

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
) Criminal Action No.
) 05-00344-01-CR-W-ODS
)
)
v.)
)
GARY EYE,)
)
) Defendant.

REPORT AND RECOMMENDATION TO DENY
DEFENDANT'S MOTION TO DISMISS COUNTS SEVEN AND EIGHT

Before the court is defendant's motion to dismiss counts seven and eight on the grounds that (1) Congress directed 18 U.S.C. § 1519 primary at the destruction of records in bankruptcy proceedings and the government has improperly expanded this statute, and (2) § 1519 is unconstitutionally vague. I find that neither statute charged in counts seven and eight is unconstitutionally vague, and both apply to the conduct charged in this case. Therefore, defendant's motion to dismiss counts seven and eight should be denied.

I. BACKGROUND

On September 29, 2005, an indictment was returned charging defendant with two counts of interference with federally protected activities, in violation of 18 U.S.C. § 245(b)(2)(B); one count of using or discharging a firearm

during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii); two counts of using or discharging a firearm during a crime of violence causing murder, in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and (j)(1); one count of tampering with a witness, in violation of 18 U.S.C. §§ 1512(a)(1)(C) and (a)(3)(A); one count of obstruction of justice, in violation of 18 U.S.C. § 1519; and one count of using fire to commit a felony, in violation of 18 U.S.C. § 844(h)(1). A superseding indictment charging the same offenses was returned on May 17, 2006.

Defendant filed the instant motion to dismiss counts seven and eight of the indictment on March 13, 2006 (document number 57). Defendant argues that count seven is unconstitutional and, because count eight "piggybacks" count seven, it must also be dismissed.¹

On April 14, 2006, the government filed a response to defendant's motion (document number 94). The government argues that § 1519 is constitutional and applies to the charged conduct.

¹Defendant does not appear to have an independent basis for arguing that count eight be dismissed. Defendant's argument is that "Count Eight purports to piggy back onto Count Seven. If Count Seven is defective for reasons argued above, then Count Eight fails".

II. LANGUAGE OF THE STATUTE

Title 18, United States Code, Section 1519 reads as follows:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

III. COUNTS SEVEN AND EIGHT OF THE INDICTMENT

Counts seven and eight of the superseding indictment read as follows:

COUNT SEVEN

On or about March 9, 2005, in Kansas City, Jackson County, in the Western District of Missouri, defendants, GARY EYE and STEVEN SANDSTROM, while aiding and abetting one another, knowingly altered, destroyed, and mutilated a tangible object, namely a 2003 Red Dodge Intrepid (VIN #2B3HD56G33H534636), with the intent to impeded, obstruct, and influence the possible investigation of a matter and matters within the jurisdiction of a department or agency of the United States, those matters being the offenses charged in Counts One through Six of this Superseding Indictment.

All in violation of Title 18, United States Code, Section 1519, and Section 2.

COUNT EIGHT

On or about March 9, 2005, in Kansas City, Jackson County, in the Western District of Missouri, defendants, GARY EYE and STEVEN SANDSTROM, while aiding

and abetting one another, knowingly used fire to commit a felony prosecutable in a court of the United States, namely the offense charged in Count Seven of this Superseding Indictment and incorporated herein by reference.

All in violation of Title 18, United States Code, Section 844(h)(1), and Section 2.

III. MOTION TO DISMISS

It is well established that an indictment is sufficient if it (1) contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and (2) enables him to plead an acquittal or conviction in bar of future prosecutions. Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. McMahan, 744 F.2d 647, 650 (8th Cir. 1984). The sufficiency of the indictment is to be judged by practical, and not by technical, considerations. Hayes v. United States, 296 F.2d 657, 667 (8th Cir. 1961), cert. denied, 369 U.S. 867 (1962). An indictment ordinarily is held sufficient unless it is so defective that by no reasonable construction can it be said to charge the offense for which the defendant was convicted. United States v. Young, 618 F.2d 1281, 1286 (8th Cir.), cert. denied, 449 U.S. 844 (1980); United States v. Ivers, 512 F.2d 121, 123 (8th Cir. 1975).

It is generally sufficient that the indictment sets forth the offense in the words of the statute itself, so

long as those words fully, directly, and expressly, without uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. Hamling v. United States, 418 U.S. at 117; United States v. McKnight, 799 F.2d 443, 445 (8th Cir. 1986); United States v. Opsta, 659 F.2d 848, 850 (8th Cir. 1981). However, the indictment does not have to follow the exact wording of the statute. United States v. Ivers, 512 F.2d at 123.

A. TRACKING THE LANGUAGE OF THE STATUTE

Count seven clearly tracks the language of 18 U.S.C. § 1519. The indictment alleges that defendant:

- (1) knowingly
- (2) altered, destroyed, and mutilated
- (3) a tangible object
- (4) with the intent to impede, obstruct, and influence
- (5) the possible investigation of a matter and matters within the jurisdiction of a department or agency of the United States.

