

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES T. CATHERMAN,

Defendant.

No. 4:07-cr-00106-JEG

O R D E R

This matter is before the Court on Defendant's Motion to Dismiss or in the Alternative to Consolidate Multiplicitous Counts, which the Government resists. Hearing was held on the matter on September 17, 2007. The Defendant was represented by attorney Jan Mohrfeld Kramer. The Government was represented by Assistant United States Attorney Craig Gaumer. For the reasons discussed below, the motion must be granted.

SUMMARY OF MATERIAL FACTS

On April 25, 2007, Defendant James T. Catherman ("Defendant") was charged in a five-count indictment with structuring financial transactions. Counts one through four each allege Defendant structured cash deposits by making more than one deposit in an amount less than \$10,000 in order to evade the requirement that financial institutions must file reports with the Government for transactions exceeding \$10,000. Count five calls for the forfeiture of assets pursuant to 21 U.S.C. § 853(p) as incorporated by 31 U.S.C. § 5317(c)(1)(B).

On August 29, 2007, Defendant filed the present Motion to Dismiss or in the Alternative to Consolidate Multiplicitous Counts. Defendant argues the four structuring counts separately charge what is appropriately a single offense, and therefore counts one through four are multiplicitous and must either be dismissed or consolidated into one count. The Government resists the motion, arguing the motion is based on hearsay, the counts are not multiplicitous, and

even if the Court were to conclude the counts were multiplicitous, neither dismissal nor pretrial consolidation is the appropriate remedy because the matter can be addressed at trial.

APPLICABLE LAW AND DISCUSSION

Pursuant to 31 U.S.C. § 5313(a), financial institutions are required to file a currency transaction report (“CTR”) for certain financial transactions. The statute states as follows:

When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes.

31 U.S.C.A. § 5313(a). The pertinent regulations state reporting is required for financial transactions which exceed \$10,000.

Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than \$10,000, except as otherwise provided in this section.

31 C.F.R. § 103.22(b)(1). “It is illegal to ‘structure’ transactions – *i.e.*, to break up a single transaction above the reporting threshold into two or more separate transactions – for the purpose of evading a financial institution’s reporting requirement.” Ratzlaf v. United States, 510 U.S.

135, 136 (1994) (citing 31 U.S.C. § 5324).

No person shall, for the purpose of evading the reporting requirements of section 5313(a) or 5325 or any regulation prescribed under any such section, the reporting or recordkeeping requirements imposed by any order issued under section 5326, or the recordkeeping requirements imposed by any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508 . . . structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

31 U.S.C. § 5324(a)(3). Defendant asserts the indictment identifies no alleged source for the cash that was allegedly structured and notes counts one through four appear to be based on units of time and charge a separate count after any substantial gap in time during the alleged structuring activity. Defendant argues structuring cannot be charged separately based on time periods but can only be broken into separate counts based on the source of the funds allegedly being structured. Defendant, a 67-year-old single, rural man who claims he has lived a very frugal and conservative lifestyle with almost no living expenses, contends the source of the funds alleged to have been structured was a single cash hoard he had saved over many years. Defendant asserts he owned and operated a plumbing business with his father until his father retired in the 1980's. Thereafter, Defendant owned and operated his own business doing plumbing and small construction related jobs until he retired in 2001. Defendant maintains he informed his investment advisor he had approximately \$250,000 in cash that he had "squirreled away" over the years, and his investment advisor informed Defendant the investment company did not accept cash. Defendant, who did not have a personal bank account, was referred to the Community First Credit Union to deposit the cash. Defendant claims this shows there is only one source of cash that was allegedly structured.

The Government disputes Defendant's claims regarding the source of the funds, although as the Government concedes, it has been unable to determine the source of the funds that were allegedly structured. The Government states no defense discovery has been provided to substantiate Defendant's claim the money at issue was "saved" earnings. The Government states over the course of forty years, Defendant earned only \$651,042.29, leaving unexplained Defendant's

accumulation of more than \$1.7-million in invested funds, not including the \$275,500¹ in allegedly structured funds. The Government argues Defendant's assertions as to the source of the money at issue is hearsay, and Defendant should not be permitted to support his motion based on self-serving, hearsay statements.

Each count in the indictment covers a separate grouping of deposits during a distinct time period with brief intervals between the groupings of deposits. Count one alleges structuring on or between October 6, 2004, through November 24, 2004. Count two charges structuring on or between January 12, 2005, through January 25, 2005. Count three charges structuring on or between May 16, 2005, through June 29, 2005, Count four charges structuring on or between July 31, 2006, through August 1, 2006.²

"A 'multiplicitous' indictment is one that charges a single offense in multiple counts and generally is not improper in a well-pleaded indictment." United States v. Worthon, 315 F.3d 980, 983 (8th Cir. 2003) (citing United States v. Webber, 255 F.3d 523, 527 (8th Cir. 2001)). The risk of multiple punishments for a single offense is the principal danger the multiplicity doctrine addresses. Webber, 255 F.3d at 527.

