UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

UNITED STATES	*	
	*	
v.	*	Criminal No. 06-CR-226-04-PB
	*	
BOAZ BENMOSHE, Defendant	*	
	*	

DEFENDANT BENMOSHE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS SUPERCEDING INDICTMENT COUNT 28 (AND COUNT 33 OF THE ORIGINAL INDICTMENT)

The Defendant, Boaz Benmoshe, by his counsel, Michael J. Iacopino and Brennan Caron Lenehan & Iacopino, respectfully submits the following Memorandum of Law in Support of his Motion to Dismiss Count 28 of the Superceding Indictment (and Count 33 of the original Indictment).

INTRODUCTION

The Defendant, Boaz Benmoshe has filed a Motion to Dismiss Count 28 of the Superceding Indictment[1] (Document 61). The Defendant submits that Count 28 fails to comply with F.R.Cr.P. 7(c)(1), and in the light of the recent Supreme Court case, *United States v. Santos*, 533 U.S. ____, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008), fails to sufficiently allege the crime of laundering of monetary instruments. The Defendant also submits that Count 28 fails to sufficiently plead the predicate specified unlawful activity

[1]Count 28 of the Superceding Indictment and Count 33 of the original Indictment are the same charge. References to Count 28 should be construed to also apply to Count 33 of the original Indictment and both should be dismissed consistent with the relief requested herein.

of wire fraud because the Superceding Indictment does not establish that anyone was defrauded of money or property. The Defendant also submits that failure to dismiss the count will result in violation of the Fifth Amendment indictment requirement because the grand jury necessarily was not apprised, per *Santos*, of the appropriate elements establishing the offense of laundering monetary instruments. Based upon these arguments the Defendant seeks dismissal of Count 28 of the Superceding Indictment and Count 33 of the original Indictment.

FACTS - ALLEGATIONS IN THE INDICTMENTS

Count 28 of the Superceding Indictment and Count 33 of the original indictment charge the Defendant with conspiracy to launder monetary instruments contrary to 18 U.S.C. § 1956 (h) and §1956 (a)(1)(A)(i). The Superceding Indictment alleges that the Defendant obtained the injectable drug known as Serostim © and sold it to Co-Defendant McFadden and an individual named Thomas Lavery. McFadden and Lavery are alleged to have then sent the drug to customers of Co-Defendant Beth Handy. Beth Handy allegedly created and sent false pedigree statements for the drugs to her customers. The customers paid Handy usually via wire transfer to New Hampshire. Handy would remove her profits from the money received and wire the remaining money to California to pay McFadden and Lavery. McFadden and Lavery would then allegedly pay the Defendant for supplying the Serostim with a bank check. Nothing in the Superceding Indictment remotely suggests that the Defendant was aware of the disposition of the Serostim by McFadden and Lavery, the alleged fraudulent preparation of drug pedigrees or the eventual disposition of the Serostim to Handy's customers.

LEGAL AUTHORITY FOR MOTION

STANDARD FOR REVIEW OF INDICTMENT

Rule 7 (c)(1) of the Federal Rules of Criminal Procedure, in pertinent part, states:

> The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated.

To be constitutionally sufficient under the Sixth Amendment the indictment must :

> (1) contain[s] the elements of the offense intended to be charged, (2) sufficiently apprise[s] the defendant of what he must be prepared to meet, and (3) allow[s] the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution." *United States v. Rankin,* 870 F.2d 109, 112 (3d Cir.1989) (internal quotation marks and citations omitted). An indictment does not state an offense sufficiently if the specific facts that it alleges "fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation." *United States. v. Panarella,* 277 F.3d 678, 685 (3d Cir.2002).

United States v. Yusuf, 536 F.3d 178, 184 (3d Cir., 2008). The First Circuit Court of Appeals has addressed the constitutional requirement as follows:

> A constitutionally adequate indictment must “sufficiently apprise[ ] the defendant of what he must be prepared to meet.” *Russell v. United States,* 369 U.S. 749, 763, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1962) (citations omitted). The Sixth Amendment requires the government to

> inform the accused " 'of the nature and cause of the accusation,' "*United States v. Murphy,* 762 F.2d 1151, 1154 (1st Cir.1985) (quoting *United States v. Tomasetta,* 429 F.2d 978, 979 (1st Cir.1970)). And, the Fifth Amendment assures the defendant that the government will try him on the charges that the grand jury voted, not on some other "charges that are not made in the indictment against him." *Stirone,* 361 U.S. at 217, 80 S.Ct. at 273 (citations omitted). Thus, the indictment must contain " 'the elements of the offense charged' " and " 'fairly inform[ ] a defendant of the charge against which he must defend.' " *United States v. Serino,* 835 F.2d 924, 929 (1st Cir.1987), (quoting *Hamling v. United States,* 418 U.S. 87, 117, 94 S.Ct. 2887, 2907-08, 41 L.Ed.2d 590 (1974)) (other citations omitted).