The indictment further identifies the tangible object, i.e., a red Dodge Intrepid, VIN #2B3HD56G33H534636; and it identifies the investigation by incorporating counts one through six of the superseding indictment (interference with the federally-protected activities of William McCay, and tampering with a witness (McCay), by using a firearm to

shoot Mr. McCay twice and murdering him. Finally, the superseding indictment in count eight describes the manner in which defendant is alleged to have altered, destroyed, and mutilated the Intrepid, that is, by burning it.

B. ELEMENTS OF SECTION 1519

When the indictment tracks the language of the statute, a challenge on the basis of vagueness can be met only when those words fully, directly, and expressly, without uncertainty or ambiguity, set forth all the elements necessary to constitute the offense charged.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Engine Manufacturer's Ass'n v. South Coast Air Quality Management District, 541 U.S. 246, 252 (2004), quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985). Unless exceptional circumstances dictate otherwise, when the court finds the terms of a statute unambiguous, judicial inquiry is complete. In re Operation of Missouri River System Litigation, 418 F.3d 915, 917 (8th Cir. 2005), cert. denied, 126 S. Ct. 1568 (2006).

Defendant is correct that there are no published cases dealing with the alleged vagueness of § 1519. However, in United States v. Velasco, 2006 WL 1679586 (M.D. Fla., June 14, 2006), the court denied a motion to dismiss an indictment charging a violation of § 1519 as being unconstitutionally vague. The court found that § 1519 is clear on its face, contains easily understandable terms and lists prohibited activity, and contains a specific scienter² requirement. I find that holding persuasive.

Defendant's argument that Congress intended § 1519 to apply only when documents are destroyed in bankruptcy cases is not supported by any authority and is contrary to the recent use of this statute in other jurisdictions. See In re Grand Jury Investigation, 445 F.3d 266, 275-76 (3rd Cir. 2006) (Jane Doe was committing the crime of obstruction of justice in violation of § 1519 by participating in a scheme to delete emails on computers); United States v. Jackson, 2006 WL 1737193 (9th Cir., June 20, 2006) (Jackson, a criminal investigator employed by the Federal Protective

²One factor in determining whether a statute is unconstitutionally vague is the existence of a scienter requirement. A scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice that the conduct is proscribed. Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

Service, was charged with falsifying records in a federal investigation, in violation of § 1519, by omitting a confession made by another FPS officer from an official investigation report); United States v. Vega, 2006 WL 1674155 (3rd Cir., June 19, 2006) (Testimony at trial indicated that, following the arrest of Ms. Ramirez and Ms. Lora, Mr. Vega instructed Ms. Ramirez to "break" the "document." The court noted that this statement could reasonably be construed as advising Ms. Ramirez to destroy the I-94 that she had received from Mr. Vega, a document that was relevant to a pending criminal investigation, and its destruction would have violated § 1519); United States v. Velasco, 2006 WL 1679586 (M.D. Fla., June 14, 2006) (defendant created a back-dated employment contract to justify a kick-back payment received).

Defendant acknowledges in his motion that the statute at issue here became effective on July 30, 2004. Therefore, it is not surprising that there have only been a few cases to date dealing with this statute. However, defendant offers no legal authority for his argument that this statute does not apply to the burning of a car used in a murder merely because in the two years it has been on the books, no other person has been charged with that same set of facts.

Finally, defendant provides the following argument in support of his assertion that § 1519 applies only to white-collar bankruptcy cases like Enron: A man finds a dead American Eagle, he cuts the talons off the Eagle and destroys the Eagle to avoid detection of the misdemeanor crime of unlawful possession of Eagle talons. Defendant argues that Congress could not have intended this statute to provide a felony punishment for covering up a misdemeanor; however, read in its simplest terms, it does just that.

To expand upon defendant's example, suppose Jonathan J. Jones, Jr., is the only witness to the severing of the Eagle talons, and when he is called to testify at the trial, he falsely testifies that he observed nothing. Although the trial against the original defendant was for a misdemeanor, Jonathan J. Jones, Jr., can be prosecuted for the felony offense of perjury under 18 U.S.C. § 1623. Such a factual scenario makes § 1519 no more vague than § 1623.

Finally, the government quotes the comments of Senator Leahy, which make absolutely clear Congress's intent to criminalize the conduct at issue in this case:

Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede, or influence the investigation or proper administration of any matter, and such matter is within the jurisdiction

of an agency of the United States, or such acts done either in relation to or in contemplation of such a matter or investigation. This statute is specifically meant not to include any technical requirement, which some courts have read into other obstruction of justice statutes³, to tie the obstructive conduct to a pending or imminent proceeding or matter. It is also sufficient that the act is done "in contemplation" of or in relation to a matter or investigation. It is also meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiry, regardless of their title. . . . It also extends to acts done in contemplation of such federal matters, so that the timing of the act in relation to the beginning of the matter or investigation is also not a bar to prosecution.

