

Appeal Nos. 07-10528 and 07-10534

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

JEFFREY A. KILBRIDE and JAMES ROBERT SCHAFFER

Defendants-Appellants.

On Appeal from an Order of the United States District Court
For the District of Arizona
Hon. David G. Campbell, Presiding
Case Nos. CR-05-00870-002-PHX-DGC and CR-05-00870-003-PHX-DGC

APPELLANTS' JOINT REPLY BRIEF

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I. INTRODUCTION

Despite 81 pages and three large appendices, the Government fails to address one simple fact: never, in the 35-year history of the *Miller* test, has a jury been instructed to consider ***both*** their own community standards and *lay witness opinion* testimony from outside their community. Yet, that is exactly what happened here. The Government has not pointed to a single case in which a similar hybrid instruction was given. The Government cannot do this because such a case does not exist. Jury instruction no. 36 is plainly erroneous and Defendants' convictions should be reversed.

The Government further misses the mark in arguing that the CAN-SPAM Act is not unconstitutionally vague. The Government fails to address Defendants' contention that the utter lack of statutory or judicial definition of the term "impair" allows arbitrary and discriminatory enforcement by government officers. The CAN-SPAM Act provides absolutely no guidance as to what *level of impairment* gives rise to criminal, as opposed to civil, liability and its definition is completely subjective. Therefore, Section 1037 is unconstitutionally vague on its face and as applied, and this Court should reverse Defendants' convictions.

Finally, the Government argues that Defendants' money laundering conspiracy convictions should stand because the Government was not required to prove either an overt act in furtherance of the conspiracy, or to obtain convictions

of anyone on the predicate offenses underlying the object money laundering offense. Defendants do not disagree that this is the law. However, for purposes of *all* counts related to obscenity, the jury *was* required to find that the images were legally obscene. The jury found in the affirmative based on an unconstitutional instruction. Moreover, because Section 1037 is unconstitutionally vague on its face and as applied, Defendants could not have known that the property involved represented proceeds of “some form of unlawful activity.” Therefore, this Court should reverse Defendants’ money laundering conspiracy convictions.

II. DISCUSSION

A. The Community Standards Jury Instruction Was Plainly Erroneous.

1. The Community Standards Jury Instruction Did Not Properly Define The Relevant Community.

Jury instruction 36 allowed the jurors to consider not only their knowledge of their own community’s standards, but also evidence of standards in other communities. This evidence came in the form of several lay witnesses from around the country, who testified as to their personal opinion of the images at issue. In addition, the Government introduced several hundred thousand email complaints to America Online and the Federal Trade Commission, some of which complained that the material was “filthy.” However, the cases make very clear that such evidence invades the province of the jury, because jurors must apply their own knowledge of their local community. *See e.g., United States v. Peraino*, 645

F.2d 548, 553 (6th Cir. 1981). “Inherent in *Miller* and *Hamling* is the idea that jurors are drawing on personal knowledge of their own community.” *Id.*, quoting *United States v. Mohney*, 476 F.Supp. 421, 426-427 (D.Hawaii 1979) (“If jurors cannot draw on personal knowledge, the idea of local community standards is a totally useless concept. A jury from the District of Hawaii cannot determine the community standards of the Eastern District of Michigan”). And the only appropriate evidence of standards in other communities outside of the jurors’ personal experience is expert testimony. *See e.g., United States v. Thomas*, 613 F.2d 787, 792 (10th Cir. 1980), *cert. den. Thomas v. United States*, 449 U.S. 888 (1980). Taken to its logical conclusion, the Government’s argument will lead to chaos in the courtroom, with both sides calling lay witness after lay witness to testify as to their personal opinion of the images at issue.

The Government fails to point to even one case approving the use of lay witness testimony (or email correspondence) to evidence standards in other communities throughout the country. In fact, the cases and sources the Government cites make clear that the community is **local**: *United States v. Easley*, 927 F.2d 1442, 1449 (8th Cir. 1991) (“[t]he ‘community’ you must consider in deciding these questions is the District of Minnesota – in other words, the entire state of Minnesota”); *United States v. Cohen*, 583 F.2d 1030, 1042 (8th Cir. 1978) (“in this case the applicable community standards . . . are those of the Northern

District of Iowa”); *Nitke v. Ashcroft*, 253 F.Supp. 2^d 587, 601 (SDNY 2003) (“the tests used to determine whether material is sufficiently sexual and offensive to constitute obscenity are explicitly linked to the geography of the prosecution”); Pattern Crim. Jury Instr. 11th Cir., OI 53 (“Contemporary community standards are those accepted in *this* community as a whole; that is to say, by society at large or people in general, and not by what some segments or groups of persons may believe this community ought to accept or refuse to accept”) (emphasis added).¹

The bottom line is that the jury should never have been instructed to consider evidence of community standards from outside the local community. Defendants respectfully request that this Court reverse the convictions.

