



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

<b>UNITED STATES OF AMERICA,</b>	)	
	)	
Plaintiff,	)	Criminal Action
	)	
v.	)	Case No. 05-10235-01-JTM
	)	
	)	
	)	
Defendant.	)	
_____	)	

**ORDER**

Now on this 12<sup>th</sup> day of September, 2006, the Court, having read and considered the Motion to Dismiss without prejudice filed herein by the United States,

DOES HEREBY ORDER, ADJUDGE AND DECREE that the Indictment filed herein against  on December 14, 2005, is dismissed without prejudice.

s/ J. Thomas Marten  
Honorable J. Thomas Marten  
Judge of the United States District Court

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA.,

*Plaintiff,*

vs.

Criminal Action  
No. 05-10235-01-JTM

*Defendant.*

MOTION TO DISMISS INDICTMENT

Pursuant to Fed. R. Crim. P. 12 and 47, [REDACTED] moves the Court to dismiss the Indictment charging him with ten counts of making or possessing a forged security, 18 U.S.C. § 513. The forged securities in this case are checks. As the company controller, [REDACTED] embezzled money from his employer by the simple process of filling in his own name as the payee on actual company checks, signing the checks with his own name because he was an authorized account signer, and endorsing the checks with his own name.

Ignoring the fact that state criminal statutes cover [REDACTED]'s crime, the federal government has stretched its jurisdictional blanket to the point of tearing and has tortured the definition of "forged" in 18 U.S.C. § 513 to grasp hold of a garden variety embezzlement. Under federal law, there is no way for an authorized signer on a checking account to forge a check by writing a check on that account to himself. The facts of this case are uncontested and [REDACTED] is not guilty as a matter of law.

## Memorandum

### A. Facts

In 2002, ██████ started work as the in-house accountant and bookkeeper for a company called ██████). His official title was Controller. (Exhibit 11, Stmt. of ██████; Exhibit 12, Decl. of ██████ at 1.)<sup>1</sup> ██████'s job was to keep the books for ██████. ██████ did not out source any of its accounting. ██████ ran ██████'s accounting software, created its financial reports, and figured and filed the company's taxes. He also paid all of ██████'s vendors and managed its payroll. (Exhibit 12, Decl. of ██████ at 1.)

██████ paid its vendors and employees by check. ██████ wrote almost all the checks for the company, including pay checks to himself for his salary. He was an authorized signatory on the company's checking account. ██████'s authority to write checks was not confined to a specific list of companies or people. There was no cap on the amount of money ██████ was authorized to write a check for. (Exhibit 12, Decl. of ██████ at 1.)

Like many companies, ██████ was set up so its controller could fill in the payee and the dollar amount on a check by typing the payee and dollar amount into ██████'s accounting software on a personal computer and then feeding a blank ██████ check through a computer printer. This was the standard way checks were prepared at ██████. (Exhibit 12, Decl. of ██████ at 2.)

---

<sup>1</sup> ██████ is one of the owners of ██████. His statement was turned over by the government in discovery.

Following this procedure, ██████r made several checks payable to himself other than those for his salary. He signed the checks as ██████'s controller and endorsed them in his own name. ██████ also made a few ██████ checks payable to his personal creditors. With these checks, ██████ stole about \$160,000 from ██████. (Exhibit 12, Decl. of Bryce Mueller at 2.)

The Indictment states that ██████ violated 18 U.S.C. § 513 in that he:

[D]id willfully and knowingly make, utter and possess a forged security of ██████, with the intent to deceive another person and ██████, that is, the defendant made, uttered and possessed check made payable to himself, which the defendant falsely made payable to himself, in the amounts set below, when the defendant knew that he was not entitled and authorized to alter, complete, sign, endorse, make a false addition to and insertion on the checks, so that he could use the funds for his benefit.

