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

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

MOTION TO DISMISS RELATED COUNTS SEVEN AND EIGHT OF THE INDICTMENT FOR FAILURE TO STATE AND OFFENSE WITH SUGGESTIONS IN SUPPORT

COUNT SEVEN ARGUMENT:

Count VII of the Indictment alleges that defendant violated 18 USC, Section 1519 by knowingly altering, destroying, and mutilating a Dodge vehicle. This vehicle is alleged to have been the vehicle used to commit the offense charged elsewhere in the indictment, that is, the murder of William McCay.

The statute captioned "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy" became effective on July 30, 2004 and is directed primarily at the destruction records in bankruptcy proceedings and reflects concern by congress over the shredding of records in the Enron case. The government here seeks to greatly expand this statute and make it an applicable second charge in virtually any federal prosecution imaginable.

The statute provides:

> 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.

A West Law search revealed only one unreported district court case where this statute is even discussed and that was in connection with a bankruptcy proceeding and that opinion is of no benefit or guidance here. See Carpenter v. Young ,Not Reported in F.Supp.2d, 2004 WL 1858353 (E.D.Pa.,2004).

First, defendant submits that the statute is unconstitutionally vague and overbroad in that if the Grand Jury is correct, then the statue criminalizes virtually every act associated with or connected with any conduct that might provide the basis for a future federal criminal investigation. This of course could not possibly have been Congress's intent.

Some years ago the now retired Chief United States Magistrate Judge Calvin K. Hamilton had before him a well publicized case involving a Scout Master who found a dead America Eagle along or near some railroad tracks. He cut the talons off the Eagle and concealed and covered up his heinous act and impeded a potential federal game warden investigation by disposing of a tangible object, the legless body of America's national symbol, by discarding it in a matter unbefitting. He

was later confronted by a Game Warden and charged with a federal misdemeanor crime of unlawful possession of eagle talons. The Grand Jury in this case would now have us believe that such a misdemeanor crime now subjects the perpetrator to an additional felony charge under 18 USC 1519 for which he can be imprisoned up to 20 years.

Moreover, under the Grand Jury's interpretation, assuming it could be proved it was discussed or done with intent, the mere contemplation by a person committing any criminal act, however misguided that contemplation might be, would constitute a separate and distinct federal criminal offense whether such a real federal offense existed or not. It would thus reach pure intrastate criminal acts with no other federal criminal jurisdictional basis.

The Fifth Amendment guarantees every citizen the right to due process. Springing from this right is the concept that vague statutes are void. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Id. "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32-33 (1963). "[L]aws [must]

give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." United States v. Mazurie, 419 U.S. 544, 550 (1975).

In determining whether a statute is unconstitutionally vague on based on facts at hand, courts must apply a two-part test. First, the statute must provide adequate notice of the proscribed conduct. Kolender v. Lawson, 461 U.S. 352, 357 (1983). Second, the statute must not lend itself to arbitrary enforcement. Id. at 358. As argued above, this statute, particularly as applied here, violates both parts of this test because the statute does not provide adequate notice of proscribed conduct and because it allows for arbitrary enforcement.

A penal statute is void if it does not sufficiently define a criminal offense so that ordinary people can understand what conduct is prohibited. Kolender, 461 U.S. at 357. This inquiry looks at what a person of "common intelligence" would "reasonably" understand the statute to proscribe, not what the particular defendant understood the statute to mean. United States v. Washam, 312 F.3d 926 (8th Cir. 2002) e.g., See United States v. Wilson, 133 F.3d 251 (4th Cir. 1998) (clean water

regulation that defined any water that "could" affect intrastate commerce was unconstitutionally too broad).

Finally, insofar as the statute purports to reach potential criminal acts that are purely intrastate in nature but criminalized federally because of the intent of the perpetrator, the statue in unconstitutional based on United States v. Lopez, 514 U.S. 549 (1995). Lopez is the of the land mark decision declaring that the purely intrastate activity of possession of a gun in a school zone cannot be federally criminalized. Likewise, a purely intrastate criminal act is not a "matter within the jurisdiction or agency of any department or agency of the United States."

COUNT EIGHT ARGUMENT:

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 (1) 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. Again, there is an attempt by the Grand Jury to reach a purely intrastate offense, the burning of a Dodge vehicle, which was clearly not used in nor which affected interstate commerce, activity which would not otherwise be proscribed by 18 U.S.C., Section 844(i). See United

States v. Monholland, 607 F.2d 1311 (10th Cir. 1979) which holds that 18 U.S.C. 844(i) does not reach the criminal act of bombing the privately owned vehicle of a judge who drove the vehicle on U.S. highways and roads to and from judging duties. This Count too should be dismissed.

WHERFORE, defendant moves the Court to dismiss Count Seven of the Indictment.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was caused to be emailed to David Ketchmark, Assistant US Attorney, WDMo, Kansas City, Missouri and other counsel in the case via the electronic document filing system on March 13, 2006.

/s/
JOHN R. OSGOOD