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

UNITED STATES OF AMERICA	§	
	§	
v.	§	NO. 08-00026-01/05-CR-W-FJG
	§	
MARY LYNN ROSTIE,	§	
CYNTHIA S. MARTIN,	§	
TROY R. SOLOMON,	§	
CHRISTOPHER J. ELDER, and	§	
DELMON L. JOHNSON	§	
	§	
Defendants	§	

DEFENDANTS' JOINT OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION (DOC. 151) RECOMMENDING TO THE DISTRICT COURT THAT DEFENDANTS' MOTION TO QUASH INDICTMENT AND MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE BE DENIED, WITH SUGGESTIONS IN SUPPORT OF THE OBJECTION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Defendants TROY R. SOLOMON and DELMON L. JOHNSON and file their objections to the Magistrate Judge's Report and Recommendation of December 10, 2008, and in support hereof would respectfully show unto this Court as follows:

1. Defendants agree generally with paragraphs "A" and "B" of the "INTRODUCTION" portion of the Magistrate's Report and Recommendation, but take issue with the standards for evaluating a motion to dismiss contained in paragraph "C" and the "DISCUSSION" carried forth thereafter. To wit, as follows.

2. "An indictment is *normally* sufficient if its language tracks the statutory language." ***United States v. Sewell***, 513 F.3d 820, 821 (8th Cir. 2008)(citing ***Hamling v. United States***, 418 U.S. 87, 117 (1974))(emphasis added. However, as expressed by the United States Supreme Court more than 130 years ago:

> But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence, and plead the judgment as a bar to any subsequent prosecution for the same offence. An indictment not so framed is defective, although it may follow the language of the statute.

United States v. Simmons, 96 U.S. 360, 362 (1877)). "Undoubtedly the language of the statute may be used in the general description of an offence, *but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.*" ***United States v. Hess***, 124 U.S. 483, 487 (1888)(emphasis added). The United States Supreme Court in ***Hess*** went on to point out that under the facts of that case, "[t]he essential requirements, indeed, all the particulars constituting the offence of devising a scheme to defraud, are wanting" from the indictment. ***Id.*** at 488-489. "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." ***United States v. Carll***, 105 U.S. 611, 612 (1881). "A cryptic form of indictment... requires the defendant to go to trial with the chief issue undefined." *See generally* ***Russell v. United States***, 369 U.S. 749, 766 (1962).

3. The basis of the Magistrate's recommendation that this Court deny Defendants' Motions to Quash the Indictment and Motion to Dismiss is a determination that the indictment meets the minimum criteria under Rule 7 of the Federal Rules of Criminal Procedure and common law in that it (1) contains the essential elements of the offenses charged; (2) fairly informs the defendants of the charges against which he must defend; and (3) enables the defendant to plead an acquittal or

conviction in bar of future prosecution for the same offenses.[1] The Magistrate correctly concludes that there exists no summary judgment procedure in criminal cases nor do the rules provide for a pre-trial determination of the sufficiency of the evidence. However, the Magistrate's Report and Recommendation fails to account for the application of law to the specific facts of this case.

4. "It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, — it must descend to particulars." ***United States v. Cruikshank***, 92 U.S. 542, 558 (1875). "For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances." ***Id***. at 558. Defendants SOLOMON and JOHNSON are alleged in the indictment to have conspired to illegally distribute narcotics and to have acted with the purpose of concealing and disguising the nature and source of proceeds/profits therefrom. In *this* case, where Defendant SOLOMON is the owner of a licensed pharmacy and Defendant JOHNSON is an employee of that pharmacy, such an allegation amounts to nothing but a conclusion of law *at best*. While it may be illegal for certain individuals to jointly endeavor to distribute narcotics and to profit therefrom, it is not a crime for a licensed pharmacy and its employees to do so in the furtherance of their business. It is, in point of fact, the very nature of their perfectly legal business. In the instant case, specific facts need be pled in the indictment outlining the government's theory regarding how a perfectly legal enterprise in the distribution of narcotics was allegedly converted into something illegal and

[1] *See generally* Report and Recommendation dated December 10, 2008.

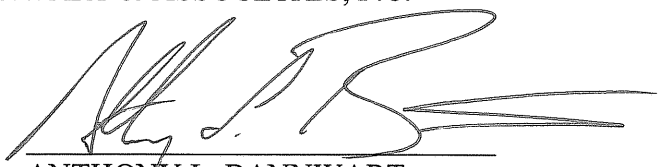
illicit in order for the Defendants to decipher the charges against which they must defend[2]. Whether the facts alleged describe some criminal intent, a description of the illicit profits, or some other underlying issue, a mere assertion that the Defendants' conduct was illegal is not sufficient notice to *these* Defendants of the acts for which they are being held to answer. The government must provide notice of the acts which made the Defendants' conduct illegal. As it was for the Supreme Court in ***Hess***, in this case "[s]uch particulars are matters of substance and not of form." ***Hess*** at 488-489.

5. Defendants further incorporate the objection filed by Defendant MARTIN relative to the Motion to Dismiss Count 2 of the Indictment for failing to state an offense. The Defendants believe that to further expound on that issue beyond the Motions and Objections already on file would be a waste of judicial economy, but intend to reserve their rights to appeal.

WHEREFORE, Defendants SOLOMON and JOHNSON submit their objections and move the Court to quash the indictment and dismiss the charges against them.

Respectfully submitted,

BANNWART & ASSOCIATES, P.C.

By: 

ANTHONY L. BANNWART
State Bar No.: 00792344
Federal Bar No. 19345
7322 Southwest Frwy., Suite 1510
Houston, Texas 77074
Tel: (713) 807-0020
Fax: (713) 807-0040

ATTORNEYS FOR DEFENDANTS

[2] Necessary facts include, but are not limited to, those described in Defendants' Motion to Quash Indictment.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Defendants' Joint Objections to the Magistrate Judge's Report and Recommendation (Doc. 151) Recommending to the District Court that Defendant's Motion to Quash Indictment and Motion to Dismiss for Failure to State an Offense be Denied, with Suggestions in Support has this day been sent via electronic filing to all parties of record.

SIGNED this 22nd day of December, 2008

BANNWART & ASSOCIATES, P.C.

By: _____
ANTHONY L. BANNWART

ATTORNEYS FOR DEFENDANTS
TROY R. SOLOMON and
DELMON L. JOHNSON