

No. SC88825

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*In the  
Missouri Supreme Court*

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**ERIC WINFREY**

**Appellant,**

**v.**

**STATE OF MISSOURI,**

**Respondent.**

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**Appeal from St. Charles County Circuit Court  
Eleventh Judicial Circuit  
The Honorable Ted C. House, Judge**

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**RESPONDENT'S BRIEF**

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## **JURISDICTIONAL STATEMENT**

This appeal is from a conviction for attempt to commit prohibited acts on an excursion gambling boat in violation of § 313.830, RSMo 2000, obtained in the St. Charles County Circuit Court and for which Appellant was sentenced to five years in the custody of the Department of Corrections. Appellant was also convicted of tampering in the first degree, but does not challenge that conviction on appeal. Appellant challenges the prohibited acts on excursion gambling boats statute, specifically § 313.830.4(9), RSMo 2000, alleging that it is void for vagueness. The Eastern District Court of Appeals transferred this cause prior to opinion, therefore, this Court has jurisdiction. Article V, §11, Missouri Constitution (as amended 1976).

## STATEMENT OF FACTS

Appellant was charged with tampering in the first degree and attempt to commit a prohibited act on an excursion gambling boat (L.F. 28). On September 30, 2005, Appellant appeared before the Honorable Ted House in the St. Charles County Circuit Court and pled guilty to the charges (L.F. 26). Appellant only appeals his conviction for his attempt to commit a prohibited act on an excursion gambling boat (App. Br. 6).

At the plea hearing, the prosecutor recited the factual basis for the offense as follows:

On or about July the 14<sup>th</sup> of 2004, in St. Charles County, Missouri, you committed the class D felony of attempt to commit a prohibited act or acts on an excursion gambling boat, in that you came in and bought \$180 in casino chips and with the intent to defraud, cashed out this \$180 in casino chips, collected \$595. What it was, you had a girlfriend working there in one of the cages, you go buy some chips, you take it to her, you give her a small amount of chips and then she gives you the larger amount of money, this is a prohibited act on an excursion boat. You did this for the purpose of committing this crime of a prohibited act on an excursion boat.

(Tr. 7). Appellant admitted he did these acts and was pleading guilty because he was guilty

(Tr. 13). The Court asked Appellant to tell the court in his own words what occurred:

On that day, I went to Ameristar casino, got chip change for \$180 from one window, went to another window where my girlfriend worked and cashed in the chips and received an additional \$415, along with the 180, which was a total of \$595 from the casino, and she gave it to me.

(Tr. 14). The Court asked whether Appellant did that for the purpose of committing a prohibited act on a gambling boat, and Appellant said that he exchanged the chips in order to defraud the casino (Tr. 15).

Appellant stated that he understood that by pleading guilty he was waiving his trial rights, including the right to confront and cross-examine state witnesses, the right to present witnesses, and the right to testify or not testify (Tr. 4-5). Appellant admitted that he was a prior and persistent offender for two prior robbery convictions in Tennessee (Tr. 23-24). The Court accepted Appellant's pleas finding they were voluntary and knowing (Tr. 24). At the sentencing hearing on November 18, 2005, Appellant was sentenced to seven years for the tampering conviction and five years for attempting to commit prohibited acts on an excursion gambling boat to be served consecutively (Tr. 31).

Appellant filed a *pro se* motion for post conviction relief on March 27, 2006 (L.F. 3). Counsel filed an amended motion on October 10, 2006 (L.F. 1). The motion court denied Appellant's motion and issued its findings of fact, conclusions of law, and judgment on January 26, 2007 (L.F. 2, 16). This appeal followed.

## ARGUMENT

### I. (Factual Basis)

**The motion court did not clearly err in denying, without an evidentiary hearing, Appellant’s claim that his guilty plea lacked a factual basis because Appellant admitted that he used casino chips in an attempt to defraud the casino and steal \$415 from the casino**

Appellant claims that his guilty plea lacked a factual basis because the facts established at the plea hearing did not constitute an offense under § 313.830.4(9), RSMo 2000. Specifically, Appellant claims that his conduct did not occur “in or from the gambling games,” so his conduct was not criminal under the plain meaning of the statute (App. Br. 11)

#### A. Standard of Review

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” *Moss v. State*, 10 S.W.3d 508, 511 (Mo. banc 2000). “Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made.” *Id.* To be entitled to an evidentiary hearing, a movant must: allege facts, not conclusions, that, if true, would warrant relief; these facts must raise matters not refuted by the record and files in the case; and the matters complained of must have resulted in prejudice to the movant. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. banc 2003).

#### B. Motion Court

The motion court did not clearly err in denying Appellant's claim, finding:

Movant alleges that because the offense occurred at the cashier windows and not "in or from gambling games or an excursion gambling boat" the act was not included in § 313.830 and, therefore, the plea of guilty lacked a factual basis. Clearly, the term "boat" in the context of gaming in the State of Missouri is a legal fiction utterly without meaning. Massive casino buildings under this section are considered gambling "boats," even though they sit on dry land. As for Movant's assertion that the offense did not involve a gambling game, this Court finds that the purchase and cashing in of chips is an integral part of the gambling process. Further, § 313.830.4(5) prohibits the manufacture of cards, chips, or dice intended to be used to violate any provision of the statute.

Through fraud, the Movant obtained cash "without having made a wager contingent on winning a game" by collecting money to which he was not entitled from a cashier. The requirements of the statute are met exactly. The transcript clearly shows that a more than adequate factual basis was made during the guilty plea.

(L.F. 17-18).

### **C. Analysis**

Supreme Court Rule 24.02(e) provides, "[t]he court shall not enter a judgment upon a plea of guilty unless it determines that there is a factual basis for the plea." Thus, the motion court must "determine facts which defendant admits by his plea and that those facts would result in defendant being guilty of the offense charged." *Hoskin v. State*, 863 S.W.2d 637,

639 (Mo. App. E.D. 1993). The court should not accept a guilty plea if the facts in the record do not establish a crime. *Id.*

The purpose of this rule is to ensure that the defendant understands the nature of the charges against him. *Saffold v. State*, 982 S.W.2d 749, 753 (Mo. App. W.D. 1998). It is not necessary for a defendant to admit to or recite facts constituting the offense in a guilty plea proceeding, so long as a factual basis for the plea exists. *State v. Morton*, 971 S.W.2d 335, 339 (Mo. App. E.D. 1998). It is acceptable if the defendant simply admits to the charges as read where the language used is “. . . simple, specific and sufficient to inform the defendant in terms that a layman would understand what acts he was charged with committing, and the commission of which constituted the crimes charged.” *Hoskin*, 863 S.W.2d at 639.

Appellant was charged with attempting to commit a prohibited act on an excursion gambling boat in violation of § 313.830.4(9), RSMo 2000, which states that a person commits a class D felony and, in addition, shall be barred for life from excursion gambling boats under the jurisdiction of the commission, if the person:

Claims, collects, or takes, or attempts to claim, collect or take, money or anything of value in or from the gambling games, with intent to defraud, without having made a wager contingent on winning a gambling game, or claims, collects, or takes an amount of money or thing of value of greater value than the amount won.

§ 313.830.4(9), RSMo 2000. Section 313.800 defines gambling game as the following:

includes, but is not limited to, games of skill or games of chance on an excursion gambling boat but does not include gambling on sporting events; provided such games of chance are approved by amendment to the Missouri Constitution.

§ 313.800.1(12), RSMo 2000.

In this case, Appellant was charged with violating § 313.830.4(9) for attempting to claim, collect, take anything of value in or from the gambling games with intent to defraud without having made a wager contingent on winning a gambling game (L.F. 29-30). As set forth above, Appellant admitted facts sufficient for a conviction under the statute. As the motion court stated, Appellant's conduct fit exactly within the statute's language. First, Appellant obtained casino chips with a face value of \$180 from a cashier at the Ameristar Casino (Tr. 7, 14). Appellant then did not make a wager contingent on winning a gambling game, but instead claimed from a different cashier an amount in excess of the face value of the previously obtained chips (Tr. 7, 14). Appellant's admitted purpose was to defraud the casino of \$415 (Tr. 7, 14). The conduct which Appellant admitted at the plea hearing falls under a reasonable reading of the plain language of the statute, because casino chips are used for the sole purpose of participating in gambling games, and are an integral part of the gambling games. Thus, the casino chips, which were used to defraud the casino were "in or from the gambling games" (even though Appellant did not make a wager contingent on winning a gambling game), which established a sufficient factual basis for the guilty plea.

When construing a criminal statute, an appellate court is to give effect to the legislature's intent by examining the plain language of the statute. *State v. Crews*, 968 S.W.2d 763, 765 (Mo. App. E.D. 1998). "The primary rule of statutory construction is to

ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning.” *State v. Grubb*, 120 S.W.3d 737, 739 (Mo. banc 2003) citing *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 251 (Mo. banc 2003). Further, the legislature is presumed to have intended what the statute says; where legislative intent is apparent from the language of the statute and there is no ambiguity, there is no room for statutory construction. *Eckenrode v. Dir. of Revenue*, 994 S.W.2d 583, 586 (Mo. App. S.D. 1999).

Appellant attempts to avoid the conclusion that his conduct falls within the statute by arguing that he was not actually participating in a gambling game such as poker, blackjack, or craps (App. Br. 16). But the statute does not require that Appellant was actually playing a game when he attempted to take anything of value from the gambling games with the intent to defraud. Appellant merely had to take something of value “in or from the gambling games,” and the casino chips are an integral part of the gambling games. Appellant was able to defraud the casino through the use of casino chips, which are an integral part of the gambling games. Appellant is simply arguing that because he did not make a wager, his conduct does not fall under the statute. But, in fact, the statute expressly states that a person can be criminally liable if he does not wager anything. The fact that Appellant did not participate in a game of chance or skill is irrelevant, as the statute, by including the language, “without having made a wager contingent on winning a gambling game,” specifically allows for instances where someone is not playing. § 313.830.4(9), *See also United States v. Manarite*, 44 F.3d 1407, 1415 (9<sup>th</sup> Cir. 1995) (Nevada statute prohibiting taking anything of value “in or from gambling game” does not require that taking occur during gambling game).

In short, Appellant's actions provided a factual basis for the conviction under the clear language of the statute.

“The plain and ordinary meaning of the words of a statute is their meaning ‘found in the dictionary ... unless the legislature provides a different definition.’” *State v. Jones*, 172 S.W.3d 448, 451 (Mo. App. W.D. 2005) *citing Lincoln Indus., Inc. v. Dir. of Revenue*, 51 S.W.3d 462, 465 (Mo. banc 2001). Appellant focuses on the language, “in or from the gambling games,” in his claim that his conduct falls outside the statute. But Webster's Dictionary defines “from” as “out of,” “originating with,” “out of the possibility of or use of,” and “because of,” all of which support the motion court's finding that Appellant's conduct provided a sufficient factual basis for the offense. *Webster's New American Dictionary*, 239 (1995). The definitions as provided by Webster's support the legislature's intent to criminalize behavior originating with gambling games, because of gambling games, out of the possibility of gambling games and does not require that the offender be engaged in actual gambling as Appellant contends (especially in light of the language stating that a person need not make any wager). The casino chips that Appellant used to defraud the casino originated with the gambling games because the chips are a necessary component of, and the only legal tender used, in gambling games.<sup>1</sup> Without the step of obtaining the casino

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<sup>1</sup> See § 313.832.3, RSMo 2000 (“Wagering shall not be conducted with money or other negotiable currency. The licensee shall exchange the money of each wagerer for electronic or physical tokens, chips, or other forms of credit to be wagered on the gambling games. The

chips, the gambling game would be incomplete, and gambling games could not occur. Indeed, every gambling game begins when a potential wagerer converts money into gambling game pieces or chips. To limit the statute's application to acts committed only while participating in or observing a game of poker or blackjack too narrowly construes the legislative intent and plain meaning which states "without having made a wager contingent on winning a gambling game." § 313.830.4(9).

