IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. JEREMY BAIRD, et al., Defendants-Appellees.	)	C.A. No. 94-10494 D.C. No. CRS 94-162 WBS (E.D. Calif., Sacramento)

Appeal from the United States District Court
for the Eastern District of California
Honorable William B. Shubb, Presiding

BRIEF FOR APPELLEES

QUIN DENVIR
Attorney at Law
660 "J" Street, Suite 200
Sacramento, CA 95814

STEVEN BAUER
Attorney at Law
1400 Santa Ynez Way
Sacramento, CA 94816

ROBERT M. HOLLEY
Attorney at Law
800 - 9th St., Ste. 300
Sacramento, CA 95814

MICHAEL KENNEDY
Asst. Federal Defender
801 "K" Street, Ste 1024
Sacramento, CA 95814

DWIGHT M. SAMUEL
Attorney at Law
117 "J" St., Ste. 202
Sacramento, CA 95814

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OPINION BELOW

The District Court's opinion is published at 865 F.Supp. 659 (E.D. Cal. 1994).

JURISDICTION

Appellees agree with appellant's statement of jurisdiction.

ISSUE PRESENTED FOR REVIEW

The sole issue presented for review is whether the temporary presence of two leased video games renders a 7-Eleven retail convenience store a "place of exhibition or entertainment" and therefore a "public accommodation" within the meaning of the Civil Rights Act of 1964, 42 U.S.C. section 2000a(b)(3).

The government took the position in the District Court that the 7-Eleven retail convenience store was also a "facility principally engaged in selling food for consumption on the premises" under 42 U.S.C. section 2000a(b)(2). On appeal, it has expressly abandoned that position, which was rejected by the

District Court. (See Appellant's Brief ("AB"), at 9, fn. 5.)

In addition, the government took the position below that the fact that the 7-Eleven store sold California lottery tickets rendered the convenience store a "place of entertainment." On appeal, it apparently has also abandoned that position, which was also rejected by the District Court.

STATEMENT OF THE CASE

In addition to stipulating that the question whether the 7-Eleven store is a place of public accommodation under the 1964 Act could properly be decided by the District Court on a pretrial motion (AB 3), the parties also stipulated in the District Court that the government had the burden of proving beyond a reasonable doubt that the 7-Eleven store in question was a place of public accommodation. (E.R. 30, 10; Order at 4.)

STATEMENT OF FACTS

Rule 28(a)(4), Federal Rules of Appellate Procedure, requires that the appellant's brief include "a statement of the facts relevant to the issues presented for review." Inexplicably, the government's brief sets forth only the facts underlying the alleged assault, facts totally irrelevant to the legal issue presented for review. (AB 4-6.) The facts relevant to the issue presented, which the District Court found to be undisputed (E.R. 10, Order at 4), are as follows:

The 7-Eleven retail convenience store in question is located at Antelope Road and Zenith Drive in Citrus Heights, California. (E.R. 84.) The store is a leased franchise from The

Southland Corporation, and is operated by Albert Woo. (E.R. 89-90.)

The Southland Corporation both operates and franchises 7-Eleven convenience stores, which are extended hour retail stores providing groceries, take-out foods and beverages, dairy products, non-food merchandise, specialty items, and various services, and emphasizing convenience to the customers. (E.R. 91.) According to The Southland Corporation, 7-Eleven stores are not intended to be places of exhibition or entertainment. (E.R. 92.) 7-Eleven franchisees are prohibited from adding equipment or fixtures to the stores that would convert a store into a place of exhibition or entertainment. (E.R. 92.) A violation of the Southland's prohibition in this regard could lead to termination of the franchise agreement. (E.R. 92.)

