

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA,)	No. 3:06cr83MCR
Plaintiff,)	
)	DEFENDANT’S MOTION TO DISMISS
v.)	COUNTS 13 THROUGH 57 AND
)	FORFEITURE CLAIM OF THE
KENT E. HOVIND, and)	INDICTMENT
JO D. HOVIND,)	
Defendants.)	

COMES NOW the Defendant Kent E. Hovind, by and through his counsel of record, and hereby moves this Court to dismiss counts 13 through 57 and the forfeiture claim of the indictment with prejudice based on the numerous errors contained therein. Dr. Hovind reserves all rights without waiving any, including the right to amend this motion. This motion is supported by the attached memorandum.

Respectfully submitted this 27th day of September, 2006.

/s/ Alan S. Richey
Alan Stuart Richey
Counsel for Kent E. Hovind

I. COUNTS 13 THROUGH 57 OF THE INDICTMENT SHOULD BE DISMISSED BECAUSE THEY FAIL TO ALLEGE ALL LEGAL REQUIREMENTS.

Counts 13 through 57 of the indictment should be dismissed with prejudice because they fail to give proper notice to Dr. Hovind of what duties he had in order for the bank to report and thus find him criminally liable. Counts 13 through 57 of the indictment allege that the

Defendants violated 31 USC §§ 5324(a)(3) and (d), 31 CFR 103.11, and 18 USC § 2. Indictment,

Motion to Dismiss Counts 13 through 57 - 1 -
& the Forfeiture Claim of the Indictment

7. They allegedly did this “knowingly and for the purpose of evading the reporting requirements of Section 5313(a) of Title 31” and its regulations. Indictment, 5. This was allegedly done through “structured, assisted in structuring, and caused to be structured ... cash withdrawal[s] from AmSouth Bank.” Indictment, 5.

A. Counts 13 Through 57 Should Be Dismissed As They Fail To Inform The Defendants Of What Underlying Regulations Of 31 USC § 5313(A) Imposed On Them Duties Which They Allegedly Violated.

The indictment in counts 13 through 57 fails to inform the Defendants of the underlying regulations of 31 USC § 5313(a) imposing on them a duty, which they then allegedly violated. Therefore, Dr. Hovind cannot adequately defend himself against these charges since he is not fully apprised of the nature and cause.

The Sixth Amendment requires that a citizen “be informed of the nature and cause of the accusation.” It is a well-settled principle of law that a person needs to know what law or duty was violated. *See, e.g., United States v. Cruikshank*, 92 US 542 (1876); *United States v. Shepard*, 235 F.3d 1295 (11th Cir. 2000); *United States v. Rankin*, 870 F.2d 109 (3rd Cir. 1989); *Sheppard v. Rees*, 909 F.2d 1234 (9th Cir. 1989); *United States v. Crummer*, 151 F.2d 958 (10th Cir. 1945) (cert. denied); *Carter v. U.S.*, 173 F.2d 684 (10th Cir. 1945) (cert. denied); *Spence v. Dowd*, 145 F.2d 451 (7th Cir. 1944). In *Higley v. Commissioner*, 69 F.2d 160, 162-63 (8th Cir. 1934), the court stated, “Liability for taxation must clearly appear [from a statute imposing the tax].” *citing Miller v. Standard Nut*, 284 U.S. 498, 508 (1932); *United States v. Updike*, 281 U.S. 489, 496 (1930); *United States v. Merriam*, 263 U.S. 179, 187 (1923). It is of constitutional magnitude that the specific law or duty violated be made known fully and clearly so as to protect a defendant from double jeopardy and to prepare an adequate defense under the 5th and 6th

Motion to Dismiss Counts 13 through 57 - 2 -
& the Forfeiture Claim of the Indictment

Amendments. *See, e.g., United States v. Sloan*, 939 F.2d 499 (7th Cir. 1991); *Sutton v. U.S.*, 157 F.2d 661 (5th Cir. 1946); *Crummer, supra*; *Carter, supra*; *Grimsley v. U.S.*, 50 F.2d 509 (5th Cir 1931); *State ex rel Wong Sun v. District Court*, 112 Mont. 153, 113 P.2d 996 (1941).

Though section 5313(a) exists, it does not standing alone require anything of anyone. Considering first the “construction of the statute” provision, the controlling precedent is the Supreme Court’s decision in *United States v. Mersky*, 361 U.S. 431. In that case, as in this one, there were at issue both a statute and a regulation promulgated pursuant to it. In finding jurisdiction in *Mersky*, however, the Court noted that “neither the statute nor the regulations are complete without the other, and only together do they have any force. In effect, therefore, the construction of one necessarily involves the construction of the other. . . . When the statute and regulations are so inextricably intertwined, the dismissal must be held to involve the construction of the statute.” 361 U.S., at 438. *See also, U.S. v. Weller*, 401 U.S. 254, 258 (1971).

By way of contrast, a court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency’s position, and the nature of its expertise. *See General Electric Co. v. Gilbert*, 429 U.S. 125, 141-145 (1976); *Morton v. Ruiz*, 415 U.S. 199, 231-237 (1974); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

How can Defendants begin to defend, let alone the Court defer the charges against them, if they are not given notice by the indictment as to the specific “regulations” prescribed by the Secretary? Also that they must be proven to have been specifically aware of those “regulations” at the time they allegedly withdrew money from their own account at AmSouth Bank?

This Court should dismiss with prejudice Counts 13 through 57 on grounds that the indictment fails to allege each and every regulation the Government intends to prove to the Jury the Defendants were specifically aware of at the time the withdrawals from their own account took place.

B. Counts 13 Through 57 Should Be Dismissed As They Fail To Allege The Defendants' Had Actual Knowledge Of The Law(s) They Allegedly Violated.

Counts 13 through 57 of the indictment should be dismissed with prejudice inasmuch as they fail to allege that the Defendants' had actual knowledge of the law(s) they allegedly violated. Proving actual knowledge of the laws a defendant is alleged to have violated is required in tax and financial (banking) cases because these crimes "involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." *U.S. v. Starks*, 157 F.3d 833, 838 (11th Cir. 1998).

In *U.S. v. High*, 117 F.3d 464, 470 (11th Cir. 1997), a jury verdict was reversed based upon the district court giving an erroneous "instruction regarding structuring currency transactions in violation of 31 U.S.C. ' 5324," which said:

I charge you that the government need not prove the defendant was aware of the illegality of money structuring in order to convict the defendant of that offense under Title 31, United States Code, Section 5324(3).

The Eleventh Circuit determined that this specific instruction was incorrect, as "the Supreme Court held in *Ratzlaf* that a defendant may be convicted of violating section 5324 only upon a showing that the defendant 'willfully' violated anti-structuring laws." *Id.*, citing *Ratzlaf v. United States*, 510 U.S. 135, 136-139 (1994). According to the Court, the government must "prove that the defendant acted with knowledge that his conduct was unlawful" in order to prove

a “willful” violation of section 5324. *Ratzlaf*, 510 U.S. at 137. In other words, *Ratzlaf* required the district court to instruct the jury that the government needed to prove the defendant was aware that money structuring was illegal.

In cases involving willful violations of the tax and banking laws, the Supreme Court has routinely concluded that “the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating.” *Bryan v. U.S.*, 524 U.S. 184, 194 (1998) See, e.g., *Cheek v. United States*, 498 U.S. 192, 201 (1991). Similarly, in order to legitimately satisfy a willful violation in *Ratzlaf*, the Supreme Court concluded that the jury had to find that the defendant knew that his structuring of cash transactions to avoid a reporting requirement was unlawful. *Ratzlaf*, 510 U.S. at 138, 149. Thus, unless the text of the statute dictates a different result, the term “knowingly” merely requires proof of knowledge of the facts that constitute the offense. *Bryan*, 524 U.S. at 193.

The terms “knowing and willful require proof of the defendant’s knowledge of the reporting requirement and his specific intent to commit the crime.” *United States v. Granda*, 565 F.2d 922, 926 (11th Cir.1978). “[T]he mere failure to comply with terms of the statutes is not a crime unless it can be shown that the defendant had knowledge of the reporting requirements and acted with the specific intent to circumvent those requirements.” *Id.* at 924. “[T]he failure to report, when one is without knowledge of the reporting requirement, must be classified as a ‘nonfeasance’ as opposed to a ‘misfeasance’ . Since the purpose of all law, and the criminal law in particular, is to conform conduct to the norms expressed in that law, no useful end is served by prosecuting the ‘violators’ when they have no knowledge of the law’s provisions.” *Id.* at 926. Thus, “in order to prove willfulness, the government should make some effort to bring the

reporting requirement to the [defendant's] attention.” *Id.* at 925. “Proof of the requisite knowledge and willfulness, therefore, is almost impossible unless affirmative steps are taken by the government to make the laws’ requirements known.” *Id.* at 926.

In this case, the Government must prove that the Defendants were both specifically aware of sections 5313(a), 5324(a)(3) and 5324(d). Furthermore, the Government must allege and prove Defendants were both aware of the “regulations” “prescribed by the Secretary” as announced in section 5313(a). Also, the Government is required to allege and prove the Defendants were both aware of 31 CFR 103.11 as well as 18 U.S.C. ' 2.

Section 5313(a) does not assign any numerical value to the Atransaction@ which would trigger the Bank's requirement to submit a report on a “withdrawal” of the Defendants’ own money. Sections 5324(a)(3) and 5324(d) give no assistance to the Government in its alleged theory. Neither of these sections identifies either the “form” or what triggers the form. There is no way by simply reading these sections the Defendants would have been made aware of their purported duties. Furthermore, the Government does not allege the Defendants were aware of sections 5313(a), 5324(a)(3) or 5324(d). The indictment does not allege when the Defendants became aware of these provision.

31 U.S.C.' 5313(a) requires a Adomestic financial institution@ who is involved in a Atransaction for the payment, receipt, or transfer of United States coins or currency...., in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation.....shall file a report on the transaction at the time and in the way the Secretary prescribes.@

The indictment does not allege what that report form looks like or is identified as. The indictment does allege CFR 103.11 but does not allege the role this provision plays in carrying out either the will of Congress or the awareness of the Defendants.

There can be no question that Defendants qualify as established customers under section 103.11(l). The question here is whether withdrawing one's own money from one's own account is either a payment, receipt or transfer for the purpose of 31 U.S.C. ' 5313(a). On at least two occasions, the 11th Circuit has determined that bank customers have no obligation to structure their transactions so as to trigger the reporting requirements of Section 5313." *U.S. v. Cure*, 804 F.2d 625, 627 (11th Cir. 1986), citing *United States v. Denmark*, 779 F.2d 1559, 1561-64 (11th Cir. 1986).

What is AmSouth Bank? The Secretary defines a financial institution as a bank. See 103.11(n)(1). There is no definition for the term bank to describe what one is. Regulations define "a transaction in currency" as "[a] transaction involving the physical transfer of currency from one person to another." 31 C.F.R. ' 103.11(ii). The regulations further provide: "A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part." 31 C.F.R. ' 103.11(ii). "Currency" is defined in the regulations as "[t]he coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance." 31 C.F.R. ' 103.11(h).

“[I]n determining the scope of a statute, one is to look first at its language. If the language is unambiguous, . . . it is to be regarded as conclusive unless there is a clearly expressed legislative intent to the contrary.” *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 110 (1983) (citations and quotation marks omitted). Moreover, it is well settled that criminal laws are to be strictly construed. *United States v. Enmons*, 410 U.S. 396, 411 (1973); *United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971); *United States v. Bass*, 404 U.S. 336, 347 (1971). Because there is no qualification in the language of the statute itself, the 11th Circuit read “a report required” to mean what it says in section 5324(a)(1). That is, the 11th Circuit read “‘a report required’ in ’ 5324(a)(1) to mean a report that the financial institution is obligated to file, which is what ‘required’ means, not a report that it would have been obligated to file had circumstances been different.” *U.S. v. Phipps*, 81 F.3d 1056, 1060 (11th Cir. 1996). “Liability, however, depends on whether the bank was required to file a CTR [currency transaction report], for, as previously mentioned, a bank customer is not liable merely for structuring his cash transactions so as to create transactions in which the filing of a CTR is not required.” *Cure*, 804 F.2d at 629. The Eleventh Circuit has held that in order for the reporting requirement to be invoked, there must be “aggregated transactions at a single branch of a bank on a single day to find a single transaction in excess of \$10,000.” *Id.*, citing *United States v. Tobon-Builes*, 706 F.2d at 1098; and citing *United States v. Thompson*, 603 F.2d 1200, 1204 (5th Cir.1979).

In order for the Government's theory of the law to go forward this Court would be required to accept that under section 5313(a) withdrawing \$ 9500.00 or \$ 9600.00 in any given day from the Defendants own account qualifies as a “payment, receipt, or transfer”

Motion to Dismiss Counts 13 through 57 - 8 -
& the Forfeiture Claim of the Indictment

either to the bank or to the Defendants. Both are ambiguous. The Bank is a deposit holder of money belonging to Defendants. The Bank cannot list the money in Defendants account as an asset of the Bank. Section 5313 utilizes the word “transactions” in its title while the Secretary defines the term “transaction” in 31 CFR ' 103.11(ii) to include “withdrawal” but further clarifies that there is an exception to this definition of “transaction” which says, “A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency, is not a transaction in currency for this purpose.” Furthermore, this same regulation defines “transaction in currency” as “a transaction involving the physical transfer of currency from one person to another.” *Id.*

This brings the issue to the meaning of two different words. The term *Aevade@* and the term *Astructuring@*. Each of these words has no statutory defined meaning. The term *Astructuring@* is not defined for purpose of section 5313(a) or 5324(a)(3) and is only defined for *Apurpose of 103.53.*" See 31 CFR 103.11(gg).

Since Congress did not say *Awithdraw@* within the words *Apayment, receipt, or transfer@* in section 5313, and because Counts 13 through 57 do not allege payment, receipt, or transfer, to trigger its reach, withdrawing ones own money from a Bank Account where the Bank is simply holding legally deposited money of which no questions have derived, to its rightful owner, neither section 5313 is triggered by such alleged withdraws nor is any duty for the Bank to make a report under the Statute or Regulations prescribed by the Secretary under 31 CFR.

In this case, the absurd should render the charges invalid. Under the Government's theory, they have alleged 45 different withdraws of \$ 9500.00 or \$ 9600.00

Motion to Dismiss Counts 13 through 57 - 9 -
& the Forfeiture Claim of the Indictment

on any given day from the Defendants= account written to Defendants. The government, as a matter of law, cannot prove that a CTR was required to be filed in this case. Nowhere in counts 13 through 57 is it alleged that there were transactions on the same day in the same bank in the aggregate of more than \$10,000. Accordingly, this Court should dismiss with prejudice Counts 13 through 57 on grounds that it does not allege a financial transaction under section 5313(a) that the claims under section 5324(a)(3) or 5324(d) could be based upon.

II. FORM 4789 DOES NOT COMPLY WITH THE PRA AND THUS BARS THE GOVERNMENT FROM SEEKING ANY PENALTY AGAINST DR. HOVIND.

The Form 4789 at issue is bootleg and violates 44 U.S.C. §§§ 3507(g), 3507(h)(3), and 3512. The government is barred from bringing the charges in counts 13 through 57 against Dr. Hovind inasmuch as the Form 4789 fails to comply with the requirements of the Paperwork Reduction Act.

The Paperwork Reduction Act (“PRA”) is to assist in the government’s collection of information. One of the specific purposes of the PRA is to “ensure that the creation, collection, maintenance, use, dissemination, and disposition of information by and for the Federal Government is consistent with applicable laws.” 44 U.S.C. § 3501(8). In order to assure compliance with the PRA, a federal agency has various responsibilities, including, “The head of each agency shall be responsible for--(A) carrying out the agency’s information resources management activities to improve agency productivity, efficiency, and effectiveness; and (B) complying with the requirements of this subchapter and related policies established by the Director.” 44 U.S.C. § 3506(a)(1).

When a government agency collects any information from the public on any form, it must “display a valid control number assigned by the Director.” 44 U.S.C. § 3512(a)(1). 44 U.S.C. § 3507(g) limits the issuance of a valid control number for a term not to exceed 3 years. The form is also required to contain a provision on the form which “inform[s] the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.” 44 U.S.C. § 3512(a)(2). After the form is approved, 44 U.S.C. § 3507(h)(3) mandates that any changes made on the form must be submitted for new approval.

The PRA of 1995, codified in title 44 sections 3507(g) specifically provides that a control number can be used for no more than 3 years. CTR Form 4789 was last “revised” on June 1, 1998. See Exhibit 1. In October, 2003, Department of Homeland Security created FinCEN form 104 which replaced Form 4789 (June 1, 1998). See Exhibit 2. Therefore, Form 4789 is in violation of 44 U.S.C. § 3512(a)(2).

44 U.S.C. § 3512, as amended in 1995, provides:

(a) Notwithstanding any other provision of law, **no person shall be subject to any penalty** for failing to comply with a collection of information that is subject to this subchapter if -

- (1) the collection of information does not display a valid control number assigned by the Director in accordance with this subchapter; or
- (2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

(b) The protection provided by this section may be raised in the form of a **complete defense, bar**, or otherwise at any time during the agency administrative process or **judicial action applicable** thereto.

Motion to Dismiss Counts 13 through 57 - 11 -
& the Forfeiture Claim of the Indictment

There can be no argument that the form at issue complied with the PRA of 1995, as they simply DID NOT comply. As the Supreme Court has stated, when an agency uses these “outlaw forms,” an individual may “refus[e] to answer these information collection requests.” *Dole v. Steelworkers*, 494 U.S. 26, 40 fn6 (1990). Most importantly, by the alleged use of the bootleg forms 4789, 44 U.S.C. § 3512 acts as a “complete defense” or a “bar” from “any penalty” for failing to provide information to the IRS. Where an agency fails to follow the PRA in regard to an information collection request that the agency promulgates via regulation, at its own discretion, and without express prior mandate from Congress, a citizen may indeed escape penalties for failing to comply with the agency's request. See, e.g., *United States v. Hatch*, 919 F.2d 1394 (9th Cir. 1990); *United States v. Smith*, 866 F.2d 1092 (9th Cir. 1989).

Form 4789 would only be good from June 1, 1998 through May 31, 2001. The charges against the Defendants begin July 20, 2001 and end August 9, 2002. There was no valid Form 4789 or any other form with any “displayed” valid OMB number to which any currency information could be required to be reported on. There was no requirement of AmSouth to report anything since there was no request for information subject to the PRA of 1995 that complied with the PRA of 1995. Likewise, there was no form where Defendants were required to report any currency withdrawal on.

Because 44 U.S.C. § 3512(b) makes the PRA a complete defense, and because no valid form existed in which any duty to report any currency information on existed, Defendant was not required to report any information to AmSouth Bank. Therefore, this Court should dismiss with prejudice Counts 13 through 57 on grounds there was no valid

Motion to Dismiss Counts 13 through 57 - 12 -
& the Forfeiture Claim of the Indictment

form to report any information on to the Secretary regarding any withdraw of any money from AmSouth Bank.

III. SECTIONS 5313, 5324(a)(3) AND 5324(d) OF TITLE 31 ARE AMBIGUOUS AND UNCONSTITUTIONAL, AND DEFENDANT CANNOT DETERMINE THE LEGAL STANDARD SET FORTH IN THOSE STATUTES.

This Court should dismiss with prejudice counts 13 through 57 either because 31 U.S.C. §§ 5313 and 5324 are ambiguous and therefore unconstitutional, or because the rule of lenity would provide that where a defendant cannot determine the legal standard so as to avoid criminal conduct, he may not be charged.

For a CRT to be required by a “financial institution,” 31 U.S.C. § 5313 requires that there be a “transaction for the payment, receipt, or transfer of United States Coins or Currency”; section 5313 requires Defendant to do nothing. The government’s view of section 5324 purports to make it a crime to withdraw \$ 9500.00 or \$ 9600.00 from Defendants= own bank account if, at the time the Defendants needed to withdraw money, they withdrew \$ 9600.00 and that amount was less than what they actually needed on that day. The government must show that on each day of a withdrawal, Defendants actually needed more than \$ 10,000.00 and stopped short of that amount solely to commit the crime of evading the reporting requirements.

The term “withdraw” does not appear in section 5313. “Withdraw” cannot mean “payment, receipt, or transfer.” The money being held by AmSouth in Defendant’s account did at all times belong to Defendant. The money did not belong to AmSouth. The withdrawals were not the property of AmSouth. Therefore to “withdraw” is not a “payment.” Next, “receipt” obviously is the opposite of “withdraw.” And finally, there is

“transfer.” There was no “transfer” of property from one “person” to another, as the property withdrawn was prior to and after the withdrawal the property of Defendants.

The Supreme Court set forth a two-step process to determine whether to afford deference to an agency regulation which interprets a statute the agency is charged with administering. *Chevron U.S.A. Inc. v. N.R.D.C.*, 467 U.S. 837, 842-45 (1984). First, we ask “whether Congress has directly spoken to the precise question at issue.” *Id.* at 842. If the will of Congress is clear from the statute itself, our inquiry ends; “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43. “[I]f the statute is silent or ambiguous,” however, we next ask whether the agency’s construction of the statute is reasonable. *Id.* at 843-44. “[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Id.* at 844. To determine whether the statutory language is ambiguous, we consider “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

There can be no doubt that the language of sections 5313(a) and 5324 are ambiguous if they must be interpreted by the Secretary, by regulation, in order to reach withdrawing one’s own money from one’s own bank account. Therefore, a court must look to whether the agency’s interpretation is reasonable.

When a statute is ambiguous, “construction should go in the direction of constitutional policy.” *United States v. Johnson*, 323 U.S. 273, 276 (1944). In other words, the “task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations.” *CSC v. Letter*

Motion to Dismiss Counts 13 through 57 - 14 -
& the Forfeiture Claim of the Indictment

Carriers, 413 U.S. 548, 571 (1973); *Staples v. United States*, 511 U.S. 600, 619, n. 17 (1994) (rule of lenity requires that “ambiguous criminal statute[s] . . . be construed in favor of the accused”); *see also United States v. Granderson*, 511 U.S. 39, 54 (1994); *United States v. Bass*, 404 U.S. 336, 347 (1971).

31 CFR 103.11(ii)(2) states, “A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the **physical transfer** of currency, **is not a transaction in currency for this purpose.**” Even if a withdrawal was a transfer, it is “not a transaction in currency” as defined by the Secretary. AmSouth is simply not a person involved in a currency transaction when an AmSouth customer withdraws properly and legally deposited money from the withdrawer’s own account.

31 U.S.C. § 5324 states that “no person shall, for the purpose of evading the reporting requirements of section 5313(a)...or any regulation prescribed under any such section (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one...domestic financial institution.” Per the plain reading of section 5324 and as fully discussed above, Defendants had no duty under section 5313(a) to file any transaction reports. At best the bank may have had a duty. Withdrawing one’s own money is not a payment, receipt or transfer, no matter how much is withdrawn.

Section 5324 relies upon the term “evade” to describe its intended reach. “Evade” is the key word in the statute, yet it has no definition in any specific provision, including section 5324. Further, no regulation defines this term.

The “rule of lenity is applied when, after considering the structure and purpose of a criminal statute, we are left with nothing more than a guess as to what Congress

intended.” *U.S. v. McClain*, 252 F.3d 1279, 1288 (11th Cir. 2001). There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of “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.” *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); accord, *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Second, as a sort of “junior version of the vagueness doctrine,” the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. H. Packer, *The Limits of the Criminal Sanction* 95 (1968). See, e.g., *Liparota v. United States*, 471 U.S. 419, 427 (1985); *United States v. Bass*, 404 U.S. 336, 347-348 (1971); *McBoyle*, supra, at 27. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, see, e.g., *Bouie*, supra, at 357-359; *Kolender*, supra, at 355-356; *Lanzetta*, supra, at 455-457; *Jeffries, Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 207 (1985), **due process** bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope, see, e.g., *Marks v. United States*, 430 U.S. 188, 191-192 (1977); *Rabe v. Washington*, 405 U.S. 313 (1972) (per curiam); *Bouie*, supra, at 353-354 (Ex Post Clauses bar legislatures from making substantive criminal offenses retroactive); cf. U.S. Const., Art. I, ' 9, cl. 3; id., ' 10, cl. 1. In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was clearly criminal. *U.S. v. Lanier*, 520 U.S. 259, 266-267 (1997).

Motion to Dismiss Counts 13 through 57 - 16 -
& the Forfeiture Claim of the Indictment

The Supreme Court applied this standard in *Screws v. United States*, 325 U.S. 91 (1945), which recognized that the expansive language of due process does provide a basis for judicial review, but, when incorporated by reference into ' 242, is generally ill suited to the far different task of giving fair warning about the scope of criminal liability. The *Screws* plurality identified the affront to the warning requirement posed by employing ' 242 to place “the accused . . . on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning.” *Id.*, at 101.

At the same time, the same Justices recognized that this constitutional difficulty does not arise when the accused is charged with violating a “right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.” *Id.*, at 104. When broad constitutional requirements have been “made specific” by the text or settled interpretations, **willful violators** “certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. . . . [T]hey are not punished for violating an unknowable something.” *Id.*, at 105. Accordingly, *Screws* limited the statute's coverage to rights fairly warned of, having been “made specific” by the time of the charged conduct.

Interpretation of a statute begins “with the language of the statute itself.” *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). As a general rule, if the language of the statute is plain, then our interpretative function ceases and we should “enforce [the statute] according to its terms.” *Id.*, quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

In interpreting the language of a statute, we generally give “the ‘words used’ their ‘ordinary meaning.’” *Moskal v. U.S.*, 498 U.S. 103, 108, quoting *Richards v. U.S.*, 369

U.S. 1, 9 (1962). We also use interpretative tools, the “canons of construction,” which “are no more than rules of thumb that help courts determine the meaning of legislation.” *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). Among these canons of construction are the principles “that Congress is presumed to be aware of judicial interpretations of a statute,” *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 524 (1984), superseded by statute on other grounds, 11 U.S.C. ' 1113 (1984), that “courts should disfavor interpretations of statutes that render language superfluous,” *Connecticut Nat'l Bank*, 503 U.S. at 253. “We assume that Congress is aware of existing law when it passes legislation.” *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). “Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity.” *Burlington N. R.R. Co. v. Oklahoma Tax Comm.*, 481 U.S. 454, 461 (1987).

As more fully addressed in Argument I-B, to establish that a defendant acted “knowingly,” and as often referred to as “willfully”, the Supreme Court distinguished tax cases as in *Cheek v. United States*, 498 U.S. 192, 201 (1991) or financial cases, such as *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994), that “involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct.” *U.S. v. Starks*, 157 F.3d 833, 838 (11th Cir. 1998). In certain cases involving willful violations of the tax laws (bank laws), the Supreme Court has routinely concluded that “the jury must find that the defendant was aware of the specific provision” alleged to have violated. *Bryan v. U.S.*, 524 U.S. at 194; *Cheek*, 498 U.S. at 201.

31 U.S.C. § 5313(a) could never inform Dr. Hovind as to what conduct he was not to participate in when withdrawing his own money out of his own account at AmSouth bank. Even though he never knew of section 5313(a) before being charged in

Motion to Dismiss Counts 13 through 57 - 18 -
& the Forfeiture Claim of the Indictment

the indictment, this section in no way references a connection to section 5324 or suggests that an act is a crime and what that specific act is. Directing a Citizen to the Secretary (regulation) as referred to in section 5313(a) in no way allows the government to survive this defect. There is no regulation that connects section 5313(a) to 5324. The only starting point would have been to section 5324(a)(3) and work backwards to section 5313(a). Further, no one reading “no person shall, for the purpose of evading the reporting requirements...” could ever read section 5313(a) and conclude he had a reporting requirement that he should not evade.

The term “evade” itself is ambiguous. What is the legal difference between “evade” and “avoid”? In the manner the government intends the statute to be read there is none. This is contrary to what the Supreme Court has stated, **In our system, avoidance of a tax by remaining outside the ambit of the law that imposes it is every person's right.** *U.S. v. Thompson/Center Arms Co.*, 504 U.S. 505, 518, fn 4 (1992). The Court has also gone to great lengths to define what tax “evasion” means without ever defining the difference. Courts have not defined the difference. Congress has not defined the difference. And, the Secretary has not attempted to publish any regulations that describe the difference.

