# IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA, )

)

Plaintiff, )

)

v. ) No. 11 CR 401

) Judge John W. Darrah

EUGENE KLEIN, )

)

Defendant. )

# DEFENDANT'S MOTION TO DISMISS COUNT ONE

**FOR FAILURE TO CHARGE AN OFFENSE AND FOR VAGUENESS**

Defendant, **EUGENE KLEIN**, by and through his attorneys, **THOMAS ANTHONY DURKIN, JANIS D. ROBERTS**, and **JOHN D. CLINE**, respectfully moves for an Order dismissing Count One for failure to charge an offense and because the underlying statute – the conspiracy to defraud the United States prong of 18 U.S.C. § 371 – is void for vagueness as applied in this case. Count One represents an unprecedented effort to stretch both § 371 and the underlying Special Administrative Measures (SAMs) far beyond their language and purpose to prosecute a prison priest. Count One seeks to punish Fr. Klein.– who is not a party to the SAMs– for alleged conduct that has nothing to do with the only lawful purpose of the SAMs: preventing inmates from fomenting violence and terrorism. The prosecution under Count One represents an abuse both of § 371 and of the controversial SAM program.

# ARGUMENT

1. **INDICTMENTS FOR CONSPIRACY TO DEFRAUD THE UNITED STATES MUST BE CAREFULLY SCRUTINIZED.**

Because the offense of conspiracy to defraud the Unites States is so inherently vague and susceptible to tactical manipulation by the government, courts have long subjected indictments charging that offense to careful scrutiny.

More than sixty years ago, Justice Jackson declared that "[t]he modern crime of conspiracy [under § 371] is so vague that it almost defies definition," and he warned that "loose practice as to this offense constitutes a serious threat to fairness in our administration of justice." *Krulewitch v. United States*, 336 U.S. 440, 455-58 (1949) (Jackson, J., concurring). Ten years later, Professor Goldstein declared that under § 371 "'conspiracy' and 'defraud' have assumed such broad and imprecise proportions as to trench [on] constitutional standards against vagueness and double jeopardy." Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 408 (1959). After carefully analyzing the unprincipled expansion of the federal conspiracy to defraud offense, he concluded that until the scope of that offense was limited, "'conspiracy to defraud the United States' will remain on the books as Kafkaesque crime, unknown and unknowable except in terms of the facts of each case--and even then, not until the verdict has been handed down." *Id.* at 463; *see, e.g., United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989) (describing the Goldstein article as a "thorough and still relevant discussion of section 371").

The Second Circuit has echoed the concerns of Justice Jackson and Professor Goldstein.

Reversing a conviction for conspiracy to defraud the United States, the court declared:

[t]he terms "conspiracy" and "defraud," when used together, have a peculiar susceptibility to a kind of tactical manipulation which shields from view very real

infringements on basic values of our criminal law . . . Accordingly, conspiracy- to-defraud prosecutions are scrutinized carefully.

*United States v. Rosenblatt*, 554 F.2d 36, 40 (2d Cir. 1977) (quotations omitted). Given the breadth of the "defraud" prong of § 371, "there is a danger that prosecutors may use it arbitrarily to punish activity not properly within the ambit of the . . . criminal sanction." *United States v. Shoup*, 608 F.2d 950, 955-56 (3d Cir. 1979) (footnote omitted).

Count One of the indictment must be read in light of six decades of judicial caution against a broad construction of conspiracy-to-defraud clause of § 371. As the Fifth Circuit has recognized, "It is [the courts'] affirmative duty to carefully scrutinize indictments under the broad language of the conspiracy statutes because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the guilty." *United States v. Porter*, 591 F.2d 1048, 1057 (5th Cir. 1979); *see United States v. Caldwell*, 989 F.2d 1056, 1061 (9th Cir. 1993) (noting potential breadth of § 371 "defraud" prong). Only if the defendant's alleged conduct "plainly and unmistakably" falls within the proscription of § 371 may the indictment be sustained. *United States v. Gradwell*, 243 U.S. 476, 485 (1917); *see, e.g., United States v. Haga*, 821 F.2d 1036, 1038 (5th Cir. 1987).

