

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action No.
	)	10-00320-12-CR-W-DGK
DESHAUN L. CERUTI,	)	
	)	
Defendant.	)	

**ORDER DENYING MOTION FOR LEAVE TO FILE OUT OF TIME**

Before the court is defendant's motion for leave to file out of time a motion to dismiss. Defendant states that he expected the government to dismiss the case against him once the court granted his motion to suppress; however, government counsel has indicated it plans to go forth with the case against defendant Ceruti. Therefore, defendant seeks leave to file a motion to dismiss as "Mr. Ceruti believes the Government has no further evidence to connect him to the charged drug conspiracy."

A challenge to the indictment based on sufficiency of the evidence should be filed at the close of the government's case in chief or at the close of the evidence presented at trial. F. R. Cr. P. 29(a).

Sufficiency of the evidence issues cannot be taken up prior to trial. United States v. Ferro, 252 F.3d 964, 967-968 (8th Cir. 2001), citing United States v. Gaudin, 515 U.S. 506, 523 (1995). "The courts have recognized . . . that an indictment is not subject to a motion to dismiss based on allegations of the insufficiency of the government's evidence." United States v. Jones, 556 F. Supp. 2d 985, 991 (E.D. Mo), citing United States v. Ferro, 252 F.3d at 968. "The case law clearly provides that an indictment that is valid on its face is immune from attack by a claim that there was insufficient competent evidence presented to a grand jury." Id., citing Costello v. United States, 350 U.S. 359, 363 (1956). So long as the indictment

contains a facially sufficient allegation, federal criminal procedure does not provide for a pretrial determination of sufficiency of the evidence. *Id.* at 968, citing United States v. Critzer, 951 F.2d 306, 307-08 (11th Cir. 1992). Instead a pretrial motion must be based on some defect appearing on the face of the challenged indictment. United States v. Mann, 517 F.2d 259, 266-67 (5th Cir. 1975) (stating that an indictment is to be tested not by the truth of its allegations, but by its sufficiency to charge an offense, because the allegations in the indictment must be taken as true).

Because a defendant may not challenge the sufficiency of the evidence in a motion to dismiss, it is

ORDERED that defendant's motion for leave to file such a motion out of time is denied.

/s/ Robert E. Larsen  
ROBERT E. LARSEN  
United States Magistrate Judge

Kansas City, Missouri  
December 28, 2011