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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 08-00026-04-CR-W-FJG**
	)	
CYNTHIA S. MARTIN,	)	
	)	
Defendant.	)	

DEFENDANT MARTIN'S MOTION TO DISMISS
FOR FAILURE TO STATE AN OFFENSE
AS TO COUNTS TWO AND TWENTY-ONE THROUGH TWENTY-FOUR

COMES NOW the defendant, Cynthia S. Martin, by and through counsel, and hereby moves this Court for its order dismissing Counts Two and Twenty-One through Twenty-Four for Failure to State an Offense with respect to Defendant Martin, pursuant to Rule 12 of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments to the United States Constitution. This pleading addresses issues recently raised by the United States Supreme Court in *United States v. Santos*, 2008 WL 229212 (U.S.), and to some extent, *United States v. Cueller*, 2008 WL 229165 (U.S.). In further support of this motion, the defendant offers the following memorandum:

Memorandum in Support

I. Introduction

On February 5, 2008, a grand jury returned a 24-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 is also 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 1 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 controlled substance. (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 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 2 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 allege 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.)

II. Legal Argument

To be sufficient, an indictment must contain all elements of the offense charged,

thereby putting the defendant on fair notice of the charge against which he must defend. *United States v. Vesaas*, 586 F.2d 101, 103 n.4 (8th Cir. 1978); *United States v. Opsta*, 659 F.2d 848, 850 (8th Cir. 1981); *United States v. Denmon*, 483 F.2d 1093, 1095 (8th Cir. 1973). Rule 7(c)(1) of the Federal Rules of Criminal Procedure requires that an indictment be a "plain, concise and definite written statement of the essential facts constituting the offense charged."

Although some courts have concluded that it is generally sufficient for an indictment to set forth the offense in the words of the statute, this general rule is only permissible as long as those words "of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *Hamling v. United States*, 418 U.S. 87, 117 (1974); *see also United States v. Helmel*, 769 F.2d 1306, 1322 (8th Cir. 1985). "'It is generally sufficient that an indictment set forth the offense in the words of the statute itself . . .' as long as the elements of the offense are delineated and the general statement is accompanied by the specific facts constituting the offense." *Helmel*, 769 F.2d at 1322 (*quoting Hamling*, 418 U.S. at 117).

The cases referencing the general rule of simply tracking the language of the statute presume that the statutory elements are sufficiently detailed to fairly identify a particular offense. The *Russell* Court noted in more particularity:

> 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, 369 U.S. at 763-64. Factually, an indictment must contain core facts which plainly demonstrate the criminality of the defendant's actions before it passes constitutional muster. *Russell*, 369 U.S. at 764; *United States v. Simmons*, 96 U.S. 360 (1877).

The Eighth Circuit has held that an indictment must allege that the defendant performed acts, which if proven, constitute the violation of law for which the defendant is charged. *United States v. Polychron*, 841 F.2d 833, 834 (8th Cir. 1988). If the acts alleged in the indictment do not constitute a violation of law, the indictment is properly dismissed. *Id.; see also United States v. Coia*, 719 F.2d 1120, 1123 (11th Cir. 1983) ("It is perfectly proper, and in fact mandated, that the district court dismiss an indictment if the indictment fails to allege facts which constitute a prosecutable offense.").

Counts Two, and Twenty-One Through Twenty-Four

As stated above, the government generally contends that defendant Martin engaged in money laundering by "concealment" because she made three payments via check to Alenco and one payment via check to MTS Automall. (See Indictment, counts 21-24). As pointed out earlier, the government further alleges that Ms. Martin engaged in a conspiracy to commit money laundering. (See Indictment, count Two). The indictment in Counts Two, and 21 through 24 fails to allege in a sufficient manner that the defendant acted with an intent

to "conceal" the nature, location, source, ownership, or control of the proceeds. Second, the indictment fails to adequately allege that Counts Two and Twenty-One through Twenty-Four involved "proceeds" of an alleged conspiracy.

> The elements of a §1956(a)(1)(B)(I) money laundering violation are: (1) that the defendant conducted a financial transaction involving the proceeds of unlawful activity; (2) that the defendant knew the *proceeds* involved in the transaction were the *proceeds* of an unlawful activity; and (3) that the defendant intended "to *conceal* or disguise the nature, the location, the source, the ownership, or the control, of the proceeds of specified unlawful activity. The purpose of the money laundering statute is to reach commercial transactions intended (at least in part) to *disguise* the relationship of the item purchased with the person providing the proceeds and that the *proceeds* used to make the purchases were obtained from illegal activities. (emphasis added)

United States v. Pizano, 421, F.3d 707, 725 (8th Cir. 2005) *citing United States v. Dugan*, 238 F.3d 1041 (8th Cir. 2001) and *United States v. Rounsavall*, 115 F.3d 561 (8th cir. 1997).

In *United States v. Rockelman*, 49 F.3d 418, 422 (8th Cir.1995) the court found insufficient evidence of intent to conceal. The defendant in *Rockelman* purchased a house for his girlfriend's son with proceeds acquired through the sale of illegal drugs. *Id.* In purchasing the house, Rockelman did not disguise his name from the realtor. He did not attempt to disguise his relationship to $16,765.00 in cash used for the purchase. He did not disguise his relationship to his girlfriend's son. Nor did he attempt to disguise his relationship to the business in which the title of the property would be placed. *Id.* The court noted, "Application of the money laundering statute to these facts would turn the 'money laundering statute into a money-spending statute.'" *Id., citing United States v. Sanders*, 928 F.2d 940, 946 (10th Cir.), *cert. denied* 502 U.S. 845, 112 S.Ct. 142, 116 L.E.2d 109 (1991).

Similarly to *Rockelman*, the indictment in the money laundering counts with regard to defendant Martin does not allege on its face evidence of *concealment* of a financial transaction. Nor does it adequately allege that the transported payments are "profits." As stated on the face of the indictment, the checks involved in Counts Two and Twenty-One through Twenty-Four were drawn on defendant Martin's personal bank account with the Bank of America.

For background, the checks constitute payments for a legitimate purchase indicated on the memo section of the check images. Specifically, the checks reference the payments relating to the construction of a sun room from a company known as Alenco. Alenco is a business located in Kansas City, Missouri that has no connection with Defendant Martin other than the fact that Alenco built a sunroom at her home. The property where the sunroom was built was titled to Ms. Martin. All three checks are attached as Exhibits 1, 2, and 3. The court will note that all three checks reference "sunroom" or "SR" in the memo portion. Clearly, there was no intent by Ms. Martin to conceal the nature and source of the funds. The transactions constituted a legitimate purchase of goods and services.

For purposes of this motion in the context of a Rule 12 pleading, the indictment fails to allege that the funds used for purchase of the sun room constituted a "concealment" of "unlawful activity." Nor does the indictment allege the money or proceeds to be "profits" as that term is further defined.

Attached as exhibit 4 is a statement from Ms. Martin's Bank of America bank account showing a deposit of $11,000.00 on April 12, 2005. Attached as exhibit 5 is a copy of check

no. 6151 written by Ms. Martin's mother, Alene Marie Routh from her personal account at the Bank of Belton. It is clear that Alenco's construction of the sunroom and Ms. Martin's corresponding payment for the sunroom, corresponded directly in time with the receipt of funds from her mother. The checks issued by Ms. Martin to Alenco which are alleged in the indictment are in the amount of $12,825.00. This amount accounts for the entirety of the $11,000.00 check paid by Ms. Martin's mother to Ms. Martin. Moreover, check number 6150 was written from Alene Routh's account in the amount of $11,000.00 to Gary and Deborah Routh, Ms. Martin's brother and sister-in-law.[1] For the reasons stated above, the government fails to allege an offense as to Count Two, Twenty-One, Twenty-Two, and Twenty-Three of the indictment.

Count Twenty-Four alleges that a Ms. Martin wrote a check in the amount of $9,980.00 to MTS Automall in order to "conceal" the proceeds of her unlawful activity. Attached to this motion as Exhibit 6 is a copy of the check written by Ms. Martin. The check clearly indicates in the memo section that it was for "Mag Car." This check was for the purchase of a car for Ms. Martin's daughter, Maggie Elizabeth Filla f/k/a Maggie Elizabeth Martin.

With respect to Count Twenty-Four, Ms. Martin respectfully suggests that the reasoning set forth in *Rockelman, supra,* should also guide this court. Ms. Martin simply

[1]Ms. Martin's father, Alene Routh's husband, passed away and left a substantial sum of money via life insurance and other assets. Alene Routh was giving some of the money to her children. In this case it was $11,000.00 to each child.

purchased the above named vehicle from the MTS Automall. She used a check from her own personal account for the purchase Ms. Martin received a legitimate product for her money. She made no attempt to otherwise conceal the transaction. To criminalize this transaction would be to turn the "money laundering statute into a money spending statute" as proscribed in *United States v. Rockelman*.

The defendant recognizes that this issue is now raised under Rule 12 as opposed to Rule 29 of the Federal Rules of Criminal Procedure. Still, the indictment fails to allege sufficient facts which, if believed, would violate the legal definitions of concealment or proceeds as applied in a money laundering context.

Count Two

With respect to Count Two, defendant Martin respectfully points to the recent holding from the United States Supreme Court in *United States v. Santos*, 2008 WL 2229212 (U.S.) In *Santos*, the question presented was the definition of "proceeds" in 18 U.S.C.§1956(a)(1)(A)(I). Specifically, the court addressed whether "proceeds" encompassed the gross receipts of a criminal enterprise or simply the profits of the enterprise. *See Santos* at *4. The defendant in *Santos*, operated an illegal gambling scheme for a number of years in the State of Indiana. *Id.* at *3. The basis for Santos' indictment was the use of revenue from his gambling operation to pay the essential business expenses of the illegal scheme, that is, the salaries and commissions of the individuals who helped run the business. *Id.* The district court found that none of the payments to the above individuals involved illegal "profits." *Id.* The indictment was based simply on the transactions that constituted the

operations of the illegal gambling scheme. Accordingly, the Supreme Court noted "a criminal who enters into a transaction paying the expenses of his illegal activity cannot possibly violate the money-laundering statute, because by definition profits consist of what remains after expenses are paid." *Id.* at 6.

Under the *Santos* rationale, Count Two in the instant indictment does not adequately allege an offense for two reasons. First, the government alleges on the face of the indictment that "It is believed that the proceeds are provided to defendant, Cynthia Martin, in the packages sent via United Parcel Service in order to pay for additional prescriptions." (Indictment at Page 10, Paragraph b). The indictment simply alleges that money sent to defendant Martin was used to purchase additional prescriptions. In other words, the indictment fails to allege that the money referenced in Count Two constitutes profits.

Count Two, as well as Counts 21 through 24, reference gross amounts. For example, Count Two alleges gross sales at $991,114, but fails to allege the amount of profits. (As set out earlier, Counts 21 through 24 allege the gross receipts or proceeds in the amounts of $1,200, $5,167, $6,458 and $9,980 respectively.) "What counts is whether the receipts from the charged unlawful act exceeded the costs fairly attributable to it." See, *Santos*, *supra*.

Second, the indictment characterizes the payment as a purchase "towards her own benefit." (Referenced in Paragraph b, Page 10 of the indictment, which is allegedly connected to the $71,666.80 referenced in Paragraph c, Page 10 of the indictment.) The government has failed to allege what steps were taken to *conceal* the amount of money listed above.

On the face of the indictment the government merely alleges that defendant Martin placed $71,666.80 in her Bank of America account. There is no allegation that the payments are profits. It should be noted that the Bank of America account is listed in Ms. Martin's name. Additionally, there are no allegations in the indictment as to other transactions used to disguise these deposits or transactions. Without alleging how Ms. Martin concealed these profits the government fails to properly allege the crime of Money Laundering under 18 U.S.C §1956.

Simply put, under *Santos*, the transactions related to expenses for the alleged crime cannot be used to justify a criminal charge for money laundering. The indictment fails to allege that Ms. Martin's deposits from October 8, 2004 until October 17, 2005 (assuming that they are profits) were knowingly designed to *conceal* the nature, location, source, ownership, or control over the proceeds (emphasis added). The recent holding in *United States v. Cueller*, 2008 WL 2229165 (U.S.) explains that "merely hiding funds during transportation is not sufficient to violate the statute, even if substantial efforts have been expended to conceal the money." While addressing § 1956(a)(2)(B)(i), the principles also apply herein. Therefore, the indictment as to Count Two and 21 through 24 fails to state an offense for which relief may be granted.[2]

WHEREFORE, based on the foregoing, the defendant, Cynthia Martin, moves the

[2] Finally, the defendant requests that the Allegation of Forfeiture as it relates to defendant, Cynthia S. Martin, also be dismissed. The principles cited herein would also apply to the requested money judgment in the amount of $991,114.00. Said amount is not pled to constitute profits, nor is this amount of proceeds further explained or pled with any reasonable specificity.

Court for an order dismissing Counts Two and Counts Twenty-One through Twenty-Four of the indictment for failure to state an offense, and for any further relief deemed proper in these circumstances.

By: /s/ James R. Hobbs

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of June, 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