The Government contends 31 U.S.C. § 5324(a)(3) does not limit the unit of prosecution to all funds structured out of a single source, but rather it defines the unit of prosecution as funds from a single transaction, which were structured into smaller units to avoid reporting requirements. The Government argues that when a defendant structures funds in a short period of time,

¹ Counts one through four charge deposits totaling \$275,500.

² Given the Government's characterization of the intervals of time that occurred between the conduct charged in counts one through four, the Court questions whether count four actually intended to charge conduct occurring in 2005 instead of 2006.

then stops for a period of time, as happened in this case, each series of events, separated by a lengthy break, can be considered a single act of structuring. Conversely, the Government asserts there is no doubt a defendant can accumulate large amounts of cash from multiple sources, combine them into one lump sum or stash, and then structure their deposit into an account. The Government therefore concludes it is not the source of the funds that 31 U.S.C. § 5324 focuses upon but the manner in which the funds are structured to avoid the currency reporting requirement that is at issue.

The Eighth Circuit has not yet addressed the question of the appropriate unit of prosecution for a structuring offense. “When the same statutory violation is charged twice, the question is whether Congress intended the facts underlying each count to make up a separate unit of prosecution.” United States v. Chipps, 410 F.3d 438, 447 (8th Cir. 2005). “The unit of prosecution is the aspect of criminal activity that Congress intended to punish.” Id. at 448.

We look to the statutory language, legislative history, and statutory scheme to ascertain what Congress intended the unit of prosecution to be. United States v. Kinsley, 518 F.2d 665, 668 (8th Cir. 1975). When Congress fails to establish the unit of prosecution “clearly and without ambiguity,” we resolve doubt as to congressional intent in favor of lenity for the defendant. Bell v. United States, 349 U.S. 81, 83-84 (1955).

Id. The statutory language does not limit the unit of prosecution to funds structured out of a single source but instead limits it to a single *transaction*. It is thus inherent that what is relevant is determining what transaction triggering the CTR requirement is a defendant trying to avoid; the source of the funds is relevant in ascertaining the scope of this transaction. Time parameters are also relevant in ascertaining the transaction sought to be avoided, but it is not determinative because an individual could attempt to structure one lump sum over a period of lengthy time intervals to further avoid detection.

Prior to the enactment of 31 U.S.C. § 5324, CTR's were required for transactions in excess of \$10,000; however, structuring a transaction below the \$10,000 threshold in order to avoid the CTR requirement was not a crime. Therefore, the legislative history addresses problems with the then-existing reporting laws but provides no guidance because it contains no analysis regarding the elements of the new crime. The statutory scheme supports a finding that the unit of prosecution is determined by the nature of the transaction structured.

It is the purpose of this subchapter (except section 5315) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.

31 U.S.C.A. § 5311. The question in this case is whether the evidence shows the series of smaller deposits detailed in counts one through four were really part of one larger deposit, exceeding \$10,000, that Defendant sought to avoid reporting, or, if the series of deposits charged in counts one through four constitute four separate attempts to avoid the CTR requirement by way of four separate and distinct transactions. The source of the funds and the timing of the deposits therefore are relevant in ascertaining the true scope of the offense conduct at issue. While the legislative history offers little guidance, the statutory language and the statutory scheme indicate the intended unit of prosecution is a "transaction." What constitutes a separate and distinct transaction will depend on the unique circumstances of a particular case.

Most cases having dealt with this issue focus on the source of the funds at issue to determine whether each single structured transaction was distinct or part of one overall plan involving multiple small transactions. In United States v. Davenport, the defendants came into possession of \$100,000, which they then structured into deposits of less than \$10,000 to avoid the reporting requirements. United States v. Davenport, 929 F.2d 1169, 1171 (7th Cir. 1991).

The Government charged the defendants with conspiracy to violate and a violation of 31 U.S.C. § 5324, and ten counts of violating the statute – one count for each of the ten deposits that had been made. Id. The defendants argued these last ten counts were multiplicitous, and the court agreed, finding the overall structuring scheme itself, and not the individual deposits, was the proper unit of prosecution. Id. at 1172.

In United States v. Nall, each deposit was charged as a separate count, even though the source of each deposit was the same \$26,000 lump sum of money. United States v. Nall, 949 F.2d 301, 308 (10th Cir. 1991). The court concluded the counts charging each deposit as a separate violation of 31 U.S.C. § 5324 were multiplicitous and found Nall had committed only one structuring violation with respect to the \$26,000 lump sum of money, and this single violation of structuring encompassed the three individual deposits. Id.

In United States v. Dashney, Dashney won over \$100,000 playing blackjack at a casino in Las Vegas. United States v. Dashney, 937 F.2d 532, 533 (10th Cir. 1991). Dashney and his friend then went to several different banks in Colorado and began purchasing, or attempting to purchase, cashier's checks in amounts less than the \$10,000 reporting requirement. Id. at 533-536. Dashney was later charged in two separate counts of structuring, although both counts clearly pertained to the same cash hoard and the same conduct committed on the same day. Id. at 536, n.2. In finding the two counts were multiplicitous, the court stated, "The basic violation of structuring by attempting to conceal *one* large cash hoard, during one day's conduct, underlies both counts charged against Dashney. They concerned only *one* structuring violation in our opinion." Id. at 542.

In United States v. Kushner, the defendants were charged in a 126-count indictment with various offenses stemming from their unlicensed money-lending and check-cashing business,

including over one hundred counts of structuring to avoid CTR requirements. United States v. Kushner, 256 F. Supp. 2d 109, 110-111 (D. Mass. 2003). The Government had charged the defendants with separate counts of structuring for each day in which the defendants had attempted to avoid the CTR requirement. Id. at 112. The court concluded the counts were multiplicitous because “[a]ll of the money within the [d]efendants’ accounts was the product of the [d]efendants’ unlicensed business, and it was the sum in its entirety that the [d]efendants sought to conceal.” Id. at 113.

Defendant, relying on Kushner, argues that if the indictment does not set forth separate sources for funds allegedly structured in each count, the indictment is multiplicitous. Kushner, however, involved not deposits structured to avoid the reporting requirements, but withdrawals.

It is true that the instant case involves withdrawals from a bank – as opposed to deposits – thus making it more difficult to trace funds to particular sources. That is, however, the essence of money laundering. If the Government chooses to identify the various sources from which the money in the Defendants’ accounts was derived, that is, the various amounts “paid” by the Defendants’ “clients” or “customers,” the Government could so charge these transactions as separate structuring counts under the reasoning of Handakas. Otherwise, the Government may only sustain one count of structuring that spanned the relevant time period. In sum, the structuring as alleged here was not conducted so as to withdraw discrete amounts of money daily to avoid the reporting requirements; it was structured so that the daily reporting requirements would reveal neither the overall scheme, nor the substantial amounts of cash the Defendants illegally received from various sources.

Kushner, 256 F. Supp. 2d at 113-114. Because Kushner involved withdrawals and not deposits, in order to charge separate structuring offenses, the Government would have had to identify the source of the funds that were later withdrawn from the account, a task the Government argued would have been difficult to accomplish. Id. at 114. The Government did not produce specific evidence regarding the source of the withdrawn funds in Kushner but rather that the funds were

withdrawn from the main account, thus the Government could only charge the defendants with structuring to avoid the disclosure of the overall scheme in which defendants were engaged. Id.

“[W]hether an aggregate of acts constitutes a single course of conduct and therefore a single offense, or more than one, may not be capable of ascertainment merely from the bare allegations of an information and may have to await the trial on the facts.” United States v. Worthon, 315 F.3d 980, 983 (8th Cir. 2003) (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 225 (1952)). Defendant claims the funds are from one cash hoard; however, the Court cannot rely on Defendant’s mere assertion of such in determining whether the counts are multiplicitous. While the Eighth Circuit has recognized some cases will have to await a trial on the facts before the evidence will indicate whether counts are multiplicitous or not, in the present case the Government conceded at hearing it has no information regarding the source of the funds except for Defendant’s statements at the time the deposits were made, and the Government admitted it had no further evidence to present at trial regarding the ultimate source of the funds. Given the unique circumstances of this case, where the Government has conceded there is no information capable of identifying the source of the funds and acknowledges it will have no additional evidence to present on the issue at trial, the Court can conclude the Government has insufficient evidence to charge counts one through four as separate structuring transactions.

The Government argues if the transactions at issue are charged as only one count as opposed to four separate counts, were Defendant to be found guilty, certain enhancements available under the advisory United States Sentencing Guidelines would be rendered inapplicable.³ The Court finds no support for this position. “Relevant conduct under the

³ The Government is most likely referring to U.S.S.G. § 2S1.3(b)(2).

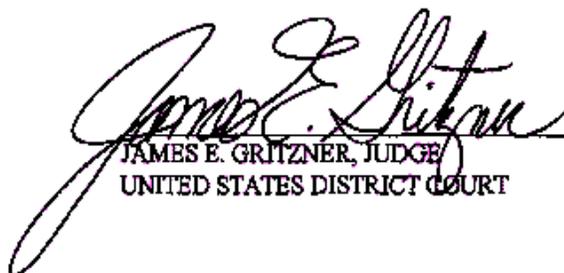
guidelines need not be charged to be considered in sentencing, and it includes all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction.” United States v. Radtke, 415 F.3d 826, 841 (8th Cir. 2005) (quoting USSG § 1B1.3(a)(2)) (quotations omitted); see also United States v. McIntosh, 492 F.3d 956, 961 (8th Cir. 2007). Whether the criminal conduct is charged as one count or four therefore is irrelevant for purposes of U.S.S.G. computations.

CONCLUSION

The record demonstrates the Government has insufficient evidence to maintain four independent counts for separate structuring transactions for the offense conduct detailed in counts one through four. Defendant’s Motion to Dismiss, or in the Alternative, Motion to Consolidate Multiplicitous Counts (Clerk’s No. 17) must therefore be **denied in part and granted in part**. The motion to dismiss is denied. The motion to consolidate counts is granted. Only one transaction count will be submitted for trial along with the forfeiture count. The Government is directed to either elect between the four counts, or consolidate counts one through four into one count, prior to the commencement of the trial in this matter.

IT IS SO ORDERED.

Dated this 24th day of September, 2007.



JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT