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

COMES NOW the defendant, Cynthia S. Martin, by and through counsel, and hereby respectfully files this reply to Government's Response to Defendant Martin's Motion to Dismiss Counts Two and Twenty-One through Twenty Four for Failure to State an Offense. As grounds for this reply, Defendant Martin states as follows:

MEMORANDUM IN SUPPORT

1. The government cites the counts of the indictment in its Response in pages 2-6 of its Reply. The government then asserts that Rule 12 is the wrong vehicle in which to advance this issue. In reply, the Defendant respectfully points out that Rule 12 is the proper tool when an indictment on its face fails to state an offense. The Eighth Circuit specifically held that indictment must allege that the defendant performed acts, which, if proven, constitute a violation of law. *See United States v. Polychron*, 841 F.2d 833, 834 (8th Cir. 1988); *U.S. v. Hughson*, 488 F.Supp.2d 835, 840 (D.Minn. May 17, 2007).

Defendant recognizes that this issue is now raised under Rule 12 as opposed to Rule

29 of the Federal Rules of Criminal Procedure. On the other hand, the indictment fails to allege sufficient facts, which, if believed, would violate the legal definitions of "concealment." Similarly, the indictment is flawed with respect to the concept of "proceeds" as applied in a money laundering context. While it is true that Defendant Martin provided some background facts in her initial motion to dismiss for the Court's understanding, the indictment itself fails to allege that Defendant Martin acted or took steps to conceal the amount of money referenced. There are also no allegations that the payments are profits, or net proceeds. There are no allegations in the indictment that the transactions were tools to disguise these deposits or to hide certain transactions. As such, the recent holding in *Cuellar v. United States*, 2008 WL 2229165, is applicable. As stated in *Cueller*, "merely hiding funds during transportation is not sufficient to violate the statute, even if substantial efforts have been expended to conceal the money." *Id*. at *8.

2. Counts Two and Twenty-One through Twenty-Four fail to allege that the proceeds are net proceeds or profits as now required under the holding in *Santos.* In holding for the Defendant, the Supreme Court stated that, "Under either of the word's ordinary definitions, all provisions of the federal money-laundering statute are coherent, no provisions are redundant; and the statute is not rendered utterly absurd. From the face of the statute, there is no more reason to think that 'proceeds'

means 'receipts' than there is to think that 'proceeds' means 'profits.'" *Id.* at 2025. It further

stated that:

> To be sure, if "proceeds" meant "receipts," one could say the that the statute was aimed at the dangers of concealment and promotion. But whether "proceeds" means "receipts" is the very issue in the case. If "proceeds" means "profits," one could say that the statute is aimed at the distinctive danger that arises from leaving in criminal hands the yield of a crime. A rational Congress could surely have decided that the risk of leveraging one criminal activity into the next poses a greater threat to society than the mere payment of crime-related expenses and justifies the money-laundering statute's harsh penalties.

Santos, 128 S.Ct. at 2026.

3. The government attempts to argue that the holding in *Santos* is not applicable as *Santos* is limited to gambling prosecutions. This argument is fallacious given the express language of *Santos*:

> The merger problem is not limited to lottery operators. For a host of predicate crimes, merger would depend on the manner and timing of payment for the expenses associated with the commission of the crime. Few crimes are entirely free of cost, and costs are not always paid in advance. Anyone who pays for the costs of a crime with its proceeds,-for example, the felon who uses stolen money to pay for the rented getaway car-would violate the money-laundering statute. And any wealth-acquiring crime with multiple participants would become money-laundering when the initial recipient of the wealth gives his confederates their shares. Generally speaking, any specified unlawful activity, an episode of which includes transactions which are not elements of the offense and in which a participant passes receipts on to someone else , would merge with money laundering. There are more than 250 predicate offenses for the money-laundering statute...

Santos, 128 S.Ct. at 2026-2027.

There is nothing in the *Santos* opinion that suggests that its holding is limited to gambling prosecutions. In fact, the opinion clearly states otherwise.

Then, the government attempts to argue that the holding in *Santos* cannot be used

because it is a only plurality opinion by the Supreme Court. This argument fails to acknowledge that *Santos* was a decision, like many decisions of the United States Supreme Court, in which a majority ruled that proceeds in the context of money laundering prosecution mean "net proceeds." The government does not attempt to argue the logic of the Supreme Court's holding, but only that it is not binding because it is a plurality opinion.

Recently, this Honorable Court sustained a Motion to Dismiss and issued a Report and Recommendation on similar facts. It is noted that this Honorable Court's ruling did not apply in the context of a gambling operation. *See United States v. Mid-Continent Specialists, Inc*. e*t. al*, (Report and Recommendation, June 27, 2008). In *Mid-Continent*, this Honorable Court also rejected the government's contention that *Santos* was not binding because it was merely a plurality opinion. *Id.* at *14, N.3.

WHEREFORE, based on the foregoing, the defendant, Cynthia Martin, submits this Reply in further support of requesting this Court's 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.

RESPECTFULLY SUBMITTED,

By: */s/ James R. Hobbs*

James R. Hobbs #29732
Nathan J.Owings #56568
Wyrsch Hobbs & Mirakian, P.C.
1000 Walnut
Suite 1600
Kansas City, Missouri 64106
Tel: (816) 221-0080
Fax: (816) 221-3280
Attorneys for Defendant Martin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29TH day of July, 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