

490 F.3d 1268 (2007)**UNITED STATES of America, Plaintiff-Appellee,
v.
Ricardo KNIGHT, Defendant-Appellant.**No. 05-14537.**United States Court of Appeals, Eleventh Circuit.**

July 3, 2007.

1269 *1269 Bernardo Lopez, Martin John Bidwell, Fed. Pub. Defenders, Ft. Lauderdale, FL, Kathleen M. Williams, Richard C. Klugh, Jr., Fed. Pub. Defenders, Miami, FL, for Knight.

Lisa T. Rubio, Anne R. Schultz, Asst. U.S. Atty., Kathleen M. Salyer, Miami, FL, Phillip DiRosa, Ft. Lauderdale, FL, for U.S.

Before TJOFLAT, FAY and SILER,^[*] Circuit Judges.

SILER, Circuit Judge:

Ricardo Knight, an alien resident of the United States, appeals his conviction for improperly voting in a federal election, in violation of 18 U.S.C. § 611(a), a misdemeanor. Knight contends that § 611 is unconstitutional because it fails to incorporate a mens rea, and the district court improperly incorporated a general intent mens rea into the offense. Additionally, Knight argues that the instructions given to the grand jury that indicted him violated the Fifth Amendment. Because Knight's arguments lack merit, we AFFIRM.

I. BACKGROUND

Knight is a 32-year-old native of Jamaica. He came to the United States as a minor with his parents. At sixteen, he became a legal permanent resident of the United States.

In 1995, at the age of 22, Knight registered to vote in the United States, stating under oath that he was a United States citizen. In 1997, he filed a petition to become a United States citizen. That same year, he requested a replacement voter's registration card. On his signed application for the replacement card was the question, "Are you a U.S. citizen?" Beside the question were two boxes, one for "yes" and another for "no." The "no" box had a check mark in it that had been crossed through, and the "yes" box contained an unblemished check mark.

In 2000, Knight voted in the United States presidential election. The next year, immigration officials interviewed him in connection with his citizenship application. He stated that he had registered to vote and had voted in a federal election.
1270 *1270 He also told the immigration officials that he had never claimed to be a United States citizen. When asked why he had registered and voted as a non-citizen, Knight stated that he did not know that he had to be a United States citizen to register and vote.

Knight was later indicted by a federal grand jury for improperly voting in a federal election based on his alienage, in violation of § 611. Prior to trial, Knight moved to dismiss the indictment by challenging the instructions given to the grand jury. The district court denied the motion, and the case proceeded to trial. Knight was convicted of violating § 611 and was sentenced to one year of probation.

II. STANDARD OF REVIEW

We review a challenge to the constitutionality of a statute de novo. *United States v. Ballinger*, 395 F.3d 1218, 1225 (11th Cir.2005). The constitutionality of the grand jury instructions present a question of law, which we also review de novo. *HGI Assocs., Inc. v. Wetmore Printing Co.*, 427 F.3d 867, 873 (11th Cir. 2005).

III. ANALYSIS

1. Constitutionality of § 611

Title 18, United States Code, § 611(a), provides that:

It shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, unless —

- (1) the election is held partly for some other purpose;
- (2) aliens are authorized to vote for such other purpose under a State constitution or statute or a local ordinance; and
- (3) voting for such other purpose is conducted independently of voting for a candidate for such Federal offices, in such a manner that an alien has the opportunity to vote for such other purpose, but not an opportunity to vote for a candidate for any one or more of such Federal offices.

Knight argues that § 611 violates his constitutional right to due process because it is both overbroad and impermissibly vague. He contends that it criminalizes two innocent acts, being an alien and voting, excluding any attendant mens rea. In his view, the statute demonstrates Congress's deliberate omission of a mens rea, and therefore, this court is prevented from reading an implied mens rea into the statute. Knight goes on to argue that even if the court does incorporate a mens rea into the statute, it would have to be a specific intent crime in order to properly separate wrongful conduct from innocent conduct. We reject these arguments.