Three rules of statutory interpretation compel a narrow reading of 18 U.S.C. § 371. First, under the rule of lenity, "when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987); *see, e.g., Cleveland v. United States*, 531 U.S. 12, 25 (2000).

Second, the Court must not, by giving the language of § 371 an expansive interpretation, violate the prohibition on federal common law crimes, "a beastie that many decisions say cannot exist." *United States v. Bloom*, 149 F.3d 649, 654 (7th Cir. 1998).

Third, under the doctrine of constitutional avoidance, the Court must interpret § 371 to avoid creating grave constitutional questions. "It is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quotations omitted); *see, e.g., Cheek v. United States*, 498 U.S. 192, 203 (1991) (interpreting criminal statute to avoid constitutional issue).

The doctrine of constitutional avoidance has particular force here. If the Court were to uphold the government's conspiracy to defraud theory in this case, it would then have to determine whether § 371, as applied, is void for vagueness. That constitutional question – if the Court were to reach it – would have to be resolved in Fr. Klein's favor. Rather than place the federal judiciary in the position of striking down an Act of Congress, the Court should read the statute as narrowly as its language permits.

# THE INDICTMENT DOES NOT ALLEGE THAT FR. KLEIN

**SOUGHT TO INTERFERE WITH A "LAWFUL GOVERNMENTAL**

**FUNCTION."**

To charge an offense under the "defraud" prong of § 371, Count One must charge that Fr. Klein conspired "to interfere with or obstruct one of [the United States'] lawful governmental functions by deceit, craft, or trickery, or at least by means that are dishonest." *Hammerschmidt*

*v. United States*, 265 U.S. 182, 188 (1924); *see, e.g., United States v. F.J. Vollmer & Co.*, 1 F.3d 1511, 1519-20 (7th Cir. 1993) (discussing sufficiency of § 371 "defraud" indictment). The "lawful governmental function" allegedly at issue in Count One is the "administration and enforcement of the Special Administrative Measures for inmate Frank Calabrese Sr." Indictment, Count One, ¶ 2. But Count One has a fatal deficiency: the facts alleged, however,

do not and cannot show an agreement to interfere with any function that the SAMs lawfully serve.

"The Attorney General's power to promulgate SAMs for individual prisoners derives from 28 C.F.R. § 501.3." *United States v. Reid*, 369 F.3d 619, 620 (1st Cir. 2004); *see Yousef v. Reno*, 254 F.3d 1214, 1219 (10th Cir. 2001). Section 501.3 thus "set[s] forth the boundaries" of the Attorney General's authority to impose SAMs. *United States v. Stewart*, 590 F.3d 93, 112 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1924 (2010). The title of § 501.3 reflects those "boundaries": the only lawful purpose of SAMs is "[p]revention of acts of violence and terrorism." Consistent with the title, the regulation permits the imposition of SAMs *only* to "protect persons against risk of death or serious bodily injury." *Id*. § 501.3(a); *see id*. (SAMs restrictions may be imposed "as is reasonably necessary to protect persons against the risk of acts of violence or terrorism"); *United States v. Johnson*, 223 F.3d 665, 672 (7th Cir. 2000) (§ 501.3(a) requires "risk of acts of violence or terrorism"). Nothing in § 501.3 permits imposition of SAMs for any purpose other than the prevention of acts of violence and terrorism.

The Calabrese SAMs attempt to expand this narrow, strictly defined purpose. The SAMs purport to permit restrictions on Calabrese's communications not only to "protect persons against risk of death or serious bodily injury," but also to "limit[] the inmate's ability to communicate (send or receive) information relating to criminal activity." SAMs at 3, ¶ 1.c; *see* Indictment at

4, ¶ 1.i., j. (reciting this language). [1](#_bookmark0)

The United States Attorney's Office's request for an

extension of the SAMs, cited at page 1 of the SAMs, underscores this effort to stretch the SAMs beyond their lawful purpose; the letter requests that the SAMs be imposed because Calabrese allegedly "sen[t] an unmonitored coded message in an apparent attempt to shield his assets from

1 The Calabrese SAMs dated November 12, 2010 are attached as Exhibit A.

seizure by the government." SAMs at 1.[2](#_bookmark1)

Shielding assets from seizure might or might not be

criminal, but it generally does not present any danger of "death or serious bodily injury." Use of the SAMs to prevent an inmate from concealing assets thus exceeds the authority in 28 C.F.R.