Because “withdraw” is not the same in meaning as “payment, receipt, or transfer” in section 5313(a), and because the term “evade” in section 5324 is not defined, and because section 5324 imposes no duty upon Defendants, this Court should either hold section 5313(a) and 5324(a)(3) unconstitutionally vague or apply the rule of lenity and dismiss Counts 13 through 57 of the indictment.

IV. THE PORTION OF THE INDICTMENT SEEKING FORFEITURE SHOULD BE DISMISSED AS THE GROUNDS FOR SUCH IS NOT APPLICABLE HERE.

The indictment alleges that Dr. Hovind violated 31 U.S.C. ' 5324(a)(3) and 5324(d), and therefore the government seeks forfeiture pursuant to 18 U.S.C. ' 982(a)(1) and Title 31, U.S.C. ' 5317(c). Indictment, 9. The basis for which the government seeks forfeiture is not found in these charges, so that portion of the indictment should be dismissed with prejudice.

18 U.S.C. ' 982(a)(1) authorizes a sentencing court after conviction of an offense under 18 USC §§§ 1956, 1957 or 1960 to “order that the person forfeit to the United States any property, real or personal, involved in such offense.” A plain reading of the indictment clearly shows that neither Defendant is accused of violating sections 1956, 1957 or 1960. Though at the beginning of this charge the Government cites to section 982(a), in their prayer for relief they request relief under section 982(b)(1). Section 982(b)(1) begins “the forfeiture of property under this section.” Since the indictment does not allege an offense subject to forfeiture under 982(a)(1), the prayer for relief under section 982(b)(1) is defective and cannot be granted. Accordingly, this Court should dismiss the claims of forfeiture by the Government contained in the indictment under section 982(a)(1) and (b)(1).

Next, the government seeks forfeiture under 31 U.S.C. ' 5317(c), and though there is no independent jurisdiction for this claim, this claim is also defective.

Section 5317(c)(1) begins “the Court in imposing sentence for any violation of section 5313, 5316 or 5324 of this title ... shall order the defendant to forfeit all property ... involved in the offense and any property traceable thereto.” As more fully set forth in

Motion to Dismiss Counts 13 through 57 - 20 -
& the Forfeiture Claim of the Indictment

the reason for dismissal of Counts 13 through 57, Defendants are not a “person,” as they do not have any “reporting requirement” under section 5313(a). Defendants also are not “persons” under any regulation prescribed under section 5313(a). Since Defendants are not persons with a reporting requirement under section 5313(a), Defendants are not persons under 5324(a)(3). Furthermore, the money at issue was withdrawn from Defendants own account and the money placed in that account was deposited legally and lawfully and therefore said withdrawals do not qualify as a “payment, receipt, or transfer” as those terms are used in section 5313(a).

Also, since the form 4789 violated the Paperwork Reduction Act of 1995 in that it expired as of June, 2001, AmSouth would have no independent duty to report withdrawals made by Defendants even if those withdrawals were “payments, receipts, or transfers” as appearing in the direct language of section 5313(a). See 44 U.S.C. ' 3512.

Since Defendants did not have any duty to report any withdrawal information to the United States and since neither did AmSouth, forfeiture under section 5317(c)(1)(B) is not applicable to the Defendants and the charges alleged against them. Therefore, this Court should issue an Order dismissing the claims of forfeiture under Title 18 ' ' 982(a)(1), 982(b)(1) and under Title 31 ' 5317(c)(1)(B) against the Defendants.

CONCLUSION

THEREFORE, based on the foregoing, Defendant Kent E. Hovind respectfully requests that this Court DISMISS WITH PREJUDICE counts 13 through 57 and the claim for forfeiture in the indictment.

Respectfully submitted this 27th day of September, 2006.

/s/ Alan S. Richey
Alan Stuart Richey
Counsel for Kent E. Hovind

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I did electronically file the foregoing motion using the court's CM/ECF system which will send notice of the filing to the attorney of record for the plaintiff, Michelle M. Heldmyer, and any other counsel of record through the CM/ECF system.

Dated this 27th day of September, 2006.

/s/ Alan S. Richey
Alan S. Richey