2. **A Nationwide Community Instruction Is Appropriate In Internet Cases.**

The Government opposes the imposition of a nationwide community standards instruction in internet cases because it is unprecedented. That is precisely the point. This case is different from every other obscenity prosecution brought before this or any other court.

¹ The Government cited these cases because, like *Hamling*, the instructions therein had the language “that is to say by society at large or people in general.” However, this language was included in instructions that made clear to the jury the community was local. *See also Hamling*, 418 U.S. at 104-105 (“A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage *from which he comes* for making the required determination . . .”) (emphasis added).

The Government contends that the law is “sender beware;” that a person is responsible for knowing the standards of the community into which he sends an email. The Government bases this argument on cases involving physical mail or telephone communications. However, this ignores the peripatetic reality of cyberspace. When you hit the send button on your personal computer, laptop or cell phone, you cannot possibly know where that email will ultimately be accessed. Will it be in West Hollywood, California, or in Provo, Utah? The picture in your email may be relatively innocuous in San Francisco, but if a recipient happens to open it on his laptop in Provo, Utah, then should that community’s standards apply as well? Unlike mail boxes that are tied to a geographic location, email inboxes may be accessed anywhere in the world. To its credit, the District Court recognized the inherent contradiction in applying local community standards to worldwide communications. But in attempting to fit old law to new facts, the court created a clearly erroneous and unprecedented hybrid instruction. This Court should now clarify the law and prevent future unconstitutional applications of the antiquated law to new and novel issues.

B. The Government Fails To Adequately Address Defendants' Argument That 18 U.S.C. Sections 1037 (a)(3) and (4) are Unconstitutionally Vague.

The Government devoted 22 pages of its voluminous brief to Defendants' vagueness challenges to the CAN-SPAM Act. In 22 pages, the Government fails to address Defendants' main contention: that the utter lack of statutory or judicial definition of the term "impair" allows arbitrary and discriminatory enforcement by government officers. The CAN-SPAM Act provides absolutely no guidance as to what *level of impairment* gives rise to criminal liability and its definition is completely subjective. *See United States v. Williams*, ___ U.S. ___, 128 S.Ct. 1830, 1846 (2008). If law enforcement encountered any difficulty whatsoever in identifying, locating or responding to a person who initiated the electronic mail message, whether it was a delay of five minutes, or subpoenaing the records of a private domain registrar, then that initiator could be criminally liable. Therefore, *both* §§ 1037(a)(3) and (a)(4) (collectively referred to herein as "Section 1037") are unconstitutionally vague.

Rather than face this fact head on, the Government attempts an artful obfuscation, arguing at length that Section 1037 is a content-neutral time, place and manner restriction that does not implicate anonymous speech and regulates only misleading commercial speech. However, Defendants do not argue that Section 1037 is unconstitutional because it impermissibly regulates commercial or

anonymous speech. Defendants do argue that they have *standing* to challenge Section 1037 as impermissibly vague on its face in violation of due process. This Court's first task in evaluating Defendants' facial vagueness challenge is determining whether Section 1037 implicates constitutionally protected conduct. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 (1982). Section 1037 implicates both constitutionally protected anonymous speech and commercial speech. In its opposition brief, the Government expresses "doubt" as to whether an individual or company would want to speak anonymously. According to the Government, no legitimate email advertiser would want to remain anonymous because that would impair a consumer's ability to consummate the transaction. This argument ignores a basic fact of e-commerce: almost all email marketing is done through affiliates, or third parties, rather than directly through the purveyor of the product or service. As set forth in Defendants' moving brief, there are a number of reasons why an "actual registrant" may wish to remain anonymous, including not wanting to be associated with products or websites that other members of the community may view as distasteful or offensive, or because they do not wish to be associated with their affiliates' political or social views. Therefore, Section 1037 implicates constitutionally protected anonymous speech.

The Government's lengthy commercial speech analysis misses the mark entirely. Section 1037 explicitly regulates false or misleading header information (an email's "to," "from" and "subject" lines). However, there is more to a commercial email message than the header information. The actual content of the message could contain absolutely truthful information concerning products or services that is not misleading at all. A person who exercises his constitutional right to speak anonymously while advertising perfectly legitimate consumer transactions could be subject to criminal liability. Therefore, Section 1037 implicates the First Amendment and Defendants have standing to challenge it on its face.