The charge is strait forward. The Indictment claims that by filling in his own name as the payee on actual ██████ checks, ██████ committed forgery. The Indictment has ten counts based on ten checks. Copies of the checks are attached as Exhibits 1 through 10.

The ██████ checks referenced in counts 2, 3, and 4 of the Indictment are not actually payable to ██████. Check number 20915 referenced in count 2 is payable to Citibank. Check number 20960 referenced in count 3 is payable to MBNA. Check number 20961 referenced in count 3 is payable to Washington Mutual Finance. These are the checks ██████ made payable to his personal creditors. ██████ did sign these checks as ██████'s controller but did not endorse them. The seven remaining checks are checks ██████ made payable to himself and endorsed as the payee. All ten

checks are actual [REDACTED] checks that [REDACTED] signed as an authorized signatory on the company's checking account.

## **B. Points and Authorities**

### **1. More than Half a Decade Ago, the Ninth and Tenth Circuits Rejected the Contention That a Genuine Instrument Is Forged Just Because it Was Made for the Purpose of Defrauding Another.**

Among other things, subsection (a) of 18 U.S.C. § 513 prohibits the making, utterance, or possession of a forged security. Subsection (c) lists checks as one of the many instruments that qualify as securities and defines forged as:

[A] document that purports to be genuine but is not, because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents.

The heart of the section's definition of forged is the first line, "a document that purports to be genuine but is not."

By filling in his name as the payee on company checks, [REDACTED] clearly embezzled money from his employer and violated one or more state criminal statutes. The only way the federal government can get its hands on this case is to call the checks forged. However, the fact that [REDACTED] used a check to embezzle from his employer does not alone make the actual check itself forged. In fact, the checks [REDACTED] used to steal from [REDACTED] were genuine checks. They were real [REDACTED] checks that were signed by [REDACTED] in his true name as an account signatory and endorsed by [REDACTED] in his true name as the payee. [REDACTED] did not forge anything. He did not have to. He had full access to [REDACTED]'s checking account.

The contention that a genuine check is forged just because it was made for the purpose of defrauding another does not hold water. The definition of forged in 18 U.S.C. § 513 is not new. In 1949, the Ninth Circuit defined forged as “not genuine, or in some material particular something other than [what] it purports to be” in *Wright v. United States*, 172 F.2d 310. In that case, the Ninth Circuit ruled that a genuine check is not forged even if it was made for the purpose of defrauding another and contains some misrepresentations of fact.

Wright was charged with violating the National Stolen Property Act, 18 U.S.C. § 2314, by transporting across state lines “falsely made, forged, altered, or counterfeited” securities with the intent to defraud. *Id.* at 311 (quoting the National Stolen Property Act). Wright signed and presented checks drawn on a bank that existed but where Wright knew he had no funds to cover the checks. After a bench trial on stipulated facts, Wright was convicted on four counts, each count based on a different check. Wright appealed. He admitted that the checks he wrote were no good, but he disputed that they were forged. *Id.* at 310-11.

The Ninth Circuit agreed with Wright and reversed his convictions. The court defined a forged document as a document that is not genuine in that it is something other than what it purports to be. A genuinely made document that just contains or implies false or misleading statements is not forged. Neither is a genuine document forged just because it has been made for the purpose of defrauding another. The court stated:

A falsely made instrument is one that is fictitious, not genuine, or in some material particular something other than it purports to be and without

regard to the truth or falsity of the facts stated therein. By the decisive weight of authority, the genuine making of a writing, which contains false or misleading statements is not false making or forgery. . . .

Moreover, it has generally been held that the genuine making of a writing for the purpose of defrauding another is not forgery.

*Wright*, 172 F.2d at 311 (citations omitted).

Wright's checks were misleading. They implied Wright had money in the bank that the checks were drawn on. However, the checks were also genuine in that they were exactly what they purported to be. The checks were drawn on a real bank and signed by Wright in his true name. Therefore, the checks were not forged. The Ninth Circuit stated:

Here, appellant drew the checks on an existent bank and signed them in his own true name. There was nothing fictitious about them. They were exactly what they purported to be, namely, written requests by appellant to the drawee bank to pay a specified sum of money to a third person or to his order. It may well be said that, by implication, they falsely represented that appellant had sufficient funds in the drawee bank to pay them upon their presentation, and the facts will support an assumption that he intended to use them to defraud, but that does not justify classifying the checks as 'falsely made' or 'forged' within the meaning of the National Stolen Property Act.

*Id.* at 311-12.

In 1954, the Tenth Circuit in *Martenev v. United States*, 216 F.2d 760, concurred with the Ninth Circuit's decision in *Wright*. *Martenev* was another prosecution brought under the National Stolen Property Act. An indictment charged Martenev and his co-defendant, C.M. Henderson, with transporting across state lines –

“a falsely made, forged, altered and counterfeited security purporting to be a warehouse receipt of the Garden Grain and Seed Company . . . evidencing that 60,000 bushels of No. 2 yellow milo were received in store from C. M. Henderson of Farwell, Texas, on November 6, 1951, knowing

the same to have been falsely made, forged, altered and counterfeited, in that the Garden Grain and Seed Company did not receive any milo in store from the said C. M. Henderson and the said Garden Grain and Seed Company on said date was actually short such grain in an amount exceeding 380,000 bushels.”

*Marteney*, 216 F.2d at 762-63 (quoting the indictment).

After a guilty plea and after sentencing, both defendants moved the district court to arrest judgment, claiming that the indictment failed to charge a federal crime. *Id.* at 761-62. The district court denied the motions and the defendants appealed. The Tenth Circuit agreed with the defendants and reversed their convictions.

The Tenth Circuit ruled that the indictment failed to charge the defendants with transporting a forged security across state lines because the warehouse receipt described in the indictment was not forged. The court stated that whether a document is forged relates “to genuineness of execution and not falsity of content.” *Id.* at 763. The warehouse receipt misrepresented a fact; that 60,000 bushels of milo were received from Henderson on a certain date. Yet, the receipt was “genuine in its execution.” *Id.* It was a real Garden Grain and Seed Company warehouse receipt. Therefore, the receipt was not forged.

The Tenth Circuit analogized *Marteney* and Henderson’s case to the “true name” check case decided in *Wright*.

[I]t has been uniformly held that a check drawn by a true maker on an existing bank is not ‘falsely made’ or ‘forged’ within the meaning of the statute, even though there were no funds to the account of the drawer in the drawee bank; and, that an indictment or information which affirmatively describes the falsely made and forged security in this manner states no federal offense . . .

By convincing analogy, it is argued that a warehouse receipt, genuine in its execution, but which falsely and fraudulently represents the storage of a stated amount of grain in the issuing warehouse, is not different from a 'true-name' check; that both the warehouse receipt and the true-name check are what they purport to be; that neither of them are false or forged in their execution, although they may be false in fact.

*Martenev*, 216 at 763.

██████████'s case is no different than the cases decided in *Wright* and *Martenev*. ██████████ filled in his name as the payee on ██████████ checks for the purpose of defrauding the company. Maybe the checks even contained or implied some misrepresentations of fact. That does not matter. The checks were genuine. They were real ██████████ checks. ██████████'s signature was genuine. He signed the checks in his own true name as an account signatory. The endorsements are genuine. ██████████ endorsed the checks in his own name as the payee. Therefore, the checks were not forged.

**2. The Fact That ██████████ Signed Checks Without ██████████'s Authority Does Not Make the Checks Forged. The Tenth Circuit and the United States Supreme Court Long Ago Ruled That an Agent Does Not Forge a Check by Signing it for a Principal Without The Principal's Authority.**

The real trouble with the checks ██████████ wrote to himself is he signed them as an agent of ██████████ but without ██████████'s authority. The Tenth Circuit in *Selvidge v. United States*, 290 F.2d 894 (10<sup>th</sup> Cir. 1961), ruled that an agent does not forge a check by signing it in his own name for a principal despite the fact that the agent does not have the authority to do so.

*Selvidge* was a prosecution under 18 U.S.C. § 495. The code section makes it a crime to falsely make, alter, forge, or counterfeit an instrument in order to get money

from the United States. Thelma Selvidge worked as a bookkeeper for Aero Precision Industries, Inc. (Aero). Aero gave Selvidge a rubber stamp that allowed her to endorse checks in Aero's name for deposit only. Without authority and without using the company's endorsement stamp, Selvidge endorsed seven U.S. Treasury checks made out to Aero and deposited them into her personal account. She endorsed the checks in Aero's name "By Thelma L. Selvidge" for deposit to her personal account. *Selvidge*, 290 F.2d at 895.

Selvidge was convicted and appealed. She conceded "that offenses were committed in violation of state law," but argued that her "unauthorized endorsement did not constitute forgery." *Id.* The Tenth Circuit agreed and reversed Selvidge's convictions.

Selvidge endorsed the checks at issue using her own name as her employer's agent. The court of appeals ruled that the endorsements were not forged because "[t]he endorsements were precisely what they purported to be." The court stated:

If Selvidge had merely endorsed the name of her principal and cashed the checks contrary to her instructions, the crime of forgery would have been complete. It is a rule of general application that an agent may commit forgery by making or signing an instrument in disobedience of his instructions or by exceeding his authority. But when she added her genuine signature purporting to endorse the checks as the agent of her named principal, although she had no authority to do so, she was not guilty of forgery. The endorsements were precisely what they purported to be; the wrongful act being a false pretense or false representation of authority.

*Id.*

The Tenth Circuit recognized the general rule that an agent cannot commit forgery by signing an instrument in her own name for a principal despite the fact that she does not have the authority to do so. The court stated:

The applicable rule is well stated in 37 C.J.S. Forgery § 8, page 38, as follows:

An agent may commit forgery by signing an instrument in disobedience of his instructions or in improper exercise of authority, but one who executes an instrument purporting on its face to be executed by him as an agent, when in fact he has no authority to execute such instrument, is not guilty of forgery.

*Selvidge*, 290 F.2d at 895.

By endorsing the checks in her own name, Selvidge misrepresented that she was authorized to do so, but she did not forge anything. The Tenth Circuit reasoned:

The endorsement by Selvidge was not spurious or fictitious. It was exactly what it professed to be. The vice was the false and fraudulent representation that she had authority to execute such a general endorsement. The offense was not forgery.

*Id.* at 897.

A year after *Selvidge*, the United States Supreme Court decided *Gilbert v. United States*, 370 U.S. 650, 82 S.Ct. 1399, 8 L. Ed. 2d 750 (1962). In *Gilbert*, the Supreme Court concurred with the Tenth Circuit's decision in *Selvidge*. *Gilbert* was also a prosecution under 18 U.S.C. § 495. Gilbert was an accountant and tax return preparer. Unbeknownst to his clients, Gilbert endorsed some of their federal tax return checks by signing their names followed by "R. Milo Gilbert, Trustee." *Id.* at 651. At trial, Gilbert moved for a jury instruction stating:

One who executes an instrument purporting on its face to be executed by him as agent of a principal named therein, when in fact he has no authority for such principal to execute said instrument, is not guilty of forgery

*Id.* at 654 n.4. The district court refused to give the instruction.