Section 611 is a constitutional general intent crime. "Some indication of congressional intent, express or implied, is required to dispense with mens rea as an element of a crime." Staples v. United States, 511 U.S. 600, 605, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994). The text of § 611 does not use the language typically associated with the creation of a specific or general intent offense because it does not utilize adverbs such as "intentional," "knowing," or "willful." See Morrisette v. United States, 342 U.S. 246, 264, 72 S.Ct. 240, 96 L.Ed. 288 (1952). Given this omission, we are to presume that Congress "legislated against the background of our traditional legal concepts which render intent a critical factor." United States v. U.S. Gypsum Co., 438 U.S. 422, 437, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). This *1271 court may "read a state-of-mind component into an offense even when the statutory definition did not in its terms so provide." Staples, 511 U.S. at 605, 114 S.Ct. 1793. The existence of a mens rea is "the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Gypsum, 438 U.S. at 437-38, 98 S.Ct. 2864. Therefore, Knight's due process rights were not violated by a deliberate omission of a mens rea by Congress.

We must now determine the appropriate mens rea to read into § 611. United States v. Henry, 111 F.3d 111, 113 (11th Cir.1997) ("where a statute is silent as to intent, it becomes a question of legislative intent to be construed by the court"). Section 611 is a general intent crime. In Henry, we found that an immigration statute, which was silent as to intent, was a general intent crime. *Id.*

While Knight maintains that we must read a specific intent mens rea into § 611 in order to properly separate wrongful conduct from innocent conduct, a general intent requirement satisfies this goal. See Staples, 511 U.S. at 610, 114 S.Ct. 1793. As a general intent crime, the government must still prove that the defendant knowingly engaged in the conduct prohibited by § 611. See United States v. Phillips, 19 F.3d 1565, 1576 (11th Cir.1994). This is sufficient to separate proper conduct from improper actions.

The district court found § 611 to be a constitutionally-sound general intent offense. We agree. Thus, we affirm the district court on the statutory claim.

2. Constitutionality of the Grand Jury Instructions

The portions of the grand jury instructions that Knight challenges are as follows:

The case that comes before you will arise in various ways. Frequently suspects are arrested on the scene, so to speak, during or shortly after an alleged crime is committed. They are taken before a judicial officer known as a magistrate judge before you become involved in the case. The United States magistrate judge holds a preliminary hearing to determine whether there is probable cause to believe that a crime was committed and that the accused committed it. If the magistrate judge finds such

probable cause, the accused will be held for the action of the Grand Jury so that you can consider whether probable cause exists and an indictment should be issued.

* * *

While you would perform a disservice if you did not indict where the evidence justifies an indictment, you would violate your oath if you merely rubber stamped the indictment brought before you by the government representatives.

These instructions were based upon the Model Jury Instructions.^[1]

1272 Knight argues that his Fifth Amendment rights were violated because the instructions improperly limited the grand jury's duty to determine probable cause and deprived the grand jury of the option not to indict. Specifically, he contends the instructions were improper in two ways. *1272 First, the instructions implied to the grand jury that a federal magistrate judge had already determined probable cause. Second, the instructions essentially prohibited the grand jury from withholding an indictment where the evidence might support it. Knight contends that these two errors taken together deprived him of an independent grand jury. These arguments are meritless.

In *United States v. Navarro-Vargas*, 408 F.3d 1184 (9th Cir.2005) (en banc), the court considered the model jury instructions and upheld them as constitutional. *Id.* at 1208. The Ninth Circuit concluded that there was no constitutional violation in instructing jurors that they could not question the wisdom of the law, or that the jurors should, rather than could, indict if sufficient evidence was presented. *Id.*

We follow *Navarro-Vargas* because its reasoning is sound. The grand jury instructions in this case are significantly similar to the *Navarro-Vargas* instructions. The grand jury could easily understand it was independent from the court and could indict or not based upon the evidence. Thus, there was no constitutional violation in the grand jury instructions in this case.

IV. CONCLUSION

Section 611 is a general intent crime. It is not unconstitutional merely because the congressional drafters did not specifically articulate a mens rea. There was also no constitutional violation in the grand jury instructions.

AFFIRMED.

[*] The Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

[1] The Model Instructions are as follows:

You cannot judge the wisdom of the criminal laws enacted by Congress, that is, whether or not there should or should not be a federal law designating certain activity as criminal. That is to be determined by Congress and not by you. (The "wisdom of the law" instruction).

Furthermore, when deciding whether or not to indict, you should not be concerned about punishment in the event of conviction. Judges alone determine punishment. (The "punishment" instruction).

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