The 7-Eleven retail convenience store in question offers for sale numerous, varied types of merchandise, including, but not limited to, the following:

> newspapers, magazines, and street maps;
> aluminum foil and various plastic wraps;
> paper plates, paper cups, plastic utensils, toothpicks, and other picnic supplies; toilet paper, tissues, and other paper products;
> sandwich bags, garbage bags, storage bags, and other plastic products; laundry detergents, household wax, stain remover, ammonia, glass cleaners, oven cleaners, air

fresheners, and other household cleaning supplies; bath soap; insect repellant and lighter fluid; motor oil, oil additives, antifreeze coolant, brake fluid, windshield wiper solvent, tire gauge, starting fluid, and other automotive supplies; canned and dry cat food and dog food, and pet treats; charcoal, charcoal lighter, and Presto logs; styrofoam coolers; ice cream, frozen desserts, and ice cream toppings; bags of icecubes and block ice; beer and wine; bottled and canned soft and fruit drinks and bottled water; ladies' nylons, pantyhose, sanitary napkins, lipstick, nail polish, and nail polish remover; shampoos, deodorants, and other personal toiletries and sundries; pens, pencils, scissors, envelopes, typing paper, scotch tape, masking tape, magic markers, paper clips, and other office supplies; notebooks, writing pads, erasers, crayons, chalk, and other school supplies; electric lightbulbs, electrical tape, emergency candles, and fuses; workgloves, screwdrivers, extension cords, glue, padlocks, mousetraps, and other hardware items; playing cards, shoelaces, nail

clippers, emery boards, thermometers, and safety pins; aspirins and other analgesics, Rolaids and other antacids, and other medicines and medical items; birthday cards, specialties cards, and birthday candles; cough syrups, cough drops, saline eye solution, nasal spray, Q-tips, and cotton balls; hairbrushes, combs, tooth brushes, toothpaste, and dental floss; canned and jarred baby food, infant formula, Pampers, pacifiers, lotions, and other supplies for infants; coffee, tea, salt, pepper, sugar, cake mix, vinegar, pasta, hamburger helper, salad dressing, vegetable oil, mustard, catsup, relish, baking soda, cocktail onions, tomato paste, lemon juice, soy sauce, barbeque sauce, spaghetti sauce, noodles, and other food items; canned beans, soups, spaghetti, ravioli, lasagna, tamales, fruit, vegetables, and other canned food items; bread, rolls, crackers, cookies, and other bread items; breakfast cereals; packaged candies and gum; potato chips, pretzels, peanuts, popcorn, sunflower seeds, and other snack foods; milk, condensed milk, cream, cheese, butter, and other dairy items; fruit

juices; eggs, bacon, packaged sandwich meats, packaged hot dogs, and other packaged food items; cigarettes, cigars, chewing tobacco, and other tobacco products; sandwiches, hot dogs, burritos, nachos, doughnuts, sweet rolls, fruit, and other take-out foods; coffee, hot chocolate, machine-dispensed soft drinks, Slurpies, and other take-out beverages; baseball caps, baseballs, and sports trading cards; batteries; photographic film; sunglasses; razors, shaving cream, and other shaving products; first aid supplies; beef jerky; condoms; photocopying services; Lotto and lottery tickets; frozen TV-dinners, fruit juices, and other frozen items. (E.R. 94-97.)

From 1993 through April 25, 1994, B & P Amusement had an agreement with Albert Woo, the operator of the Citrus Heights 7-Eleven store, whereby B & P Amusement installed and maintained two video games at the store. (E.R. 85-86, 100-101.) The two video games were "E-Swat" and "Street Fighter II Champion Edition." (E.R. 86.) The video games were removed from the 7-Eleven store on April 25, 1994. (E.R. 101.)

Pursuant to their agreement, B & P Amusement and Mr. Woo split the proceeds from the video games on an equal basis. (E.R. 101.) Gross receipts from the video games averaged less

than $150 per month during 1994. (E.R. 101.) In May 1993, the store's share of the proceeds from the video games represented twenty-three hundredths of one percent (.23%) of the store's gross sales. (E.R. 106.)

The government presented no evidence regarding the actual operation of the video games, just the fact of their presence in the store. (E.R. 84.)