Gilbert was convicted and appealed. The Ninth Circuit affirmed Gilbert's convictions and he petitioned for certiorari. The Supreme Court reversed and remanded for a new trial. The Court ruled that the district court should have given Gilbert's instruction. It agreed with the Tenth Circuit's ruling in *Selvidge*. An agent does not forge an instrument by signing it in his own name for his principal despite the fact that the agent does not have the authority to do so. *Gilbert*, 370 U.S. at 657-58. The Supreme Court traced this rule back to an English case decided in 1847, *Regina v. White*, in which it was held:

“[I]ndorsing a bill of exchange under a false assumption of authority to indorse it per procuracion, is not forgery, there being no false making.”

*Id.* at 655 (quoting *Regina v. White*).

Just like in *Selvidge* and *Gilbert*, the fact that [REDACTED] signed [REDACTED] checks as [REDACTED]'s agent but without [REDACTED]'s authority does not make the checks forged. The crime here is embezzlement, not forgery.

**3. The Government Is Trying to Force 18 U.S.C. § 513 into Service as “The Punishment of Fraudulent Conduct in General,” Exactly the Thing Congress Intended Not To Do When It Enacted This Statute.**

18 U.S.C. § 513 was enacted as part of the Comprehensive Crime Control Act of 1984. That act was derived from Senate Bill 1762, referred by the Senate Committee on the Judiciary. The Committee's report, Senate Report 98-225, states that the definition of forged in 18 U.S.C. § 513 was taken from an earlier bill, Senate Bill 1630.

The report states:

[18 U.S.C. § 513] contains elaborate definitions of the terms 'counterfeited', 'forged', and 'security', as well as 'organization' and 'state'.

The first three definitions are taken from the counterfeiting and forgery subchapter of s. 1630, the criminal code reform legislation approved by the Committee in the 97th Congress, and the committee report thereon should be consulted.

Senate Report 98-225 at 372, 1984 U.S.C.C.A.N. 3182 at 3513.

The report referred to, Senate Report 97-307, is a Senate Judiciary Committee report that gives an in depth analysis of the exact same definition of forged that appears in 18 U.S.C. § 513. The report starts with the definition, stating:

[A] written instrument which purports to be genuine but is not – because it has been falsely altered, completed, signed, or endorsed, contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine written instruments.

Senate Report 97-307 at 764-65.

The report makes it clear that a “false agency” signature on a document does not make that document forged, citing *Selvidge* and *Gilbert*. The report states that the definition of forged –

is not intended to cover “false agency” signatures and endorsements and thus continues the rule that the term “forgery” does not cover the situation where a person signs an instrument purporting on its face to be signed by him as an agent, when, in fact, he has no authority to sign such [an] instrument. The reason for not including such conduct within this section is that, as the person executing the instrument signs his true name, the execution of the instrument is, in fact, genuine, unlike forgery where there is no genuine execution. That is, the falsity lies not in the execution of the written instrument but rather in the representation of a non-existent authority.

*Id.* at 777-78.

Citing *Wright* and *Martaney*, the report also states that false or misleading statements in a genuinely made document do not make the document forged. The report states:

[I]t is not intended that this section encompass the genuine making of a written instrument which contains false or misleading statements. The purpose of this section, like section 1741, is the protection of the integrity of written instruments and not the punishment of fraudulent conduct in general.

Senate Report 97-307 at 778.

In ██████'s case, the government is trying to force 18 U.S.C. § 513 into service as "the punishment of fraudulent conduct in general," exactly the thing Congress intended not to do when it enacted this criminal statute.

Respectfully Submitted,

Joseph & Hollander, P.A.  
*Attorneys for Defendant*

By: /s/ Christopher M. McHugh (19889)  
cmchugh@josephhollander.com

And: /s/ Stephen M. Joseph (07452)  
sjoseph@josephhollander.com

500 North Market  
Wichita, Kansas 67214  
Tel: (316) 262-9393  
Fax: (316) 262-9006

### Certificate of Electronic Filing and Service

I hereby certify that on March 25, 2006, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to Debra Barnett at [debra.barnett@usdoj.gov](mailto:debra.barnett@usdoj.gov).

/s/ Christopher M. McHugh