In support of his claim that the statute's clear intent is to criminalize activities that occur while participating in or observing gambling game, Appellant cites to other subsection of § 313.830.4 which criminalize other behavior (App. Br. 18-20). Appellant claims that each subsection of § 313.830 "involves cheating or gaining an unfair advantage in some manner in the context of a game of skill or game of chance" (App. Br. 19). But the subsections of the statute do not support Appellant's proposition. Subsection 1 criminalizes bribing anyone who is connected with an excursion gambling boat operator with the intent that the bribe will influence the actions of the person, the outcome of a gambling game, or influence official action of a member of the commission. § 313.830.4(1). Subsection 2 criminalizes officers and employees of licensees who solicit or knowingly accepts a bribe. § 313.830.4(2). Subsection 5 prohibits the manufacture, sales, and distribution of any cards, chips, dice, game or device which is intended to be used to violate any provision of the excursion gambling boat statutes. § 313.830.4(5). Clearly

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licensee shall exchange the tokens, chips, or other forms of wagering credit for money at the request of the wagerer.")

subsection five addresses conduct that is outside the “gambling game” and outside the confines of an excursion gambling boat, but which affects an integral part of the gaming system. Subsection 6 prohibits instructing a person in cheating or in the use of devices for that purpose. § 313.830.4(6). Again, such an instruction could take place outside the “gambling game,” but which affects the gambling game. Subsection 13 criminalizes mere possession of “any devices intended to be used to violate a provision of sections 313.800 to 313.850.” § 313.830.4(13). As the foregoing shows, § 313.830.4 criminalizes a range of behaviors that may or may not occur during or while actually engaged in a gambling game. Thus, the other subsections of the statute demonstrate the legislature’s intent to criminalize a wide range of unlawful behavior related to the excursion gambling boats and not just conduct that occurs during the course of a game of chance or skill. In short, Appellant’s conduct of obtaining chips that are part of the gambling games, and then using those chips in a scheme to defraud the casino and claim more than the face value of those chips, was conduct prohibited by § 313.830.4(9).

In addition, it may be observed that Appellant was charged with attempting to commit a prohibited act on a gambling excursion boat (L.F. 28-29). To show that Appellant attempted to commit a prohibited act, the State was required to show that

. . . with the purpose of committing the offense, he does any act which is a substantial step towards commission of the offense. A substantial step is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

*State v. Withrow*, 8 S.W.3d 75, 78 (Mo. banc 1999) *citing* § 564.011.

Here, the facts as recited by the prosecutor and admitted by Appellant showed that Appellant committed a substantial step towards the commission of the offense. First, Appellant went to a cashier and exchanged \$180 dollars for casino chips (Tr. 7, 14). Next, Appellant went to another cashier, his girlfriend, where he exchanged the casino chips for an amount in excess of their face value, defrauding the casino of \$415 (Tr. 7, 14). Appellant stated he did this act with the purpose to defraud (Tr. 15). Thus, even if the phrase “in or from the gambling games” implies that the conduct must occur during the course of a game of skill or chance, Appellant’s actions constituted a prohibited act under the statute. Appellant’s actions showed that he took a substantial step toward attempting to claim, collect, or take anything of value in or from the gambling games. The factual basis detailed in the guilty plea hearing demonstrated that Appellant’s conduct qualified as a substantial step toward the prohibited act.

In short, the plain meaning of the statute supports the motion court’s determination that Appellant’s actions established a factual basis under § 313.830.4(9) because casino chips are a necessary component of the gambling games and Appellant claimed and collected an amount in excess of the face value of the chips without having made a wager contingent on winning a gambling game. Additionally, Appellant was charged with attempt to commit a prohibited act, so the facts constituting a completed offense were not required. Appellant’s claim is without merit and should be denied.

## **II. (Statute is constitutional)**

**This Court should decline to review Appellant's claim that § 313.830.4(9) is unconstitutional because Appellant failed to raise this issue at the first opportunity. In any event, Appellant has failed to show how this statute is void for vagueness in that the statute gave fair notice that his conduct was criminal.**

By failing to challenge the constitutionality of § 313.830.4(9) until after his guilty plea, Appellant waived this claim; thus, this Court should decline to review Appellant's claim.

### **A. This Court should decline to review Appellant's claim because it was waived.**

Because Appellant did not challenge the constitutionality of § 313.830.4(9) at the first opportunity, this Court should decline to review his claim. Missouri has always adhered to the rule that to preserve a constitutional issue for appellate review, it must be raised at the earliest time consistent with good pleading and orderly procedure. *State v. Flynn*, 519 S.W.2d 10, 12 (Mo. 1975); *State v. Bowens*, 964 S.W.2d 232, 236 (Mo. App. E.D. 1998). Here, Appellant made no objection to the constitutionality of the statute at his guilty plea

hearing, nor did he challenge the information after it was filed on September 30, 2005 (L.F. 28). Thus, “[i]nasmuch as no constitutional challenge to the statute . . . was made . . . the constitutional issue has not been preserved for review.” *State v. Belcher*, 805 S.W.2d 245, 251 (Mo. App. S.D. 1991); *see also State v. Long*, 972 S.W.2d 559, 563 (Mo. App. W.D. 1998) (summarily denying challenge to constitutionality of §491.075 that was raised for the first time on appeal); *State v. Zismer*, 696 S.W.2d 349, 351 (Mo. App. S.D. 1985) (stating that the first time to challenge a statute’s constitutionality is to attack the charging document); and *State v. Newlon*, 216 S.W.3d 180, 184 (Mo. App. E.D. 2007) (Because defendant’s constitutional challenge was not preserved for appellate review, jurisdiction pertaining to the constitutionality of the statute lay with the appellate court).

In *State v. William*, 100 S.W.3d 828 (Mo. App. W.D. 2003), the defendant was charged by information with possession of a dangerous item of personal property about the premises of a correctional institution of the Missouri Department of Corrections under § 217.360. On appeal, the defendant claimed that § 217.360.1(4) violated the void for vagueness doctrine in that the statute did not give fair and adequate notice of the proscribed conduct because a cell phone was not inherently dangerous. *Id.* at 831. The appellate court held that because the defendant raised the constitutional issue for the first time on appeal, this claim was not preserved for appeal. *Id.*

Additionally, the general rule in Missouri is that a guilty plea waives all nonjurisdictional defects, including statutory and constitutional guaranties. *State v. Sexton*, 75 S.W.3d 304, 309 (Mo. App. S.D. 2002). “If Defendant wanted to challenge the constitutionality of this statute, he must have done so before pleading guilty.” *Id.* Because

Appellant's challenge to the constitutionality of the statute was waived, this Court should refuse to review Appellant's claim.

### **B. Standard of Review**

Although Appellant's claim was not preserved, "[t]he constitutionality of a statute is a question of law, the review of which is *de novo*." *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo. banc 2007). "A statute's validity is presumed, and a statute will not be declared unconstitutional unless it clearly contravenes some constitutional provision." *Id.* "This Court is bound to adopt any reasonable reading of the statute that will allow its validity and to resolve any doubts in favor of constitutionality." *State v. Burns*, 978 S.W.2d 759 (Mo. banc 1998).

### **C. Section 313.830.4(9) is not unconstitutionally vague**

As stated above, this claim was not preserved, but, in any event, Appellant's claim is without merit. When defining a criminal offense, the legislature is not held to an "impossible standards of specificity." *State v. Hatton*, 918 S.W.2d 790, 793 (Mo. banc 1996); *State v. Duggar*, 806 S.W.2d 407, 408 (Mo. banc 1991). "It is not the fact that the legislative branch of government which enacted the statute could have chosen more precise or clearer language which determines the issue of vagueness." *State v. Wiles*, 26 S.W.3d 436, 442 (Mo. App. S.D. 2000). The void for vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and to protect against arbitrary and discriminatory enforcement. *State v. Entertainment Ventures I, Inc.*, 44 S.W.3d 383, 386 (Mo. banc 2001).

To determine whether a statute is void for vagueness, the standard is whether the terms or words used in the statute are of common usage and are understandable by persons of

ordinary intelligence. *Wiles*, 26 S.W.3d at 442. “A valid statute must give a person of ordinary intelligence a reasonable opportunity to learn what is prohibited.” *Id.* Vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand. *Hatton*, 918 S.W.2d at 792.

Appellant contends that he was not reasonably on notice that his conduct, which he characterizes as stealing “outside” a gambling game, was illegal under § 313.830.4(9) (App. Br. 27). But as discussed in Point I, § 313.830.4(9) provided fair and adequate notice to Appellant that his actions constituted the class D felony described therein.

As discussed above, Appellant took chips, an item of value, from the gambling games, with the intent to defraud, without having made a wager contingent on winning a gambling game, as expressly proscribed in the statute. “The test for vagueness is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.” *State v. Brown*, 140 S.W.3d 51, 54 (Mo. banc 2004). As discussed in Point I, the language, “in or from the gambling games” is not vague and a person of ordinary intelligence was on notice that conduct that involves taking casino chips, which are part of the gambling games, and presenting them to another cashier for an amount higher than the face value with the intent to defraud is illegal. Moreover, the express language of the statute informs a person of ordinary intelligence that he need not even be participating in a game of skill or chance, as the statute expressly states, “without having made a wager contingent on winning a gambling game.” §

313.830.4(9). Appellant was reasonably on notice that his actions constituted a crime under this statute.<sup>2</sup>

Further, a specific intent requirement in a statute “relieve[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware.” *Screws v. United States*, 325 U.S. 91, 102 (1945). Both federal and Missouri courts have repeatedly refused to find a statute void for vagueness where the statute includes a scienter requirement.

In *State v. Shaw*, 847 S.W.2d 768, 775 (Mo. banc 1993), the Missouri Supreme Court observed that the phrase “unfair practice” in the statute at issue was vague in isolation, but the fact that the statute required a finding that the defendant acted “willfully and knowingly . . . with the intent to defraud” saved the statute from being found void for vagueness. *Id.* at 775-776. The Supreme Court, in *Shaw*, cited numerous United States Supreme Court cases that have declined to find a statute void for vagueness when the statute required some sort of scienter. *Id.* at 776, citing *Boyce Motor Lines v. United States*, 342 U.S. 337, 342 (1951) (requirement of culpable intent as necessary element “does much to destroy” argument that

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<sup>2</sup> Respondent notes that numerous states have the exact same statute including Michigan, M.C.L.A. 432.218(2)(j) (2001); Nevada, N.R.S. 465.070.3 (2001); California, West’s Ann.Cal.Penal Code § 337u(c) (2003); Iowa, I.C.A. § 99F.15.4(i) (1996); Mississippi, MS ST § 75-76-301 (1993); and Indiana, IC 4-33-10-2(9) (2002).

application of statute would be unfair); *United States v. Ragen*, 314 U.S. 513, 524 (1942) (“A mind intent upon willful evasion is inconsistent with surprised innocence.”).

Here, the statute required that the Appellant have a specific intent to defraud when he committed a prohibited act on an excursion gambling boat. Appellant told the Court that he committed the act with the purpose to defraud, therefore, the statute was not vague. A person with ordinary intelligence had notice that conduct that involved using casino chips in an attempt to defraud the casino falls under § 313.830.4(9), which prohibits attempting to take anything of value in or from the gambling games with an intent to defraud without having made a wager contingent on winning a gambling game.

This Court should decline to review Appellant’s claim. But even if this Court reviews the constitutionality of § 313.830.4(9), the statute is not void for vagueness. The statute specifically states that a person need not make a wager to be criminally liable; thus, a person of ordinary intelligence would know that attempting to defraud the casino by claiming more money than his gambling chips were worth is prohibited by this statute. Appellant’s claim is without merit and should be denied.

## **CONCLUSION**

The motion court did not clearly err in denying Appellant's claim without an evidentiary hearing. Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 5,191 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 17<sup>th</sup> day of October, 2007, to:

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**APPENDIX**

Judgment, Findings of Fact & Conclusion of Law ..... A1