On the front of the 7-Eleven retail convenience store, above the telephones, is posted a 7-Eleven sign which states "no loitering," "no drinking on premises," and "customer parking only." (E.R. 97.)

ARGUMENT

The superseding indictment charged violations of 18 U.S.C. sections 241 and 245(b)(2)(F). These sections "create[] no substantive rights, but prohibit[] interference with rights established by the Federal Constitution or laws and by decisions interpreting them." (United States v. Kozminski, 487 U.S. 931, 941 (1988).) The underlying right must be one "'which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.'" (United States v. Reese, 2 F.3d 870, 881 (9th Cir. 1993), quoting Scales v. United States, 325 U.S. 97, 104 (1954).)

The right at issue here is defined by Title II of the Civil Rights Act of 1964. Title II guarantees equal access to a "place of public accommodation, as defined in this section." (42 U.S.C. section 2000a(a).) Subdivision (b) of Section 2000a then

provides four separate definitions of a place of public accommodation, only one of which is relevant here: "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment." (Section 2000a (b)(3).)

As the District Court found, "Title II of the Civil Rights Act of 1964 was not intended to cover every type of business." (E.R. 10, Order at 4; see also Miller v. Amusement Enterprises, Inc., 394 F.2d 342, 350 (5th Cir. 1968) (en banc).) Rather, as made clear by Senator Humphrey, a major supporter of the legislation, specifically excluded from the Act's coverage were "retail establishments generally." (Remarks of Senator Hubert Humphrey, Congressional Record, 88th Congress, 2d Session, Vol. 110, No. 58, March 30, 1964.) [1/] The reason for this exclusion by Congress was that "[d]iscrimination in retail establishments generally is not as troublesome a problem as is discrimination in the places of public accommodation enumerated in the bill," as well as the likelihood that "if discrimination is terminated in restaurants and hotels, it will soon be terminated voluntarily in the few retail stores where it still exists." (Ibid.) In particular, "food stores are not covered." (Newmann v. Piggie Park Enterprises, Inc., 377 F.2d 433, 436 (4th Cir. 1967) (emphasis in original).) Thus, as the District Court

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1. A summary of the legislative history of the Act, prepared by the United States Department of Justice, is attached as an appendix to the panel opinion in Miller v. Amusement Enterprises, Inc., 391 F.2d 86, 90 (5th Cir. 1967), rev'd, 394 F.2d 342 (5th Cir. 1968)(en banc).

stated, rather than imposing a blanket coverage of all business establishments open to the public, "section 2000a(b) is very explicit in limiting the types of establishments that may qualify as a place of public accommodation under the statute." (E.R. 11, Order at 5.)

The 7-Eleven store in question clearly is not a "motion picture house, theater, concert hall, sports arena, [or] stadium." (Section 2000a(b)(3).) The issue then is whether the retail convenience store is an "other place of exhibition or amusement." (Ibid.)

The government urges that the statutory language must be given "a liberal and broad construction," claiming that such an approach is required by the United States Supreme Court decision in Daniel v. Paul, 395 U.S. 298 (1968). (See AB 18.) To the contrary, the high court in Daniel was very explicit that "the statutory language 'place of entertainment' should be given full effect according to its generally accepted meaning." (Daniel, 395 U.S. at 308; emphasis added.) The court then applied this rule of construction to conclude that a "natural reading" of the statutory language included both spectator entertainment and recreational entertainment. (Daniel, 395 U.S. at 307.)

