit various violations in connection with their gambling operation. Additionally, they were each charged with various substantive offenses including operating an illegal gambling business, traveling in aid of racketeering, and money laundering.

The jury found Truesdale, Hamilton, and Milner not guilty of conspiracy, but guilty on

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several counts of money laundering and guilty of illegal gambling. Jones was convicted of conspiracy, illegal gambling, and money laundering, but found not guilty on most of the "traveling in aid of racketeering" counts.

At sentencing, the court granted a downward departure for all appellants. Truesdale and Hamilton's base offense levels were reduced from 20 to 12, and Milner and Jones's levels were reduced from 23 to 16.

Truesdale was sentenced to 15 months in jail and 3 years' supervised release, fined $10,000, and ordered to pay a special assessment of $250.

Hamilton was also sentenced to 15 months in jail with 3 years' supervised release, fined $7500, and ordered to pay a special assessment of $100.

Jones was sentenced to 46 months in jail with 3 months' supervised release, fined $12,500, and ordered to pay a special assessment of $350.

Milner was sentenced to 24 months in jail and 3 years' supervised release and no fine and ordered to pay a $200 special assessment.

Discussion

Appellants, who made appropriate Fed.R.Crim.P. 29 motions below, argue that there was insufficient evidence supporting their convictions on Count Two for illegal gambling. We agree and reverse their convictions on Count Two. Additionally, because we agree that the appellants did not engage in illegal gambling as alleged in the indictment and charged to the jury, we also reverse the conspiracy, money laundering, and travel in aid of racketeering convictions, since those convictions all depended on a finding that the appellants engaged in illegal gambling activity.

The standard of review for sufficiency of the evidence is high, and we must affirm if a rational trier of fact could have found that the evidence, viewed in the light most favorable to the government, established guilt beyond a reasonable doubt. See Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); United States v. Gardea Carrasco, 830 F.2d 41, 43 (5th Cir.1987).

Count Two of the indictment charged Jones, Truesdale, Hamilton, and Milner with conducting an illegal gambling operation in violation of 18 U.S.C. § 1955, which prohibits conducting, financing, managing, supervising, directing, or owning, "all or part of an illegal gambling

business." See 18 U.S.C. § 1955(a). Under section 1955, an illegal gambling business is defined as a gambling business that: (1) violates state or local law, (2) involves 5 or more people, and (3) is in continuous operation for more than 30 days or has gross revenue of $2,000 in a single day. See 18 U.S.C. § 1955(b)(1); United States v. Heacock, 31 F.3d 249, 252 (5th Cir.1994). [1]

In order to meet the first prong (violation of state law), the indictment alleged that appellants' gambling operation was being conducted in violation of Chapter 47, Gambling, of the Texas Penal Code. The indictment did not cite a specific provision within this chapter, but it alleged only "bookmaking." [2] Additionally, the government's case **focused entirely on and the jury charge instructed only on the "bookmaking" provisions of Chapter 47.** Chapter 47 defines "bookmaking" as follows:
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> "(A) to receive and record or to forward more than five bets or offers to bet in a period of 24 hours;
> (B) to receive and record or to forward bets or offers to bet totaling more than $1,000 in a period of 24 hours; or
> (C) a scheme by three or more persons to receive, record, or forward a bet or an offer to bet." Tex. Penal Code § 47.01(2)(A)-(C).

Under Texas law "bookmaking" is illegal, and if a person intentionally or knowingly commits "bookmaking," he commits the offense of gambling promotion. Tex. Penal Code § 47.03(a)(2). Bookmaking, however, is not the only activity that constitutes gambling promotion. **Section 47.03(a) lists five separate categories of activity (including "bookmaking") each of which can constitute gambling promotion**. [3] Section 47.03(a) makes it a separate offense for an individual, for gain, to "... become[ ] a custodian of anything of value bet or offered to be bet[.]" Tex. Penal Code § 47.03(a)(3**). In this case, neither the indictment nor the jury charge nor the government's argument alluded to this section**. **The indictment only mentioned bookmaking and the jury charge only tracked the language of sections 47.01(2) and 47.03(a)(2). Thus, the illegal gambling convictions can only be sustained on the basis of a violation of the Texas law against "bookmaking," and the fact that the appellants engaged in financial transactions in the State of Texas that may have run afoul of section 47.03(a)(3) is irrelevant.** So far as concerns the violation of the state--here Texas--law element of section 1955, this case was charged, tried, and instructed on solely on the basis of a claimed violation of the Texas prohibition against "bookmaking" as contained in sections 47.01(2) and 47.03(a)(2).

Appellants claim that there was insufficient evidence that they engaged in illegal bookmaking in Texas, because the bookmaking portion of their business occurred in Jamaica and the Dominican Republic. They

argue that no bets were received, recorded, or forwarded in Texas. The government, however, argues that the jury could have inferred that the operation received, recorded, or forwarded bets, and thereby conducted illegal bookmaking, in Texas, and, in the alternative, the government argues that the operation conducted financial transactions related to the gambling operation with bettors in Texas, and, thus, a part of the betting operation's business was transacted in Texas, in violation of Texas law. We find the government's arguments unpersuasive.

As stated in the foregoing summary of the evidence, it is plain that the bookmaking activities occurred outside the United States in Jamaica and the Dominican Republic. Under section 1955, the illegal gambling activity must violate the law of the state in which it is conducted. The evidence at trial indicated that the bets were taken in the Dominican Republic or Jamaica (where such activity is legal), and the government produced no evidence that anyone in the organization accepted bets in Texas, or otherwise violated the Texas bookmaking law. The government simply argues that the jury could have inferred that some bets were also being accepted in Texas, and thus appellants engaged in conduct that violated Texas law.

There is evidence that Jones took bets in the Dallas-Fort Worth area before he moved the operation offshore, and thereby violated Texas' bookmaking statute, but this evidence is irrelevant since these Texas bookmaking activities occurred before the time period stated in the indictment.

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The fact that two of the toll-free numbers used by the organization terminated at the Texas residences of Truesdale and Jones is not probative of illegal bookmaking without some evidence that bets were actually accepted over these phone lines. If these were the only phone lines associated with WSB and the only means through which bettors could communicate with WSB, then perhaps a jury could rationally conclude that the lines were used for illegal betting. [4] But there were other toll-free numbers, which were specifically designated as "betting lines," that terminated offshore and were in fact used to place bets. That is why there was a big operation offshore. It is not rational to infer beyond a reasonable doubt that simply because the phone numbers could have been used to receive bets in Texas, that they were actually used for this illegal purpose.

The only evidence that illegal betting was conducted over these information-only phone lines in Texas came from agents who answered the phones while searching the residences. When agents answered the phones at Jones's and Hamilton's residences, callers either asked for line information or checked whether their gambling account deposits had been received. Two agents testified that they took bets from these callers, but

their testimony is not probative of any wrongdoing by the appellants.

A caller at Hamilton's house did not ask to place a bet, rather the agent searching the residence offered to take a bet from the caller. Agent Molina testified that when he answered the phone at Hamilton's house, he offered to take a bet from a caller, and the caller asked whether he had called the right number. Even after Molina answered "Yes," the caller refused to place a bet. Three callers at Jones's house placed bets on basketball or baseball games. But, the testimony does not suggest that any of these three callers had ever placed a bet over one of these lines before. Indeed, one caller thought he was calling Jamaica.

The fact that agents allowed people to place bets on these phone lines is probative of very little. At best it shows that callers may have attempted to place bets in Texas, but it does not indicate that appellants accepted bets from callers on these phone lines.

In addition to these phone calls, the government also points out that Jones had the capability to input information (such as bets and line information) into the betting computer in Jamaica from his home computer in Dallas. But there is no evidence indicating that Jones (or anyone else) ever did this. The government also argues that a notebook seized from Hamilton's residence containing account numbers, teams, and amounts could have been notes for accepting bets in Dallas. Finally the government argues that black ash found floating in Jones's toilet was evidence of something illegal.

Perhaps in some other circumstances, evidence of callers attempting to place bets, the mere capability to input illegal bookmaking information into the offshore computer, and the other circumstantial evidence might lead to a rational inference that appellants were engaged in illegal bookmaking in Texas. However, looking at the overall circumstances of this case, such an inference is unwarranted. Jones and his co-appellants went to great effort to make sure that their operation was legal. They set up offshore offices and consulted with lawyers in the United States and abroad on the legality of their enterprise; they furnished the Caribbean local offices with desks and telephones and staffed them with personnel to accept international phone wagers; they set up separate phone lines that could be used to place bets in the offshore offices. Under these circumstances, without specific evidence of any wrongdoing, it is irrational to conclude beyond a reasonable doubt that after having gone through the effort of fully equipping, staffing, and widely advertising the Caribbean offices, the appellants nevertheless illegally accepted bets in the United States.

The government has no direct evidence supporting its contention that appellants engaged in illegal bookmaking in Texas. And the circumstantial evidence here does not furnish an adequate basis from which a

reasonable
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jury could conclude beyond a reasonable doubt that the appellants were engaged in bookmaking in Texas. The appellants went out of their way to stay within the law. The mere fact that they had the capability or even the opportunity to break the law by accepting bets in Texas is insufficient to prove that they actually did so.