Separately, in arguing against Defendants' vagueness as applied challenge, the Government again fails to address Defendants' arguments in the moving brief. Rather than explain why not one person ever attempted to contact Mr. Kilbride at his valid, working email address listed in the "WHOIS" information for the domains at issue, the Government argues that Defendants' speech raises no constitutional concerns because it was obscene. This is a red herring. Vagueness challenges to statutes that do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand. *United States v. Powell*, 423 U.S. 87, 92 (1975); *United States v. Mazurie*, 419 U.S. 544, 550 (1975). Whether or not the speech at issue is obscene is irrelevant. The fact remains that if someone

had contacted Mr. Kilbride through his working email address, and if he had responded, then there would have been no issue of impairment in identifying, locating or responding to an initiator of the message.² Therefore, Section 1037 is unconstitutionally vague as applied to Defendants, and this Court should reverse the convictions for violations of the CAN-SPAM Act and conspiracy to violate that Act.

C. This Court Should Reverse Defendants' Convictions For Conspiracy To Commit Money Laundering.

The Government argues that Defendants' money laundering conspiracy convictions should stand because the Government was not required to prove either an overt act in furtherance of the conspiracy, or to obtain convictions of anyone on the predicate offenses underlying the object money laundering offense.

Defendants do not disagree that this is the law. However, for purposes of *all* counts related to obscenity, the jury *was* required to find that the images were legally obscene. Without a finding that the images were obscene there can be no criminal liability whatsoever. Because the jury was improperly instructed on the

² Kilbride's correct email address, Ganymede1@hushmail.com, was listed in the WHOIS information for each domain. (ER II, 157:24-159:12; 160; 170:21-171:8; ASER III, 723:2-8; 731-736). Sometime around June 2004, after Zeller investigated the AOL complaints and Schaaf began his investigation, Kilbride began using gml@ganymedemarketing.com, and that email address was also provided to the domain registrar and reflected in the WHOIS information. (ASER III, 720:9-10; 721-722; 723:8-11; 724:21-25; 725-728; 730:9-10).

elements of obscenity resulting in a constitutional error, any conviction that is based on the images being legally obscene must be reversed and remanded for retrial with a proper obscenity instruction. The Government has not cited and cannot cite to any case in which a conviction for conspiracy to commit money laundering based on obscenity was obtained *without* a finding that the material at issue was legally obscene. It just does not exist. Yet, this is exactly the outcome the Government advocates.

In order to establish that a defendant conspired to launder monetary instruments in violation of 18 U.S.C. § 1956(h), the Government must show that the Defendants agreed to: 1) conduct a financial transaction; 2) *involving the proceeds of specified unlawful activity*; 3) knowing that the property involved in the transaction represented the proceeds of some form of unlawful activity; and 4) knowing that the financial transaction was designed in whole or in part to conceal or disguise the nature, source, location, ownership, or control of those proceeds. *United States v. Henry*, 325 F.3d 93, 103 (2nd Cir. 2003) (emphasis added).

In this case, the alleged specified unlawful activity was the distribution of obscene material in violation of 18 U.S.C. §§ 1462 and 1465. (SER I, 57). Therefore, the Government was required to prove that the proceeds at issue derived from images that were, in fact, obscene. *Hamling*, 418 U.S. at 120 (“To prove the element of scienter [for a substantive obscenity violation] . . . the inquiry “is

whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offence is complete. . .

“). The Government itself cites a case where the same community standards applicable to substantive obscenity violations apply to conspiracy to commit obscenity violations. *See e.g., United States v. Cohen*, 583 F.2d 1030, 1041 (8th Cir. 1978). Therefore, whether the Government alleged substantive violations of §§ 1462 or 1465, or a conspiracy to violate those sections, or a money laundering offense based on obscenity violations, or a conspiracy to commit money laundering based on obscenity violations, the jury must find that the materials at issue are legally obscene.

Moreover, even assuming that the jury did not have to find the materials at issue obscene, this Court should still reverse Defendants’ conspiracy convictions. The Government was required to prove that Defendants knew that the property involved in the alleged transactions represented the proceeds of some form of unlawful activity; in this case, CAN-SPAM violations. (SER I, 57). However, because Section 1037 is unconstitutionally vague on its face and as applied, Defendants could not have known that the property involved represented proceeds of some form of unlawful activity. *See e.g., United States v. Rosen*, 520 F.Supp.2d 786, 792 (E.D.Va. 2007).

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2009, I electronically filed Appellants' Joint Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by first-class mail, postage prepaid, one copy to Jill Trumbull-Harris, Esq., U.S. Department of Justice, U.S. Attorney's Office for the Northern District of Indiana, 5400 Federal Plaza, Hammond, Indiana 46320; and one copy to Bonnie L. Kane, Esq., U.S. Department of Justice, 1400 New York Avenue, N.W., Washington, D.C. 20530, Attorneys for Plaintiff-Appellee the United States of America.

/S/
Colin Hardacre