In addition to the Supreme Court's mandate in Daniel v. Paul, a civil case, there is another, constitutionally-based reason for interpreting the language of the 1964 act "according to its generally accepted meaning" when, as here, the Act is

invoked to support a criminal prosecution. Absent such an interpretive standard, the Act would lack "the basic specificity necessary for criminal statutes under our system of government." (Screws v. United States, 325 U.S. 91, 96 (1945).) [2/] "The constitutional vice in such a statute is the essential injustice to the accused of placing him 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.) If the terms of the statute are given their generally accepted meaning, it may be true that "the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." (Id., at 102.) As Sutherland points out, "a statute will not be considered unconstitutionally vague if its meaning is fairly ascertainable by reference to . . . commonly accepted meanings of words." (1A, Sutherland Statutory Construction, §21.16, p. 140 (5th ed.).) However, where the statutory terms are extended beyond their generally accepted meaning, it is clear that "[t]o enforce such a statute would be like sanctioning the practice of

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2. As the United States Supreme Court has explained, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (Kolender v. Lawson, 461 U.S. 352, 357 (1983).) "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids . . . '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, violates the first essential of due process of law.'" (Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939), quoting Connally v. General Const. Co., 269 U.S. 385, 391 (1926).)

Caligula who 'published the law, but it was written in very small hand, posted up in a corner, so that no one could make a copy of it.'" (Id., at 96, quoting Suetonius, Lives of the Twelve Caesars, p. 248.) [3/]

In the present case, the District Court faithfully followed the approach to statutory construction mandated by the Supreme Court in Daniel v. Paul and by due process fair warning concerns. The court first noted that "the cases finding a facility to be a place of exhibition or entertainment under the statute having uniformly involved facilities which in some realistic sense fit the 'generally accepted meaning' of a place of entertainment," citing seven examples. (E.R. 16, Order at 10.) The court then concluded:

> "The nature of the type of establishment intended to be covered by the phrase 'place of exhibition or entertainment' is demonstrated by the examples set forth in the statute, i.e., 'motion picture house, theater, concert hall, sports arena, stadium' (42 U.S.C. §2000a(b)(3), and by the facilities judicially held to come within the statutory definition. Based upon the evidence presented, the court cannot conclude that 7-Eleven convenience stores in general, or this store in particular, come within the generally accepted meaning of that phrase." (E.R. 18, Order at 13.)

The government places great reliance on United States

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3. The government stands oblivious to the fair warning guaranteed a criminal defendant under the Fifth Amendment. While urging that business establishments should be given reasonable notice of coverage under the 1964 Act, the government states that no such notice is due a person facing criminal prosecution predicated on the Act. (AB 21 and fn. 8.) The government is wrong.

v. De Rosier, 473 F.2d 749 (5th Cir. 1973), where a divided panel of the Fifth Circuit held that the presence of a jukebox, shuffleboard, and pool table rendered a neighborhood bar "a place of entertainment" under the 1964 act. First of all, Judge Godbold's five-page dissent presents a more thorough, thoughtful, and compelling analysis and resolution of the issue than the two-page majority opinion. Moreover, neither the holding nor the reasoning of the De Rosier majority has been followed by any other court, except the Fifth Circuit itself in a per curiam opinion, United States v. Devorio, 473 F.2d 1041, 1042 (5th Cir. 1973). [4/]

In addition, it is necessary to look at the nature of the establishment at issue in De Rosier. A bar is by its nature a place where "one may engage in such pleasant diversions as drinking wine or beer, bantering lightly or commiserating lachrymosely with friends and bartender, and even lifting voice in song" (De Rosier, 473 F.2d at 755; dissenting opinion), "a place where people are invited to congregate and mingle for social purposes." (E.R. 17; Order at 11.) Thus, "under generally accepted meaning, a bar is a 'place of entertainment'" by its very nature. (De Rosier, 473 F.2d at 755; dissenting opinion (emphasis in original).) Accordingly, it is only the peculiar legislative history of the 1964 Act that excludes a bar

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4. The government is correct that no other case has reached a result contrary to De Rosier or has cited it with disapproval. (AB 13.) On the other hand, no other case has reached the same result as De Rosier or has cited it with approval.

from the statutory definition of a "place of entertainment." Whether rightly or wrongly, the De Rosier majority merely held that the addition of a jukebox, shuffleboard, and pool table, all of which reinforce and enhance the fundamental, inherent nature of the establishment, brings a bar back within the generally accepted meaning of "a place of entertainment" and thus back within the statutory coverage.

