

1 **II. ANALYSIS**

2 Defendant argues that the evidence presented at trial does not
3 establish beyond a reasonable doubt that the monetary transactions at
4 issue in counts nine, ten, eleven, thirteen, fourteen, seventeen, and
5 eighteen involved over \$10,000 in criminally derived property.

6 A. Standard for a Motion for Acquittal

7 Federal Rule of Criminal Procedure 29(c)(1) provides that "[a]
8 defendant may move for a judgment of acquittal, or renew such motion,
9 within 7 days after a guilty verdict or after the court discharges the
10 jury, whichever is later, or within any other time the court sets
11 during the 7-day period." Further, Rule 29(c)(2) provides that "[i]f
12 the jury has entered a guilty verdict, the court may set aside the
13 verdict and enter an acquittal."

14 A judgment of acquittal is proper under Rule 29(c) when no
15 rational fact-finder could find, beyond a reasonable doubt, against
16 the defendant. United States v. Gil, 58 F.3d 1414, 1423
17 (9th Cir. 1995) ("When the sufficiency of evidence is challenged, this
18 Court must determine whether, after viewing the evidence in the light
19 most favorable to the prosecution, any rational trier of fact could
20 have found the essential elements of the crime beyond a reasonable
21 doubt."); Rhoden v. Rowland, 10 F.3d 1457, 1461 (9th Cir. 1993) ("In
22 reviewing a sufficiency of the evidence challenge, we must decide
23 'whether, after viewing the evidence in the light most favorable to
24 the prosecution, any rational trier of fact could have found the
25 essential elements of the crime beyond a reasonable doubt.'") (quoting
26 Jackson v. Virginia, 443 U.S. 307, 319 (1979)); United States v.
27 Mundi, 892 F.2d 817, 820-21 (9th Cir. 1989) ("We review the denial of
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1 the Rule 29 motions and [defendant's] challenge to the sufficiency of
2 the evidence under the same standard, assessing whether, when viewed
3 in the light most favorable to the government, the evidence adduced at
4 trial was sufficient for a rational jury to find [the defendant]
5 guilty beyond a reasonable doubt."). "In making this assessment, the
6 reviewing court should not substitute its own inferences for those of
7 the jury." United States v. Diggs, 649 F.2d 731, 735 (9th Cir. 1981),
8 cert. denied, 454 U.S. 970 (1981), overruled on other grounds by
9 United States v. McConney, 728 F.2d 1195 (9th Cir. 1984) (citations
10 omitted).

11 B. The Tracing Requirement

12 "A conviction for money laundering under 18 U.S.C. § 1957
13 requires the government to show: (1) the defendant knowingly engaged
14 in a monetary transaction; (2) he knew the transaction involved
15 criminal property; (3) the property's value exceeded \$10,000; and (4)
16 the property was derived from a specified unlawful activity." United
17 States v. Roger, 321 F.3d 1226, 1229 (9th Cir. 2003). Where the
18 transaction involves criminal proceeds that have been commingled with
19 innocent funds, the Ninth Circuit imposes a tracing requirement; the
20 government must trace each of the alleged monetary transactions to
21 criminally-derived proceeds. United States v. Rutgard, 116 F.3d 1270,
22 1292 (9th Cir. 1997); United States v. Hanley, 190 F.3d 1017, 1024
23 (9th Cir. 1999).

1 With respect to a withdrawal,¹ three potential methods of
2 satisfying the tracing requirement exist other than tracing the funds.
3 Hanley, 190 F.3d at 1025 (citing Rutgard, 116 F.3d at 1292). First,
4 "the government may prevail by showing that all the funds in the
5 account are the proceeds of crime." Rutgard, 116 f.3d at 1292 (citing
6 United States v. Savage, 67 F.3d 1435, 1440-43 (9th Cir. 1995).
7 Second, the government may prevail if the Defendant "transferred out
8 of the account all the funds that were in it." 116 F.3d at 1292.
9 Finally, in some circuits the government may prevail based on a rule
10 or presumption that "once criminally-derived funds were deposited, any
11 transfer from the account would be presumed to involve them for the
12 purpose of applying § 1957." Id. While other Circuits have adopted
13 such a presumption, see United States v. Haddad, 462 F.3d 783, 792
14 (7th Cir. 2006); United States v. Davis, 226 F.3d 346 (5th Cir. 2000);
15 United States v. Sokolow, 91 F.3d 396, 409 (3d Cir. 1996); United
16 States v. Moore, 27 F.3d 969, 976-77 (4th Cir. 1994); United States v.
17 Johnson, 971 F.2d 562 (10th Cir.1992), the Ninth Circuit has expressly
18 rejected its adoption. 116 F.3d at 1292-93 (explaining that "[t]he
19 statute does not create a presumption that any transfer of cash in an
20 account tainted by the presence of a small amount of fraudulent
21 proceeds must be a transfer of these proceeds . . . and [t]o create
22 such a presumption in order to sustain a conviction under § 1957 would
23 be to multiply many times the power of that draconian law.")

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26 ¹ With respect to a deposit, the tracing requirement is satisfied so
27 long as the transaction involved a deposit of at least \$10,000 of
28 criminally-derived proceeds. Rutgard, 116 F.3d at 1292. The presence
of innocent funds in the account, or the later deposit of innocent
funds, "cannot wipe out the crime committed by the deposit of the
criminally-derived proceeds." Id.

1 For example, in Rutgard, the defendant was charged with
2 transferring \$7.5 million from his bank account. 116 F.3d at 1290.
3 The Court determined that the bank account had only contained \$46,000
4 in criminally-derived funds which were commingled with innocent funds.
5 Id. The Court observed that more than \$46,000 remained in the account
6 after the transaction. Id. at 1293. Therefore, the Ninth Circuit held
7 that the government failed to prove beyond a reasonable doubt that the
8 transfer necessarily included more than \$10,000 in criminally-derived
9 funds. Id. at 1291-93. See also Hanley, 190 F.3d at 1025-26
10 (rejecting government's argument that tracing requirement was
11 satisfied where the government had proven that the great majority of
12 the funds in the account were criminally derived funds.)

13 C. The Monetary Transactions at Issue

14 Defendant argues that the government failed to trace at least
15 \$10,000 in criminally-derived property to the monetary transactions
16 charged in counts nine, ten, eleven, thirteen, fourteen, seventeen,
17 and eighteen. The government contends that the funds charged in these
18 counts can be traced to proceeds of a violation of 18 U.S.C. § 152(1)
19 and (2).

20 1. Count Nine

21 Count nine charges the deposit of check number 1389 in the amount
22 of \$20,000, drawn on the Yagman & Yagman & Reichman Los Angeles firm
23 account and deposited into the K.D. Mattox account on July 21, 2000.
24 The government contends that these funds represent the proceeds of the
25 \$150,000 attorneys' fees received from the Scott case.

26 Prior to the deposit of the \$150,000 check for attorneys' fees in
27 the Scott case into the Los Angeles firm account, the firm account had
28 a balance of \$17,056.44. Subsequent to the deposit of the \$150,000,

1 but prior to the processing of the \$20,000 check, a check for
 2 \$50,209.39 was processed from the Los Angeles firm account. Thus, the
 3 relevant sequence of events proceeded as follows:

<u>DATE</u>	<u>TRANSACTION</u>	<u>ACCOUNT BALANCE</u>	<u>POTENTIAL AMOUNT OF INNOCENT FUNDS</u>
???		\$17,056.44	\$17,056.44
???	Deposit of \$150,000 for attorneys' fees in <u>Scott</u> case	\$167,056.44	\$17,056.44
???	to Various withdrawals totaling \$9,439.39 ²	\$157,617.05	\$17,056.44
July 21	\$50,209.39 check is written from the account and processed ³	\$107,407.66	\$17,056.44
July 21	\$20,000 check is written from the account		

19 Defendant argues that it is impossible to determine whether the
 20 \$20,000 check contained at least \$10,000 of the Scott proceeds. For
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22 ² Neither party mentions these withdrawals. However, the record
 23 shows that the account balance was \$167,056.44 on the day the Scott
 24 check was deposited and \$107,407.66 on July 21. Because there were no
 25 deposits during this time period, there were necessarily withdrawals
 26 totaling \$9,439.39 during this period. As below, the Court cannot
 simply presume that innocent funds were withdrawn during this period
 rather than tainted funds. Therefore, \$17,056.44 in innocent funds
 potentially remained in the account after these withdrawals.

27 ³ Although the \$20,000 and \$50,209.39 checks were written on the same
 28 day, the processing numbers indicate that the \$50,209.39 check was
 processed first.

1 example, it is possible that the check consisted of \$17,000 in
2 innocent funds and \$3,000 in criminally-derived funds. Because the
3 Court cannot presume that check contained criminally derived proceeds
4 even if the great majority of funds in the account were criminally-
5 derived funds, see Hanley, 190 F.3d at 1025-26, Defendant argues that
6 the evidence presented at trial does not establish beyond a reasonable
7 doubt that the monetary transactions at issue in counts nine involved
8 criminally derived proceeds.

9 Although the Ninth Circuit has rejected the adoption of any
10 presumption that specific funds used in a transaction consist of
11 criminally-derived funds, the government assumes without explanation
12 that the \$50,209.39 check consisted of all of the \$17,056.44 of
13 untainted funds. Thus, the government concludes that only criminally-
14 derived funds remained in the account at the time the \$20,000 check
15 was processed.

16 The government's conclusion is not logically permitted by the
17 evidence. While it is possible that the \$50,209.39 check consisted of
18 all of the untainted funds, it is also possible that the check
19 consisted of solely criminally-derived funds. Thus, no rational fact-
20 finder could determine beyond mere speculation whether the check
21 contained tainted or untainted funds. Because the earlier transaction
22 did not necessarily involve untainted funds, the government's
23 conclusion is possible only if the court were to adopt a presumption
24 that earlier transactions necessarily exhaust untainted funds before
25 tainted funds are withdrawn.

26 The government is correct in noting that neither Rutgard nor
27 Hanley directly addresses whether withdrawals from an account,
28 following the deposit of tainted funds, reduces the balance of tainted

1 funds or untainted innocent funds. However, the Court finds that the
2 government's reading of Rutgard and Hanley as prohibiting a
3 presumption of taint but permitting a presumption of lack of taint is
4 contrary to a plain reading of the cases. Rutgard and Hanley clearly
5 establish that a court may not employ any presumption in determining
6 the source of a specific transaction. The Court sees no distinction
7 between presuming that a withdrawal contained tainted funds and
8 presuming that a earlier withdrawal contained untainted funds.⁴ In
9 both circumstances there are no indicia (in the absence of tracing) to
10 suggest whether the transaction involved tainted or untainted funds,
11 and both situations implicate the same concerns which motivated the
12 Ninth Circuit's refusal to adopt a presumption. See Rutgard, 116 F.3d
13 at 1293. Finally, the government has failed to cite a single case in
14 support of their presumption that the earlier transaction necessarily
15 involved untainted funds rather than tainted funds.

16 Absent a presumption, no rational fact-finder could determine
17 whether the transaction involved criminally-derived proceeds or
18 innocent funds. Therefore, the Court finds that the evidence
19 presented at trial does not establish beyond a reasonable doubt that
20 the monetary transactions at issue in count nine involved at least
21 \$10,000 in criminally derived proceeds.

22 2. Count Ten

23 Count ten charges the withdrawal of funds in the account held in
24 the name of K.D. Mattox at US Bank by check number 2072 in the amount
25 of \$12,000, made payable to W.G. Childs on July 21, 2000. Defendant
26 _____

27 ⁴By presuming that the earlier withdrawal consisted of innocent funds,
28 the Government is effectively presuming that the later transaction
consisted of criminally-derived funds.

1 argues that it is impossible to determine whether the \$12,000 check
 2 contained at least \$10,000 in criminally-derived proceeds. The
 3 following chart details the banking activity in the K.D. Mattox
 4 account for the time period in question:

<u>DATE</u>	<u>TRANSACTION</u>	<u>ACCOUNT BALANCE</u>	<u>POTENTIAL AMOUNT OF INNOCENT FUNDS</u>
June 20		\$22,706.31	\$22,706.31
June 21	Deposit of \$15,000 of criminally- derived proceeds	\$37,706.31	\$22,706.31
June 21 to July 18	Various withdrawals totaling \$22,025.94 ⁵	\$15,680.37	\$15,680.37
July 18 to July 21	Various withdrawals totaling \$3629.91 ⁶	\$12,050.46	\$12,050.46
July 21	Deposit of \$20,000 and \$5655.85 of criminally-derived proceeds	\$37,706.31	\$12,050.46

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⁵ Neither party mentions these withdrawals. However, the record shows that the account balance was \$22,706.31 on June 20, and \$15,680.37 on July 18. Because the only deposit during this period was the \$15,000 deposit on June 21, there were necessarily withdrawals totaling \$22,025.94 during this period. As discussed above, the Court cannot simply presume that innocent funds were withdrawn during this period rather than tainted funds. Therefore, \$15,680.37 in innocent funds potentially remained in the account after these withdrawals.

⁶ Again, neither party discusses these withdrawals. However, the record show that the account balance was \$15,680.37 on July 18 and \$37,706.31 on July 21. Because the only deposits during this period were the \$20,000 and \$5655.85 deposits on July 21, there were necessarily withdrawals totaling \$3,629.91 during this period. Because all of the funds in the account on July 18 were potentially untainted, the withdrawal of \$3,629.91 necessarily reduces the potential amount of innocent funds to \$12,050.46.

July 21	\$12,000 check is written from the account		
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As illustrated above, there were potentially \$12,050.46 in innocent funds in the K.D. Mattox account at the time the \$12,000 check was written. Because the Court cannot simply presume that this check consisted of criminally-derived funds, the government has failed to prove beyond a reasonable doubt that the monetary transactions at issue in count nine involved at least \$10,000 in criminally derived proceeds.

3. Count Eleven

Count eleven charges the deposit of check number 1817 in the amount of \$82,561.61, drawn on the Los Angeles firm account at US Bank, into the account held in the name of K.D. Mattox on June 18, 2001. Defendant argues that it is impossible to determine whether the \$82,561.61 check contained at least \$10,000 in criminally-derived proceeds. As the Court observed in its previous order requiring further briefing on Defendant's motion for acquittal, "the determinative factor in the analysis of this transaction is whether a \$30,000 deposit from the K.D. Mattox Schwab account consisted of criminally-derived funds." (Order Re Further Briefing, July 30, 2007, at 10.)

Based on an analysis of the K.D. Mattox Schwab account, the Court finds that there were sufficient potentially innocent funds in the Schwab account to fund the \$30,000 deposit with entirely innocent funds. See (Govt's Exhs. 452A and 452B). Therefore, the Court finds

1 that the \$30,000 deposit must be characterized as potentially innocent
2 funds. The Government also concedes that if the Court's
3 interpretation of Rutgard is applied, the \$30,000 deposit must be
4 characterized as potentially innocent funds. (Govt.'s Supp. Brief at
5 9.)

6 As the Court detailed in its previous order, the account
7 potentially contained \$88,865.01 in untainted funds at the time the
8 \$82,561.61 check was written if the \$30,000 check consisted of tainted
9 funds. (Order re Further Briefing, July 30, 2007 at 11-13); see also
10 (Govt.'s Exh. 456A) (showing that \$88,865.11 in potentially innocent
11 funds remained in the account at the time the \$82,561.61 check was
12 written). Consequently, no rational fact-finder could conclude that
13 the \$82,561.61 check necessarily consisted of more than \$10,000 in
14 criminally-derived funds. The Government concedes that the above
15 analysis, under the Court's interpretation of Rutgard, reveals that
16 Count 11 should be dismissed." (Govt.'s Supp. Brief at 12)

17 4. Counts Thirteen and Fourteen

18 Count thirteen charges the deposit of check number 1987 in the
19 amount of \$25,000, drawn on the Los Angeles firm account at US Bank,
20 into the account of K.D. Mattox at Network Bank on October 12, 2001.
21 Count fourteen charges the deposit of check number 1963 in the amount
22 of \$25,000, drawn on the Los Angeles firm account at US Bank into the
23 account held in the name of KD Mattox at US Bank. The government
24 claims that these checks represented the proceeds from the attorneys'
25 fees in the Children Who Want an Education case. The following chart
26 details the banking activity in the Los Angeles firm account at US
27 Bank for the time period in question:

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<u>DATE</u>	<u>TRANSACTION</u>	<u>ACCOUNT</u> <u>BALANCE</u>	<u>POTENTIAL AMOUNT OF</u> <u>INNOCENT FUNDS</u>
9/25		\$19,047.54	\$19,047.54
9/27	Deposit of \$150,202.64 in criminally-derived proceeds from attorneys' fees in <u>Children Who Want an</u> <u>Education</u>	\$169,250.18	\$19,047.54
9/27- 10/12	Various withdrawals totaling \$33,720.75	\$135,529.43	\$19,047.54
10/12	Withdrawal of \$27,000	\$108,529.43	\$19,047.54
10/12	Check no. 1987 for \$25,000 is written from the account		
10/12	Check no. 1963 for \$25,000 is written from the account		

As the chart illustrates, there were potentially \$19,047.54 in innocent funds in the account at the time the \$25,000 checks were written. As Defendant recognizes, one of the two checks must have necessarily contained more than \$10,000 in criminally-derived funds. (Def.'s Mot. at 9.) However, there is no means for a rational factfinder to decide beyond a reasonable doubt which check contained the criminally-derived funds because it is equally likely that either of the checks contained at least \$15,001.00 in untainted funds. Therefore, the government has failed to prove beyond a reasonable

1 doubt that the monetary transactions at issue in counts thirteen or
2 fourteen involved at least \$10,000 in criminally derived proceeds.⁷

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6 ⁷ The government argues that these transactions are distinguishable
7 from the transaction in Rutgard and therefore the Court is free to
8 apply the presumptions adopted by other Circuits. (Govt.'s Opp. at 8-
9 9.) Specifically, in Rutgard the account balance after the
10 transaction at issue exceeded the amount of tainted funds. Thus, in
11 Rutgard it was possible that none of the tainted funds had been used
12 in the transaction at issue. In contrast, in these transactions the
13 account balance after the transactions at issue was less than the
14 amount of tainted funds. Thus, in this case some of the tainted funds
15 were necessarily involved in the transactions at issue. Under these
16 circumstances, the government argues that the Court should presume
17 that the transaction involved at least \$10,000 in tainted funds.
18 United States v. Davis, 226 F.3d 346, 357 (5th Cir. 2000) ("[W]hen the
19 aggregate amount withdrawn from an account containing commingled funds
20 exceeds the clean funds, [any] individual withdrawal may be said to be
21 of tainted money even if a particular withdrawal was less than the
22 amount of clean money in the account."); United States v. Haddad, 462
23 F.3d 783, 792 (7th Cir. 2006) (same).

24 The Court finds no justification for ignoring Rutgard under the
25 circumstances of this case. First, Rutgard and Hanley clearly
26 instruct that a court may not adopt any presumption in determining
27 whether a transaction involved more than \$10,000 in criminally-derived
28 proceeds. See Rutgard, 116 F.3d at 1292-93. Instead, the Ninth
Circuit explained that the question is whether the defendant
"necessarily" transferred the fraudulent proceeds. Second, both of
the cases on which the government relies note that the results would
be different under Ninth Circuit law. Haddad, 462 F.3d 792 (finding
the Ninth Circuit's "all or nothing" approach in Rutgard to be
"unworkable"); Davis, 226 F.3d at 357. It would be disingenuous to
apply the presumption established by Haddad or Davis when those
Circuits recognized that Rutgard dictated a different result. Third,
both Haddad and Davis cited favorably the Fourth Circuit's decision in
United States v. Moore, 27 F.3d 969 (4th Cir. 1994). Haddad, 462 F.3d
at 792; Davis, 226 F.3d at 357. However, the Ninth Circuit explicitly
declined to adopt the presumption created in Moore. 116 F.3d at 1292.
Finally, the Court finds the distinction sought by the government to
be meaningless because under Rutgard the question is whether the
transaction necessarily involved tainted funds. Whether or not the
account balance exceeded the amount of tainted funds does not affect
whether or not the transaction necessarily involved \$10,000 in tainted
funds. Thus, the government's distinction would only be meaningful if
the question was whether the transaction necessarily involved any
tainted funds.