United States v. Santa-Manzanos, 842 F. 2d 1, 2 (1st Cir., 1988). Count 28 of the Superceding Indictment fails to satisfy either the rule or the constitutional requirements of the Fifth and Sixth Amendments.

COUNT 28 FAILS TO PROPERLY ALLEGE THE ELEMENTS OF THE OFFENSE OF LAUNDERING MONETARY INSTRUMENTS

Count 28 of the Superceding Indictment fails to appropriately plead the essential elements of the offense of conspiracy to launder monetary instruments contrary to 18 U.S.C. §1956 (h) because it does not establish that "proceeds" as that term has been recently defined by the United States Supreme Court were involved in the alleged monetary transactions. The money laundering statute, in pertinent part, contemplated in this indictment, states:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity. . . (A)(I) with the intent to promote the carrying on of specified unlawful activity ... shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years,

> or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

18 U.S.C. §1956 (a)(1)(A)(i). Conspiracy to launder monetary instruments requires that a person agree with one or more other persons to commit the crime of laundering monetary instruments with the specific intent to agree and with the specific intent that the crime of laundering monetary instruments be committed. See, 18 U.S.C. 1956 (h); 18 U.S.C. 371.

In *United States v. Santos*, 533 U.S. ___, 128 S.Ct. 2020, 170 L.Ed.2d 912, the Supreme Court had occasion to review the case of two men charged in an illegal gaming indictment in the Northern District of Indiana. Efrain Santos, the operator of the gaming business was originally convicted of various gaming offenses, one count of conspiracy to launder money in violation of 18 U.S.C. §§ 1956 (a)(1)(A)(i) and 18 U.S.C. §1956 (h), and two counts of laundering money contrary to 18 U.S.C. §§ 1956 (a)(1)(A)(I). *Santos*,128 S.Ct., p. 2023. His co-defendant Benedicto Diaz was originally convicted of one count of conspiracy to launder money[2]. The evidence at their trial demonstrated that Santos employed runners who would collect bets at various places, keep their "cut" of 15-20 percent and turn the funds over to "collectors" like Diaz. The collectors would collect the funds from the runners and then turn the funds over to Santos. Santos then used the funds to pay collectors like Diaz and to pay winning

[2]The Defendant is charged under the same statutory provisions applied to Santos and Diaz. *See*, Superceding Indictment Count 28.

bettors. These funds formed the basis of the money laundering and conspiracy charges against both men. Id. After unsuccessful appeals both men attacked their convictions by motion filed pursuant to 28 U.S.C. § 2255 asserting that the recent Seventh Circuit case, *United States v. Scialabba*, 282 F.2d 475 (2002), interpreted the term "proceeds" as used in the money laundering statutes to mean criminal profits and not criminal receipts. The motions were granted and the Seventh Circuit affirmed, setting the stage for the Supreme Court to determine the meaning of the phrase "proceeds" as contained in the money laundering statutes. The Court agreed with the Seventh Circuit and held that the term "proceeds" as used in the federal money laundering statutes means "profits' and does not mean "receipts."

In coming to this conclusion the Santos Court applied the rule of lenity to define the ambiguous nature of the term "proceeds." The Court recognized that the purpose of the statute could be viewed as "aimed at the distinctive danger that arises from leaving in criminal hands the yield of a crime". *Santos*, at 128 S.Ct. at 2026 . The Court also opined that its interpretation would ensure that "the severe money-laundering penalties will be imposed only for the removal of profits from criminal activity, which permit the leveraging of one criminal activity into the next." *Santos*, at 128 S.Ct. at 2028. The Court also recognized the fact that the money laundering statutes are extremely broad and contain over 250 predicate offenses. *Santos* at 128 S.Ct. 2027. The Court identified the problem of "merger" if the term "proceeds" was to be interpreted as simply receipts of criminal activity. Specifically the court noted that:

> 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 the 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.

Santos, 128 S.Ct. at 2026 - 2027 . The Court recognized that there was no reason for congress to "radically increase" the potential penalty for something that is a normal part of a crime that congress had already defined and punished in a separate statute. *Id.* Finally, the Court rejected the Government's arguments that proceeds must be interpreted to mean receipts because it is easier for the Government to get a conviction with the use of receipts rather than profits. The Court recognized this ruse as nothing more than turning "the rule of lenity upside down." *Santos*, 128 S.Ct. at 2028. Based upon these basic considerations of statutory construction the Court found "proceeds" to mean "profits" and not "receipts."

Count 28 of the Superceding Indictment in this case can not be sustained after *Santos*. Paragraph 40 of the Superceding Indictment clearly demonstrates that Co-Defendant Handy retrieved her profits from the alleged sales of Serostim from the funds she received from her customer and then paid her alleged confederates for providing the Serostim. The facts alleged in this indictment are no different than the facts involved in *Santos*. In *Santos* the collector, Diaz was paid for collecting and transferring the gambling funds. In this case Benmoshe and presumably McFadden are alleged to have been paid for supplying the Serostim to Handy. There is no more basic cost of doing business than the "cost of goods sold." The Superceding Indictment does not identify

any funds or monetary instruments to represent anything more than Handy's cost of her crime. Therefore the Superceding Indictment fails to set forth the essential elements of the crime of conspiracy to launder monetary instruments and must be dismissed as to the Defendant, Boaz Benmoshe.

A short discussion of the *stare decisis* effect of *Santos* is appropriate at this juncture. Justice Stevens concurred in the judgment of the Court but disagreed about whether the term "proceeds" would always mean "profits." Justice Stevens opined that the term may mean different things for different underlying specified unlawful activity. *See, United States v. Santos*, 128 S.Ct. at 2031 -2032. However, that approach was specifically rejected in both dissenting opinions. Thus, future applications of *Santos* should recognize that the term "proceeds" means "profits' regardless of the underlying specified criminal activity. Although the Government may be free to argue for an interpretation that varies from crime to crime they do not have the support of a majority of the Supreme Court (in fact the clear majority opines otherwise). If the Government seeks such relief they are inviting this Court to "invent a statute rather than interpret one". *See, Clark v. Martinez*, 543 U.S. 371, 378 125 S.Ct. 716, 723-724, 160 L.Ed.2d 734.

In its Objection to the Defendant's Motion to Dismiss for Improper Venue (Document 130) the Government suggests (and may do so again in response hereto) that the Serostim cited in the Indictment is "contraband" and therefore the term proceeds should mean receipts and not profits. The Government relied on Justice Steven's dissent for this proposition. It should be noted however that the plurality regards Justice Stevens dissent in this regard to be *dicta*. Moreover, Justice Steven's

dissent also reveals the fallaciousness of the Government's argument. Justice Steven's specifically cited to the general civil forfeiture statute, 18 U.S.C. § 981, as an example of an area where congress specifically used a different definition of "proceeds" for different conduct. Justice Stevens writes:

> In fact, in the general civil forfeiture statute, § 981, Congress did provide two different definitions of "proceeds," recognizing that-for a subset of activities-"proceeds" must allow for the deduction of costs. Compare § 981(a)(2)(A) (2000 ed.) (defining "proceeds" in cases involving illegal goods and services to mean "property of any kind obtained directly or indirectly ... not limited to the net gain or profit realized from the offense") with § 981(a)(2)(B) (defining "proceeds" with respect to lawful goods sold in an illegal manner as the amount of money acquired "less the direct costs incurred in providing the goods or services").

Santos, 128 S.Ct. at 2031 - 2032 (Stevens, J., dissenting). The Serostim referenced in the Superceding Indictment is not an "illegal good" such as marijuana or heroin. Serostim is a legal material that, according to the theory of the indictment, gets sold in an illegal manner - without the regulatory controls of the PDMA[3]. Any effort by the Government to continue to try to morph this indictment into a drug trafficking indictment should be rejected because 1) it has no effect on the rules of statutory construction which specifically require that the term "proceeds" in the money laundering context must be interpreted to mean "receipts; and, 2) the underlying theory of the government's indictment is not a drug trafficking crime but a regulatory crime, the heart of which is the misuse of drug pedigree forms. Likewise, any reliance by the Government on the RICO case, *United States v. Hurley*, 63 F.3d 1, 21, (1995), is

[3]There is no statutory authority for the proposition that Serostim becomes contraband when drug pedigrees are misused or even when distributed without a license. Compare 18 U.S.C. 2341(2) concerning contraband cigarettes.

inapposite because: 1) This case is not a RICO case; 2) Congress has made no statement defining the term "proceeds" in the context of money laundering and 3) the rules of statutory construction, as eloquently explained by Justice Scalia for the plurality opinion, require that the term proceeds be construed by this Court to mean "profits."

The Superceding Indictment in this case fails to set forth the essential elements of the offense of conspiracy to launder monetary instruments and fails to fully inform the Defendant of what he must be prepared to meet at trial. Count 28 of the Superceding Indictment (and Count 33 of the original Indictment) must be dismissed.

THE INDICTMENT MUST BE DISMISSED BECAUSE THE GRAND JURY WAS PROBABLY UNAWARE OF THE REQUIREMENT THAT MONEY LAUNDERING MUST INVOLVE PROFITS AND NOT RECEIPTS

The Superceding Indictment in this matter was filed with the Court on September 26, 2007. *United States v. Santos* was decided by the United States Supreme Court on June 2, 2008. Prior to *Santos* the First Circuit apparently interpreted the money laundering statutes to pertain to receipts rather than profits of specified unlawful activity. *See, e.g.* *United States v. Iacoboni*, 363 F.3d 1,4 (2004); *United States v. Hurley*, 63 F.3d 1, 21 (1995). Thus it is more likely than not that the grand jurors were instructed consistent with a receipts theory rather than a profits theory at the time of the presentation of this case. It can reasonably be inferred that the grand jurors did not attempt to discern from the evidence presented whether the funds which were the subject of the monetary transactions were receipts or profits. A court cannot permit a defendant to be tried on charges that were not brought by a grand jury. *See,* *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); *Ex Parte Bain*, 121

U.S. 1, 7 S.Ct. 781, 30 L.Ed.2d 849 (1887). Therefore Count 28 of the Superceding Indictment must be dismissed.

If the Court does not dismiss the indictment it should at least order the disclosure of all transcripts of the grand jury proceedings in order for the parties and the Court to review the presentation to determine if the grand jury was properly instructed on the elements of the money laundering count and properly applied the evidence presented. F.R.Cr.P. 6(e)(3)(E)(i and ii) provides:

> (E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:
>
> (i) preliminarily to or in connection with a judicial proceeding;
>
> (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

In this case the Defendant has raised grounds for the dismissal of Count 28 of the Superceding Indictment. If the Court does not dismiss the indictment outright, it should require disclosure of all grand jury transcripts for review to determine whether the matter was properly presented to and properly decided by the grand jury.

COUNT 28 MUST BE DISMISSED
BECAUSE THE INDICTMENT FAILS TO ESTABLISH
THE SPECIFIED UNLAWFUL ACTIVITY OF WIRE FRAUD

Count 28 of the Superceding Indictment bases the money laundering conspiracy charge against the Defendant on the specified unlawful activity of wire fraud and conspiracy to commit wire fraud contrary to contrary to 18 U.S.C. § 1343 and 1349. In

order to commit wire fraud or wire fraud conspiracy one must execute a scheme or artifice that fraudulently deprives another of money or property. *See,* *McNally v. United States*, 483 U.S. 350, 360 (1987). This indictment does not allege that any of Co-Defendant's Handy's customers got anything but what they bargained for: discount priced Serostim. The indictment does not allege that the Serostim was in any way, adulterated, tampered with or otherwise not exactly what it was promised to be - Serostim. The failure to establish that a victim was fraudulently deprived of money or property is fatal to the charge contained in Count 28 and it must therefore be dismissed.

CONCLUSION

Count 28 of the Superceding Indictment (and Count 33 of the original Indictment) must be dismissed because it fails to set forth the essential element of the offense of conspiracy to launder monetary instruments or to adequately apprise the Defendant of what he must be prepared to meet at trial. The Count should also be dismissed because it is more likely than not that the presentation of the matter to the grand jury and the grand jury's eventual indictment were based upon a faulty understanding of the elements of the offense of laundering monetary instruments. Finally the Indictment fails to establish sufficient specified unlawful activity in the form of wire fraud to support Count 28. For these reasons Count 28 must be dismissed. Alternatively this Court pursuant to F.R.Cr.P. 6(e) should order the immediate disclosure of all grand jury materials in order to determine whether the matter was appropriately presented to the grand jury in accordance with *United States v. Santos*.

Respectfully submitted,
Boaz BenMoshe, Defendant
By his Attorneys,
BRENNAN CARON LENEHAN & IACOPINO

Date: September 28, 2008

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Memorandum of Law in Support of Motion to Dismiss Count 28 was served on the following person, even date herewith, and in the manner specified herein: electronically served through ECF: Assistant United States Attorney Mark Irish, United States Attorney's Office, James C. Cleveland Federal Bldg., 55 Pleasant St., Room 352, Concord, NH 03301-3941 and to all counsel of record.

/s/Michael J. Iacopino
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