UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-20577-JORDAN/BROWN

UNITED STATES OF AMERICA

vs.

GREENPEACE, INC.,
d/b/a "Greenpeace USA,"
Defendant.
_____/

MOTION TO DISMISS ON GROUNDS THAT THE STATUTE EITHER DOES NOT APPLY TO THE CONDUCT CHARGED OR IS IMPERMISSIBLY VAGUE AND INCORPORATED MEMORANDUM OF LAW

Defendant, Greenpeace, Inc. ("Greenpeace"), hereby moves to dismiss the Indictment on grounds that the Indictment fails to state a crime in that the charged conduct does not fall within the prohibitions of the statute which forms the basis for the charges. Alternatively, the statute is impermissibly vague as applied to the facts of this case. In support of the Motion, Greenpeace states:

On April 12, 2002, Greenpeace activists in inflatable boats approached the APL Jade, a vessel that Greenpeace had learned from a reliable sources was bringing mahogany into the United States in violation of United States and international law.[1] The ship was located between three and five miles from the port of Miami.[2] Two of the activists peacefully boarded the ship by

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1 A more detailed description of Greenpeace and its campaign to preserve mahogany trees and the forests in which they grow can be found in Greenpeace's Motion for Discovery on Claim of Selective Prosecution, which is being filed at the same time as this Motion.

2 The Government has agreed that the vessel was approximately three miles offshore, while Greenpeace activists put it further out, at between four and five miles. Given this range of

a ladder that hung down from its side with a banner which stated: "President Bush, Stop Illegal Logging," in an effort to prompt U.S. authorities to seize the Jade's cargo of illegal mahogany and to make greater efforts in the future to interdict shipments of illegally logged wood.

Over fifteen months later, Greenpeace was charged with a substantive violation of and conspiracy to violate Title 18 U.S.C. § 2279. That statute, entitled, "Boarding vessels before arrival," provides, in relevant part, as follows:

> Whoever, not being in the United States service, and not being duly authorized by law for the purpose, goes on board any vessel about to arrive at the place of her destination, before her actual arrival, and before she has been completely moored, shall be fined under this title or imprisoned not more than six months, or both.

The Jade, at least three miles offshore when it was boarded, was not "about to arrive at the place of her destination." That phrase, which is undefined in the statutory scheme or history, requires an immediacy of arrival not found on these facts. Therefore, the Indictment fails to charge a crime and must be dismissed.

At its best from the Government's point of view, the phrase "about to arrive at the place of her destination" renders the statute impermissibly vague. The Indictment, echoing the statute, is equally vague. The Indictment fails to state where the vessel was when the boarding occurs and simply suggests the boarding happened as the Jade "approached the Port of Miami. . . ." *See* ¶7, page 3. The statute, thus, fails to provide sufficient notice of the conduct it prohibits, and it authorizes and may encourage arbitrary and discriminatory enforcement, requiring dismissal of these charges.

I. THE INDICTMENT FAILS TO CHARGE A CRIME

The Jade was at least three miles out of port. She was not, therefore, "about to arrive at

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distances and the estimated speed of the vessel, it was anywhere from 30 minutes to one hour from port.

the place of her destination," as the statute requires and the Indictment charges. Thus, the court should dismiss the Indictment.

Common usage dictates the conclusion that the conduct of Greenpeace was outside the zone of "about to arrive." According to the American College Dictionary, the phrase "about to" means "on the point of." All the common usages of the phrase connote imminence and immediacy.

A review of this phrase as used in numerous Supreme Court opinions shows that sense of immediacy and imminence:

> According to Redmond, Allen was brandishing a butcher knife and disregarded her repeated commands to drop the weapon. Redmond shot Allen when she believed he was **about to** stab the man he was chasing.

Jaffee v. Redmond,116 S.Ct.1923, 1925-26 (1996) (Justice Stevens)

> What follows is an English translation of portions of the tape-recorded questioning in Spanish that occurred in the emergency room of the hospital when, as is evident from the text, both parties believed that respondent was **about to** die . . .