The present case is far different. By its very nature, a 7-Eleven retail store is not a "place of entertainment," either within the generally accepted meaning of that term, or as it has been defined by the courts, e.g., "a place of enjoyment, fun and recreation." (Miller v. Amusement Enterprises, Inc., supra, 394 F.2d at 351.) Under the government's theory, however, the addition of a single video game [5/] would fundamentally alter the very nature of the establishment and transmute what is a retail convenience store (in the eyes of both the public and the owners) into a "place of entertainment." That result defies reality.

Moreover, it must be noted that video games are becoming more and more widespread and are present in a wide variety of business establishments. For example, New York City

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5. As Judge Godbold has pointed out, "the mechanistic application of a 'presence of a device' rule is unrealistic. In light of the Congressional history, some kind of de minimis principle must be applied. Or, to put it another way, it is not rational to conclude that Congress intended that every departure, however nominal, from the usual mode of operation of an otherwise noncovered establishment will cause it to become covered notwithstanding that its essential character has not altered." (United States v. De Rosier, supra, 473 F.2d at 757-758; dissenting opinion.)

has established a detailed scheme for the licensing of such devices, wherein a special "arcade" license is required for a facility with five or more games. (America's Best Family Showplace v. City of New York, 536 F.Supp. 170, 172 (E.D. N.Y. 1982).) However, general licenses are routinely granted to operators of one to four video games as long as the facility is one of "over seventy-five types of retail, service or amusement establishments," including such diverse establishments as restaurants, laundromats, donut shops, pool halls, candy stores, gift shops, record stores, skating rinks, and shoe or hat repair shops. (Id., at 172 and fn. 4.) As of 1982, approximately 4,500 licenses had been issued to such establishments in New York City. (Id., at 172.) Under the government's theory, by adding a single video machine, each of these 4,500 extremely diverse businesses became a "place of entertainment." Such a result neither comes within, is dictated by, nor is compatible with, the generally accepted meaning of the statutory language.

The government's bedrock position is that if an establishment "provides 'entertainment,'" it is covered by the Civil Rights Act. (AB 16.) Does this mean that the presence of a television in a barber shop or other retail establishment, or of a radio in a beauty salon or similar business, or of piped-in Muzak in an elevator, converts such facilities to a "place of exhibition or entertainment" under the Act? In this regard, the government points out that Congress did not state "a place principally engaged in providing entertainment" (AB 15); by the

same token, Congress did not state "a place with entertainment." Rather, the language chosen by Congress was a "place of entertainment," which by its terms would seem to exclude business establishments (like the 7-Eleven store) where any entertainment offered is a peripheral adjunct to the basic non-entertainment nature of the business establishment.

The government also urges that, since mechanical devices are deemed "sources of entertainment" under Section 2000a(c)(3) for purposes of determining whether the operations of a covered establishment affect commerce, the mere presence of such a device should render an establishment a "place of entertainment" covered under Section 2000a(b)(3). (AB 16-17.) That argument, however, compares apples with oranges, as so persuasively pointed out in Judge Godbold's dissent in De Rosier. (See 473 F.2d at 755-757.) Congress did not define a place of public accommodation as "any place with a source of entertainment," but rather as any "place of exhibition or entertainment." Thus, the question of what is a covered "place of entertainment" under Section 2000a(b)(3) is entirely separate from the question of whether a covered establishment customarily presents "sources of entertainment which move in commerce" under Section 2000a(c)(3). "To equate the criteria separately specified in Sections 2000a(c)(3) and 2000a(b)(3) operates to extend coverage in plain contravention of the statute's intended scope." (See 473 F.2d at 756-757, dissenting opinion.)