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2 5. Counts Seventeen and Eighteen

3 Count seventeen charges the deposit of check number 115 in the
4 amount of \$100,000 drawn on the account held in the name of KD Mattox
5 at Charles Schwab, into Defendant's retirement account at Charles
6 Schwab. Count eighteen charges the deposit of check number 117 in the
7 amount of \$62,000, drawn on the account held in the name of KD Mattox
8 at Charles Schwab into the Los Angeles firm account at US Bank on
9 April 22, 2002. The government contends that the funds in the KD
10 Mattox Schwab account were criminally-derived proceeds because the
11 funds represented amounts received from Defendant's relatives that
12 were concealed in the bankruptcy petition.

13 The amount of potentially innocent funds in the K.D. Mattox
14 Schwab account at the time of these withdrawals depends on whether the
15 initial opening deposits of \$25,000.00 is considered criminally-
16 derived or potentially innocent. According to Defendant's own
17 testimony at trial, the opening deposit of \$25,000 into the account
18 represented the transfer of his relatives' funds rather than any
19 transfer of pre-existing funds in the account. (Govt.'s Supp. Brief
20 at 5.) Therefore, viewing the evidence in the light most favorable to
21 the Government, there was sufficient evidence at trial for a jury to
22 find beyond a reasonable doubt that the initial opening deposit of
23 \$25,000.00 in the relatives' account consisted of money that Defendant
24 had received from his relatives. Because Defendant's failure to
25 disclose his receipt, use, and control of these funds is the specific
26 unlawful activity underlying the § 1957 charge, the \$25,000.00 opening
27 deposit must be characterized as criminally-derived funds.

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2 i. Count Seventeen

3 Because the initial deposit of \$25,000.00 into the Schwab account
4 is consider criminally-derived, the balance of potentially innocent
5 funds in the Schwab account on March 11, 2002 was \$66,909.01.⁸ See
6 (Govt.'s Exh. 452A, line 34; 452B, line 34.) Therefore, check number
7 115, drawn in the amount of \$100,000, was necessarily funded by more
8 than \$10,000 in criminally-derived funds. Defendant agrees with this
9 analysis and concedes that judgment of acquittal is not required on
10 Count seventeen. (Def.'s Supp. Brief at 6).

11 ii. Count Eighteen

12 The government argues that check number 117, drawn in the amount
13 of \$62,000, must have necessarily been funded by criminally-derived
14 funds because check number 115 (Count seventeen), exhausted the entire
15 balance of potentially innocent funds. However, the Court cannot
16 conclude that check number 115 necessarily exhausted the account of
17 potentially innocent funds. Check number 115 might have consisted of
18 \$65,000 in potentially innocent funds and \$35,000 in criminally-
19 derived funds, or alternatively, check number 115 might have consisted
20 entirely of criminally-derived funds.⁹ It is purely speculative

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22 ⁸ Although Exhibit 452A-line 34 lists the amount of potentially
23 innocent funds as \$65,000.00, the amount of potentially innocent funds
24 was actually \$66,909.01. Exhibit 452A fails to take into account
25 deposits of \$748.32 and \$1,160.69 in potentially innocent funds which
26 were noted in Exhibit 452B. See (Govt.'s Ex. 452B lines 2, 4.)
However, regardless of whether these two deposits should be included
in the balance of potentially innocent funds, the Court's analysis is
unaffected by these deposits totaling \$1909.01.

27 ⁹On March 15, 2002, when check number 115 was processed, the account
28 contained \$485,434.19 in criminally-derived funds and \$65,000 in
potentially innocent funds. See (Govt's Ex. 452A lines 34-35.)

1 whether check number 115 contained any innocent funds, and thus no
2 rational factfinder could determine beyond a reasonable doubt that the
3 account was exhausted of potentially innocent funds at the time check
4 number 117 was written. Because there were potentially \$65,000 in
5 innocent funds in the account at the time the \$62,000 check was
6 written, the government has failed to prove beyond a reasonable doubt
7 that the monetary transactions at issue in Count eighteen involved at
8 least \$10,000 in criminally derived proceeds.

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10 **III. CONCLUSION**

11 For the foregoing reasons, the Court GRANTS Defendant's motion to
12 acquit with respect to Counts nine, ten, eleven, thirteen, fourteen,
13 and eighteen. The Court DENIES Defendant's motion with respect to
14 Count seventeen.

15 IT IS SO ORDERED.

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18 DATED: August 17, 2007



STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

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Consequently, check number 115 could have been funded entirely by
criminally-derived funds.