Chavez v. Martinez, 123 S.Ct. 1994, 2010 (2003) (Justice Stevens, criticizing what he deemed a coercive interrogation undertaken after the respondent had been shot)

> "The passage in the Restatement deeming compensable 'emotional disturbance resulting from the bodily harm or from the conduct which causes it,' § 456(a), refers, as the official commentary makes clear, to this sort of instantaneous emotional trauma arising from the tortious act. See ***id.,*** Comment *e* ('Thus one who is struck by a negligently driven automobile and suffers a broken leg may recover not only for his pain, grief, or worry resulting from the broken leg, but also for his fright at seeing the car **about to** hit him')."

Norfolk & Western Ry. Co. v. Ayers, 123 S.Ct. 1210, 1231 (2003) (quoting the Restatement of Torts)

> Rule 11 of the Federal Rules of Criminal Procedure requires a judge to address a defendant **about to** enter a plea of guilty, to ensure that he understands the law of his crime in relation to the facts of his case, as well as his rights as a criminal defendant.

U.S. v. Vonn, 122 S.Ct. 1043, 1048 (2002) (Justice Souter)

> Assume persons are **about to** enter a building from different points and a protester is walking back and forth with a sign or attempting to hand out leaflets.
>
> Nowhere is the speech more important than at the time and place where the act is **about to** occur.

Hill v. Colorado, 120 S.Ct. 2480, 2520 and 2528 (2000)(Justice Kennedy, dissenting)

> But this is to say that when the clock is **about to** strike midnight, a court considering class certification may lower the structural requirements of Rule 23(a) as declared in *Amchem* . . . .

Ortiz v. Fibreboard Corp., 119 S.Ct. 2295, 2323 (1999) (Justice Souter)

> Informing Thompson that execution of a search warrant was underway at his home, and that his truck was **about to** be searched pursuant to another warrant, the troopers asked questions that invited a confession.

Thompson v. Keohane, 116 S.Ct. 457, 461 (1995) (Justice Ginsburg)

> [T]he judgment of the Nation and Congress has ... long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was **about to** flee, and the like.

United States v. Watson, 423 U.S. 411 (1976)(Justice White)

> In cases of misdemeanor, a peace officer like a private person has at common law

> no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is **about to** be committed or renewed in his presence.' (quoting 9 Halsbury, Laws of England § 612, p. 299 (1909)).

Carroll v. United States, 267 U.S. 132, 157 (1925)

> In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons **about to enter** a business establishment.

NLRB v. Retail Store Employees, 447 U.S. 607, 619, 100 S.Ct. 2372, 2379, 65 L.Ed.2d 377 (1980) (STEVENS, J., concurring in part and concurring in result).

> This inquiry is not an accurate measure of an encounter' s coercive effect when a person is seated on a bus **about to** depart, has no desire to leave, and would not feel free to leave even if there were no police present.

Florida v. Bostick, 111 S.Ct. 2382, 2383-2384 (1991)

> The fundamental objective that alone validates all unconsented government searches is, of course, the seizure of persons who have committed or are **about to** commit crimes, or of evidence related to crimes.

Illinois v. Rodriguez, 110 S.Ct. 2793, 2799 (1990)

That the statute applies only when the vessels is in the act of pulling up and being secured to its dock or berth is reinforced and compelled by other language in the statute, which states that the offense must occur "before she has been completely moored." The statute thus applies, by its terms, when a boarding occurs while the vessel is in the process of being moored, but has not yet completed the process. The Jade, at least three miles out when she was boarded, was neither completely moored nor moored at all. She was in open water.

The Court can make the determination that the statute does not apply and dismiss the Indictment at this juncture. Rule 12 (b) (2) of the Federal Rules of Criminal Procedure permits the court to dismiss a case before trial if review of the undisputed facts reveals that no crime has been committed. The Rule provides as follows: "A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." That is possible here, as the parties agree that, at a minimum, the Jade was approximately three miles offshore when it was boarded.

"It is perfectly proper, and in fact mandated, that the district court dismiss an indictment if the indictment fails to allege facts which constitute a prosecutable offense." *United States v. Coia,* 719 F.2d 1120, 1123 (11th Cir.1983). Courts in many cases have dismissed indictments on such grounds. In *United States v. Myr Group, Inc*., 2003 WL 21790246 (N.D.Ill. 2003), the district court determined pre-trial that a parent corporation could not be criminally responsible for acts of its subsidiary that allegedly resulted in the deaths of employees in violation of an OSHA regulation that could be prosecuted as a crime under 18 U.S.C. § 666(e). The court stated:

> Pretrial motions to dismiss are not limited to challenging the technical sufficiency of the indictment, however. "[A]ny defense ... that the court can determine without a trial of the general issue" can be raised in a pretrial motion. Fed.R.Crim.P. 12(b)(2). Regardless of the sufficiency of the indictment in setting out the elements of a statutory violation, if the government' s own facts establish that there is no violation, the indictment may be dismissed. *See United States v. Risk,* 843 F.2d 1059, 1061 (7th Cir.1988)**.**

2003 WL 21790246 *1. *See also United States v. Pirro*, 96 F.Supp 2d 279, 280 (S.D.N.Y. 1999)

(court dismissed, pre-trial, charges of tax fraud which "fail[ed] to articulate the violation of a known legal duty"). In *United States v. Risk, supra,* the court upheld the dismissal of an indictment for structuring in violation of in violation of 31 U.S.C. §§ 5313 and 5322 on the ground that the facts asserted did not amount to a violation of those statutes. Responding to the government's contention that the court had improperly determined ahead of the trial that it could not prove its case, the court stated: "Rather, the district court found the allegations in the indictment insufficient to state a claim . . . ." 843 F.2d at 1061. The court there stated that such matters may be addressed pretrial under Rule 12.

> Rule 12 (b) ensures that trials will be efficient and that defendants raise defenses "which [are] capable of determination without the trial of the general issue" before trial. Fed.R.Crim.P. 12(b); *United States v. Griffin,* 765 F.2d 677, 681 (7th Cir.1985). Rule 12(e) requires the court to make a pretrial determination on the motions raised by a defendant unless there is good cause not to do so. Fed.R.Crim.P. 12(e) also allows the court to consider factual issues in its disposition of 12(b) motions. *Id.; United States v. Coia,* 719 F.2d 1120, 1123 (11th Cir.1983)**.**

843 F.2d at 1061.

The Tenth Circuit, dismissing an indictment on the ground that stolen computer software was not subject to the National Stolen Property Act, stated: "it is permissible and may be desirable where the facts are essentially undisputed, for the district court to examine the factual predicate for an indictment to determine whether the elements of the criminal charge can be shown sufficiently for a submissible case." *United States v. Brown*, 925 F.2d 1301, 1304 (10th Cir. 1991).

"There are no constructive offenses, and before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo v. United States*, 272 U.S. 620, 629 (1926). Here, the undisputed facts show "plainly" that the Jade was not "about to arrive at the place of her destination." Therefore, these charges must be dismissed.

II. <u>THE STATUTE IS IMPERMISSIBLY VAGUE</u>

Even if the Court declines to grant Greenpeace's motion to dismiss for failure to charge a crime, the charges should be dismissed on the grounds that the statute is unconstitutionally vague. A statute is unconstitutionally vague if it fails to "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, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standard less that it leaves the public uncertain as to the conduct it prohibits . . . ." *Giaccio v. Pennsylvania*, 382 U. S. 399, 402-403 (1966); *Grayned v. City of Rockford,* 408 U.S. 104 (1972) ("[L]aws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."); *Lanzetta v. New Jersey,* 306 U.S. 451 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."); *see also City of Chicago v. Morales,* 527 U.S. 41, 56 (1999).

A corollary to the prohibition against vague laws is the bedrock principle that criminal laws are to be strictly construed. *United States v. Enmons,* 410 U.S. 396, 411 (1973) (Hobbs

Act); *United States v. Campos-Serrano,* 404 U.S. 293, 297 (1971) (Immigration and Naturalization Act); *United States v. Bass,* 404 U.S. 336, 347 (1971) (Omnibus Crime Control and Safe Streets Act); *United States v. Boston & Me. R.R.,* 380 U.S. 157, 160 (1965) (Clayton Act).

The rule of lenity, a manifestation of the due process fair warning requirement, "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier,* 520 U.S. 259, 266 (1997). The touchstone inquiry is "whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant' s conduct was criminal.' *Id.* at 267. It applies in 'those situations in which a reasonable doubt persists about a statute' s intended scope even after resort to ' the language and structure, legislative history, and motivating policies' of the statute.' *Moskal v. United States,* 498 U.S. 103, 108, 111 S.Ct. 461, 465, 112 L.Ed.2d 449 (1990) (quoting *Bifulco v. United States,* 447 U.S. 381, 387, 100 S.Ct. 2247, 2252, 65 L.Ed.2d 205 (1980)); *United States v. Shabani,* 513 U.S. 10, 17 (1994). If the court finds that the reach of the criminal statute is ambiguous, the ambiguity should be resolved in favor of lenity. *See Rewis v. United States,* 401 U.S. 808, 812 (1971).

These principles, the Supreme Court has cautioned, should not be evaluated "mechanically." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 498 (1982).

> The degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test

> because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law' s vagueness, especially with the respect to the adequacy of notice to the complainant that his conduct is proscribed.

Id., at 498-99 (citation omitted).

A review of these principles shows that the statute used in this case does not pass muster. What does "about to arrive at the place of her destination" mean? Where is the place where a lay person and a law enforcement officer would both plainly know that the vessel is "about to arrive at her place of destination"? Certainly reasonable people could disagree about that location. Thus, the language is impermissibly vague, as it does not give fair warning. It is not being used for economic regulation, it is being used in a criminal prosecution, and there is no scienter requirement to redeem it. Moreover, this case, which Greenpeace challenges in its accompanying motions as a selective prosecution undertaken due to Greenpeace's effective pursuit of environmental objectives at the expense of the Bush administration, is an example of arbitrary and discriminatory enforcement.

The history and purpose of the statute provide no guidance and, indeed, support the position that the statute is unclear. Indeed, Greenpeace is not the first to observe that the statute is unclear. This statute was enacted in 1872. It is so old that the Library of Congress cannot locate its legislative history. There are only two reported cases under the statute, one in 1872 and

one in 1890. In the very first one, the Court observed, as follows: "The statute in question [is] new, and its language, in many instances, inartistic and obscure . . . ." *United States v. Anderson*, 24 F.Cas. 812, 812 (C.C.N.Y. 1872). Neither *Anderson*, nor the other reported case, *United States v. Sullivan*, 43 F. 602 (C.C. Or. 1890) tell us at what point a vessel becomes "about to arrive."

Nor was this statute enacted with this sort of action in mind. The purpose was set out in one of the two reported cases: "The evil which this section is intended to prevent and remedy is apparent, and in this district notorious. For instance, lawless persons, in the interest or employ of what may be called ' sailor-mongers,' get on board vessels bound for Portland as soon as they get in the Columbia river, and by the help of intoxicants, and the use of other means, often savoring of violence, get the crews ashore, and leave the vessel without help to manage or care for her. The sailor thereby loses the wages of the voyage, and is dependent on the boarding-house for the necessaries of life, where he is kept, until sold by his captors to an outgoing vessel, at an enormous price." *United States v. Sullivan,* 43 F. 602, 604-5 (C.C. Or. 1890).

The statute does not have a specific intent requirement to ameliorate its vagueness. As noted above, courts have held that a specific intent requirement may redeem an otherwise vague statute. As the Eleventh Circuit Court of Appeals pointed out in *United States v. Waymer*, 55 F.3d 564, 568 (2003):

> The constitutionality of a vague statutory standard is closely related to whether the standard incorporates a requirement of *mens rea. Colautti v. Franklin,* 439 U.S. 379, 395, 99 S.Ct. 675, 685, 58 L.Ed.2d 596 (1979). "A statutory requirement that

> an act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *United States v. Conner,* 752 F.2d 566, 574 (11th Cir.) (quoting *Screws v. United States,* 325 U.S. 91, 101-02, 65 S.Ct. 1031, 1035-36, 89 L.Ed. 1495 (1945) (Douglas, J., concurring)), *cert. denied sub nom., Taylor v. United States,* 474 U.S. 821, 106 S.Ct. 72, 88 L.Ed.2d 59 (1985); *see also United States v. Margiotta,* 688 F.2d 108, 129 (2d Cir.1982) ("[t]he broad language of [section 1341], intended by Congress to be sufficiently flexible to cover the wide range of fraudulent schemes mankind is capable of devising, is not unconstitutionally vague because section 1341 contains the requirement that the defendant must have acted willfully and with a specific intent to defraud."), *cert. denied,* 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983).

There is no specific intent requirement in 18 U.S.C. § 2279. The statute does not call for knowing or willful conduct. It does not ask for any state of mind that would permit an inference that a Greenpeace activist knew that the ship was "about to arrive" and still meant to go aboard.

Moreover, the statute could have been made clear to lay persons and to law enforcement by using the traditional definitions relating to United States jurisdiction over ships at sea. Those terms, "within the special maritime and territorial jurisdiction" or in "Customs Waters," are defined with precision in the United States Code. *See* 18 U.S.C. § 7 and 19 U.S.C. § 1401(j) As the court in *United States v. Handakas*, 286 F.3d 92 (2nd Cir. 2002) stated: "Nor is this a 'case where further precision in the statutory language is either impossible or impractical." *Id*. at 104, quoting *Kolender*, 461 U.S. at 361. Certainly that observation is applicable here.

And here the statute has been pulled out of mothballs to be used against an organization whose supporters were engaged in a peaceful protest action seeking to prevent the commission of another crime, the importation into this country of illegal mahogany. Thus, finally, and

critically, a conviction here would penalize Greenpeace for engaging in a public protest action aimed at drawing attention to a public controversy and to the Government's failure to enforce the law and to protect the Amazon. "There is no question that speech critical of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nevada*, 501 U.S. 1030,1035 (1991). The court, by its own account, has been "especially intolerant of vague statutes in the First Amendment area." *Pope v. Illinois*, 481 U.S. 497, 516 (1987)(citing *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Grayned v. Rockford*, 408 U.S. 104, 108-109 (1972*); Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 684-690(1968); *Cramp v.Board of Public Instruction of Orange County*, 368 U.S. 278, 283-84 (1961); *Smith v. California*, 361 147, 151 (1959); *Winters v. New York*, 333 U.S. 507, 515 (1948).

A vessel three to five miles out of port, which would mean that it would not arrive at port for approximately another hour cannot be deemed to be so clearly "about to arrive" that a criminal prosecution may be founded upon it.

This Court cannot repair the error. It is not a solution for this Court to determine when a vessel is "about to arrive" and when it has not yet reached that location, wherever that might be. Because only Congress can enact criminal laws, neither the executive nor judicial branches may enlarge them to deprive people of their freedom and liberty. *Bishop v. Reno*, 210 F.3d 1295, 1299 (11th Cir. 2000) ("Penal laws are construed strictly because legislatures, not courts, define crimes and establish punishment.").

It would certainly be dangerous if the legislature could set a net large enough to

> catch all possible offenders, and leave it to the courts to step inside and say who could rightfully be detained; and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

United States v. Reese, 92 U.S. 214, 221(1875). The Court "is not authorized to rewrite the law so it will pass constitutional muster." *Humanitarian Law Project v. Reno*, 205 F.3d 1130,1137-38 (9th Cir. 2000). Thus, courts are not empowered to supply definitions omitted by Congress.

Courts have recently applied these principles to dismiss indictments and reverse convictions. The Second Circuit Court of Appeals reversed the conviction in *United States v. Handakas*, 286 F.3d 92 (2nd Cir. 2002), on vagueness grounds. Handakas was convicted under 18 USC § 1346 of a conspiracy to deprive a state entity of its "intangible right of honest services." He had a contract with New York City which required him to certify that he paid his employees the prevailing wage rate. Handakas so certified despite the fact that he actually paid them less than half the prevailing rate and pocketed the difference. The Second Circuit reserved on vagueness grounds, holding that the statute failed both prongs of the *Kolender* test. It did not provide a sufficient definition to alert a lay person to what conduct it prohibited. *Id.* at 104-107. The court also found that the statute violated the second and "more important" prong, *Id*. at 107, in that its indefiniteness "creates opportunity for the misuse of government power," that is, arbitrary and capricious enforcement. *Id.* at 107-108. Finally, the Court in *Handakas* stated that the Court could not make the statute more precise: "If the words of a criminal statute insufficiently define the offense, it is no part of deference for us to intuit or invent the crime." *Id.* at 109-110.

In *United States v. Sattar*, 2003 WL 21698266 (S.D.N.Y.), the district court held that 18 USC § 2339B, which prohibits providing material support or resources to a foreign terrorist organization, was unconstitutionally vague with regard to its prohibition on "providing" material support or resources in the form of "communications equipment" and "personnel" as applied to the conduct at issue in the case. The Indictment charged an attorney and a translator with providing material support to a designated foreign terrorist group principally by acting as conduits for the delivery of secret messages from the attorney's client, the imprisoned Sheik Omar Abdel Rahman, to his followers in the Islamic Group. The Court determined that "by criminalizing the mere use of phones and other means of communication the statute provides neither notice nor standards for its application such that it is unconstitutionally vague as applied." *6. Moreover, there was no permissible definition of the term "personnel" in the statute. Here again, the Court declined the Government's invitation to rewrite the statute in a way not prescribed by Congress. *Id.* at *8.

In *Chatin v. Coombe*, 186 F.3d 82 (2d Cir.1999), the court held that a prison rule which prohibited unauthorized religious services and speeches was impermissibly vague as applied to an inmate's individual, silent demonstrative prayer. In *United States v. Plasser*, 57 F.Supp.2d 140 (E.D.Pa.1999) the court held, on grounds of lenity, that a company could not be convicted of obstructing an "audit of United States" for its actions in connection with an audit of Amtrak, when it was unclear whether Amtrak, because of its separate corporate identity, should be deemed to be the "United States" for purposes of this statute.

In *United States v. Lachman*, 2003 WL 22002565 (D. Mass.), the court held that the regulation under which the defendants had been convicted, which prescribed unlicensed export of controls that were "specially designed" for certain listed manufacturing equipment was too vague to support criminal liability. In *Lachman* the defendants exported material which was likely to be used to facilitate nuclear weaponry in South Asia, which the court found reprehensible. Despite that, given that there was no general shared understanding of the term "specially designed," which the court learned only after trial, the judge did not let the convictions stand.

In *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985), the First Circuit reversed Anzalone's conviction and dismissed the Indictment on grounds that the statute and regulations regarding currency transaction reporting structuring did not give him fair warning. Those statutes and regulations, since amended, placed a duty on banks, not their customers, to report covered transactions. The government's theory was that the Defendant's failure to inform the bank of the "structured" nature of his transactions was illegal because it caused the bank to fail in its duty to report them. Anzalone challenged the application of the statutes to him as a bank customer. Given that the regulations governing the reporting requirements at that time placed the obligation to report only on the bank, the Court ruled that the laws did not provide fair warning. The court similarly ruled that the illegality of structuring was not clear at that time and would not criminalize conduct which was not clearly illegal. *See also U.S. v. Genova*, 2003 WL 21418411 (dismissing a RICO conviction because it was a novel use of the statute).

CONCLUSION

Thus, the specific terms of the statute, as written and enacted by Congress, do not sufficiently proscribe the conduct charged in the Greenpeace Indictment, and it must be dismissed. Moreover, the statute is too vague to provide fair warning to potential defendants and fair guidance to law enforcement. "To make the warning fair, so far as possible, the line should be clear." *United States v. Bass,* 404 U.S. 336, 348 (1971). Here, the line is not clear. Congress could have specified the reach of this statute but failed to. The Indictment must be dismissed.

DATED: October 6, 2003

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Mail this 6th day of October 2003 to: Cameron Elliott, Esq., United State Attorney=s Office, 99 Northeast 4th Street, Miami, Florida 33132.

_____
Jane W. Moscowitz