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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 08-00026-03-CR-W-FJG**
	)	
TROY R. SOLOMON	)	
	)	
Defendant.	)	

DEFENDANT TROY SOLOMON'S MOTION TO DISMISS
COUNT TWO FOR FAILURE TO STATE AN OFFENSE

COMES NOW, Troy Solomon, by and through his undersigned attorneys, and respectfully moves this Honorable Court to dismiss Count Two for failure to state an offense with respect to Defendant Solomon 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 decided by the United States Supreme Court in *United States v. Santos*, 2008 WL 229212 (U.S.). In further support of this Motion, the Defendant offers the following memorandum.

Memorandum in Support

I. Introduction

Troy Solomon is charged by indictment with conspiracy to distribute controlled substances in violation of Title 21, U.S. Code, Section 841(a)(1), 841(b)(1)(D), 841(b)(2), 841(b)(3) and 846; conspiracy to commit promotional / concealment money laundering in violation of Title 18, U.S. Code, Section 1956(h); and ten counts of distributing a controlled

substance in violation of Title 21, U.S. Code, Section 841(a)(1), (b)(1)(D), 841(b)(2), (b)(3) and Title 18, U.S. Code, Section 2.

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. Montemayor*, 703 F.2d 109, 117 (5th Cir.1983); *United States v. Bieganowski,* 313 F.3d 264, 285 (5th Cir.2002). 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. Slepicoff*, 524 F.2d 1244, 1246-48 (5th Cir. 1975). "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. In *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 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 passes constitutional muster. *Russell*, 369 U.S. at 764; *United States v. Simmons*, 96 U.S. 360 (1877).

The Fifth Circuit has held that an indictment must allege that the defendant performed acts that, if proven, constitute a punishable offense. *United States v. Nevers*, 7 F.3d 59, 62 (5th Cir. 1993). If the acts alleged in the indictment do not constitute a violation of law, the indictment is properly dismissed. *Id.*; *see also Reno v. United States*, 317 F.2d 499, 504-05 (5th Cir. 1963); *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.")

III. Count Two

The government generally contends that Defendant Solomon engaged in a conspiracy to commit money laundering because it alleges that from September 2, 2004 through October 31, 2005, approximately 70 packages were shipped from Houston, Texas to Defendant

Martin using an address in Houston, Texas that is alleged to be the residence of Defendant Johnson and is owned by Defendant Solomon.[1] The government alleges that the proceeds of the conspiracy are generated by Defendants Solomon and Johnson through the sale of prescriptions that were filled and then mailed to Defendants Solomon and Johnson at the business locations of South Texas Wellness Center and Ascensia Nutritional Pharmacy in Houston, Texas. (*See* Indictment, Count Two).

Defendant Solomon 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

[1] The address alleged is 5833 Sunforest Drive, Houston, Texas. The Government acknowledges in its indictment: (1) that these packages are the only alleged connection of any kind between Defendants Solomon and Martin; and (2) that Defendant Martin is the only alleged financial connection between Defendants Solomon and Rostie.

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. Simply put, under *Santos*, the transactions related to the proceeds of the alleged crime cannot be used to justify a criminal charge for money laundering.

IV. Conclusion

Under the *Santos* rationale, Count Two in the instant indictment does not adequately allege an offense - the indictment fails to allege that the money referenced in Count Two constitutes "profits." There is not a single allegation that the transactions involved criminal profits. Additionally, there are no allegations in the indictment as to how the financial transactions "promoted the carrying on of said specified unlawful activity." Without alleging that Defendant Solomon utilized transactions involving criminal profits, the Government fails to properly allege the crime of Money Laundering under 18 U.S.C. § 1956.

WHEREFORE, based on the foregoing, Defendant Solomon respectfully prays that this Honorable Court issue its order dismissing Count Two of the indictment, and for any further relief deemed proper in these circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of August, 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, including the following:

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