107 S. Rpt. 146, at 10-11 (May 6, 2006).

Because the indictment clearly tracks the language of § 1519 and clearly and unambiguously sets forth all the elements necessary to constitute the offense intended to be punished, and because the legislative history of the statute supports the application of that statute to the conduct

³The legislative history expresses congressional frustration with certain pre-existing obstruction statutes because their applicability is limited to corporate matters. The legislative history cites United States v. Frankhauser, 80 F.3d 641 (1st Cir. 1996), in support of the effort to expand the reach of federal obstruction statutes. Frankhauser was a matter based wholly on a civil rights violation. In that case, the court overturned the obstruction conviction under 18 U.S.C. § 1503 due to insufficient evidence that the defendant knew a grand jury proceeding was pending.

charged in this indictment, defendant's motion to dismiss count seven should be denied.

C. AUTHORITY OF CONGRESS TO ENACT § 1519

Defendant's final argument is that Congress cannot criminalize purely intrastate criminal acts merely because of the intent of the perpetrator, citing United States v. Lopez, 514 U.S. 549 (1995). The Supreme Court in Lopez found that possessing a firearm at a school has no more than a minimal impact on interstate commerce.

However, as the government points out, Congress enacted this statute pursuant to the Necessary and Proper Clause of the Constitution and not the Commerce Clause. Congress has the authority to enact statutes to criminalize conduct which may impact federal law enforcement and the federal judicial process, and to protect the integrity of federal functions and the safety of federal officers. See M'Culloch v. Maryland, 17 U.S. (4 Wheat) 316, 417 (1819) (finding the Necessary and Proper Clause authorized Congress to enact statutes criminalizing falsifying court records or perjury because such laws are "certainly conducive to the due administration of justice."); United States v. Sabri, 326 F.3d 937, 950 (8th Cir. 2003) (statute prohibiting bribery intended to influence an organization that receives federal

funds was legitimate exercise of Congress's power under the Necessary and Proper Clause); United States v. Dittrich, 100 F.3d 84, 87 (8th Cir. 1996) ("A law making it a crime to steal property from a Post Office is well within even the narrowest construction of the Necessary and Proper Clause."), cert. denied, 520 U.S. 1178 (1997); Dropps v. United States, 34 F.2d 15, 18 (8th Cir. 1929) ("That Congress has power under the constitution to enact a law punishing bribe taking on the part of officers of the United States and others acting in an official capacity for the United States is patently within its general powers to make all laws necessary and proper for carrying into execution the particular powers specifically conferred upon it."), cert. denied, 281 U.S. 720 (1930).

Therefore, defendant's argument that Congress exceeded its authority in enacting § 1519 is without merit and his motion to dismiss on this basis should be denied.

IV. COUNT EIGHT

Defendant states in his motion at page 5:

Count Eight purports to piggy back onto Count Seven. If Count Seven is defective for reasons argued above then Count Eight fails based on the plain language of the section which states "(h) Whoever (l) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States [is guilty of an offense]." The gist of this Count also revolves

around the burning of the vehicle that was allegedly used in the commission of the murder of the victim.

Defendant has no independent basis for challenging count eight other than that if count seven fails, then count eight must also fail. As discussed at length above, count seven does not fail; therefore, count eight will not either.

Title 18, United States Code, Section 844(h)(1), the statute named in count eight, is a generic penalty section that draws its constitutional authority from the requirement that the underlying felonies can be prosecuted "in a court of the United States." United States v. Walker, 47 Fed. Appx. 639 (4th Cir. 2002).

Because defendant's sole argument as to count eight is based on the unconstitutionality of count seven, and as discussed above, count seven is constitutional, defendant's motion to dismiss count eight should also be denied.

IV. CONCLUSION

Based on all of the above, I find that (1) count seven of the indictment sets forth the offense in the words of § 1519 itself; (2) the words of the statute fully, directly, and expressly, without uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; (3) the legislative history of §

1519 demonstrates its applicability to the charged conduct; (4) § 1519 is a valid exercise of Congress's power under the Necessary and Proper Clause; and (5) § 844(h)(1) does not exceed Congress's power because the underlying felony is one that can be prosecuted in a court of the United States. I further find that counts seven and eight contain the elements of the offenses charged and fairly inform the defendant of the charges against which he must defend, and enable him to plead an acquittal or conviction in bar of future prosecutions. Therefore, it is

RECOMMENDED that the court, after making an independent review of the record and the applicable law, enter an order denying defendant's motion to dismiss counts seven and eight.

Counsel are advised that, pursuant to 28 U.S.C. § 636(b)(1), each has ten days from the date of receipt of a copy of this report and recommendation to file and serve specific objections.

1/s/ Robert E. Larsen
ROBERT E. LARSEN
United States Magistrate Judge

Kansas City, Missouri
August 14, 2006