In light of the weak circumstantial evidence, the government argues in the alternative that the convictions can be upheld because appellants accepted money from bettors and paid out proceeds from bets in the United States. The government maintains that these financial transactions were an essential part of the operation. It may be true that these financial transactions were essential to the overall operation, but they do not establish an essential element of the crime of "bookmaking" as it is defined by Texas law. The Texas bookmaking statute prohibits recording, receiving, and forwarding bets; where and how the money is paid out is irrelevant under section 47.03(a)(2). [5] **Becoming a custodian of money that is used to place bets offshore would be a violation of section 47.03(a)(3). However, the indictment did not allege that the appellants violated section 47.03(a)(3) and the jury was not instructed on any such violation. Nor was the case tried on that theory. In short, the government's case and the jury's verdict were focused exclusively on illegal bookmaking, and we cannot affirm the case on a different theory**.

Because there is insufficient evidence to establish beyond a reasonable doubt that the appellants were guilty of operating a bookmaking service in violation of the Texas bookmaking statute, we reverse the convictions on Count Two. Additionally, because we are reversing the underlying gambling offense, we also reverse Jones's Conspiracy and Travel in Aid of Racketeering convictions, and we reverse all the appellants' money laundering convictions. All these convictions are predicated on the section 1955 violation charged in Count Two.

We reverse the money laundering convictions because without the gambling conviction there is no underlying criminal activity. Milner and Jones were convicted pursuant to 18 U.S.C. § 1956(a)(1)(A)(I) for: (1) conducting or attempting to conduct a financial transaction, (2) which the defendant then knew involved the proceeds of illegal activity, (3) with the intent to promote or further unlawful activity. See United States v. Gaytan, 74 F.3d 545, 555 (5th Cir.1996). Truesdale and Hamilton were convicted pursuant to 18 U.S.C. § 1956(a)(1)(B)(I) for: (1) conducting or attempting to conduct a financial transaction, (2) which the defendant then knew involved the proceeds of illegal activity, (3) with the intent to conceal or

disguise the nature, location, source, ownership, or control of the proceeds of unlawful activity. See United States v. Wilson, 77 F.3d 105, 108 (5th Cir.1996).

Money laundering requires that the defendant conduct or attempt to conduct a financial transaction involving the proceeds of an illegal activity. In this case, the only illegal activity that was ever alleged or submitted to the jury was illegal bookmaking. As discussed above, we reverse those convictions. Without those convictions, no illegal activity has been properly established upon which to base a money laundering conviction. We suspect that appellants' financial transactions in Texas probably ran afoul of section

47.03(a)(3), but the case was not tried on that theory, and without an indictment and appropriate jury instructions, we cannot uphold the money laundering convictions on such a basis.

We also reverse Jones's convictions for travel in aid of racketeering and conspiracy. Like money laundering, travel in aid of racketeering requires an underlying criminal activity. Jones was indicted for violating 18 U.S.C. § 1952(a)(3), which requires that the defendant travel in interstate or foreign commerce with the intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity[.]" 18 U.S.C.1952(a)(3). The travel in aid of racketeering counts were explicitly made dependent on Count Two. The indictment specifically referred to the gambling enterprise alleged in Count Two as the unlawful activity supporting the travel in aid of racketeering counts. Since we reverse the convictions on Count Two, there is no illegal activity on which to base a travel in aid of racketeering conviction, and hence we reverse these convictions. Finally, because we reverse all the substantive counts, we also reverse Jones's conviction for conspiracy to commit those offenses. [6]

Conclusion

For the foregoing reasons, we reverse the appellants' convictions on all counts.

REVERSED.

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1 Section 1955 reads as follows:

"(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 The indictment alleged that "[appellants'] illegal gambling business involv[ed] bookmaking, in violation of the laws of the State of Texas (Title 10, Texas Penal Code, Chapter 47)...."

3 Section 47.03, Gambling Promotion, reads as follows:

"(a) A person commits an offense if he intentionally or knowingly does any of the following acts:

(1) operates or participates in the earnings of a gambling place;

(2) engages in bookmaking;

(3) for gain, becomes a custodian of anything of value bet or offered to be bet;

(4) sells chances on the partial or final result of or on the margin of victory in any game or contest or on the performance of any participant in any game or contest or on the result of any political nomination, appointment, or election or on the degree of success of any nominee, appointee, or candidate; or

(5) for gain, sets up or promotes any lottery or sells or offers to sell or knowingly possesses for transfer, or transfers any card, stub, ticket, check, or other device designed to serve as evidence of participation in any lottery." Tex. Penal Code § 47.03(a) (emphasis added).

4 So also, perhaps, if these lines had no other purpose. But they clearly had other purposes--including to give information on the offshore betting and to establish credit.

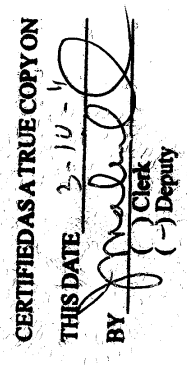
5 The jury seems to have been confused about whether accepting money for future betting constitutes "betting" under Texas law. During deliberations, the jury sent a note to the judge asking "[d]oes receiving money to facilitate the placing of a wager (to be done at a future time) constitute a bet?" The court did not answer this question, and responded "[t]he question you have posed is addressed in the court's charge and you should look to the charge, considering my instructions as a whole, for the answer." This response was inadequate, as the subject matter of the question was not directly or expressly addressed in the charge, and could not have cleared up the jurors' confusion. See United States v. Stevens, 38 F.3d 167 (5th Cir.1994). The court should then have clearly instructed that Texas law has broken gambling down into two separate offenses: bookmaking (as defined in the instructions) and for gain becoming a custodian of anything of value bet or offered to be bet, or at the very least the court should have answered "No," as appellants requested below.

The court's instruction in response to the question was inadequate and would require reversal were we not in any event reversing the case because of insufficient evidence.

6 Under the allegations of the indictment, the basis on which the government tried the case and the charge, the conspiracy ultimately depended on the theory that what was done--and there is no showing or claim that anything else was contemplated or agreed--constituted bookmaking in Texas contrary to sections 47.01(2) and 47.03(a)(2).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	SUPERSEDING INDICTMENT
-v-	:	
ISAI SCHEINBERG,	:	S3 10 Cr. 336 (LAK)
RAYMOND BITAR,	:	
SCOTT TOM,	:	
BRENT BECKLEY,	:	
NELSON BURTNICK,	:	
PAUL TATE,	:	
RYAN LANG,	:	
BRADLEY FRANZEN,	:	
IRA RUBIN,	:	
CHAD ELIE,	:	
and	:	
JOHN CAMPOS,	:	
Defendants.	:	



COUNT ONE

(Unlawful Internet Gambling Enforcement Act Conspiracy)

The Grand Jury charges:

Introduction

1. From at least in or about November 2006, and continuing through in or about March 2011, the three leading internet poker companies doing business in the United States were PokerStars, Full Tilt Poker and Absolute Poker/Ultimate Bet (collectively the "Poker Companies"). Because United States banks were largely unwilling to process payments for an illegal activity such as internet gambling, the three Poker Companies used fraudulent methods to avoid these restrictions and to

receive billions of dollars from United States residents who gambled through the Poker Companies. The principals of the Poker Companies, including defendants ISAI SCHEINBERG and PAUL TATE of PokerStars, SCOTT TOM and BRENT BECKLEY of Absolute Poker, and RAYMOND BITAR and NELSON BURTNICK of Full Tilt Poker, deceived or directed others to deceive United States banks and financial institutions into processing billions of dollars in payments for the Poker Companies, by, among other things, arranging for the money received from United States gamblers to be disguised as payments to hundreds of non-existent online merchants and other non-gambling businesses.

2. To accomplish this deceit, ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, NELSON BURTNICK and PAUL TATE, the defendants, relied on highly compensated third party payment processors (the "Poker Processors") who lied to United States banks about the nature of the financial transactions they were processing and covered up those lies through the creation of phony corporations and websites to disguise payments to the Poker Companies. These Poker Processors included, among others, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, and CHAD ELIE, the defendants, who, at various times relevant to this Indictment, processed and helped disguise payments to each of the three Poker Companies.

3. Working together, the Poker Companies and Poker Processors deceived United States banks and financial

institutions - including banks insured by the Federal Deposit Insurance Corporation - into processing billions of dollars in gambling transactions for the Poker Companies. Approximately one-third or more of the funds deposited by gamblers went directly to the Poker Companies as revenue through the "rake" the Poker Companies charged players on almost every poker hand played online.

The Defendants and Their Associated Entities

4. At all times relevant to this Indictment, ISAI SCHEINBERG, the defendant, was a founder, owner, and principal decision-maker for PokerStars, an internet poker company founded in or about 2001 with headquarters in the Isle of Mann. Through its website, pokerstars.com, PokerStars provided real-money gambling on internet poker games to United States customers. At various times relevant to this Indictment, PokerStars did business through several privately held corporations and other entities, including but not limited to Oldford Group Ltd., Rational Entertainment Enterprises Ltd., Pyr Software Ltd., Stelekram Ltd. and Sphene International Ltd. (collectively, "Pokerstars").

5. At all times relevant to this Indictment, RAYMOND BITAR, the defendant, was a founder, owner, and principal decision-maker for Full Tilt Poker, an internet poker company founded in or about 2004 with headquarters in Ireland. Through

its website, fulltiltpoker.com, Full Tilt Poker provided real-money gambling on internet poker games to United States customers. At various times relevant to this Indictment, Full Tilt Poker did business through several privately held corporations and other entities, including but not limited to Tiltware LLC, Kolyma Corporation A.V.V., Pocket Kings Ltd., Pocket Kings Consulting Ltd., Filco Ltd., Vantage Ltd., Ranston Ltd., Mail Media Ltd., and Full Tilt Poker Ltd. (collectively, "Full Tilt Poker"). As of March 2011, Full Tilt Poker was the second-largest poker operator offering gambling on poker games to United States residents.

6. At certain times relevant to this Indictment, SCOTT TOM, the defendant, and his step-brother, BRENT BECKLEY, the defendant, were founders and/or principal decision-makers for Absolute Poker, an internet poker company founded in or about 2003 with headquarters in Costa Rica. Through its websites, absolutepoker.com and ultimatebet.com, Absolute Poker provided real-money gambling on internet poker games to United States customers. At various times relevant to this Indictment, Absolute Poker did business through several privately held corporations and other entities, including but not limited to SGS Systems Inc., Trust Services Ltd, Fiducia Exchange Ltd., Blue Water Services Ltd., and Absolute Entertainment, S.A. In or around October 2006, Tokwiro Enterprises was identified as the

owner of record of Absolute Poker and a companion poker and blackjack gambling website, Ultimate Bet. In around August 2010, ownership of Absolute Poker and Ultimate Bet was transferred to Blanca Games, Inc. of Antigua (collectively, these entities are "Absolute Poker").

7. At certain times relevant to this Indictment, NELSON BURTNICK, the defendant, was an executive in the payment processing departments of PokerStars and Full Tilt Poker. From in or about October 2006 through in or about November 2008 BURTNICK was an employee in the payment processing department of PokerStars, where he ultimately served as the head of payment processing. From in or about January 2009 up to and including in or about March 2011, BURTNICK served as head of the payment processing department for Full Tilt Poker.

8. From at least in or about the summer of 2006 up to and including in or about March 2011, PAUL TATE, the defendant, was an employee of PokerStars, including in the payment processing department. From in or about early 2009, up to and including in or about March 2011, TATE served as the head of the payment processing department for PokerStars.

9. From at least in or about October 2006, up to and including at least in or about the spring of 2010, RYAN LANG, the defendant, worked with the Poker Companies to identify Poker Processors willing to process payments for the Poker Companies,

including through deceptive means. In this capacity, LANG acted as an intermediary between principals of the Poker Companies, including defendants ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, NELSON BURTNICK and PAUL TATE, and the Poker Processors.

10. From at least in or about 2007, up to and including on or about March 2011, BRADLEY FRANZEN, the defendant, worked with internet gambling companies including the Poker Companies, to identify Poker Processors willing to process payments for the Poker Companies, including through deceptive means. In this capacity, FRANZEN acted as an intermediary between principals of the Poker Companies, including defendants BRENT BECKLEY and NELSON BURTNICK, and the Poker Processors.

11. From at least in or about 2007, up to and including in or about March 2011, IRA RUBIN, the defendant, processed payments for various internet gambling companies, including each of the Poker Companies, by disguising the payments as payments to dozens of phony internet merchants.

12. From at least in or about the summer of 2008, up to and including in or about March 2011, CHAD ELIE, the defendant, together with others, opened bank accounts in the United States, including through deceptive means, through which each of the Poker Companies received payments from United States-based gamblers.

13. From at least in or about September 2009, up to and including in or about March 2011, JOHN CAMPOS, the defendant, was the Vice Chairman of the Board of Directors and part owner of SunFirst Bank in St. George, Utah, which processed payments for PokerStars and Full Tilt Poker.

The Enactment of the UIGEA

14. On or about October 13, 2006, the United States enacted the Unlawful Internet Gambling Enforcement Act ("UIGEA"), making it a federal crime for gambling businesses to "knowingly accept" most forms of payment "in connection with the participation of another person in unlawful Internet gambling." Following the passage of the UIGEA, leading internet gambling businesses - including the leading internet poker company doing business in the United States at that time - terminated their United States operations.

15. On various dates in October 2006, notwithstanding the passage of the UIGEA, the Poker Companies issued public statements indicating that they intended to continue offering gambling on internet poker in the United States. For example, in an October 16, 2006 press release, Absolute Poker - whose United States citizen founders had relocated to Costa Rica - noted that Absolute Poker was a "privately held operation, which gives our business model more flexibility and creativity in operating." Absolute Poker also claimed that its payment transactions were

done "within the framework of the international banking system, which the U.S. Congress has no control over."

The Scheme to Defraud

16. As set forth more fully below, at most times relevant to this Indictment, because internet gambling businesses such as those operated by the Poker Companies were illegal under United States law, internet gambling companies, including the Poker Companies, were not permitted by United States banks to open bank accounts in the United States to receive proceeds from United States gamblers. Instead, both prior to and particularly after the passage of the UIGEA, the principals of the Poker Companies, including ISAI SCHEINBERG, RAYMOND BITAR, SCOTT TOM, BRENT BECKLEY, NELSON BURTNICK and PAUL TATE, the defendants, operated through various deceptive means designed to trick United States banks and financial institutions into processing gambling transactions on the Poker Companies' behalf.

Fraudulent Credit Card Processing

17. Beginning in or about 2001, credit card companies Visa and MasterCard introduced regulations requiring member banks that processed credit card transactions for merchants (so-called "acquiring banks") to apply a particular transaction code to internet gambling transactions. Thereafter, certain U.S. banks that issued credit cards to U.S. consumers (so-called "issuing banks") elected not to extend credit to customers for internet

gambling purposes and as a matter of policy automatically declined transactions bearing that internet gambling transaction code. The number of U.S. issuing banks declining such transactions increased significantly over time such that, even prior to the passage of the UIGEA in October 2006, most United States banks blocked transactions containing the internet gambling code.

18. In order to circumvent the Visa and MasterCard regulations and trick U.S. banks into authorizing their internet gambling transactions, ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, NELSON BURTNICK and PAUL TATE, the defendants, worked with and directed others to apply incorrect transaction codes to their respective Poker Companies' internet gambling transactions in order to disguise the nature of those transactions and create the false appearance that the transactions were completely unrelated to internet gambling.

19. One method used by the members of the conspiracy to trick the United States banks into approving internet gambling charges involved the creation of phony non-gambling companies that the Poker Companies used to initiate the credit card charges. At various times alleged in this Indictment, RAYMOND BITAR, BRENT BECKLEY, and NELSON BURTNICK, the defendants, worked with other members of the conspiracy to create such fictitious companies - including phony online flower shops and pet supply

stores - that established Visa and MasterCard merchant processing accounts with offshore banks. When Full Tilt Poker and Absolute Poker processed a transaction through one of these phony companies without applying a gambling code to the transaction, the United States issuing bank would be tricked into approving the gambling transaction even if its policy was to not allow the extension of credit for internet gambling. Because the credit card networks were often able to detect the fraudulent nature of these phony merchants after a period of time and to shut down processing for those phony merchants, BITAR, BECKLEY and BURTNICK, and their co-conspirators, arranged for a supply of stand-by phony merchants to be used when a particular phony merchant was discovered. For example, an Absolute Poker document from in or around the fall of 2007 identifies approximately twenty phony internet shopping companies then being used by Absolute Poker to disguise credit card transactions, including, among others, www.petfoodstore.biz and www.bedding-superstore.tv.

20. A second method used by the members of the conspiracy to trick United States banks involved the use of certain pre-paid credit cards. At various times alleged in this Indictment, the Poker Companies, through, among others, ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, NELSON BURTNICK, and PAUL TATE, the defendants, and their co-conspirators developed so-called "stored value cards" - such as pre-paid debit cards or

even pre-paid "phone" cards - that could be "loaded" with funds from a U.S. customer's credit card without using a gambling transaction code. Once "loaded" in this way, the stored value cards were used by gamblers almost exclusively to transfer funds to Poker Companies and other gambling companies. To avoid detection, SCHEINBERG, BITAR, BECKLEY, BURTNICK, and TATE, and their co-conspirators, arranged for fake internet web sites and phony consumer "reviews" of the stored value cards so that it would appear that the stored value cards had some other legitimate purpose.

Fraudulent E-Check Processing

21. Because Visa and MasterCard sought to identify and block attempts to circumvent their rules requiring internet gambling transactions to be correctly identified - so that banks could decline to accept them if they wished - the Poker Companies were unable to process credit card transactions consistently, even through their use of fraudulent means. Accordingly, ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, NELSON BURTNICK, and PAUL TATE, the defendants, and others, worked with and directed others to develop yet another method of deceiving United States banks and financial institutions into processing their respective Poker Companies' internet gambling transactions, through fraudulent e-check processing.

22. At all times relevant to this Indictment, the Automated Clearinghouse (or "ACH") system was an electronic network, administered by the Federal Reserve, that allowed for electronic fund transfers to and from United States bank accounts through "e-checks" or "electronic checks." At various times relevant to this Indictment, the Poker Companies, through among others ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, NELSON BURTNICK, and PAUL TATE, the defendants, increasingly focused their payment systems on e-checks.

23. A principal difficulty for the Poker Companies in e-check processing was that the ACH system required the merchant to open a processing account at a United States-based Originating Depository Financial Institution (or "ODFI"). Because the Poker Companies were not legally able to offer gambling in the United States, the Poker Companies could not - and did not - seek to open bank accounts for e-check processing in the names of their businesses. Instead, the Poker Companies found third parties - the Poker Processors - willing to open the bank accounts and process these e-check transactions on behalf of the Poker Companies using the names of phony companies.

24. In furtherance of this aspect of the scheme, ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, NELSON BURTNICK, and PAUL TATE, the defendants, relied on various middlemen, including RYAN LANG and BRADLEY FRANZEN, the defendants, to connect their

respective Poker Companies with payment processors willing to handle internet poker e-check transactions. Following these introductions, SCHEINBERG, BITAR, BECKLEY, BURTNICK, and TATE entered into processing agreements with certain of the e-check processors. The agreements provided the e-check processors with fees for processing each e-check transaction that were substantially higher than fees paid for standard e-check processing for legitimate, non-gambling merchants. The Poker Companies, including through SCHEINBERG, BITAR, BECKLEY, BURTNICK, and TATE, then worked with the e-check processors and other co-conspirators to disguise the Poker Companies' receipt of gambling payments so that the transactions would falsely appear to United States banks as non-gambling transactions.

25. At all times relevant to this Indictment, the Poker Companies, through ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, NELSON BURTNICK, and PAUL TATE, the defendants, and others, and the e-check processors, typically accomplished fraudulent e-check processing as follows:

a. First, the e-check processors - sometimes directly, and sometimes through third parties - opened bank accounts at United States-based ODFI banks in order to process the Poker Companies' e-check transactions through the ACH system. The e-check processors typically lied to the ODFI bank about the purpose of the account, falsely claiming that the account would

be used to process e-checks for a wide variety of e-commerce merchants without disclosing that, in fact, they would be used to process internet gambling transactions. In some cases, the e-check processors offered specific lies about the identity of these purported e-commerce merchants. In several cases, for example, the e-check processors falsely told the banks that the transactions were for particular purported internet shopping sites, such as an online store selling watches, when, in reality, as the e-check processors well knew, the transactions were for the Poker Companies.

b. Second, the e-check processors worked with the Poker Companies, including with ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, NELSON BURTNICK, and PAUL TATE, the defendants, in the creation of dozens of phony corporations and corresponding websites so that the money debited from U.S. customer's banks would falsely appear to United States banks to be consumer payments to non-gambling related businesses. For example, in or about mid-2008, IRA RUBIN, the defendant, together with co-conspirators, created dozens of phony e-commerce websites purporting to sell everything from clothing to jewelry to golf clubs to bicycles which, in reality, and as RUBIN and his co-conspirators well knew, would in fact be used to disguise PokerStars's gambling transactions. In another example, in or around June 2009, BRADLEY FRANZEN, the defendant, working with

multiple co-conspirators, created a phony business called "Green2YourGreen" to be used to disguise payments from U.S. gamblers destined for each of the Poker Companies. FRANZEN's co-conspirators falsely told multiple United States banks insured by the FDIC, including Citibank and Wells Fargo Bank, among others, that "Green2YourGreen" was a "direct sales" business that allowed consumers to buy environmentally friendly household products and sell them to other consumers in return for commissions. Indeed, the phony Green2YourGreen website that FRANZEN's co-conspirators created to disguise the gambling transactions listed numerous products that were purportedly for sale and contained "testimonials" about the benefits of green living.

c. The development and selection of phony merchants and websites to serve as cover for the poker processing was conducted in close coordination with the Poker Companies themselves, including with ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, NELSON BURTNICK, and PAUL TATE, the defendants. When a U.S. gambler entered his or her checking account information on one of the Poker Company's websites, the e-check transaction was submitted through the ACH system using the name of one of the phony businesses rather than the name of the Poker Company, and the charge appeared on the customer's bank account under this phony name. The e-check processors' computer systems communicated with the computer systems of the Poker Companies so

that when a gambler entered e-check information on one of the Poker Operator's websites, the gambler and Poker Operator received notice of the name of the phony merchant that would appear on the customer's bank account statement, in lieu of the name of the Poker Company, as having initiated the charge. For example, in or around February 2009, two gamblers ("Gambler 1" and "Gambler 2") made e-check payments to PokerStars and received e-mails immediately thereafter from PokerStars that "oneshopcenter" and "mygolflocations," respectively, would appear as the party initiating the charge on their respective bank statements. At the time, "oneshopcenter.com" and "mygolflocation.com" were purported internet merchants that falsely claimed to sell clothing and jewelry (for oneshopcenter.com) and golf clubs (for mygolflocation.com).

d. Similarly, the Poker Companies worked with the Poker Processors to coordinate responses to customer inquiries to the phony merchants, including the complaints of gamblers confused by the phony merchant name appearing on their checking account statement. For example, in or around March 2009, Gambler 1 and Gambler 2 sent e-mails to purported customer service addresses listed by oneshopcenter.com and mygolflocation.com regarding attempts to purchase particular items. Gambler 1 and Gambler 2 received responses not from these websites, but from individuals identifying themselves as customer service employees

of PokerStars replying from e-mail addresses associated with PokerStars.

e. Tracking all of the phony merchants used to disguise gambling transactions created administrative and technical difficulties for the Poker Companies. For example, a PokerStars document from in or about May 2009 provided as follows:

> It's not unusual for PokerStars to have their [*sic*] transactions identified by 30+ descriptors [the name of the merchant appearing on the consumer's credit card or checking account] at any point in time. The purpose of a descriptor is to help the customer identify the source of the transaction, be it credit card or electronic funds transfer. Unfortunately PokerStars does not have this luxury; relying on whatever descriptor the processor can get approved by the bank. These descriptors are diverse, often vague and rarely reflect the nature of the transaction in any way. In fact most descriptors strongly imply the transaction has nothing to do with PokerStars (i.e. BICYCLEBIGSHOP.COM, GOLFSHOPCENTER.COM, VENTURESHOPPING.COM etc). Whilst some players read confirmation emails and understand the process, many do not and it is all too easy for a player to say to their bank "I've never made a purchase at BICYCLEBIGSHOP.COM". As a result chargebacks (Not Auth & Stop Payments) are increasing which in turn jeopardizes the relationship with the processor and their banks.

To address the issue, PokerStars modified its software so, where possible, a consistent phony descriptor would appear on the bank statements of a given U.S. customer.

26. ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, NELSON BURTNICK, and PAUL TATE, the defendants, worked with multiple e-check processors introduced to them by defendants RYAN LANG, BRADLEY FRANZEN, and others, many of which the Poker

Companies used simultaneously. These e-check providers included the following:

a. Intabill In or around the spring of 2007, LANG introduced SCHEINBERG, BITAR, and BECKLEY to a method of e-check processing offered by Intabill, an Australia-based payment processing company. Because Intabill did not have direct access to United States ACH processing accounts, Intabill "sub-contracted" its processing to various United States based e-check processors. With the knowledge and approval of SCHEINBERG, BITAR, BECKLEY, BURTNICK and TATE, Intabill disguised the gambling transactions as the transactions of dozens of phony financial services merchants. Intabill processed at least $543,210,092 of transactions for the Poker Companies from mid-2007 through March 2009. In or around March 2009, the Poker Companies ceased processing through Intabill, in part because Intabill owed them tens of millions of dollars for past processing.

b. CHAD ELIE In 2008 and 2009, CHAD ELIE, the defendant, had worked with Intabill to establish processing accounts for internet gambling that were disguised as accounts set up to process repayments of so-called "payday loans," which were high-interest, high-risk loans unrelated to gambling transactions. In or about August and September 2009, working with FRANZEN, ELIE processed transactions on behalf of Full Tilt

Poker. Also in or about August and September 2009, working with BECKLEY, ELIE processed transactions on behalf of Absolute Poker through a bank account at Fifth Third Bank that ELIE told the bank was an account to be used for internet marketing transactions. ELIE's deceptive processing through Fifth Third Bank terminated in September 2009 when the bank froze the funds, which were subsequently seized by U.S. law enforcement through a judicial warrant.

c. Intabill's U.S. Representative In or around March 2009, Intabill's former U.S.-based representative, Andrew Thornhill, began seeking to process transactions for the Poker Companies himself, communicating at various times with SCHEINBERG, TATE, FRANZEN, and ELIE, among others, about potential processing. In or around June 2009, Thornhill and FRANZEN began processing e-checks for each of the Poker Companies disguised as payments to the phony "Green2YourGreen" environmentally friendly household products company described in paragraph 25(b) of this Indictment. The Green2YourGreen processing lasted only a few months, until approximately August 2009, when Citibank and Wells Fargo Bank, among others, discovered that the transactions were, in fact, for internet gambling and terminated the accounts. At that time, the proceeds of these accounts were then seized by U.S. law enforcement pursuant to a judicial warrant.

d. The Arizona Processor In or around December 2008, after learning that Intabill was unlikely to continue processing, SCHEINBERG, BITAR, BECKLEY, BURTNICK and TATE began processing payments through an Arizona payment processor (the "Arizona Processor"), which was assisted at times by a company operated by LANG. From in or about December 2008 through on or about June 1, 2009, the Arizona Processor processed more than $100 million in payments primarily from U.S. gamblers to each of the Poker Companies; all of these transactions were processed using the names of phony merchants so as falsely to appear unrelated to internet gambling. On or about June 1, 2009, the Arizona Processor ceased processing transactions for the Poker Companies following the seizure of its bank accounts by U.S. law enforcement pursuant to a judicial warrant.

e. IRA RUBIN At various times relevant to this Indictment, each of the Poker Companies employed IRA RUBIN, the defendant, his company E-Triton, and various of RUBIN's associates, including an e-check processor in California (the "California Processor"), to process their internet gambling transactions disguised as legitimate online merchant transactions, in order to trick U.S. banks into authorizing the transactions. For example, in or about mid-2008, SCHEINBERG and BURTNICK hired RUBIN's company E-Triton to process PokerStars transactions disguised as payments to dozens of phony web stores,

including oneshopcenter.com and mygolflocation.com, which RUBIN sub-contracted to the Arizona Processor. In another example, in or about June 2009, following the Arizona Processor's termination of its processing activities, BURTNICK and FRANZEN arranged for two of RUBIN's associates to process payments for Full Tilt Poker disguised as payments to a medical billing company, until accounts related to that processing were seized by judicial order in or about September 2009. In a final example, at various times from approximately 2008 up to and including in or about March 2011, BECKLEY hired RUBIN to process e-checks for Absolute Poker disguised as, among other things, payroll processing, affiliate marketing, and online electronics merchants.

"Transparent Processing"

27. In or around late 2009, following the collapse of multiple e-check processing operations used by the Poker Companies and the judicially ordered seizure of funds, ISAI SCHEINBERG and RAYMOND BITAR, the defendants, begin exploring a new payment processing strategy - so-called "transparent processing" - and directed the heads of their payment processing departments, PAUL TATE and NELSON BURTNICK, the defendants, to find, at least where possible, processing solutions that did not involve lies to banks. Despite their expressed desire for "transparent" processing, PokerStars and Full Tilt Poker

continued to rely on processors who disguised the poker transactions.

28. In order to find "transparent" processors, ISAI SCHEINBERG, RAYMOND BITAR, NELSON BURTNICK and PAUL TATE, the defendants, turned to processors who had worked with the Poker Companies before, including defendants RYAN LANG, BRADLEY FRANZEN, and CHAD ELIE. The Poker Companies had previously sued ELIE for allegedly stealing $4 million of the Poker Companies' money. ELIE was accepted as a source for "transparent" processing following a conversation between ELIE and SCHEINBERG in or about the fall of 2009 in which ELIE agree to repay some of this money.

29. Because it was illegal to process their internet gambling transactions, the Poker Companies had difficulty in identifying "transparent" processors. CHAD ELIE, the defendant, and his associates were, however, able to persuade the principals of certain small, local banks that were facing financial difficulties to engage in such processing. In exchange for this agreement to process gambling transactions, the banks received sizeable fee income from processing poker transactions as well as promises of multi-million dollar investments in the banks from ELIE and his associates. In at least one case, a payment to a bank official who approved the processing was made as well.

30. For example, in or around September 2009, CHAD ELIE, the defendant, together with Andrew Thornhill and a partner of ELIE's ("Elie's Partner") approached JOHN CAMPOS, the defendant, the Vice Chairman of the Board and part-owner of SunFirst Bank, a small, private bank based in Saint George, Utah. CAMPOS, while expressing "trepidations" about gambling processing, proposed in a September 23, 2009 e-mail to accept such processing in return for a $10 million investment in SunFirst by ELIE and Elie's Partner, which would give ELIE and Elie's Partner more than 30% ownership of the bank. ELIE and Elie's Partner made an initial investment in SunFirst Bank of approximately $3.4 million in approximately December 2009. On or about November 29, 2009, Andrew Thornhill told an associate "things are going well with the bank we purchased in Utah and my colleagues and I are looking to purchase another bank for the purpose of repeating our business plan. We probably could do this for a grand total of 3 or 4 banks."

31. On or about December 14, 2009, SunFirst Bank began processing payments for Pokerstars and FullTilt Poker. On or about April 8, 2010, JOHN CAMPOS, the defendant, sent an "invoice" to Elie's Partner requesting that $20,000 be paid to a corporate entity that CAMPOS controlled as a "bonus" for "Check and Credit Card Processing Consulting." SunFirst Bank processed over $200 million of payments for PokerStars and Full Tilt Poker

through on or about November 9, 2010, when, at the direction of the FDIC, it ceased third party payment processing. SunFirst Bank earned approximately $1.6 million in fees for this processing.

Statutory Allegations

32. From at least on or about October 13, 2006, up through and including in or about March 2011, in the Southern District of New York and elsewhere, ISAI SCHEINBERG, RAYMOND BITAR, SCOTT TOM, BRENT BECKLEY, NELSON BURTNICK, PAUL TATE, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, CHAD ELIE, and JOHN CAMPOS, the defendants, together with others known and unknown, unlawfully, willfully, and knowingly did combine, conspire, confederate, and agree together and with each other to commit offenses against the United States, to wit, violations of Title 31, United States Code, Section 5363.

33. It was a part and an object of the conspiracy that ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, SCOTT TOM, NELSON BURTNICK, PAUL TATE, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, CHAD ELIE, and JOHN CAMPOS, the defendants, and others known and unknown, unlawfully, willfully, and knowingly, with persons engaged in the business of betting and wagering, would and did knowingly accept, in connection with the participation of another person in unlawful internet gambling, to wit, gambling in violation of New York Penal Law Sections 225.00 and 225.05 and the laws of other states where the gambling businesses operated,

credit, and the proceeds of credit, extended to and on behalf of such other person, including credit extended through the use of a credit card, and an electronic fund transfer and the proceeds of an electronic fund transfer from and on behalf of such other person, and a check, draft and similar instrument which is drawn by and on behalf of such other person and is drawn on and payable at and through any financial institution, in violation of Title 31 United States Code, Sections 5363 and 5366.

OVERT ACTS

34. In furtherance of said conspiracy and to effect the illegal object thereof, ISAI SCHEINBERG, RAYMOND BITAR, SCOTT TOM, BRENT BECKLEY, NELSON BURTNICK, PAUL TATE, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, CHAD ELIE, and JOHN CAMPOS, the defendants, and others known and unknown, committed the following overt acts, among others, in the Southern District of New York and elsewhere:

a. On or about October 20, 2008, LANG sent an e-mail to principals of Intabill, reminding them that BURTNICK would soon leave PokerStars and that they had promised to "kick him back" 5 cents for every dollar on Intabill's processing revenue from PokerStars.

b. On or about January 20, 2009, PokerStars, Full Tilt Poker, and Absolute Poker each received an electronic transfer of funds from a gambler located in the Southern District of New York.

c. On or about February 11, 2009, BECKLEY sent an e-mail to a co-conspirator not named as a defendant herein requesting that the co-conspirator obtain e-check and credit card processing for Absolute Poker.

d. On or about April 2, 2009, SCHEINBERG sent an e-mail to a co-conspirator not named as a defendant herein about a PokerStars processing account shut down by a United States bank.

e. On or about April 3, 2009, LANG, BURTNICK, and BITAR met in Nevada with a co-conspirator not named as a defendant herein about processing payments through tribal banks.

f. On or about June 4, 2009, FRANZEN sent an e-mail to a co-conspirator not named as a defendant here in and asked for a "payout company ID" for Full Tilt Poker consisting of "something on the shelf with a basic web presence."

g. On or about June 23, 2009, an unidentified individual at Full Tilt Poker sent an e-mail to FRANZEN that included comments on a call center script used by a payment processor that discussed the importance of not mentioning online poker to anyone calling customer service about a charge on a bank statement.

h. On or about September 22, 2009, ELIE forwarded to BECKLEY and FRANZEN an e-mail from a bank representative stating that funds in an account opened by ELIE for processing internet

marketing payments were being frozen by the bank as gambling funds.

i. On or about September 29, 2009, CAMPOS sent an e-mail to an attorney in which CAMPOS called the attorney a "wet blanket" for cautioning CAMPOS about processing gambling payments.

j. On or about October 15, 2009, RUBIN sent an e-mail to TATE about processing PokerStars transactions through a Bank of America account opened in the name of a supposed internet shop selling electronics and other items.

k. On or about July 20, 2010, CAMPOS flew from New York to Ireland to a meeting regarding processing of poker transactions.

l. In or around August 2007, Full Tilt Poker processed credit card payments for gambling transactions under the name "PS3SHOP," using a non-gambling credit card code for the transactions, through a credit card network with headquarters in the Southern District of New York.

(Title 18, United States Code, Section 371.)

COUNT TWO

(Unlawful Internet Gambling Enforcement Act: PokerStars)

The Grand Jury further charges:

35. Paragraph 1 through 31 of this Indictment are repeated and realleged as if fully set forth herein.

36. From in or about October 2006 up to and including in or about March 2011, in the Southern District of New York and elsewhere, ISAI SCHEINBERG, NELSON BURTNICK, PAUL TATE, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, CHAD ELIE, and JOHN CAMPOS, the defendants, persons engaged in the business of betting and wagering and persons aiding and abetting persons in the business of betting and wagering, did knowingly accept, in connection with the participation of another person in unlawful internet gambling, to wit, gambling through PokerStars in violation of New York Penal Law Sections 225.00 and 225.05 and the laws of other states where PokerStars operated, credit, and the proceeds of credit, extended to and on behalf of such other person, including credit extended through the use of a credit card, and an electronic fund transfer and the proceeds of an electronic fund transfer from and on behalf of such other person, and a check, draft and similar instrument which was drawn by and on behalf of such other person and was drawn on and payable at and through any financial institution.

(Title 31, United States Code, Sections 5363 and 5366; Title 18 United States Code, Section 2).

COUNT THREE

(Unlawful Internet Gambling Enforcement Act: Full Tilt Poker)

The Grand Jury further charges:

37. Paragraph 1 through 31 of this Indictment are repeated and realleged as if fully set forth herein.

38. From in or about October 2006 up to and including in or about March 2011, in the Southern District of New York and elsewhere, RAYMOND BITAR, NELSON BURTNICK, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, CHAD ELIE, and JOHN CAMPOS, the defendants, persons engaged in the business of betting and wagering and persons aiding and abetting persons in the business of betting and wagering, did knowingly accept, in connection with the participation of another person in unlawful internet gambling, to wit, gambling through Full Tilt Poker in violation of New York Penal Law Sections 225.00 and 225.05 and the laws of other states where Full Tilt Poker operated, credit, and the proceeds of credit, extended to and on behalf of such other person, including credit extended through the use of a credit card, and an electronic fund transfer and the proceeds of an electronic fund transfer from and on behalf of such other person, and a check, draft and similar instrument which was drawn by and on behalf of such other person and was drawn on and payable at and through any financial institution.

(Title 31, United States Code, Sections 5363 and 5366; Title 18 United States Code, Section 2).

COUNT FOUR

(Unlawful Internet Gambling Enforcement Act: Absolute Poker)

The Grand Jury further charges:

39. Paragraph 1 through 31 of this Indictment are repeated and realleged as if fully set forth herein.

40. From in or about October 2006 up to and including in or about March 2011, in the Southern District of New York and elsewhere, SCOTT TOM, BRENT BECKLEY, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN and CHAD ELIE, the defendants, persons engaged in the business of betting and wagering and persons aiding and abetting persons in the business of betting and wagering, did knowingly accept, in connection with the participation of another person in unlawful internet gambling, to wit, gambling through Absolute Poker in violation of New York Penal Law Sections 225.00 and 225.05 and the laws of other states where Absolute Poker operated, credit, and the proceeds of credit, extended to and on behalf of such other person, including credit extended through the use of a credit card, and an electronic fund transfer and the proceeds of an electronic fund transfer from and on behalf of such other person, and a check, draft and similar instrument which was drawn by and on behalf of such other person and was drawn on and payable at and through any financial institution.

(Title 31, United States Code, Sections 5363 and 5366; Title 18 United States Code, Section 2).

COUNT FIVE

(Operation of an Illegal Gambling Business: PokerStars)

The Grand Jury further charges:

41. Paragraph 1 through 31 of this Indictment are repeated and realleged as if fully set forth herein.

42. From at least in or about 2001 up to and including in or about March 2011, in the Southern District of New York and elsewhere, ISAI SCHEINBERG, NELSON BURTNICK, PAUL TATE, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, CHAD ELIE, and JOHN CAMPOS, the defendants, unlawfully, willfully, and knowingly did conduct, finance, manage, supervise, direct, and own all and part of an illegal gambling business, namely a business that engaged in and facilitated online poker, in violation of New York State Penal Law Sections 225.00 and 225.05 and the law of other states in which the business operated, and which business involved five and more persons who conducted, financed, managed, supervised, directed, and owned all and part of that business, and which business had been and had remained in substantially continuous operation for a period in excess of thirty days and had gross revenues of $2,000 in a single day, to wit, the defendants operated and aided and abetted the operation of Pokerstars.

(Title 18, United States Code, Sections 1955 and 2.)

COUNT SIX

(Operation of an Illegal Gambling Business: Full Tilt Poker)

The Grand Jury further charges:

43. Paragraphs 1 through 31 of this Indictment are repeated and realleged as if fully set forth herein.

44. From in or about 2004 up to and including in or about March 2011, in the Southern District of New York and

elsewhere, RAYMOND BITAR, NELSON BURTNICK, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, CHAD ELIE, and JOHN CAMPOS, the defendants, unlawfully, willfully, and knowingly did conduct, finance, manage, supervise, direct, and own all and part of an illegal gambling business, namely a business that engaged in and facilitated online poker, in violation of New York State Penal Law Sections 225.00 and 225.05 and the law of other states in which the business operated, and which business involved five and more persons who conducted, financed, managed, supervised, directed, and owned all and part of that business, and which business had been and had remained in substantially continuous operation for a period in excess of thirty days and had gross revenues of $2,000 in a single day, to wit, the defendants operated and aided and abetted the operation of Full Tilt Poker.

(Title 18, United States Code, Sections 1955 and 2.)

COUNT SEVEN

(Operation of an Illegal Gambling Business: Absolute Poker)

The Grand Jury further charges:

45. Paragraphs 1 through 31 of this Indictment are repeated and realleged as if fully set forth herein.

46. From in or about 2003 up to and including in or about March 2011, in the Southern District of New York and elsewhere, BRENT BECKLEY, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN and CHAD ELIE, the defendants, unlawfully, willfully, and

knowingly did conduct, finance, manage, supervise, direct, and own all and part of an illegal gambling business, namely a business that engaged in and facilitated online poker, in violation of New York State Penal Law Sections 225.00 and 225.05 and the law of other states in which the business operated, and which business involved five and more persons who conducted, financed, managed, supervised, directed, and owned all and part of that business, and which business had been and had remained in substantially continuous operation for a period in excess of thirty days and had gross revenues of $2,000 in a single day, to wit, the defendants operated and aided and abetted the operation of Absolute Poker.

(Title 18, United States Code, Sections 1955 and 2.)

COUNT EIGHT

(Conspiracy to Commit Bank and Wire Fraud)

The Grand Jury further charges:

47. Paragraphs 1 through 31 and 34 of this Indictment are repeated and realleged as if fully set forth herein.

48. From at least in or about 2006, up to and including on or about March 2011, in the Southern District of New York and elsewhere, ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, NELSON BURTNICK, PAUL TATE, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, and CHAD ELIE, the defendants, and others known and unknown, unlawfully, willfully, and knowingly did combine, conspire, confederate, and agree together and with each other to commit bank

fraud, in violation of Title 18, United States Code, Section 1344, and wire fraud, in violation of Title 18, United States Code, Section 1343.

49. It was a part and an object of the conspiracy that ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, NELSON BURTNICK, PAUL TATE, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, and CHAD ELIE, the defendants, and others known and unknown, unlawfully, willfully, and knowingly would and did execute and attempt to execute a scheme and artifice to defraud a financial institution, the deposits of which were insured by the Federal Deposit Insurance Corporation, and to obtain monies, funds, credits, assets, securities, and other property owned by and under the custody and control of that financial institution by means of false and fraudulent pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1344.

50. It was further a part and an object of the conspiracy that ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, NELSON BURTNICK, PAUL TATE, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, and CHAD ELIE, the defendants, and others known and unknown, unlawfully, willfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire, radio, and televison

communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, in violation of Title 18, United States Code, Section 1343, to wit, the defendants participated in a scheme involving wire communications to deceive financial institutions and other financial intermediaries into processing and authorizing payments to and from the Poker Companies and United States gamblers by disguising the transactions to create the false appearance that they were unrelated to gambling, and thereby to obtain money of, or under the custody and control of, those financial institutions and intermediaries.

(Title 18, United States Code, Section 1349).

COUNT NINE

(Money Laundering Conspiracy)

The Grand Jury further charges:

51. Paragraphs 1 through 31 and 34 of this Indictment are repeated and realleged as if fully set forth herein.

52. From at least in or about 2006, up to and including in or about March 2011, in the Southern District of New York and elsewhere, ISAI SCHEINBERG, RAYMOND BITAR, SCOTT TOM, BRENT BECKLEY, NELSON BURTNICK, PAUL TATE, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, CHAD ELIE, and JOHN CAMPOS, the defendants, and others known and unknown, unlawfully, willfully and knowingly did combine, conspire, confederate and agree together and with each

other to violate Title 18, United States Code, Sections 1956 and 1957.

53. It was a part and an object of said conspiracy that ISAI SCHEINBERG, RAYMOND BITAR, SCOTT TOM, BRENT BECKLEY, NELSON BURTNICK, PAUL TATE, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, CHAD ELIE, and JOHN CAMPOS, the defendants, and others known and unknown, would and did transport, transmit, transfer and attempt to transport, transmit, and transfer a monetary instrument and funds from a place in the United States to a place in the United States from and through a place outside the United States, with intent to promote the carrying on of specified unlawful activity, to wit, the operation of an illegal gambling business, in violation of Title 18, United States Code, Section 1956(a)(2)(A).

54. It was a further a part and an object of the conspiracy that ISAI SCHEINBERG, RAYMOND BITAR, SCOTT TOM, BRENT BECKLEY, NELSON BURTNICK, PAUL TATE, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, CHAD ELIE, and JOHN CAMPOS, the defendants, and others known and unknown, in an offense that took place in the United States, unlawfully, willfully and knowingly, would and did engage in monetary transactions in criminally derived property of a value greater than $10,000 and which was derived from specified unlawful activity, to wit, the operation of an illegal gambling business, in violation of Title 18, United States Code, Section 1957(a).

(Title 18, United States Code, Section 1956(h)).

FORFEITURE ALLEGATION AS TO COUNTS FIVE, SIX, AND SEVEN

55. As a result of committing one or more of the gambling offenses alleged in Counts Five, Six, and Seven of this Indictment, ISAI SCHEINBERG, RAYMOND BITAR, SCOTT TOM, BRENT BECKLEY, NELSON BURTNICK, PAUL TATE, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, CHAD ELIE, and JOHN CAMPOS, the defendants, shall forfeit to the United States, pursuant to 18 U.S.C. § 981(a)(1)© and 28 U.S.C. § 2461, all property, real and personal, that constitutes and is derived from proceeds traceable to the commission of these gambling offenses, and, pursuant to 18 U.S.C. § 1955(d), all property, including money, used in committing these gambling offenses, including but not limited to the following:

a. A sum of money representing the amount of proceeds obtained as a result of operation of the unlawful gambling businesses alleged in Counts Five through Seven and the amount of property used in committing the gambling offenses alleged in Counts Five through Seven, delineated as follows:

1) with respect to Count Five, the operation of PokerStars, at least approximately $1.5 billion in U.S. currency;

2) with respect to Count Six, the operation of Full Tilt Poker, at least approximately $1 billion in U.S. currency; and

3) with respect to Count Seven, the operation of Absolute Poker, at least approximately $500 million in United States currency;

b. All of the defendants' right, title, and interest in the following entities and businesses:

1. PokerStars,
2. Full Tilt Poker,
3. Absolute Poker,
4. Ultimate Bet,
5. Oldford Group Ltd.,
6. Rational Entertainment Enterprises Ltd.,
7. Pyr Software Ltd.,
8. Stelekram Ltd.,
9. Sphene International Ltd.,
10. Tiltware LLC,
11. Kolyma Corporation A.V.V.,
12. Pocket Kings Ltd.,
13. Pocket Kings Consulting Ltd.,
14. Filco Ltd.,
15. Vantage Ltd.,
16. Ranston Ltd.,
17. Mail Media Ltd.,
18. Full Tilt Poker Ltd.,
19. SGS Systems Inc.,
20. Trust Services Ltd,
21. Fiducia Exchange Ltd.,
22. Blue Water Services Ltd.,
23. Absolute Entertainment, S.A., and

24. Blanca Games, Inc. of Antigua;

c. All of the defendants' right, title, and interest in funds and other property held in the following domestic accounts:

1. all funds formerly on deposit in account numbered 121015390 held at Sunfirst Bank, St. George, Utah, in the name of Triple Seven LP d/b/a A WEB DEBIT, presently held in escrow, and all funds traceable thereto;

2. all funds formerly on deposit in account numbered 121015408 held at Sunfirst Bank, St. George, Utah, in the name of Triple Seven LP d/b/a Netwebfunds.com, presently held in escrow, and all funds traceable thereto;

3. all funds formerly on deposit in account numbered 121015333 held at Sunfirst Bank, St. George, Utah, in the name of Triple Seven LP d/b/a Netwebfunds.com, presently held in escrow, and all funds traceable thereto;

4. account numbered 129000576 on deposit at Sunfirst Bank, St. George, Utah, formerly in the name of Sunfirst Bank ITF Mastery Merchant/Psars, now in the name of Sunfirst Bank, and all funds traceable thereto;

5. account numbered 12900584 on deposit at Sunfirst Bank, St. George, Utah, formerly in the name of Sunfirst Bank ITF Powder Monkeys/Full Tilt, now in the name of Sunfirst Bank, and all funds traceable thereto;

6. account numbered 1093 held at Vensure Federal Credit Union, Mesa, Arizona, in the name of Trinity Global Commerce Corp., and all funds traceable thereto;

7. account numbered 898039077711 held at Bank of America, N.A., Charlotte, North Carolina, in the name of ASC Management Services Group, and all funds traceable thereto;

8. account numbered 200003309 held at All American Bank, N.A., Des Plaines, Illinois, in the name of 21 Debit LLC, and all funds traceable thereto;

9. account numbered 200003291 held at All American Bank, Des Plaines, Illinois, in the name of 21 Debit LLC, and all funds traceable thereto;

10. account numbered 200003325 held at All American Bank, Des Plaines, Illinois, in the name of 21 Debit LLC, and all funds traceable thereto;

11. account numbered 200003317 held at All American Bank, Des Plaines, Illinois, in the name of 21 Debit LLC, and all funds traceable thereto;

12. account numbered 0200003358 held at All American Bank, Des Plaines, Illinois, in the name of Kemp & Grzelakowski Ltd., escrow agent, for the benefit of 21 Debit LLC, and all funds traceable thereto;

13. account numbered 23000101 held at All American Bank, Des Plaines, Illinois, in the name of Kemp & Grzelakowski

Ltd., escrow agent, for the benefit of 21 Debit LLC, and all funds traceable thereto;

14. account numbered 32441 held at New City Bank, Chicago, Illinois, in the name of 21 Debit LLC, and all funds traceable thereto;

15. account numbered 32506 held at New City Bank, Chicago, Illinois, in the name of 21 Debit LLC, and all funds traceable thereto;

16. account numbered 32433 held at New City Bank, Chicago, Illinois, in the name of 21 Debit LLC, and all funds traceable thereto;

17. account formerly numbered 953500105 held at Bank One, Utah, N.A., now JPMorgan Chase Bank, N.A., in the name of 4 A Consulting, and all property traceable thereto;

18. account numbered 730666271 held at Whitney National Bank, New Orleans, Louisiana, in the name of Ndeka LLC, and all funds traceable thereto;

19. account numbered 09300053086 held at Mutual of Omaha Bank in the name of ASC Management Services, and all funds traceable thereto;

20. account numbered 148348510 held at Branch Banking & Trust in the name of ASC Management Services Group, an all funds traceable thereto;

21. account numbered 9117162742 held at Citibank, N.A., in the name of ASC Management Services Group, and all funds traceable thereto;

22. account numbered 7600710425 formerly held at Mercantile Bank, Florida, now TD Bank, N.A., in the name of Payonix, and all funds traceable thereto;

23. account numbered 229023757111 held at Bank of America, N.A., in the name of Buyvo Inc., and all funds traceable thereto;

24. account numbered 266086554 held at Citibank, N.A., in the name of ASC Management Services Group, and all funds traceable thereto;

25. account numbered 4203790 held at First Tier Bank, Colorado, in the name of Omega Systems Group, and all funds traceable thereto;

26. account numbered 103678753536 held at US Bank Co. In the name of Omega Systems Group, and all funds traceable thereto;

27. account numbered 0049901761 held at BankUnited, Florida, in the name of Omega Systems Inc., and all funds traceable thereto;

28. account numbered 00052606411 held at M&I Marshall and Ilsley Bank, Milwaukee, Wisconsin, in the name of Omega Systems Group, Inc., and all funds traceable thereto;

29. account numbered 1892947126 held at Comerica Bank, Dallas, Texas, in the name of Tiltware, and all funds traceable thereto;

30. account numbered 1892947134 held at Comerica Bank, Dallas, Texas, in the name of Tiltware, and all funds traceable thereto;

31. account numbered 800801483 held at Comerica Bank, Dallas, Texas, in the name of Raymond Bitar, and all funds traceable thereto; and

32. account numbered 800922552 held at Comerica Bank, Dallas, Texas, in the name of Raymond Bitar, and all funds traceable thereto;

d. All of the defendants' right, title, and interest in funds and other property held in the following foreign accounts:

1. account numbered 27894506164 held at Bank of Montreal, Canada, in the name of Axiom Foreign Exchange Intl, for the benefit of Redfall International, and all funds traceable thereto;

2. Credit Agricole (Suisse) SSA, Switzerland, Account no. 27351910081015, in the name of Sphene (Intl) LTD, and all funds traceable thereto;

3. account numbered 27351910081015 held at Societé Generale Cyprus LTD, Cyprus, in the name of Golden Shores Properties LTD, and all funds traceable thereto;

4. account numbered 7283 held at Wirecard Bank AG, Germany, in the name of Kolyma Corporation, and all funds traceable thereto;

5. account numbered CY1211501001065983USDCACC002 held at FBME Bank LTD, Cyprus, in the name of Triple Seven Inc., and all funds traceable thereto;

6. account numbered 004-411-346034-838 held at Hong Kong and Shanghai Banking Corporation, Hong Kong, in the name of Griting Investments LTD, and all funds traceable thereto;

7. account numbered MT54 SBMT 5550 50000000 1678 2GAU SDO, held at Sparkasse Bank Malta PLC, Malta, in the name of Trinity Global Commerce Corp., and all funds traceable thereto;

8. account numbered 1200402039 held at Banca Privada D'Andorra, Andorra, in the name of Trinity Global Commerce Corp., and all funds traceable thereto;

9. account numbered 0815305390803077 held at Caisse Centrale Des Jardines, a/k/a Caisse Populaire Kahnawake, Canada, in the name of TMC Financial Services, and all funds traceable thereto;

10. at Union Bank of the Philippines, Philippines, held in the name Krores Cards, Inc., and all funds traceable thereto;

11. account numbered 201002907 held at Barclay's Bank, England, Hotwire Financial LLC, and all funds traceable thereto;

12. account numbered GB26BARC20473563472044 held at Barclay's Bank, England, Hotwire Financial LLC, and all funds traceable thereto;

13. at Banque Hapoalim (Suisse) SA, Luxembourg, in the name of Sphene (Intl) LTD, and all funds traceable thereto;

14. account numbered 27554003786 held at Royal Bank of Canada, Canada, in the in the name of Terricorp Inc. d/b/a TLC Global, and all funds traceable thereto;

15. account numbered 27554003760 held at Royal Bank of Canada, Canada, in the in the name of Terricorp Inc. d/b/a TLC Global, and all funds traceable thereto;

16. account numbered 27554001038 held at Royal Bank of Canada, Canada, in the in the name of Terricorp Inc. d/b/a TLC Global, and all funds traceable thereto;

17. account numbered 27551017789 held at Royal Bank of Canada, Canada, in the in the name of Terricorp Inc. d/b/a TLC Global, and all funds traceable thereto;

18. account numbered 000759 held at Basler Kantonal Bank, Switzerland, in the name of Vantage, and all funds traceable thereto;

19. account numbered 2208887 held at Basler Kantonal Bank, Switzerland, in the name of Vantage, and all funds traceable thereto;

20. account numbered CH7300770252534932001 held at Basler Kantonal Bank, Switzerland, in the name of Mailmedia LTD, and all funds traceable thereto;

21. account numbered CH7000770016542254461 held at Basler Kantonal Bank, Switzerland, in the name of Ranston LTD, and all funds traceable thereto;

22. account numbered IE85AIBK93006727971082 held at Allied Irish Bank, Ireland, in the name of Filco Ltd., and all funds traceable thereto;

23. account numbered IE07DABA95151340074209 held at Danske Bank A/S, Denmark, in the name of Pocket Kings LTD, and all funds traceable thereto;

24. account numbered LU811944013080000USD held at Banque Invik, Luxembourg, in the name of Vantage Limited, and all funds traceable thereto;

25. account numbered CH4308755011432400000 held at Pictet and Co., Switzerland, in the name of Rintrade Finance SA, and all funds traceable thereto;

26. account numbered 61-12-9436-6 held at Banco Panameno De La Vivienda SA, Panama, in the name of Disora Investment, Inc., and all funds traceable thereto;

27. account numbered 0011271083 held at Citibank London, England, in the name of Mundial Valores, for the benefit of Disora Investment, Inc., MAM000804, and all funds traceable thereto;

28. account numbered MT14SBMT55505000000011451GAEURO held at Sparkasse Bank Malta, Malta, in the name of Tokwiro Enterprises Enrg, and all funds traceable thereto;

29. account numbered MT23SBMT55505000000001108 held at Sparkasse Bank Malta, Malta, in the name of Blue Water Services LTD, and all funds traceable thereto;

30. account numbered 60092074136054 held at Natwest, Jersey, in the name of Raymond Bitar, and all funds traceable thereto;

31. account numbered 95434087766 held at Natwest, Channel Islands, in the name of Raymond Bitar, and all funds traceable thereto;

32. account numbered 91707289 held at Bank of Ireland, Ireland, in the name of Raymond Bitar, and all funds traceable thereto;

33. account numbered 99045014745206 held at Bank of Scotland Ireland, Inc., Ireland, in the name of Raymond Bitar, and all funds traceable thereto;

34. account numbered 99045014801116 held at Bank of Scotland Ireland, Inc., Ireland, in the name of Pocket Kings Consulting LTD, and all funds traceable thereto;

35. account numbered IE58IPBS9906291390203 held at Irish Permanent Treasury, PLC, in the name of Pocket Kings, and all funds traceable thereto;

36. account numbered 95151380025186 held at National Irish Bank, Ireland, in the name of Raymond Bitar, and all funds traceable thereto;

37. account numbered 95151340062618 held at National Irish Bank, Ireland, in the name of Raymond Bitar, and all funds traceable thereto;

38. account numbered 99022000439546 held at Anglo Irish Bank, Ireland, in the name of Pocket Kings Consulting LTD, and all funds traceable thereto;

39. account numbered 99022000440162 held at Anglo Irish Bank, Ireland, in the name of Pocket Kings Consulting LTD, and all funds traceable thereto;

40. account numbered 26257031 held at Allied Irish Bank, Ireland, in the name of Raymond Bitar, and all funds traceable thereto;

41. account numbered 7262 held at Wirecard Bank AG, Germany, in the name of Raymond Bitar, and all funds traceable thereto;

42. account numbered 7244 held at Wirecard Bank AG, Germany, in the name of Raymond Bitar, and all funds traceable thereto;

43. account numbered 52409 held at Wirecard Bank AG, Germany, in the name of Relecomm Ltd., and all funds traceable thereto;

44. account numbered CH150874101409380000 held at Credit Agricole (Suisse) SA, Switzerland, in the name of Oldford Group LTD, and all funds traceable thereto; and

45. account numbered DE34512308000000007283 held at Wirecard Bank AG, Germany, in the name of Kolyma Corp., and all funds traceable thereto.

FORFEITURE ALLEGATION AS TO COUNT EIGHT

56. As a result of committing the offense of conspiring to commit bank fraud and wire fraud as alleged in Count Eight of this Indictment, ISAI SCHEINBERG, RAYMOND BITAR, BRENT BECKLEY, NELSON BURTNICK, PAUL TATE, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, and CHAD ELIE, the defendants, shall forfeit to the United States, pursuant to 18 U.S.C. § 982, all property constituting or derived from proceeds obtained directly and indirectly as a result of the offense alleged in Count Eight, including but not limited to the following

a. A sum of money of at least $2 billion in United States currency.

b. All of the defendants' right, title, and interest in the entities, businesses, and accounts described in paragraph 55(b), ©, and (d), which are incorporated by reference herein.

FORFEITURE ALLEGATION AS TO COUNT NINE

57. As a result of committing the offense of conspiring to commit money laundering as alleged in Count Nine of this Indictment, ISAI SCHEINBERG, RAYMOND BITAR, SCOTT TOM, BRENT

BECKLEY, NELSON BURTNICK, PAUL TATE, RYAN LANG, BRADLEY FRANZEN, IRA RUBIN, CHAD ELIE, and JOHN CAMPOS, the defendants, shall forfeit to the United States, pursuant to 18 U.S.C. § 982(a)(1), all property, real and personal, involved in the offense alleged in Count Nine, and all property traceable to such property, including but not limited to the following:

a. A sum of money of at least $2.5 billion in United States currency.

b. All of the defendants' right, title, and interest in the entities, businesses, and accounts described in paragraph 55(b), ©, and (d), which are incorporated by reference herein.

Substitute Assets Provision

58. If any of the forfeitable property described in paragraphs 55 through 57 above, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third person;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to 18 U.S.C. § 982(b) and 21 U.S.C. § 853(p), to seek forfeiture of any other property of said defendant up to the value of the above forfeitable property.

(Title 18, United States Code, Sections 981, 982, and 1955; Title 21, United States Code, Section 853; Title 28, United States Code, Section 2461.)

FOREPERSON

PREET BHARARA
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v -

ISAI SCHEINBERG,
RAYMOND BITAR,
SCOTT TOM,
BRENT BECKLEY,
NELSON BURTNICK,
PAUL TATE,
RYAN LANG,
BRADLEY FRANZEN,
IRA RUBIN,
CHAD ELIE, and
JOHN CAMPOS,

Defendants.

INDICTMENT

S3 10 Cr. 336 (LAK)

(18 U.S.C. §§ 371, 1349, 1955, 1956(h), and 2.)

PREET BHARARA
United States Attorney.

A TRUE BILL

Foreperson.