§ 501.3 and is not a "lawful" government function.

The indictment leaves no doubt that the agreement in which Fr. Klein is alleged to have participated in Count One did not have as its object interference with the only lawful function of the SAMs: the protection of persons "against risk of death or serious bodily injury." 28 C.F.R.

§ 501.3(a). Count One alleges that Fr. Klein agreed with Calabrese and others to help retrieve a Stradavarius violin from a Calabrese home that the government had seized. As far as the indictment reveals, the alleged conspiracy never progressed beyond a telephone call from Fr. Klein to the realtor selling the house. Nothing in the indictment so much as hints that the recovery of the Stradivarius, had it been accomplished, would have presented any risk of death or serious bodily injury. The indictment thus fails to allege facts that constitute an agreement to interfere with a "lawful governmental function," as *Hammerschmidt* requires.

Because the facts alleged in Count One do not amount to a violation of the "defraud" prong of 18 U.S.C. § 371, the Court should dismiss that count for failure to charge an offense. *See, e.g., United States v. Panarella*, 277 F.3d 678, 685 (3d Cir. 2002) ("[F]or purposes of [Fed.

R. Crim. P.] 12(b)(2), a charging document fails to state an offense if the specific facts alleged in the charging document fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation."); *United States v. Varbel*, 780 F.2d 758, 762-63 (9th Cir. 1985) (indictment fails to charge offense where alleged conduct does not fall within scope of statute); *United States v. Cogswell*, 637 F. Supp. 295, 296 n.2 (N.D. Cal. 1985) ("The district court must

2 We have asked the government to produce the November 2, 2010 letter from the USAO requesting extension of the Calabrese SAMs. The government has refused to provide it.

dismiss an indictment prior to trial if it fails to allege facts that constitute a prosecutable offense.").

# ALETERNATIVELY, IF THE COURT HOLDS THAT COUNT ONE APPLIES TO FR. KLEIN'S CONDUCT, THEN THE STATUTE IS VOID FOR VAGUENESS AS APPLIED.

The Fifth Amendment Due Process Clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). This void-for-vagueness doctrine has two components: providing fair warning to potential violators, and cabining the discretion of the police, prosecutors, and juries.

The fair warning component focuses on fairness to the targeted individual. It is a bedrock principle of criminal law that "'fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)); *see, e.g., Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."). The fair warning principle ensures that a person can "conform [his] conduct to law . . . by reading the *face* of a statute – not by having to appeal to outside legal materials." *Sabetti v. DiPaolo*, 16 F.3d 16, 17 (1st Cir. 1994) (emphasis in original; quotation omitted) (Breyer, J.).

The prosecutorial discretion component of the vagueness doctrine focuses on a separate interest: the systemic importance of clearly drawn criminal statutes as a means of preventing police, prosecutors, and juries from targeting and convicting individuals arbitrarily. Thus, even

if a statute provides fair warning, it may nonetheless be impermissibly vague if it fails adequately

to restrain the discretion of police, prosecutors, and jurors. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion). In that case, the statute violates due process "not because it provides insufficient notice, but because it does not provide sufficient minimal standards to guide law enforcement officers." *Morales*, 527 U.S. at 72 (Breyer, J., concurring) (quotation omitted); *see, e.g., Kolender*, 461 U.S. at 357.

Under these standards, § 371 is void for vagueness to the extent it applies to Fr. Klein's conduct. *See, e.g., United States v. Cueto*, 151 F.3d 620, 635 (7th Cir. 1998) (as-applied vagueness challenge to "defraud" prong of § 371). Nothing on the face of the statute suggests that the statutory phrase "conspire . . . to defraud the United States" includes what Count One alleges: an agreement to interfere with the administration and enforcement of SAMs, which under § 501.3 may serve only to protect against violence and terrorism, by assisting in the recovery of a violin. *Compare Cueto*, 151 F.3d at 636 (rejecting vagueness challenge where "the plain and ordinary meaning of 'conspiracy to defraud' necessarily reaches [the defendant's] conduct").

Nor does caselaw interpreting § 371 provide the requisite clarity. Comparison with the only other case that has based a conspiracy to defraud charge on the violation of SAMs demonstrates how unprecedented and unforeseeable the theory in Count One is. In *Stewart*, the government charged an attorney (Lynne Stewart) and members of her staff with conspiring to defraud the United States by smuggling messages to and from their incarcerated terrorist client in violation of the SAMs. The Second Circuit upheld the conviction on appeal. *See* 590 F.3d at 109-12.

*Stewart* differs from this case in two critical respects. First, the communications at issue there implicated the fundamental purpose of the SAMs – the prevention of violence and

terrorism. Stewart's client – Sheikh Omar Ahmad Ali Abdel Rahman – used Stewart and her staff to communicate to the terrorist group he headed that he did not oppose ending a cease-fire and returning to violence. *See id*. at 103-107. The Sheikh even issued a fatwa through Stewart's staff (and in violation of the SAMs) "mandating the killing of the Israelis everywhere." *Id*. at

107. Thus, as the court of appeals observed, Stewart and her co-conspirators "endangered people's lives" through their conduct – exactly what the SAMs are intended to prevent. *Id*. at

112. Here, by contrast, nothing that Fr. Klein is alleged to have done presented any risk of violence to anyone.

Second, Stewart and her staff were parties to the Abdel Rahman SAMs. They had repeatedly signed documents agreeing to be bound by the SAMs. *See id*. at 102-03. They had the right to challenge the SAMs if they believed the restrictions on the Sheikh interfered with their representation. *See id*. at 112. Fr. Klein, on the other hand, is not alleged to be a party to the Calabrese SAMs. He thus lacked the unequivocal notice that Stewart and her staff received that the SAMs applied to him to the same extent they applied to Calabrese. And he even more clearly lacked notice that by communicating with third persons about a violin, he would interfere with the enforcement of SAMs that had as their only lawful purpose the prevention of violence and terrorism fomented by Calabrese. For these reasons, the interpretation of § 371 in *Stewart* does not come close to providing the clarity necessary to save the "defraud" prong from vagueness as applied here.

Fr. Klein had no fair warning that the "defraud" prong of § 371 could be stretched to cover his alleged conduct here. In addition, an interpretation of the statute that covers his alleged conduct would so greatly expand its scope – by reading out the "lawful governmental function" restriction in *Hammerschmidt* – as to give prosecutors virtually unfettered discretion to bring

charges. Thus, to the extent the § 371 "defraud" prong applies to Fr. Klein's alleged conduct, it is void for vagueness.

# CONCLUSION

For the foregoing reasons, the Court should dismiss Count One for failure to charge an offense. In the alternative, the Court should find the "defraud" prong of 18 U.S.C. § 371 void for vagueness as applied here and dismiss Count One on that basis.

Respectfully submitted,

/s/ Thomas Anthony Durkin

# THOMAS ANTHONY DURKIN,

/s/ Janis D. Roberts

# JANIS D. ROBERTS,

/s/ John D. Cline

# JOHN D. CLINE,

Attorneys for Defendant

# DURKIN & ROBERTS

2446 North Clark

Chicago, IL 60614

(312) 913-9300

tdurkin@durkinroberts.com jdroberts@durkinroberts.com

# LAW OFFICE OF JOHN D. CLINE

235 Montgomery Street, Suite 1070 San Francisco, CA 94104

(415) 322-8319 (Office)

(415) 302-2401 (Cell)

(415) 524-8265 (Facsimile) cline@johndclinelaw.com

# CERTIFICATE OF SERVICE

Thomas Anthony Durkin, Attorney at Law, hereby certifies that the foregoing Motion to Dismiss Count One for Failure to Charge an Offense and for Vagueness was served on November 17, 2011, in accordance with Fed.R.Crim.P.49, Fed.R.Civ.P.5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court’s system as to ECF filers.

/s/ Thomas Anthony Durkin

# THOMAS ANTHONY DURKIN

**DURKIN & ROBERTS**

2446 N. Clark Street Chicago, Illinois 60614

(312) 913-9300

tdurkin@durkinroberts.com