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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 08-00026-02-CR-W-FJG**
	)	
CYNTHIA S. MARTIN,	)	
	)	
Defendant.	)	

DEFENDANT MARTIN'S OBJECTION TO THE REPORT AND RECOMMENDATION ISSUED BY THE MAGISTRATE JUDGE RECOMMENDING DENIAL OF DEFENDANT'S MOTION TO DISMISS COUNT TWO FOR FAILURE TO STATE AN OFFENSE

COME NOW the defendant, Cynthia Martin, by and through counsel, and respectfully submits her objections to the Report and Recommendation made by the Honorable Sarah Hays, United States Magistrate Judge, recommending that Defendant's Motion to Dismiss Counts Two and Twenty-One through Twenty-Four (Doc. #57) be denied.

I. *Introduction*

In a Report and Recommendation filed on the 10th day of December, the Honorable Sarah Hays recommended that the defendant's Motion to Dismiss Counts Two and Twenty-One through Twenty-Four be denied. Counsel is aware of the fact that under the case of *Thomas v. Arn*, 106 S. Ct. 466 (1985), a failure to object to reports and recommendations made by a magistrate judge pursuant to his or her authority under 28 U.S.C. § 636 may be construed as a waiver of issues upon appeal. For this reason, counsel files her objections herein.

Magistrate Sarah Hays, in her Report and Recommendation, has reviewed the motions and pleadings filed by the parties and the applicable law related to these issues. However, the Ms. Martin would again reassert her position regarding the Defendant's Motion to Dismiss Counts Two and Twenty-One through Twenty-Four.[1]

II. *Procedural History*

On February 5, 2008, a grand jury returned a twenty-four count indictment charging five different defendants with various violations stemming from an alleged conspiracy to distribute Schedule III, IV and V substances. Cynthia S. Martin is charged with Conspiracy to Distribute Controlled Substances and Conspiracy to Commit Concealment Money Laundering. She was also originally charged with four counts of substantive money laundering violations. The charges are based on the "concealment" prong of 18 U.S.C. § 1956(a)(1)(B)(i) and 2. On February 20, 2008, the defendant entered a plea of not guilty to all counts to which she was charged.

Count One alleges that Ms. Martin's role in the manner and means by which the conspiracy was allegedly committed involved the receipt of numerous packages that were sent via United Parcel Service from Houston, Texas to defendant Martin. It is further alleged that Ms. Martin delivered to defendant Rostie several thousand dollars in cash for the purpose of illegally distributing controlled substances. (See Indictment, Page 7, Paragraphs f and g). Furthermore, the indictment alleges that Defendant Martin introduced defendant Solomon and defendant Rostie for the purpose of obtaining controlled substances. (See

[1] Strictly speaking, this appeal now applies to Count Two only as explained in the procedural history below given the plea agreement entered by the government and the defendant.

Indictment, Page 7, Paragraph a). Significantly, no other facts are even alleged by the government as to Ms. Martin's role in the instant allegations.

Count Two alleges that all of the defendants conspired to commit money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and 2. With regard to defendant Martin, the government alleges that defendant Martin received approximately 70 packages via UPS from defendant Johnson's address in Houston, Texas. It is further alleged that the delivery of the packages by Ms. Martin constitute the only known financial connection between defendant Solomon and defendant Martin. (See Indictment, Pages 9-10, Paragraph a.) Ms. Martin was the only known financial connection between defendants Rostie and Solomon. The government further alleges that the UPS packages contained proceeds to pay for additional prescriptions. Specifically, the indictment alleges that defendant Martin received approximately $71,666.80 in proceeds based upon 29 deposits into her personal checking account between October 8, 2004 and October 17, 2005. Lastly, the Indictment alleges that defendant Martin transported the currency to defendant Rostie's business for payment on the account of South Texas Wellness Center. The currency is alleged to represent the "proceeds" from the illegal sale of the controlled substances.

Counts Twenty-One through Twenty-Four originally alleged that defendant Martin used a bank account with Bank of America to conceal or disguise the source of the illegal drug scheme beginning in August of 2004 to at least October of 2005. The indictment alleges that defendant Martin made several deposits into the Bank of America account and then wrote checks involving the proceeds of the alleged conspiracy in order to conceal the nature, location, source, ownership and control of the proceeds. Specifically, Counts

Twenty-One, Twenty-Two, and Twenty-Three are based on three checks totaling $12,825.00 written to Alenco. (Alenco is a home remodeling business specializing in custom sunrooms.) Count Twenty-Four is based on a check in the amount of $9,980.00 written to MTS Automall. (MTS is a used car dealership.)[2]

III. *Discussion*

The particularity requirement for a charging document is necessary to ensure that the indictment provides fair notice to the accused of the offense with which he or she is charged to enable the defendant to prepare a defense, to permit the defendant to invoke any double jeopardy defense, and to inform the court of the facts alleged so that it can determine whether the facts are sufficient as a matter of law to support a conviction, if one should be had. *Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Cruikshank*, 92 U.S. 542, 558 (1875). The United States Supreme Court in *Russell* stated as follows:

> An indictment not framed to appraise the defendant "with reasonable certainty" of the nature of the accusation against him . . . is defective, although it may follow the language of the statute. In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all elements necessary to constitute the offense intended to be punished . . . .Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.

Russell v. United States, 369 U.S. 749, 763-64 (1962). Factually, an indictment must contain core facts which plainly demonstrate the criminality of the defendant's actions before it

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2 The defendant plead guilty to Count One on December 18, 2008. She also plead guilty to Count Two conditionally on the same date. It is anticipated that the remaining counts will be dismissed at sentencing. Therefore, this motion still raises a viable issue as to Count Two. The exhibits referenced above are attached to Ms. Martin's original motion to dismiss.

passes constitutional muster. *Russell*, 369 U.S. at 764; *United States v. Simmons*, 96 U.S. 360 (1877); *United States v. Beard*, 436 F.2d 1084 (5th Cir. 1971). Thus, the fact that an indictment may track the language of a criminal statute is not sufficient to confer validity if the indictment fails to allege the minimum facts required to fulfill the purposes of the indictment.

IV. *Defendant's Specific Objections and Further Reply*

In this instance, the indictment references the elements of the 18 U.S.C.§§ 371 and 1956. However, it does not provide a sufficient allegation that Ms. Martin acted with an intent to conceal the nature, location, source, ownership of control of the proceeds. In denying the motion, Magistrate Hays noted "whether evidence of intent is a question that cannot be resolved prior to the Government's presentation of the case to the jury." (R&R at p. 13).

Similarly, on the issue of whether the government sufficiently averred that the "proceeds" constitute "profits" Magistrate Hays noted that the government had not presented its evidence on this point. (R&R at p. 16). Any complaints that the Magistrate Hays originally noted in her Report and Recommendation are now satisfied by the factual basis set out in the plea agreement which has been agreed to by the government and the defendant.

Therefore, defendant Martin's Motion should now be sustained. (The operative facts should also be supplemented with Exhibit A, a schedule prepared by the government of Ms. Martin's share of the deposits from the "total proceeds." This exhibit supports the factual assertion in the indictment at p. 10.) (Exhibits 1-6 are attached to Defendant Martin's Motion to Dismiss for failure to State an Offense are also incorporated here by reference).

The essence of Ms. Martin's argument as to count Two remains. First, even assuming that Count Two survives given the arguments raised, the "net profits" as applied to Ms. Martin should, at most, be approximately $75,000.00, not the total proceeds of all monies including that portion delivered to Defendant Rostie (i.e., $660,742.00). (See factual basis of the Plea Agreement at p. 4). (In the alternative, at least the costs associated with actually filling the prescriptions should be subtracted from the total "proceeds." This amount could be established at Ms. Martin's sentencing hearing or perhaps by agreement with government counsel.)

Second, the operative facts describing the offense conduct do not provide proof of "concealment" in the context that *Santos* has recently explained it. Money was received by the defendant who, in turn, delivered it to Ms. Rostie. There was no concealment. As to Ms. Martin's share of the proceeds, she either deposited it or used it to purchase the items referenced in the indictment. (*See generally*, paragraph 3 supporting the factual basis of Ms. Martin's Plea Agreement and Exhibit A.)

Third, even assuming that Count Two survives both a pleading and a sufficiency challenge, the amount of loss for guideline purposes as applied to Ms. Martin should be approximately $75,000.00, and not the total figure of $660,742.00. (See U.S.S.G. §§ 251.1(a)(2) and 2B1.1(b)(1). In other words, the "value of the laundered funds" is not the entire $660,742.00 which is the total of the funds delivered by Ms. Martin to Ms. Rostie after she was aware that her conduct was in furtherance of a conspiracy. (See Plea Agreement at p. 4.)

In short, this Motion to Dismiss still raises a live issue with respect to Ms. Martin's sentencing guidelines.

The magistrate also distinguishes *United States v. Rockelman*, 49 F.3d 418 (8th Cir. 1995) in her Report and Recommendation at page 12. Again, there is now a factual basis for this argument as set out in the Plea Agreement and in the Rule 11 hearing conducted on December 18, 2008. The agreed factual basis does not support a money laundering violation, nor does it support the amount of loss as generally referenced in the Indictment.

At pages 16 and 17 of the Report and Recommendation the magistrate further notes "the *Cuellar* court found insufficient evidence after a trial. The Government has not yet had the opportunity to present its evidence in this case." Again, the factual basis now supports the defendant's position on this issue.

Regarding the allegation of forfeiture, even the government concedes that "Defendant Martin admits that by January 2005 she was aware that her receipt of cash from defendant Solomon and provision of that cash to defendant Rostie was conduct in furtherance of the criminal conspiracies to distribute narcotics and launder money set forth in Counts One and Two of the Indictment. Consequently, the monetary judgment to be entered against her should be in the amount of $660,742.00." (See Plea Agreement at p. 4). Without waiving Ms. Martin's objection that there should be no forfeiture because no money laundering violation has occurred, she offers an alternative figure for the proposed forfeiture judgment and for purposes of calculating the sentencing guidelines.

Therefore, the Defendant renews her objection to the original sum of $991,114.00, as well as the more narrowed figure of $660,742.00 referenced in her Plea Agreement. She

suggests that the more appropriate figure for purposes of forfeiture, if any, at least with respect to Defendant Martin is $71,666.80. .

WHEREFORE, based upon the matters contained in Defendant's objection to the Magistrate Judge's Report and Recommendation, it is requested that this Honorable Court grant the Defendant's Motion to Dismiss Count Two. In the alternative, Defendant Martin requests that this issue be addressed at the time of sentencing in order to provide any additional factual record this court may desire before issuing its ruling. It is further requested that this Honorable Court enter any other orders deemed just and proper in the premises.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of December, 2008, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ *James R. Hobbs*
Attorney for Defendant