The government also urges the Court, for policy

reasons, to hold that the 7-Eleven retail convenience store is a "place of entertainment." (AB 19-21.) However, setting civil rights policy is the province of the Congress, not the courts. Moreover, the government sings the virtues of the "bright-line" rule it proposes, i.e., a single video game does a place of entertainment make. (AB 20-21.) However, any rule, "bright-line" or not, must be grounded in the statute, and, as we have shown, the government's proposed rule would go far beyond the generally accepted meaning of the statutory language, and would both do violence to the statute and deny a defendant fair warning.

In another policy argument, the government first states that "Congress expressly included within the scope of the Act places such as restaurants, soda fountains, gas stations, and movie houses where, at least in the 1960's, public congregation seemed most likely and thus where the potential for public 'humiliation involved in discriminatory denials of access' would be particularly great." (AB 19.) The government then asks the Court to take the giant leap of taking judicial notice of the supposed fact that "[i]n today's suburban America, neighborhood convenience stores containing entertainment devices have become teenage hangouts equivalent to the soda fountains and lunch counters that were popular places of congregation at the time the Act was passed." (AB 19.)

First, the government offered no evidence below to support this fanciful assertion on appeal. In fact, the only

evidence in the record on appeal indicates that the 7-Eleven store was not a "hangout," since it had no facilities for the consumption of food or beverages on the premises, or indoor or outdoor seating areas where food could be consumed on or near the store, and since it was clearly posted with a 7-Eleven sign stating, "NO LOITERING," "NO DRINKING ON THE PREMISES," and "CUSTOMER PARKING ONLY." (See E.R. 12, 89, 97-99.)

Second, "[i]n order to be judicially noticeable under Rule 201 a fact must be 'not subject to reasonable dispute.'" (21 Wright & Graham, Federal Practice and Procedure, Evidence, §5104.) Thus, in the sole case cited by the government, the Court of Appeals could properly take judicial notice of "the common ordinary fact that human beings are 'people watchers' and derive much enjoyment from this pastime." (Miller v. Amusement Enterprises, Inc., supra, 394 F.2d at 349.) However, judicial notice is inappropriate here, where appellees strongly -- and reasonably -- dispute the government's view that in suburban America (or anywhere else) neighborhood convenience stores have become teenage hangouts comparable to the soda fountains and lunch counters of the 1960's.

CONCLUSION

The government's attempt to federalize a state assault prosecution stands or falls on the question of whether the temporary presence of video game(s) converts a retail convenience store into a "place of exhibition or entertainment" within the meaning of the Civil Rights Act of 1964. In a well-reasoned

opinion, the District Court concluded that a retail convenience store with two leased video games did not come within the generally accepted meaning of the statutory language and, on that basis, dismissed the two civil rights counts alleged against the defendants. As shown above, both the reasoning of, and the result reached by, the District Court are absolutely correct. Accordingly, this Court should affirm the District Court's order of dismissal.

DATED: February 10, 1995

Respectfully submitted,

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QUIN DENVIR

_____
STEVEN BAUER

_____
ROBERT M. HOLLEY

_____
MICHAEL KENNEDY

_____
DWIGHT M. SAMUEL

Attorneys for Appellees

QUIN DENVIR
Attorney at Law
State Bar No. 49374
660 "J" Street, Suite 200
Sacramento, CA 95814
Telephone: (916) 448-8868

Attorney for Defendant
Gary Flores

UNITED STATES DISTRICT COURT

FOR EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JEREMY BAIRD, et al. Defendants.	No. CR. S-94-162 WBS PROOF OF SERVICE

I the undersigned, hereby certify that I am over the age of eighteen years and not a party to the above-entitled action.

On February 10, 1995, I served a copy of

BRIEF FOR APPELLEES

X by placing said copy in a postage-paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the United States Mail.

Gary Flores
8410 East Granite Drive
Granite Bay, CA

Hon. William B. Shubb
U. S. District Court Judge
650 Capitol Mall
Sacramento, CA 95814

Chuck Stevens
U. S. Attorney
555 Capitol Mall, 15th Floor
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct.