OVERVIEW OF THE MONEY LAUNDERING STATUTES

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I. Introduction

This is an overview of the money laundering statutes

- I'll talk first about cases we can prosecute under the Bank Secrecy Act, which are the currency offenses in Title 31
- and then about the cases we can prosecute under the money laundering statutes in title 18, which are Sections 1956, 1957 and 1960

II. The Currency Reporting Statutes

The first money laundering statutes were the currency reporting offenses set forth in title 31

The purpose of the reporting requirement is to allow the Government to enforce the tax laws and to track and monitor cash involved in criminal activity:

- *United States v. Coney*, 689 F.3d 365, 374 (5th Cir. 2012) (explaining that the CTR requirements were enacted because CTRs have a high degree of usefulness in tax investigations and structuring impedes the IRS's ability to enforce the tax laws; structuring is evidence of a willful attempt to evade taxes);
- *United States v. Aunspaugh,* 792 F.3d 1302 (11th Cir. 2015) (noting that one of the purposes of the CTR requirement is to deter persons who have reason to fear triggering an investigation from conducting questionable business transactions in cash);

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- *United States v. Malewicka*, 664 F.3d 1109, 1107-08 (7th Cir. Dec. 2011) (rejecting defendant's argument that structuring causes no harm; it deprives the Government of the information it needs to detect tax evasion, fraud and other crimes);

– the idea was to create a paper trail so that criminals couldn't stay below the radar screen by dealing exclusively in cash

Currency Transaction Reports (CTRs)

31 U.S.C. § 5313 and 31 C.F.R. §§ 1010.311 and 1010.306(a) say that a financial institution has to file a currency transaction report (CTR) on any cash transaction exceeding $10,000

– so if any financial institution, including a check casher or money remitter, conducts a transaction involving more than $10,000 with a customer, the institution has to file a CTR

– failure to file – or causing a bank to fail to file -- is an offense under 31 U.S.C. §§ 5313 and 5324(a)(1)

- *United States v. Kushner*, 256 F. Supp. 2d 109 (D. Mass. 2003) (a money remitter's failure to file a CTR regarding cash transactions with customers is properly charged under sections 5313 and 5322);

– for example, we held M&T Bank and its head teller liable when a drug dealer came into the bank and exchanged $560,000 in street money for $100 bills and the teller didn't file a CTR

Similarly, 31 U.S.C. § 5325 and 31 C.F.R. § 1010.415 require businesses that sell travelers checks, money orders and similar instruments to keep a record of the identity of the person purchasing such items with more than $3,000 in cash

– it is an offense under § 5324(a)(3) to evade that requirement as well

- *United States v. Williams*, 605 F.3d 556, 562 n.3 (8th Cir. 2010) ("Buying money orders in amounts less than $3,000 avoids Currency Transaction Reports (CTRs) which are designed to identify persons involved in money laundering");

- *United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 72 (2d Cir. 2002) (civil forfeiture based on structuring of money orders to evade the $3,000 reporting requirement in section 5325);

- *United States v. 133 U.S. Postal Serv. Money Orders*, 780 F. Supp. 2d 1084, 1092 n.10 (D. Haw. 2011) (§ 5325 is a reporting requirement that is evaded, in violation of § 5324(a)(3), when a person structures the purchase of $3,000 or more in money orders with the intent to avoid having to provide identifying information to the vendor);

- *See also United States v. Fisher,* 2016 WL 7383269 (W.D.N.Y. Dec. 21, 2016) (noting that the defendant was charged with structuring the purchase of money orders in amounts under $3000 to avoid the ID requirement in violation of § 5325);

Finally, Section 5324(a)(2) makes it a crime for a person to cause the bank or other financial institution subject to any of these requirements to file a false or incomplete report

- *United States v. Caro*, 454 Fed. Appx. 817, 842-43 (11th Cir. 2012) (check casher and its owner convicted of §§ 5313 and 5324(a)(2), respectively, for filing CTRs falsely identifying a shell company as the entity cashing checks when they knew the checks were being cashed for an employer using the cash to pay illegal employees);

– the most common violations of Section 5324(a) involve structuring, which we'll talk about in a little bit

Form 8300

There is a parallel requirement to the CTR requirement involving cash transactions in excess of $10,000 at any trade or business: 31 U.S.C. § 5331

– the form (called Form 8300) must be filed by all non-financial institutions: that is, all types of trades and businesses from car dealerships to law firms that do not have to file the CTR form that banks file

– and Section § 5324(b) makes it an offense to cause a business to fail to file the form, or to file a false form

- *United States v. Calmes,* 574 Fed. Appx. 295 (5th Cir. 2014) (dealership convicted of violating § 5331 and manager convicted of violating § 5324(b)(1) when dealership fails to file Form 8300s on motorcycle sales);

- *United States v. Chaplin's, Inc.*, 646 F.3d 846, 849 (11th Cir. 2011) (jeweler charged with failing to file Form 8300s under § 5324(b)(1));

- *United States v. Hosseini*, 679 F.3d 544, 556 (7th Cir. 2012) (car dealer charged with failure to file Form 8300); *United States v. Robins*, ___ Fed. Appx. ___, 2016

WL 7234612 (2nd Cir. Dec. 14, 2016) (same; charged as violation of § 5331/5322);

The penalty section in 31 U.S.C. § 5322, which applies to the CTR and Form 8300 offenses, provides for a 5-year sentence, or double that if the crime involved more than $100,000 in a 12-month period, plus forfeiture of all of the money involved in the violation; see 31 U.S.C. § 5317(c)

- *United States v. Robbins,* 2015 WL 505232, *11 (W.D.N.Y. Feb. 5, 2015) (indictment properly charged defendant in the conjunctive with failing to file Form 8300 *and* doing so as part of a pattern involving more than $100,000, while instructions properly allowed jury to convict merely for failing to file *or* failing to file as part of a pattern), aff'd ___ Fed. Appx. ___, 2016 WL 7234612 (2nd Cir. Dec. 14, 2016);

Structuring

The first currency reporting statutes were enacted in the early 1970's.

- by the 1980s, the bad guys had found ways around them.

- teams of "smurfs" would go to different banks on different days and deposit amounts under $10,000 to evade the CTR requirement

- or they would go to lots of different post offices buying money orders totaling well over $3,000 without providing the necessary identification

So Congress made the act of structuring cash transactions a separate crime

- under Section 5324, it is a crime to structure cash transactions with the intent to evade the CTR requirement, the Form 8300 requirement, or the CMIR requirement (which we will get to in a moment)

Structuring has three elements: the defendant structured his transactions, knowing of the reporting requirement, and intending to evade it.

- *United States v. $17,891.89 in Funds From Union Bank & Trust*, 2011 WL 1883985, at *5 (E.D. Va. May 17, 2011) (setting forth the three elements and denying Government's motion for summary judgment because there was a genuine dispute as to the third);

- *United States v. $61,900.00 Seized from Account Number XXXXXX4429*, 802 F. Supp. 2d 451, 452 (E.D.N.Y. 2011) (the three elements of structuring are 1)

structured transactions, 2) knowledge of the reporting requirement, and 3) an intent to evade it);

- although the Government must prove that the defendant was aware of the reporting requirement and intended to evade it, he does not have to know that structuring is illegal

    - *United States v. Pang*, 362 F.3d 1187, 1193-94 (9th Cir. 2004) (the Government need not prove that the defendant knew structuring was illegal; it is sufficient to prove intent to evade the reporting requirement);

    - *United States v. Ismail*, 97 F.3d 50, 56 (4th Cir. 1996) (discussing the *Ratzlaf* fix and the elimination of the willfulness requirement for structuring under section 5324);

- knowledge and intent may be shown by circumstantial evidence:

    - *United States v. Aunspaugh,* 792 F.3d 1302 (11th Cir. 2015) (that defendant was a former bank teller who had a motive to avoid an investigation that a CTR might trigger is strong evidence of knowledge and intent);

    - *United States v. Malewicka*, 664 F.3d 1099, 1109-10 (7th Cir. 2011) (244 structured withdrawals of just under $10,000, with no withdrawal greater than that amount, is evidence of defendant's actual knowledge of the reporting requirement and her intent to evade it);

    - *United States v. Van Allen*, 524 F.3d 814, 820 (7th Cir. 2008) (massive amount of money [$5 million], number of transactions [1,148 deposits], and the inconvenience and expense of going to multiple locations and paying check-cashing fees, is sufficient to prove, circumstantially, that defendant knew of the reporting requirement and intended to evade it);

    - *United States v. MacPherson*, 424 F.3d 183, 195 (2d Cir. 2005) (the jury may infer defendant's knowledge of the reporting requirement and his intent to evade it from the pattern of his transactions; depositing $258,000 in 32 sub-$10,000 transactions, with multiple deposits sometimes occurring at different banks on the same day, is powerful circumstantial evidence);

    - *United States v. $134,972.34 Seized from FNB Bank,* 94 F. Supp.3d 1224 (N.D. Ala. 2015) (jury may infer, from the pattern of structured withdrawals, that an individual would not undertake so inefficient and burdensome method of obtaining cash unless he was aware of the reporting requirements and intended to evade them);

- that the defendant sometimes engaged in reportable transactions in excess of $10,000 is not a defense:

- *United States v. Aunspaugh,* 792 F.3d 1302 (11th Cir. 2015) (a defendant who sometimes conducts reportable transactions in excess of $10,000 does not thereby get a free pass "to structure later transactions with impunity");

- *But see United States v. Taylor,* 816 F.3d 12 (2nd Cir. 2016) (evidence of 17 transactions in excess of $10,000 during same time seven structured transactions occurred negated any inference of intent that could be drawn from a more *consistent* pattern);

The Government is not *required* to establish the defendant's motive or to show that there was a nexus to another criminal offense:

- *United States v. MacPherson*, 424 F.3d 183, 193 (2d Cir. 2005) (§ 5324 makes no reference to the source of the money or to the defendant's motive; its "singular focus is on the method employed" to evade the filing requirement);

- *United States v. Peterson*, 607 F.3d 975, 981 (4th Cir. 2010) ("straight structuring" with no nexus to another offense may qualify as a "pattern of unlawful activity" for purposes of the sentencing enhancement in § 2S1.3(b)(2));

- *United States v. Fisher,* 2016 WL 7383269, *5 (W.D.N.Y. Dec. 21, 2016) (explaining the difference between structuring and money laundering, the lack of a requirement to prove the illegal source of the money in structuring cases, and why structuring is therefore easier to prove);

- *United States v. Conigliaro,* 2016 WL 370805, *1 (D. Mass. Jan. 29, 2016) (denying motion to dismiss indictment: Government not required to allege or prove motive for structuring; it is required only to prove intent to evade the reporting requirement, whatever the motive might have been, and that is an issue for trial);

— Conversely, having an innocuous motive is not a defense:

- *United States v. Approximately $168,052.25 Seized From Northfield Bank,* 2016 WL 1169242 (E.D.N.Y. Mar. 16, 2016) (there is no "innocuous motive" defense to structuring; to the contrary, statement that claimant structured his transactions to save time and avoid the inconvenience of filing a CTR is "compelling indicia of intent to evade the reporting requirement);

— but the Government often offers evidence of the defendant's motive both for jury appeal and to demonstrate that the defendant intended to evade the reporting requirement

- *United States v. Young,* 2014 WL 494576 (W.D. Pa. Feb. 6, 2014) (evidence that the defendant was engaged in drug trafficking was admitted in his structuring trial to show he had a motive to evade the currency reporting requirements);

- *United States v. Fisher,* 2016 WL 7383269 (W.D.N.Y. Dec. 21, 2016) (prosecutor was entitled to present grand jury with the complete picture, including evidence of the possible illegal source of the structured funds, even though she was not seeking money laundering charges and the source of the money is not an element of structuring);

There are different methods of structuring:

- the most common is "lump sum" structuring in which the defendant takes more than $10,000 and breaks it up into multiple currency transaction of less than $10,000 each

- but it is also an offense for a defendant who has a steady stream of income to conduct a transaction every time he gets close to $10,000 so that he does not, by waiting for the additional cash to arrive, end up with more than $10,000 on hand

  - *United States v. Sperrazza,* 804 F.3d 1113 (11th Cir. 2015) (defendant who conducts a series of sub-$10,000 cash transactions with the intent to evade the currency reporting requirement is guilty of "serial structuring" even if he never has more than $10,000 in his possession at one time);

  - *United States v. Peterson,* 607 F.3d 975, 978-81 (4th Cir. 2010) (explaining that structuring may consist of breaking up a lump sum and making multiple deposits into the same bank on the same day ("imperfect structuring") or into different banks or the same bank on different days ("perfect structuring"), or a series of transactions over many days ("serial structuring"), or even a solitary transaction that was the first act of a never-completed scheme to structure);

Structuring is also a 5-year felony subject to the enhancement for offenses involving more than $100,000 in a 12-month period, plus the forfeiture of the structured funds; 31 U.S.C. § 5324(d)

- *United States v. Peterson*, 607 F.3d 975, 981-82 (4th Cir. 2010) (structuring deposits of more than $100,000 in currency constitutes a "pattern" for purposes of applying the sentencing guidelines enhancement in § 2S1.3, even though the defendant is charged with only a single count of structuring, and the offense did not involve any other illegal activity);

- *United States v. Wang*, 418 Fed. Appx. 19, 21-22 (2d Cir. 2011) (affirming a within-the-guidelines sentence for straight structuring as not inappropriate under the § 3553 factors);

CMIRs

Congress also wanted to create a paper trail regarding cash being moved in or out of the country.

- 31 U.S.C. § 5316 and 31 C.F.R. § 1010.340 say that a person transporting more than $10,000 in cash into or out of the United States must file the Currency and Monetary Instrument (CMIR) report

- and § 5324(c) makes it an offense to cause someone to fail to file a report or to file a false report

  - *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1146 (9th Cir. 2012) (the elements of an offense under § 5324(c) are: 1) knowledge that the person is about to transport more than $10,000 in cash over the U.S. border; 2) knowledge of the reporting requirement; and 3) an intent to evade the reporting requirement);

- Knowledge of the reporting requirement is key:

  - *United States v. Ibisevic*, 675 F.3d 342, 353 (4th Cir. 2012) (to prove a violation of either § 5332 or § 5324(c), the Government must prove that the defendant "actually understood the questions put to him by the customs agents and so knowingly or intentionally committed the alleged crimes;" it is not enough to show that the defendant understood English well enough so that he should have understood those questions);

- as mentioned earlier, structuring the transportation of the money into or out of the country to evade the CMIR requirement is also an offense

  - *United States v. $23,090.00 in U.S. Currency*, 377 F. Supp. 2d 1223, 1231 (S.D. Fla. 2005) (person who divides more than $10,000 into smaller amounts, and gives it to multiple couriers to carry out of the United States, all with the intent to evade the CMIR requirement, violates both §§ 5316 and 5324(c));

Bulk Cash Smuggling

Under 31 U.S.C. § 5332, it is an offense to conceal more than $10,000 in luggage, merchandise or any container being shipped into or out of the United States with the intent to evade the CMIR requirement.

- this was enacted in 2001 as part of the USA Patriot Act to make it clear that the smuggling of currency is a serious offense, and not merely a regulatory violation involving the simple failure to file a Customs form

- like structuring cases, criminal prosecutions for bulk cash smuggling are now fairly common

    - *United States v. Jose*, 499 F.3d 105 (1st Cir. 2007) (although the elements of a bulk cash smuggling offense are similar to those of a CMIR offense, Asection 5332 places its emphasis on the knowing concealment of more than $10,000 in currency . . . rather than the requirement to file a report);

    - *United States v. Varanese*, 417 Fed. Appx. 52, 55 (2d Cir. 2011) (truck driver's false answer when asked if he was carrying more than $10,000 established that he had concealed the money for the purpose of evading the reporting requirement);

    - *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1145 (9th Cir. 2012) (like § 5324(c), § 5332 requires proof that the defendant was aware of the reporting requirement and that he was carrying more than $10,000; when defendant claimed he did not know his vehicle contained $500,000 in currency, Government was able to establish knowledge with circumstantial evidence including quantity of currency, attempt to conceal, time of day when transportation occurred, and attempts by third parties to learn defendant's whereabouts when he was detained);

Again, the source of the funds is irrelevant:

- *United States v. Cuellar*, 553 U.S. 550, 560 (2008) (bulk cash smuggling has no proceeds requirement; it punishes the transportation of lawfully acquired funds with the intent to evade the CMIR requirement);

- *United States v. Tatoyan*, 474 F.3d 1174, 1178-79 (9th Cir. 2007) (court properly excluded evidence of legitimate source of the funds; the Government is not required to show motive for failing to file a report or for attempting to evade it, so the absence of an evil motive is irrelevant);

Search and seizure: smuggled currency is often found during a warrantless border search:

- *United States v. Taylor,* 584 Fed. Appx. 47, 51 (4th Cir. 2014) (CBP agents do not need probable cause to stop and question a passenger regarding her knowledge of the CMIR requirement once she has crossed the threshold of the jetway to an international flight);

- *United States v. Taylor,* 584 Fed. Appx. 47, 52 (4th Cir. 2014) (claimant's evasive answers and admission that she was concealing $100,000 given to her by third parties to carry on an international flight under her clothing was sufficient to establish probable cause to arrest her for bulk cash smuggling on the jetway without first confirming that she had not filed a CMIR);

Example involving bulk cash smuggling and structuring:

It is not unusual for a title 31 money laundering case to involve a combination of violations of these statutes

For example:

- U.S. contractor embezzles money or receives a bribe while serving overseas
- He has $100,000 in cash that he wants to bring back to the US without filing a CMIR
- So he smuggles it with his luggage or sends it hidden with his personal property: violation of 31 U.S.C. § 5332
- Then he wants to deposit the money into a bank account or use it to buy a car
- If the bank files a CTR or the car dealer files a Form 8300, the Government might ask, where did this money come from, and why was no CMIR filed if it came from overseas
- So he structures the transaction to evade the CTR/8300 requirement

Forfeiture

In all of these Title 31 cases, the property involved in the offense is subject to criminal and civil forfeiture under 31 U.S.C. § 5317, or in the case of bulk cash smuggling, under 31 U.S.C. § 5332(b) and (c)

- forfeiture will be covered in a separate presentation

III. Sections 1956 and 1957

It’s time to talk about money laundering under the statutes in title 18: Sections 1956 and 1957

Altogether, Sections 1956 and 1957 comprise four separate offenses, each of which can be committed in a number of ways:

- Section 1956 itself is divided into three parts:
  - 18 U.S.C. § 1956(a)(1) ("domestic money laundering") makes it an offense to conduct a financial transaction involving the proceeds of "specified unlawful activity" ("SUA") with certain specific intent (“concealment” or “promotion”)
  - 18 U.S.C. § 1956(a)(2) ("international money laundering") similarly makes it an offense to transport money -- it doesn’t have to be criminal proceeds -- into or out of the United States with certain specific intent
  - 18 U.S.C. § 1956(a)(3) (“sting” provision) makes it an offense to conduct a financial transaction with money represented by an undercover agent to be SUA proceeds with certain specific intent
- and Section 1957 is a separate offense altogether
  - 18 U.S.C. § 1957 makes it an offense to spend, invest or transfer through the banking system more than $10,000 in SUA proceeds.

Elements of § 1956(a)(1):

The defendant --

1) knowing that the property involved in the financial transaction represents the proceeds of some form of unlawful activity; and

2A) intending to

a. promote the carrying on of the specified unlawful activity, or

b. engage in conduct which violates 26 U.S.C. §§ 7201 or 7206, or

2B) knowing that the purpose of the transaction was to:

c. conceal or disguise the nature, location, source, ownership, or control of the proceeds of the specified unlawful activity, or

d. avoid a transaction reporting requirement;

3) takes the proceeds of a specified unlawful activity (SUA); and

4) conducts or attempts to conduct a financial transaction.

So, the *actus reus* of the crime is the financial transaction;

-- all the rest of the elements are mental states (knowledge and intent) or factual predicates (SUA proceeds) that must be present at the time the financial transaction takes place

Financial transaction

What is a financial transaction?

- the term is defined in Sections 1956(c)(3) and (4); there's a laundry list of things that constitute a financial transaction, but it's not necessary to get into the weeds

- simply stated, a financial transaction is virtually anything you can do with money

- it can be any "disposition" of money between two people, or any use of a financial institution

- it can involve cash, or monetary instruments, or electronic or other funds

- or it can involve no money at all, but simply the transfer of title to real property or a vehicle, vessel or aircraft

- here are some examples from the case law:

- *United States v. Jenkins*, 633 F.3d 788, 804 (9th Cir. 2011) (wire transfer of funds is a financial transaction);

- *United States v. Bronzino*, 598 F.3d 276, 278 n.1 (6th Cir. 2010) (cashing chips at a casino is a financial transaction because a casino is a financial institution under § 5312(a)(2)(X));

- *United States v. Rounsavall*, 115 F.3d 561 (8th Cir. 1997) (writing check to purchase cashier's checks is financial transaction);

- *United States v. Brown*, 31 F.3d 484, 489 n.4 (7th Cir. 1994) (processing credit card charges is a financial transaction because it involves "payment, transfer, or delivery by, through or to a financial institution");

- *United States v. Day*, 700 F.3d 713, 726 (4th Cir. 2012) (gold – when used as a financial asset – constitutes "funds" within the meaning of the money laundering statute so its transfer is a financial transaction);

- *United States v. Hall*, 434 F.3d 42, 52 (1st Cir. 2006) (recording a mortgage is a financial transaction);

- *United States v. Ulbricht,* 2014 WL 3362059, *24 (S.D.N.Y. July 9, 2014) (Bitcoins are "funds" because their purpose is to allow a person to pay for things; thus, paying for things with Bitcoins is a financial transaction);

- *United States v. Faiella*, 39 F. Supp.3d 544, 545 (S.D.N.Y. 2014) (Bitcoins are "funds" for purposes of § 1960);

The simple delivery of cash from one person to another can be a financial transaction

- *United States v. Blair,* 661 F.3d 755, 764 (4th Cir. 2011) (attorney conducts financial transaction when he receives duffle bag stuffed with cash from client in his office);

- *United States v. Reed,* 77 F.3d 139, 142 (6th Cir. 1996) (giving drug proceeds to a courier is a financial transaction that "involves monetary instruments, namely the currency");

Limitation: The only serious limitation in the case law is that the simple transportation of cash from point A to point B may not be a financial transaction

-- unless there is a financial institution involved, there has to been a transfer or disposition of the cash between two people

- *United States v. Puig-Infante*, 19 F.3d 929 (5th Cir. 1994) (transporting drug proceeds from Fla. to Tex. not a "transaction" absent evidence of disposition once cash arrived at destination);

- *But see United States v. Elso*, 422 F.3d 1305, 1310 n.7 (11th Cir. 2005) (defendant who retrieves third party's money from third party's house, puts it in his car, and drives away, conducts a "transaction");

- *United States v. Silva,* 356 Fed. Appx. 740, 741 (5th Cir. 2009) (distinguishing *Puig-Infante*; courier may be convicted of attempting to conduct a financial transaction if she transports SUA proceeds with the intent to return them to the person who hired her);

Choosing the right financial transaction

The typical crime, conducted for profit, will involve a whole series of financial transactions.

– it could be just one or two transfers or it could be a complex series of transfers

– for example, in a drug case, someone gets money, gives it to someone in exchange for drugs, that person transfers the money to someone else, he deposits it in the bank, the next guy wires it to Colombia, and so forth.

Choosing the right financial transaction to charge as a money laundering offense is critical to your case because the financial transaction is the *actus reus* of the crime

- *United States v. Roy*, 375 F.3d 21 (1st Cir. 2004) (conducting a financial transaction is the *actus reus* of section 1956(a)(3) offense; the intent to promote is part of the mens rea);

- *United States v. Mikell*, 163 F. Supp. 2d 720, 739 (E.D. Mich. 2001) (financial transaction is the *actus reus* of the money laundering offense; the proceeds requirement is only a "circumstance element");

– which financial transaction you choose will therefore determine many other things:

1. Unit of prosecution

- most courts hold that the financial transaction is the unit of prosecution, so each transaction constitutes a separate offense and must be charged separately

  - *United States v. Smith*, 44 F.3d 1259, 1265 (4th Cir. 1995) (the financial transaction is the "core" of the money laundering offense, distinguishing one money laundering offense from another);

  - *United States v. Majors*, 196 F.3d 1206, 1212 n.14 (11th Cir. 1999) (*dicta*) (money laundering is not a continuing offense; each transaction constitutes a separate offense).

- this is true for both § 1956 and § 1957

  - *United States v. Askarkhodjaev*, 2010 WL 3940450, *6 (W.D. Mo. Sept. 16, 2010) (each monetary transaction in excess of $10,000 is a separate violation of Section 1957 and each may be charged in a separate count even if all of the transactions were part of the same scheme);

- most courts consider charging multiple transactions in the same count to be duplicitous:

  - *United States v. Prescott*, 42 F.3d 1165 (8th Cir. 1994) (charging multiple financial transactions as a continuing course of conduct in a single count is duplicitous);

  - *United States v. Conkey*, 826 F. Supp. 1536 (W.D. Pa. 1993) (dismissing duplicitous charge with leave to refile);

  - *United States v. Gray*, 101 F. Supp. 2d 580, 586 & n.7 (E.D. Tenn. 2000) (indictment that alleges a course of conduct must be dismissed not because it is duplicitous, but because it alleges an offense that does not exist; the unit of prosecution is the individual financial transaction);

  - *But see United States v. Moloney*, 287 F.3d 236 (2d Cir. 2002) ("a single money laundering count can encompass multiple acts provided that each act is part of a unified scheme");

2. Venue

The Supreme Court has held that venue for a money laundering prosecution lies where the financial transaction took place, not where the underlying crime that generated the criminal proceeds occurred.

- *United States v. Cabrales*, 524 U.S. 1 (1998)

– in response, Congress enacted 18 U.S.C. § 1956(i), which provides that the prosecution may be brought where the financial transaction occurred *or* where the underlying proceeds were generated, if the defendant participated in moving the proceeds from that district to the place where they were laundered

- *United States v. Nichols*, 416 F.3d 811, 824 (8th Cir. 2005) (defendant who was charged with committing the SUA in Missouri, and who participated in moving the proceeds from Missouri to California, where the money was laundered, could be charged with money laundering in Missouri);

Whether there is extraterritorial jurisdiction over an offense that occurs in part, or in whole, outside of the US is a separate question that we will discuss later.

3. Statute of limitations

The statute of limitations runs from date on which the financial transaction is complete:

- *United States v. Bucci,* 582 F.3d 108, 116 (1st Cir. 2009) (for purposes of the statute of limitations, a bank deposit occurs when the bank processes it, even though the customer actually made the deposit late in the previous business day);

– so, even if the underlying crime occurred many years ago, you would still be within the statute of limitations for money laundering if the financial transaction occurred within the past five years

- *United States v. Ross,* 2014 WL 3750452, *1 n.2 (N.D. Cal. Jul. 29, 2014) (because the statute of limitations runs from the date of the money laundering offense, there is no reason money laundering charges cannot be filed more than 5 years after the date of the SUA);

- *United States v. Miller*, 2012 WL 2362366 (E.D. Pa. June 21, 2012) (defendant convicted of concealment money laundering when he

uses house purchased 10 years earlier with drug proceeds to obtain a new mortgage loan and then launders the proceeds);

4. When the "knowledge" "intent" and "proceeds" elements apply

-- the choice of the financial transaction fixes the time at which the other elements apply

-- as we'll discuss, the defendant must have the requisite knowledge and intent, and the property must be criminal proceeds, at the time the financial transaction takes place

- *United States v. McDougald*, 990 F.2d 259 (6th Cir. 1993) (circumstantial evidence insufficient to prove defendant knew money was proceeds of unlawful activity at the time the transaction occurred; what defendant learned afterwards does not help Government);

- *United States v. Hughes*, 230 F.3d 815, 820-21 (5th Cir. 2000) (defendant must know money was criminal proceeds at the time he conducts the money laundering transaction);

5. Forfeiture

— and the choice of the financial transaction determines what property is going to be subject to forfeiture

— that is, pursuant to 18 U.S.C. § 982(a)(1), we can forfeit all property *involved in* the money laundering offense for which the defendant is convicted

— we'll talk about what is forfeitable in a money laundering case in a separate lecture

Interstate Commerce

Interstate commerce is an element of the offense:

- *United States v. Evans*, 272 F.3d 1069, 1081 (8th Cir. 2001) ("an effect on interstate commerce is an essential element of money laundering");

- *United States v. Aramony*, 88 F.3d 1369 (4th Cir. 1996) (interstate commerce nexus is an essential element of § 1957 offense which Government must prove beyond a reasonable doubt);

But it is sufficient to show a minimal impact:

- *United States v. Ripinsky*, 109 F.3d 1436 (9th Cir. 1997) (if the transaction is commercial in nature, gov't need only prove that it had a minimal effect on interstate commerce that, through repetition by others, could have a substantial effect);

- *United States v. Leslie*, 103 F.3d 1093, 1101 (2d Cir. 1997) ("The interstate commerce element of the money laundering statute, while an essential element, is jurisdictional in nature…. Hence, the Government's burden is not heavy.");

Use of a bank implicates interstate commerce:

- *United States v. Parker*, 364 F.3d 934 (8th Cir. 2004) (use of check drawn on bank engaged in interstate commerce to conduct financial transaction is sufficient);

– or a business that engages in interstate commerce

- *United States v. Patel*, 1999 WL 615196, *7 (N.D.N.Y. 1999) (use of business sufficient to prove interstate commerce element if the Government proves business engages in interstate commerce; proof that business bank account was opened by business in Canada sufficient);

Effect on commerce established by the nature of the SUA offense:

- *United States v. Gotti*, 459 F.3d 296, 336 (2d Cir. 2006) (laundering the proceeds of extortion, where the victims were businesses and unions engaged in interstate commerce, and the proceeds of gambling that was international in scope, affects interstate commerce because of the nature of the SUA);

- *United States v. Hatcher*, 323 F.3d 666, 672 (8th Cir. 2003) (laundering jewelry stolen from stores doing business in interstate commerce satisfies the commerce requirement);

- *United States v. Goodwin*, 141 F.3d 394, 399 (2d Cir. 1997) (laundering drug money always implicates interstate commerce);

"Conducts" Financial Transaction

To be guilty of a money laundering offense, the defendant must be the person who conducted the transaction

- but "conducts" is defined by 18 U.S.C. § 1956(c)(2) to include "initiating, concluding, or participating in initiating, or concluding a transaction."
- so the receiver of the criminal proceeds can be the money launderer
  - *United States v. Gotti*, 459 F.3d 296, 335 (2d Cir. 2006) (person who accepts a transfer of cash participates in the conclusion of the transfer, and therefore "conducts" the transaction within the meaning of section 1956(c)(2));
  - *United States v. Li*, 55 F.3d 325, 330 (7th Cir. 1995) ("either initiating or concluding a transaction constitutes the conducting of a transaction");
- or he or she may be a person who directs others to move money
  - *United States v. Prince*, 214 F.3d 740 (6th Cir. 2000) (defendant conducts transaction when he directs third party to withdraw cash from a bank, or to send him a check);
- or any member of a money laundering conspiracy
  - *United States v. Clark*, 717 F.3d 790, 809 (10th Cir. June 18, 2013) (defendant substantively liable for a money laundering offense in which he did not participate because he was a member of the underlying fraud conspiracy, the money laundering offense furthered the fraud conspiracy, and it was foreseeable to defendant that the fraud proceeds would be laundered);
- generally, it is not difficult to prove, as a factual matter, that the defendant is the one who conducted the financial transaction

Extra-territorial jurisdiction

Under section 1956(f), the United States has extraterritorial jurisdiction over a money laundering offense committed by a U.S. citizen, even if the offense occurs entirely overseas:

- *United States v. Tarkoff*, 242 F.3d 991, 993-94 (11th Cir. 2001) (defendant, a U.S. citizen, convicted of section 1956(a)(1)(B)(i) offense when he transferred funds from

Curaçao to Israel; distinguishing section 1956(a)(2), which requires transfer to or from United States);

- *Cf. European Community v. RJR Nabisco, Inc*., 764 F.3d 129, 139-140 (2d Cir. 2014) (there is extraterritorial jurisdiction over a RICO offense if the court would have such jurisdiction over the underlying RICO predicates; a RICO offense in which the pattern of racketeering comprises an international money laundering scheme whereby U.S. citizens caused illicit drug proceeds to be laundered in Europe and used to finance the importation of U.S. goods qualifies);

The United States also has jurisdiction over conduct by a foreign person in violation of sections 1956 and 1957 that occurs in part in the United States; 18 U.S.C. §§ 1956(f) and 1957(d)(1):

- *United States v. Chao Fan Xu*, 706 F.3d 965 (9th Cir. 2013) (court had jurisdiction over transfer of proceeds of Chinese fraud from China to U.S. under § 1957(d) because the transfer took place in the U.S.);

- *United States v. Garcia,* 533 Fed. Appx. 967, 982 (11th Cir. 2013) (there is extraterritorial jurisdiction over the transfer of drug proceeds from the U.S. to Mexico and on to Colombia because even though most of the activity occurred outside of the U.S., it did occur in part in the U.S., which is all § 1956(f) requires);

- *United States v. All Assets Held at Bank Julius Baer & Co.*, 571 F. Supp. 2d 1 (D.D.C. 2008) (district court has jurisdiction over wire transfer of dollars between foreign countries where money passed through a New York bank acting as intermediary; applies equally to sections 1956 and 1957);

- *United States v. Real Property Known as 2291 Ferndown Lane,* 2011 WL 2441254, *4 (W.D. Va. June 14, 2011) (to invoke the court's extraterritorial jurisdiction, the Government need only show that the money laundering transaction occurred in part in the U.S.; the underlying SUA may have occurred wholly in a foreign country if it is one of the offenses covered by § 1956(c)(7)(B)); *United States v. Real Property Known as Unit 5B*, 2012 WL 1883371, *3 (S.D.N.Y. May 21, 2012) (same);

- *But see United States v. Kuok*, 671 F.3d 931, 939-40 (9th Cir. 2012) (district court has jurisdiction over a money laundering offense involving money sent into the U.S. by a non-citizen only if the transaction involves more than $10,000);

Knowledge

The Government must show that at the time the financial transaction occurred, the money launderer knew that the property involved in the financial transaction was dirty money

-- he must know that the property represented the proceeds of "some form" of unlawful activity, but he does not need to know precisely what unlawful activity this was;

- "Knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from "some form, though not necessarily which form," of activity that constitutes a felony under state, federal, or foreign law; *see* 18 U.S.C. § 1956(c)(1):

-- it's not a defense for the defendant to say, "I didn't know it was drug money, I thought it was the proceeds of insurance fraud"

- *United States v. Turner,* 400 F.3d 491, 496 (7th Cir. 2005) (defendant need not know actual source of the money, but only that it came from "some illegal activity");

- *United States v. Rivera-Rodriguez*, 318 F.3d 268, 271 (1st Cir. 2003) ("defendant is not required to know what type of felony spawned the proceeds but only that some felony did so");

- *United States v. Reiss*, 186 F.3d 149 (2d Cir. 1999) (defendant need only know money is criminally derived; he does not need to know it is drug proceeds; distinguishing sentencing enhancement under 2S1.2 which requires knowledge money is drug proceeds);

Where the defendant is laundering his own money, this is obvious, but the launderer need not be person who committed the underlying offense

- *United States v. Chon*, 713 F.3d 812, 820 (5th Cir. 2013) (defendant's knowledge that the property was from an illegal source is established if defendant was a participant in the underlying SUA);

- *United States v. Godwin*, 272 F.3d 659, 669 (4th Cir. 2001) (knowledge element established by proof the defendant was "intimately involved" in the underlying SUA);

-- how do you prove a defendant knew he was laundering someone else's dirty money?

Circumstantial evidence of knowledge

Often we have to rely on circumstantial evidence of the defendant's knowledge

– such as the defendant's relationship to the source of the money or knowledge of the source's circumstances:

- *United States v. Alaniz*, 726 F.3d 586, 603 (5th Cir. 2013) (jury could infer that defendant's family members knew the source of his income from his sudden accumulation of unexplained wealth and their willingness to engage in inexplicably convoluted transactions);

- *United States v. George,* 761 F.3d 42, 50 (1st Cir. 2014) (circumstantial evidence established that lawyer who laundered money for former client, knowing that he had retained proceeds of past crimes, knew he was laundering criminally derived property, even though he also knew former client had legitimate assets as well; evidence of "bad acts" committed with the former client was admissible to illustrate the relationship);

- *United States v. Podlucky,* 567 Fed. Appx. 139, 145-46 (3rd Cir. 2014) (wife's awareness that she was spending more than income shown on joint tax return would allow, her use of convoluted transactions involving trusts and corporate accounts and fictitious address for personal expenses, and her awareness of forfeiture action commenced by the Government and co-defendant's plea, sufficient to show knowledge);

- *United States v. Maragh,* 532 Fed. Appx. 256, 258 (3d Cir. 2013) (that defendant was willing to serve as intermediary for transfer of drug proceeds from dealer to supplier on 16 occasions, and that supplier trusted him in that role, was sufficient evidence to establish knowledge that the money was proceeds of some form of unlawful activity);

– or the unusual nature of the transaction:

- *United States v. Ledee,* 772 F.3d 21 (1st Cir. 2014) (conducting real estate transaction on a holiday, using housekeeper as named seller, and convoluted use of eight cashier's checks show purpose was to conceal property from bankruptcy);

- *United States v. Persaud,* 411 Fed. Appx. 431, 434 (2nd Cir. 2011) (defendant's knowledge that his parents were accused of fraud by investors, his failure to declare the money placed in his name for tax purposes, and his engaging in multi-layered transactions with their money, was sufficient to establish his knowledge);

- *United States v. Cedeno-Perez,* 579 F.3d 54, 59 (1st Cir. 2009) (use of code words and concern about police detection reflected defendant's awareness that the currency he was transferring derived from unlawful activity);

- *United States v. Turner*, 400 F.3d 491 (7th Cir. 2005) (that the money involved in a loan came in the form of structured checks, payable to a third party, that were endorsed over to defendant with instructions not to deposit them into a local bank must have suggested to defendant "that something was amiss" regarding the source of the money);

- *United States v. Robins*, ___ Fed. Appx. ___, 2016 WL 7234612 (2nd Cir. Dec. 14, 2016) (circumstantial evidence that car dealer knew he was being paid with drug proceeds included failure to file Form 8300, titling vehicle in third party's name, and putting lien on the vehicle despite receiving payment in full);

– or the use of third parties or other deception:

- *United States v. Rivera-Rodriguez*, 318 F.3d 268, 272 (1st Cir. 2003) (structuring large cash transactions and use of third party name shows knowledge of illegal source of funds);

- *United States v. Cassano*, 372 F.3d 868 (7th Cir. 2004) (evidence that defendant cashed checks for third party while third party was in jail, continued to do so after third party was released, was highly paid for this service, and refused to cosign the checks was sufficient to show knowledge);

– use of offshore accounts; advanced technology:

- *United States v. Bansal*, 663 F.3d 634, 646 (3d Cir. 2011) (knowledge of illegal source inferred from defendants' keeping accounts offshore and using the internet to preserve anonymity);

Knowledge may also be shown by willful blindness

- *United States v. Flores*, 454 F.3d 149, 255-56 (3d Cir. 2006) (attorney was willfully blind to the illegal source of money he assisted client in moving through bank accounts; it was not necessary to show attorney knew the money was from drug trafficking);

- *United States v. Rivera-Rodriguez*, 318 F.3d 268, 272 (1st Cir. 2003) ("because governing law equates willful blindness with knowledge, it would suffice for the jury to conclude that [defendant] consciously averted his eyes from the obvious explanation for the funds");

- *United States v. Puche*, 350 F.3d 1137, 1147 n.4, 1149 (11th Cir. 2003) (defendant's deliberate ignorance shown by his reaction when undercover agent attempted to explain the source of the cash he was laundering: defendant said, "No, no, no," and said agent should not say anything about the source of the money);

- but we must prove that the defendant had the required knowledge *at the time the financial transaction took place*

    - *United States v. Hughes*, 230 F.3d 815, 820-21 (5th Cir. 2000) (defendant must know money was criminal proceeds at the time he conducts the money laundering transaction; where Brady violation is alleged, evidence that defendant did not learn money was such proceeds until 6 weeks after he received it is relevant to transactions that occurred during such time, but not to transactions conducted later);

Proceeds

The third element is proceeds:

- the property involved in the financial transaction must be the proceeds of a "specified unlawful activity" (SUA), which includes all state, federal, and foreign offenses listed in 18 U.S.C. §§ 1956(c)(7), 1961(1) (as incorporated by section 1956(c)(7)(A)), and 2332b(g)(5)(B) (as incorporated by section 1961(1)(G));

- not every crime is an SUA, but the list includes most serious federal crimes

For example, suppose you want to know if mail fraud is an SUA

- you would look first to Section 1956(c)(7), but you would not find mail fraud (18 U.S.C. § 1341) in the long list of statutes listed in subparagraphs (D) and (E)

- but notice that § 1956(c)(7)(A) incorporates, with one exception, the entire list of statutes in § 1961(1) – the RICO statute

- and if you look in § 1961(1)(B), you find § 1341 in the list of offenses that appears there

- therefore, mail fraud is what we call a money laundering predicate offense

Bribes and kickbacks:

- the same would be true for other commonly-used SUAs, such as 18 U.S.C. § 201 (bribery), and § 666 (theft from a government program);

- *United States v. Reagan,* 725 F.3d 471 (5th Cir. 2013) (Government agent soliciting bribe);

- *United States v. Meffert*, 2010 WL 2360776, *11 (E.D. La. June 7, 2010) (conspiring to spend bribes and kickbacks in violation of § 1957);

- *United States v. Morris*, 2010 WL 1049936, *3 (E.D. Ky. Mar. 19, 2010) (if a Government contract is obtained through bribery or extortion, payments to the defendants pursuant to that contract are financial transactions "involving the proceeds of specified unlawful activity.");

- *United States v. Mariano*, 2006 WL 487905, *3 (E.D. Pa. 2006) (money paid as bribe to public official is the proceeds of "honest services" fraud under sections 1341 and 1346);

Some foreign crimes can serve as the SUA

— that is, if you have a financial transaction involving the proceeds of one of the foreign crimes listed in § 1956(c)(7)(B), you could have a U.S. money laundering offense

— but to do this, you need to be able to prove the foreign crime beyond a reasonable doubt

- *United States v. Lazarenko*, 564 F.3d 1026, 1039 (9th Cir. 2009) (extortion under Ukrainian law);

- *United States v. All Assets Held in Account Number 80020796,* 83 F.Supp.3d 360 (D.D.C. 2015) (proceeds of Nigerian public corruption; § 1956(c)(7)(B)(iv));

- *United States v. Prevezon Holdings, Ltd.,* 2015 WL 4719786 (S.D.N.Y. Aug. 7, 2015) (proceeds of theft of public funds under Russian law; § 1956(c)(7)(B)(iv));

- *United States v. All Funds on Deposit at Old Mutual of Bermuda, Ltd.,* 2014 WL 1689939 (S.D. Tex. Mar. 19, 2014) (proceeds of Mexican public corruption sent from Mexico to Bermuda via a U.S. bank account);

- *United States v. One 1997 E35*, 50 F. Supp. 2d 789, 802-03 (N.D. Ill. 1999) (property was sent into United States to promote foreign murder and extortion; section 1956(c)(7)(B));

- *United States v. Real Property Known as 2291 Ferndown Lane*, 2011 WL 2441254 (W.D. Va. June 14, 2011) (bribery of a foreign official);

- *United States v. Real Property Known as Unit 5B*, 2012 WL 1883371 (S.D.N.Y. May 21, 2012) (same);

- *United States v. $15,270,885.69 Formerly on Deposit in Account No. 8900261137*, 2000 WL 1234593, *4 (S.D.N.Y. 2000) (property was proceeds of foreign kidnaping and/or proceeds of violation of foreign tax and capital control laws);

Altogether, there are some 250 money laundering predicates

— the AFMLS publication “Asset Forfeiture and Money Laundering Statutes” lists every one of the SUAs and the series of cross-references you need to get to it

Proving that the money involved in the transaction is SUA proceeds is easy if you can trace the money to a particular offense, but you need not do that

— it's sufficient if you can prove that the money was generated by the specified unlawful activity without identifying the date and place of the offense

- *United States v. Shafer*, 608 F.3d 1056, 1067 (8th Cir. 2010) (“The Government is not required to trace funds to prove a violation of § 1957;” when drug dealer buys car for cash, conviction may be based on his lack of legitimate income and history of using large quantities of cash in his drug business and to purchase personal items);

- *United States v. Hardwell*, 80 F.3d 1471 (10th Cir. 1996) (evidence that the defendant was engaged in drug trafficking and had insufficient legitimate income to produce the money used in the financial transaction was sufficient); *United States v. Herron*, 97 F.3d 234, 237 (8th Cir. 1996) (same);

- *United States v. Mankarious*, 151 F.3d 694 (7th Cir. 1998) (where SUA is mail fraud, Government need only show that laundered funds came from a fraudulent scheme and that the use of the mails furthered that scheme; no need to trace proceeds to a particular mailing);

Proceeds need not be money:

- *United States v. Frank*, 354 F.3d 910 (8th Cir. 2004) (because car that defendant should have disclosed to court in compliance with restitution order was SUA proceeds, sale of car was a money laundering offense);

- *United States v. George*, 363 F.3d 666 (7th Cir. 2004) (when defendant used counterfeit securities to buy computer chips, the chips became SUA proceeds, so subsequent sale of chips was section 1957 offense);

Section 1956(c)(9) defines “proceeds” as property obtained or retained:

- *United States v. Esquenazi,* 752 F.3d 912, 936 (11th Cir. 2014) (money defendant retained by having its debt reduced in exchange for promise to pay a bribe was proceeds of the bribery offense);

- *United States v. Yusuf*, 536 F.3d 178 (3d Cir. 2008) ("unpaid taxes unlawfully retained by defendants represented the 'proceeds' of a fraud");

Proceeds remain proceeds as they change form, no matter how much time passes or who else handles the money:

- *United States v. George*, 363 F.3d 666 (7th Cir. 2004) (where defendant uses counterfeit securities to buy computer chips and then converts the chips to cash, the cash becomes the SUA proceeds);

- *United States v. Hall*, 434 F.3d 42, 51 (1st Cir. 2006) (money remained drug proceeds after it was loaned to a third party, the loan was repaid, and the payments were deposited into a bank account and transferred to another account);

- *United States v. Magluta,* 418 F.3d 1166 (11th Cir. 2005) (Government agent's handling of drug money as an intermediary at one stage of the case did not purge it of its taint; it was still SUA proceeds when defendant used it to conduct his transaction);

- *United States v. Ward*, 197 F.3d 1076 (11th Cir. 1999) ("once proceeds become tainted, they cannot become untainted"; funds in a commingled bank account still involve SUA proceeds even though months have passed, and other transactions have occurred, since the SUA proceeds were commingled);

Finally, otherwise untainted property may be considered the proceeds of an SUA if it is part of a related or parallel transaction that involves SUA proceeds

- otherwise money launderers could evade prosecution by putting SUA proceeds in one account and taking money from another, or by using a hawala; *see* 18 U.S.C. § 1956(a)(1)

- for example, suppose the defendant receives drug proceeds from a drug dealer and puts the money in Bank Account A

- then, because he has the money in Account A, he is able to use the money in Bank Account B to conduct a financial transaction

    - *United States v. Covey*, 232 F.3d 641, 646 (8th Cir. 2000) (where defendant receives cash from drug dealer and gives drug dealer checks drawn on own funds in return, transfer of checks is a money laundering offense involving SUA proceeds);

- *United States v. Mankarious*, 151 F.3d 694, 706-07 (7th Cir. 1998) (if check constituting SUA proceeds is deposited in bank account and second check is written on that account, second check constitutes proceeds, even if first check has not yet cleared);

Circumstantial evidence

The case law is filled with colorful examples of instances where the government proved the proceeds element with circumstantial evidence:

- *United States v. Richardson*, 658 F.3d 333, 338 (3th Cir. 2011) (proof that drug dealer's legitimate business was insolvent was evidence the money he used to buy a house came from his drug business);

- *United States v. Huy Chi Luong*, 468 Fed. Appx. 710, 712 (9th Cir. 2012) (defendant's access to funds at the time he was committing criminal offenses, and when he lacked other sources of income, sufficient to allow jury to find the funds were SUA proceeds);

- *United States v. Slagg*, 651 Fed. Appx. 832, 845 (8th Cir.2011) ("pointedly guarded telephone conversations," defendant's drug dealing and lack of legitimate income, and efforts to collect money from people who owed debts to defendant, sufficient to show money used to pay defendant's bail was drug proceeds);

- *United States v. Misher*, 99 F.3d 664 (5th Cir. 1996) (when defendant, who is connected to drug trafficking, pays for car with suitcase full of cash, there is sufficient evidence that the money is SUA proceeds);

Lack of legitimate income or a "net worth" analysis may be used to establish the proceeds element:

– This is often the most important evidence that the defendant must have used his criminal proceeds – and not clean money – to conduct the transaction:

  - *United States v. Shafer*, 608 F.3d 1056, 1067 (8th Cir. 2010) (affirming § 1957 conviction for buying car with cash based on lack of legitimate income; that defendant received large lawsuit settlement 10 months earlier did not undermine verdict where defendant had cashed the check and spent three times the amount of the settlement on other items in the intervening period);

  - *United States v. Hardwell*, 80 F.3d 1471, 1483 (10th Cir. 1996) (evidence that the defendant was engaged in drug trafficking and had insufficient legitimate income to produce the money used in the financial transaction was sufficient); *United*

States v. Herron, 97 F.3d 234, 237 (8th Cir. 1996) (same);

- *United States v. McQueen,* 636 Fed. Appx. 652 (6th Cir. 2016) (case agent's testimony that defendant's sole source of income at the time the conducted the alleged money laundering transactions was funds obtained from investors was sufficient to satisfy the "proceeds element" of §§ 1956 and 1957);

Remember, the defendant charged with money laundering need not be the person who committed the underlying SUA

- the money may be the proceeds of a crime committed by a third party

  - *United States v. Wert-Ruiz*, 228 F.3d 250, 253 (3d Cir. 2000) (money remitter convicted of laundering drug money for drug traffickers; good explanation of how money remitters operate);

  - *United States v. Abbell*, 271 F.3d 1286, 1290 (11th Cir. 2001) (defense attorney convicted of laundering client's money);

- the defendant may be charged with laundering the proceeds of a crime charged in a different indictment, with laundering the proceeds of a crime prosecuted by the State, or with laundering the proceeds of a crime not charged at all

  - *United States v. McGauley*, 279 F.3d 62, 73 (1st Cir. 2002) (because SUA offenses need not be charged in the same indictment, defendant may be convicted of laundering the proceeds of a portion of a scheme to defraud that is not charged as a substantive offense);

  - *United States v. Gregory*, 322 F.3d 1157, 1165-66 (9th Cir. 2003) (no constitutional violation in waiting until after defendant has been convicted of drug charges and has served his sentence before charging him with money laundering based on same offense);

- it follows that the SUA need not be charged in the same indictment

Only part of the money need be dirty; any money involved in a transaction from a commingled account is considered "proceeds"

- *United States v. Warshak*, 631 F.3d 266, 332 (6th Cir. 2010) (a transaction does not have to consist solely of criminal proceeds to constitute a money laundering offense; that a transaction may have included proceeds of a legitimate side of defendant's business is irrelevant);

- *United States v. Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005) (the presence of

legitimate funds does not make a money laundering transaction lawful; it is only necessary to show that the transaction *involves* criminal proceeds);

- *United States v. Bieganowski*, 313 F.3d 264, 379-80 (5th Cir. 2002) (even if some of health care provider's income was legitimate, transfer of commingled funds would satisfy the proceeds element of section 1956(a)(1));

The defendant need not have physical possession of the funds for them to be proceeds:

- the money laundering offense can take place after the defendant has caused the proceeds to be send to a third party

  - *United States v. Prince*, 214 F.3d 740, 752-53 (6th Cir. 2000) (money becomes proceeds when victim wires it to third party designated by defendant; defendant need not be in physical possession for money to be proceeds);

Merger issue

I talked about timing with respect to the knowledge requirement: the defendant has to know the property is the proceeds of some form of unlawful activity at the time the financial transaction takes place

- similarly, the money must be SUA proceeds *at the time the financial transaction occurs*

- for example, if a drug sale takes place on a street corner, you have a financial transaction, but it does not involve SUA proceeds because there are no proceeds until the sale is complete;

  - *United States v. Harris,* 666 F.3d 905, 909 (5th Cir. 2012) ("mere payment of the purchase price for drugs by whatever means . . . does not constitute money laundering" because the money does not become proceeds until the payment is made);

- the subsequent deposit of the money would involve proceeds, however

- and it would be different if you could show that the "buy" money was the proceeds of an earlier sale

The requirement that the money be SUA proceeds *at the time the financial transaction occurs* is a problem in bribery cases:

- property defendant intends to use to commit offense is not proceeds if the offense has not yet been committed

- so some courts hold that money that the defendant intends to use to pay a bribe is not SUA proceeds until the bribe is paid

  - *United States v. LaBrunerie*, 914 F. Supp. 340, 341-42, 46 (W.D. Mo. 1995) (transaction involving clean money intended to be paid as a bribe does not involve proceeds even though agreement to pay bribe constituted completed offense);

- but other courts have held that the bribe payment can be a money laundering offense if there was a prior agreement to pay the bribe

  - *United States v. Reagan*, 725 F.3d 471, 484 (5th Cir. 2013) (bribery offense was complete when defendant solicited bribe, so payment to third party at defendant's direction involved SUA proceeds);

  - *United States v. Mariano*, 2006 WL 487905, *5 (E.D. Pa. 2006) (money that briber intends to use to bribe public official becomes SUA proceeds when he gives it to a third party; third party's subsequent transfer of the money to the defendant is a money laundering offense);

- my advice is to avoid the issue by not charging the bribe payment itself as a money laundering offense, but instead charging only a "downstream" transaction occurring after the bribe has been paid

The merger of the money laundering financial transaction and the underlying SUA is also a big problem in fraud cases:

-- inducing a victim to wire money to defendant is not money laundering if happens all in one step

  - *United States v. Johnson,* 971 F.2d 562 (10th Cir. 1992) (where defendant fraudulently induces victim to wire transfer funds directly to defendant's account, such transfer does not constitute money laundering, because funds were not "criminally derived" at the time the transfer took place);

- the rule is that the acts that produce the proceeds being laundered must be distinct from the conduct that constitutes money laundering;

  - *United States v. Butler*, 211 F.3d 826, 830 (4th Cir. 2000) (Athe laundering of funds cannot occur in the same transaction through which those funds first become tainted by crime"); *United States v. Richard*, 234 F.3d 763 (1st Cir. 2000) (same; quoting *Butler*);

- *United States v. Mankarious*, 151 F.3d 694 (7th Cir. 1998) (explaining *Johnson*);

- *United States v. Carucci*, 364 F.3d 339 (1st Cir. 2004) (conviction reversed because evidence did not establish that the SUA offense occurred before the money laundering transaction);

– but a two-step transaction -- victim sends check to defendant, defendant deposits check -- is money laundering

  - *United States v. Baxter,* 761 F.3d 17, 29-30 (D.C. Cir. 2014) (where defendant embezzled funds by writing check from her employer to front company, which in turn transferred funds to co-defendant, latter transactions occurred after the money was proceeds);

  - *United States v. Silvestri,* 409 F.3d 1311 (11th Cir. 2005) (mail fraud yielded proceeds in the form of a check before defendant committed a money laundering offense by depositing the check);

– so is a transaction that takes place after the first phase of the underlying crime is complete, but while the underlying crime is still on-going

  - *United States v. Kennedy,* 707 F.3d 558, 566-67 (5th Cir. 2013) (there was no merger problem when bank transferred fraudulently-obtained loan proceeds to defendant's loan-closing company as the first step, and defendants transferred a portion of those proceeds to a shell corporation they controlled as the second step; after step one, defendants had possession of the proceeds of a completed wire fraud offense);

  - *United States v. Singh*, 518 F.3d 236, 247 (4th Cir. 2008) (conviction based on prostitute's paying for motel room with money received from her customer did not violate the rule that the money laundering transaction must be separate from the transaction that generated the proceeds because the prostitution offense was complete when the prostitute received payment for her services; following *Butler*);

  - *United States v. Castellini*, 392 F.3d 35 (1st Cir. 2004) (acts occurring after the money becomes SUA proceeds may be charged either as money laundering or additional substantive SUA offenses, or both);

  - *United States v. Morelli*, 169 F.3d 798 (3rd Cir. 1999) (proceeds may be derived from a completed offense, or from a completed phase of an ongoing offense of which the money laundering transaction is also a part);

- *United States v. Smith*, 44 F.3d 1259, 1265 (4th Cir. 1995) (wire transfer as second step in scheme constitutes § 1957 offense, even though the transfer is part of the scheme);

The Supreme Court's decision in *Santos*

The idea that the same transaction could constitute both a money laundering offense and a later step in the substantive offense being promoted is what got the Supreme Court upset in *United States v. Santos,* 553 U.S. 507 (2008)

- the problem that *Santos* created has been fixed, but we still need to talk about it

The Supreme Court didn't like the idea that once money in the hands of a bookmaker was gambling proceeds, his paying off the winning bettors could be charged as both money laundering and as a gambling offense

- they thought the Government was using the money laundering statute in that instance just to raise the penalty for the gambling violation

Instead of imposing another merger rule – e.g., they could have said that completing the offense is not really "promotion," the plurality of the court dealt with the problem by defining "proceeds" to mean "profits"

- if "proceeds" means "profits" then Santos could not be guilty of money laundering because he didn't have any profits until he had paid his runners and winning bettors

What the Court did not foresee, unfortunately, that its definition of proceeds as profits would wreak havoc across the money laundering landscape

- the lower courts were all over the place trying to figure out when *Santos* applied, and when it applies, when a transaction involve "profits"

Happily Congress fixed the problem by defining "proceeds" to mean "gross receipts" for offenses committed after May 20, 2009

- 18 U.S.C. § 1956(c)(9), Pub. L. 111-21, 123 Stat. 1617 (2009)

- *United States v. Van Alstyne,* 584 F.3d 803, 814 n.12 (9th Cir. 2009) (*Santos'*s "net profits" definition of proceeds applies only to money laundering transactions committed before May 2009);

- *United States v. Simmons,* 737 F.3d 319, 324, 329 (4th Cir. 2013) (noting that § 1956(c)(9) "effectively overruled *Santos*" but because it does not apply retroactively, offense that occurred in 2007-08 is governed by *Santos;* Congress amended the statute, *inter alia,* to reverse *Santos* with respect to payments to investors in Ponzi schemes);

- *United States v. Ferguson*, 412 Fed. Appx. 974, 976 (9th Cir. 2011) (the question whether proceeds means profits or receipts "does not matter for crimes committed after May 2009");

- For the limited legislative history of the *Santos* fix, *see* S. Rep. 111-10, cited in *United States v. Reiner,* 2010 WL 1490303, *23 n.44 (D. Me. Apr. 13, 2010);

The merger issue that upset the Supreme Court in *Santos* has not gone away entirely, however

– while all of the case law cited above remains intact, the Department of Justice, as a matter of policy, now requires approval by the U.S. Attorney of any case in which the Government is charging money laundering based on a transaction that also constitutes the commission of the crime being promoted

Specific Intent

At the time of the financial transaction, the defendant must act with one of 4 specific intents.

1. Intent to promote

Section 1956(a)(1)(A)(i) is often called the "promotion money laundering" offense.

– the intent to promote is part of the *mens rea* for the money laundering offense.

  - *United States v. Roy*, 375 F.3d 21 (1st Cir. 2004) (intent to promote is part of the *mens rea*, not the *actus reus* of the offense);

– to prove promotion money laundering, you only have to prove that the

defendant intended to promote an SUA

- this can be the same SUA that generated the proceeds or an entirely separate crime

- you *do not* have to prove any intent to conceal or disguise the criminal proceeds: that would be "concealment money laundering" which we'll discuss in a minute

    - *United States v. Alerre*, 430 F.3d 681, 693 n.14 (4th Cir. 2005) (explaining the difference between promotion and concealment money laundering);

    - *United States v. Marbella*, 73 F.3d 1508, 1514 (9th Cir. 1996) (statute is worded in the disjunctive; therefore, conviction can be based on intent to promote without any evidence of intent to conceal or disguise);

    - *United States v. Reed*, 264 F.3d 640, 650-52 (6th Cir. 2001) (that defendant conducted the transaction without concealing or disguising anything has no bearing on her conviction for a promotion offense under section 1956(a)(1)(A)(i));

Examples of promotion money laundering:

- plowing back: defendant reinvests the money to continue the offense

    - *United States v. Lawrence*, 405 F.3d 888 (10th Cir. 2005) (using proceeds of Medicare fraud scheme to pay doctor whose participation was essential to the scheme, and to keep "the doors of the clinic open," promoted the scheme and were not ordinary business expenses);

    - *United States v. Grasso*, 381 F.3d 160 (3d Cir. 2004) (reinvesting proceeds of fraudulent scheme to cover advertising, printing, and mailing expenses was promotion money laundering);

    - *United States v. Fitzgerald,* 496 Fed. Appx. 175, 178 (3rd Cir. 2012) (following *Grasso*; reinvestment or "plowing back" drug proceeds to buy more drugs is still a promotion money laundering offense even though the transaction is part of the offense being promoted);

    - *United States v. Coles*, 558 Fed. Appx. 173, 180 (3d Cir. 2014) (paying for apartment where equipment used to divide and package cocaine is located is promotion even though, for *Santos* purposes, it is not an essential expense);

- but ordinary expenses that would have been incurred in any event by a

legitimate business are not promotion expenses:

- *United States v. Miles*, 360 F.3d 472 (5th Cir. 2004) (any expenditure in furtherance of wholly illegitimate business can be a promotion offense; but paying "customary, reasonable and legal operating expenses" of a partially legitimate business is not promotion);

- *United States v. Brown*, 186 F.3d 661, 670-71 (5th Cir. 1999) (using proceeds of fraud for ordinary business expenses of legitimate business through which fraud was conducted is insufficient to show intent to promote even though such expenses indirectly keep the scheme going by bringing in more potential victims; expenses must be more directly related to the fraud to prevent the Government from using section 1956(a)(1)(A)(i) as a "money spending" statute);

– distributing proceeds:

- *United States v. Valdez*, 726 F.3d 684, 691 (5th Cir. 2013) (paying employees who submitted the false billings in a health care fraud scheme above normal salary supported jury's conclusion that the payments were made to secure loyalty or cooperation in the scheme, and were not normal business expenses);

- *United States v. Warshak,* 631 F.3d 266, 319 (6th Cir. 2010) (distributing proceeds to employees of a fraud scheme "to reward faithful service and encourage future commitment to the criminal endeavor" promotes the continuation of the scheme);

- *United States v. Alerre*, 430 F.3d 681, 695 (4th Cir. 2005) (distributing fraud proceeds to codefendants and other employees as compensation for their participation in a health care fraud scheme promotes the scheme);

- *United States v. Kelley*, 471 Fed. Appx. 840, 845 (11th Cir. 2012) (monthly dividend payments gave the principals in a steroid distribution scheme "an incentive to continue their activities despite the risks inherent in such activity;" "there is no requirement that the funds were reinvested into the illegal activity");

– using proceeds to facilitate the SUA or keep the scheme going:

- *United States v. Ayala-Vazquez,* 751 F.3d 1, 15-16 (1st Cir. 2014) (using drug proceeds to pay for Christmas parties in public housing project promoted the drug organization's success by maintaining good relations with the project's residents);

- *United States v. Pendelton,* ___ F.3d ___, 2016 WL 4254946 (8th Cir. Aug. 12, 2016) (using drug proceeds to buy more drugs is promotion money laundering);

- *United States v. Fata,* 650 Fed. Appx. 260 (6th Cir. 2016) (using the proceeds of health care fraud to fund a clinic that will be used to generate more fraudulent billings constitutes promotional money laundering);

- *United States v. Frazier,* 605 F.3d 1271, 1281-82 (11th Cir. 2010) (paying a courier to drive drugs from Canada to the U.S. and return with firearms promotes a specified unlawful activity);

- *United States v. Singh*, 518 F.3d 236, 247-48 (4th Cir. 2008) (prostitute who uses the money received from her first customer of the day to pay for her motel room commits promotion money laundering where the payment gives her the right to the use of the room for the rest of the day without further charge, and creates goodwill for future transactions);

- *United States v. Brown*, 553 F.3d 768, 782 (5th Cir. 2008) (using proceeds of illegal sales of hydrocodone to purchase more of the same drug is a promotion offense; it is not necessary to show that all of the drug would be sold illegally);

– using proceeds to "lull" prospective fraud victims or to create an aura of legitimacy promotes SUA offense:

- *United States v. Warshak,* 631 F.3d 266, 319 (6th Cir. 2010) (using fraud proceeds to make a charitable contribution promotes the scheme if it was "intended to raise [Defendant's] philanthropic profile and create an aura of legitimacy");

– transaction intended to avoid detection:

- *United States v. Huber,* 404 F.3d 1047 (8th Cir. 2005) (transaction that helps defendant maintain the appearance of eligibility for funds for which he was not eligible promotes the underlying fraud scheme);

A third party money launderer may be guilty of promoting someone else's offense:

- *United States v. Arthur*, 582 F.3d 713, 719 (7th Cir. 2009) (wife commits promotion money laundering when she deposits funds husband is concealing from bankruptcy trustee into her bank account, thus promoting the fraud);

- *United States v. Bueno,* 585 F.3d 847, 850 (5th Cir. 2009) (that currency courier knew he was working with a drug organization was sufficient evidence that he intended to promote their operation when he transported money on their behalf);

The troublesome cases are ones in which the promotion relates to a crime that has already been completed

- for example, suppose the defendant receives drugs on consignment and uses the proceeds of his sale of the drugs to pay the consignor

- is he really promoting an offense?

    - *Compare United States v. Martinez*, 151 F.3d 384, 389 (5th Cir. 1998) (paying for drugs received on consignment with proceeds of street sales from same consignment promotes drug trafficking); *United States v. Skinner*, 946 F.2d 176, 179-80 (2d Cir. 1991) (same); and *United States v. Barragan*, 263 F.3d 919, 923-24 (9th Cir. 2001) (same)

    - *With United States v. Heaps*, 39 F.3d 479, 485-86 (4th Cir. 1994) (on same facts, holding that payment for consignment merges with the SUA and therefore does not constitute money laundering);

- does it make a difference if we can prove he's doing this to make sure he has a continuing source of supply or otherwise is able to keep the scheme going?

    - *United States v. Robinson-Gordon*, 418 Fed. Appx.173, 176 (4th Cir. 2011) (payment on a completed contract for fraudulent visas promotes the scheme where there is evidence the parties intended to continue the scheme but would do so only if past services were paid for);

    - *United States v. Singh*, 518 F.3d 236, 247-48 (4th Cir. 2008) (prostitute's payment for past use of a motel room promotes the continuation of the prostitution scheme in the future; limiting *Heaps* to cases where the payment is a one-time payment on an antecedent debt and there is no evidence it was made to create goodwill for future transactions);

- Suppose the defendant just takes the proceeds of his crime and puts them in the bank or converts them to cash – is that "promotion?"

    - *Compare United States v. Montoya*, 945 F.2d 1068, 1076 (9th Cir. 1991) (deposit of check that represents proceeds of state bribery offense promotes bribery in that it gives defendant use of the fruits of his criminal activity);

    - *With United States v. Jolivet*, 224 F.3d 902, 910 (8th Cir. 2000) (deposit of fraud proceeds does not promote the already completed crime; rejecting *Montoya*);

These are the types of cases that, after *Santos*, the Department wants us to treat very carefully.

2. Evasion of income taxes

- *United States v. Zanghi*, 189 F.3d 71 (1st Cir. 1999) (transferring fraud proceeds in manner designed to make it appear to be a loan repayment instead of income violates (a)(1)(A)(ii); defendant does not have to know his conduct violates the tax laws; intentionally engaging in conduct that in fact violates § 7201 is sufficient (citing legislative history);

- *United States v. Suba*, 132 F.3d 662 (11th Cir. 1998) (defendant's failure to report 3 checks on his income tax return is evidence that he laundered them with intent to evade taxes);

- *United States v. Shellef,* 732 F. Supp.2d 42, 74 n. 48, 75 (E.D.N.Y. 2010) (*Cuellar* applies to § 1956(a)(1)(A)(ii); Government must prove that the *purpose* of the transaction was to evade taxes; failure to pay taxes is not, by itself, dispositive; but failure to pay taxes combined with defendant's failure to tell his tax accountant that he'd transferred funds to domestic and foreign bank accounts was sufficient to prove his purpose);

3. Conceal or disguise

Section 1956(a)(1)(B)(i) makes it an offense to conduct a financial transaction knowing that the purpose of the transaction was to "conceal or disguise" the source, location, ownership, nature or control of SUA proceeds.

– the courts call this "concealment money laundering"

- *United States v. Dvorak,* 617 F.3d 1017, 1022 (8th Cir. 2010) (Congress made concealing the location of criminal proceeds a serious offense under the money laundering laws because "money that cannot be found cannot be subject to forfeiture");

– proof that the transaction was designed to conceal *any one* of the listed attributes is sufficient

- *Cuellar v. United States*, 553 U.S. 550 (2008) (rejecting view that the only way to commit concealment money laundering is to attempt to create the appearance of legitimate wealth; such "classic money laundering" is one way to violate the statute, but the text makes clear that there are many other ways to violate it as well);

- *United States v. Concepcion,* 2008 WL 4585331 (2d Cir. Oct. 14, 2008) (following *Cuellar*; creating the appearance of legitimate wealth is not the only way to satisfy the concealment element);

Knowledge that the purpose of the transaction was to conceal or disguise almost always has to be shown by circumstantial evidence

-- engaging in unusual or convoluted transactions implies knowledge that purpose was to conceal or disguise:

- *United States v. Wilkes*, 662 F.3d 524, 547 (9th Cir. 2011) (making three transfers within a week before using proceeds of fraudulently-obtained contract to pay kickback was a convoluted transaction designed to conceal the source and future ownership of the money);

- *United States v. Morales-Rodriguez*, 467 F.3d 1, 13 (1st Cir. 2006) (monthly secretive transfers of funds between three separate bank accounts was an attempt to conceal the nature, location, source, ownership, and control of proceeds);

- *United States v. Magluta,* 418 F.3d 1166 (11th Cir. 2005) (moving cash from Miami to New York to Israel, where it was deposited in an account in a false name, was sufficient to show that when defendant paid his lawyer with check drawn on that account, he intended to conceal the source of the money);

-- using third party name, or name of legitimate business

- *United States v. Sheridan,* ___ Fed. Appx. ___, 2017 WL 663511 (7th Cir. Feb. 16, 2017) (having third party open bank accounts that were used to deposit drug proceeds in one part of the country and funnel them to California concealed the relationship of the money to the drug dealer and his customer; that the transactions were conducted in third party's name and did not conceal his identity was irrelevant);

- *United States v. Ayala-Vazquez,* 751 F.3d 1, 16 (1st Cir. 2014) (using straw purchaser to acquire race cars with drug proceeds was concealment money laundering);

- *United States v. Davis*, 690 F.3d 912, 921 (8th Cir. 2012) (drug dealer's putting cash in girlfriend's account so she could get a cashier's check and use it to buy a car in her name shows purpose was to conceal or disguise);

- *United States v. Cruzado-Laureano,* 404 F.3d 470 (1st Cir. 2005) (corrupt mayor who deposited extortion checks payable to wife's dental practice into her account had intent to conceal; that he was well known in the bank is no defense);

- *United States v. Shepard*, 396 F.3d 1116 (10th Cir. 2005) (depositing fraud proceeds in bank account of family member shows intent to conceal);

-- commingling dirty money and clean money

- *United States v. Jackson*, 935 F.2d 832, 841 (7th Cir. 1991) (commingling drug proceeds with legitimate funds in church bank account showed intent to conceal or disguise);

- *United States v. Ward*, 197 F.3d 1076, 1082 (11th Cir. 1999) (Acommingling of funds is itself suggestive of a design to hide the source of ill-gotten gains"; following *Jackson*);

- *United States v. Shepard*, 396 F.3d 1116 (10th Cir. 2005) (commingling fraud proceeds with funds in bank account of legitimate business shows intent to conceal);

– structuring transactions to conceal:

- *United States v. Elder,* 682 F.3d 1065, 1072 (8th Cir. 2012) (paying for prescriptions with used, small denomination bills rather than by check, and instructing intermediary to limit bank deposits to amounts under $10,000, is circumstantial evidence of intent to conceal or disguise);

- *United States v. Richardson,* 658 F.3d 333, 341 (3d Cir. 2011) (listing ways in which concealment may be shown, including making structured cash deposits before using funds to conduct a transaction, and funneling money through a legitimate business);

- *United States v. Puerto,* 392 Fed. Appx. 692, 697 (11th Cir. 2010) (structuring transactions in a convoluted or highly unusual way is sufficient to establish an intent to conceal);

– use of codes; unusual secrecy:

- *United States v. Gotti*, 459 F.3d 296, 337 (2d Cir. 2006) (cash transactions conducted through several intermediaries, in a surreptitious manner, and using coded language, evidenced intent to conceal the source of the money);

– falsifying nature of the transaction:

- *United States v. Kelley*, 461 F.3d 817, 829-30 (6th Cir. 2006) (disguising kickback to public official as payment to wife for consulting services, depositing check, and having bank issue cashier's check to hotel to pay for wife's birthday party);

- *United States v. Hall*, 434 F.3d 42, 53 (1st Cir. 2006) (giving seller $24,000 in cash in a paper bag and falsifying the bill of sale to show the price of a vehicle was only $5,000 allowed defendant to conceal the additional funds);

– using real estate transaction to conceal or disguise:

- *United States v. Delgado*, 653 F.3d 729, 738 (8th Cir. 2011) (understating the purchase price on real estate documents and paying the difference with cash in an unrecorded transaction violates § 1956(a)(1)(B)(i));

– sending property abroad:

- *United States v. Cihak*, 137 F.3d 252, 262 (5th Cir. 1998) (defendant's apparent hurry to liquidate accounts and transfer them out of the country sufficient to show intent to conceal source and location);

– converting proceeds to goods and services or to cash:

- *United States v. Ayala-Vazquez,* 751 F.3d 1, 15-16 (1st Cir. 2014) (paying expenses in small bills in paper bags through third parties was evidence of concealment);

- *United States v. Bowman*, 235 F.3d 1113, 1117-18 (8th Cir. 2000) (transformation of stolen funds into another form—i.e., merchandise purchased by defendant's girlfriend—evinces the design to conceal);

- *United States v. Dvorak*, 617 F.3d 1017, 1024 (8th Cir. 2010) (depositing fraud proceeds in a bank account and immediately withdrawing the funds as cash, while not dispositive, is strong evidence of an intent to conceal the location of the funds "for the simple reason that cash cannot be traced");

Be careful, simply spending money on goods or services may not be sufficient to show purpose was to conceal or disguise

- *United States v. Sanders*, 929 F.2d 1466 (10th Cir. 1991) (buying a car in own name or daughter's name with drug proceeds is not violation of (a)(1)(B)(i); Section 1956 is not a "money spending" statute);

- *United States v. Demmitt,* 706 F.3d 665, 679 (5th Cir. 2013) (simply sending portion of defendant's fraud proceeds to her son, without any evidence that she used "classic money laundering techniques" to do so, was only "money spending" and not concealment money laundering);

– but there are a number of cases where the court distinguished *Sanders* and held that the defendant converted his cash to goods and services

specifically to conceal or disguise it

- *United States v. Messino*, 382 F.3d 704 (7th Cir. 2004) (purchase of real property made with structured cash deposits and property titled in defendant's daughter's name was intended to conceal);

- *United States v. Magluta,* 418 F.3d 1166 (11th Cir. 2005) (using drug proceeds to pay attorney's fee was not simply money spending where defendant went to great lengths -- including use of foreign bank account in false name -- to conceal source of the money);

- *United States v. Norman,* 143 F.3d 375 (8th Cir. 1998) (purchase of car may not have concealed defendant's identity but it did conceal what happened to the SUA proceeds; converting the money from one form to another -- bank deposit to consumer goods -- may constitute violation of 1956(a)(1)(B)(i));

Note that in these cases, the defendant could be found guilty for concealing or disguising *any* of the attributes of the property being laundered

– it is an offense to conceal or disguise the nature, source, location, ownership or control of the property

– the crime is *not* limited to concealing the identity of the wrongdoer:

- *United States v. Delgado*, 653 F.3d 729, 737 (8th Cir. 2011) ("the money laundering statute does not require an intent to conceal the launderer's identity");

- *United States v. Warshak*, 631 F.3d 266, 321 (6th Cir. 2010) (transactions conducted in defendant's own name did not conceal his identity, but their enormous complexity evinced an intent to conceal the nature and source of the proceeds);

- *United States v. Spencer*, 592 F.3d 866, 880 (8th Cir. 2010) (following *Norman*; defendant's purchase of real property in his own name did not conceal his identity, but the conversion of cash to checks concealed the source and nature of the money);

- *United States v. Hall*, 434 F.3d 42, 50 (1st Cir. 2006) (the transaction need not conceal defendant's identity; it is enough to show the purpose was to conceal the origin of the funds);

- *United States v. Bikundi,* 2016 WL 912169, *42 (D.D.C. Mar. 7, 2016) (moving money from business bank account through accounts of shell companies that defendants' controlled, and ultimately to their personal accounts may not have concealed identity, but it concealed the source of the money);

I always enjoy the cases where the defendant says, “my transaction concealed nothing; it was entirely transparent; even a law enforcement agent could follow it”

- *United States v. Tobin*, 676 F.3d 1264, 1290 (11th Cir. 2012) (“complex arrangements” may be helpful in showing an intent to conceal but are not necessary; that defendant withdrew funds from his bank account after Government executed a search warrant “provided a sufficient basis for the jury to find that [defendant] sought to conceal those funds from the Government”);

- *United States v. Naranjo,* 634 F.3d 1198, 1210 (11th Cir. 2011) (“It is irrelevant that [Defendant] left enough evidence to allow a novice investigator to trace” the transactions back to him; “the statute requires only that proceeds be concealed, not that they be concealed well”);

- *United States v. Kneeland*, 148 F.3d 6 (1st Cir. 1998) (defendant’s transfer of funds through series of bank and brokerage accounts, while creating a paper trail that agents could follow, nevertheless was so complex that it indicated an intent to conceal or disguise);

- *United States v. Shepard*, 396 F.3d 1116 (10th Cir. 2005) (that defendant’s transactions created a paper trail that agents could follow was not a defense to concealment money laundering);

Applying *Cuellar*

The “hot issue” in concealment money laundering cases is the application of the Supreme Court’s decision in *Cuellar*

- decided the same day as *Santos*, this case has caused its own share of confusion

In *Cuellar*, the defendant was transporting currency hidden in his VW Beetle as he drove toward the Mexican border

- he was charged with concealment money laundering under the international money laundering statute, 18 U.S.C. § 1956(a)(2)

- the Government argued, and the Fifth Circuit held (*en banc)* that the concealment of the money in the vehicle while transporting it across the border was enough to satisfy the concealment element

- but the Supreme Court disagreed

- what the Government has to show is not that the defendant concealed the money in order to transport it, but that he transported the money in order to conceal it

- that Cuellar hid the money under the seats of his vehicle tells us something about *the manner* in which he transported the money, but doesn't tell us about *his purpose* in transporting the money

  - *Cuellar v. United States*, 553 U.S. 550, 563-68 (2008) (conviction reversed because the evidence showed only that defendant transported the $81,000 in currency in a secretive or clandestine way—wrapped in bundles in a secret compartment covered with goat hair; there was no evidence that the purpose of the transportation was to conceal or disguise);

So in concealment cases, the Government's proof must focus on the *reason* the defendant did what he did, not the manner in which he did it

- for example, in *Cuellar* the Government might have called a witness to say moving drug money to Mexico helps to conceal it because it's harder for U.S. law enforcement to find it, or because Mexico has lax currency reporting laws

  - *Cuellar v. United States*, 553 U.S. 550 (2008) (Government could have shown that the purpose of courier's transportation of cash to Mexico was to conceal or disguise by showing that he knew that once the money was in Mexico it would be harder for U.S. law enforcement to find, to link to drugs, or to establish ownership or control);

- Note, *Cuellar* was an international money laundering case charged under § 1956(a)(2), but the holding in *Cuellar* applies equally to domestic transactions under § 1956(a)(1)

  - *United States v. Huezo*, 546 F.3d 174 (2d Cir. 2008) (*Cuellar* applies to section 1956(a)(1)(B)(i));

  - *United States v. Garcia,* 587 F.3d 509 (2nd Cir. 2009) (reversing conviction for conspiracy to violate § 1956(a)(1)(B)(i) in light of *Cuellar*);

The case law since *Cuellar* was decidedly is mixed

- some cases that the Government would have won before *Cuellar* have gone the other way

    - *United States v. Valdez*, 726 F.3d 684, 690 (5th Cir. 2013) (under *Cuellar*, it is not enough to show that defendant's commingling fraud proceeds with other funds and moving them to other bank accounts or converting them to other forms made detection less likely; Government must show defendant's purpose was to do so; absent use of false names, third parties or "complicated financial maneuvers", evidence insufficient);

    - *United States v. Faulkenberry*, 614 F.3d 573, 586 (6th Cir. 2010) (reversing § 1956(a)(1)(B)(i) conviction where Government proved only that the defendant used concealment to conduct the money laundering transaction, but did not prove that concealment of the attributes of the money was the "animating purpose" of the transaction);

    - *United States v. Garcia*, 587 F.3d 509 (2d Cir. 2009) (reversing conviction for conspiracy to violate § 1956(a)(1)(B)(i) in light of *Cuellar*; to prove that a currency courier for a drug organization is guilty of concealment money laundering when he is paid to move money from one place to another, the Government must prove that he knew that the overall purpose of the transaction was to conceal or disguise; it is not sufficient to show that the money was packaged in a way that facilitated his transportation of it);

- other courts have held that the convoluted or surreptitious manner in which the financial transaction was conducted was evidence of *both* the manner in which the transaction occurred *and* its purpose

- that's because evidence that what the defendant did actually made it harder to move the money is evidence that his purpose was to conceal or disguise it

    - *United States v. Day*, 700 F.3d 713, 724 (4th Cir. 2012) (Government satisfied *Cuellar* when it showed that the defendant moved his gold to Mexico to conceal its location from law enforcement, and did not hide it in vehicles merely to conceal it while transporting it; convoluted means of transporting proceeds allows jury to infer purpose was to conceal location);

    - *United States v. Warshak,* 631 F.3d 266, 322 (6th Cir. 2010) (distinguishing *Cuellar* and *Faulkenberry*; defendant did not conceal currency and FedEx boxes and send it from his business to his home address to make the transaction easier; it actually made it harder to conduct; he did it conceal the nature, source or location of the money);

    - *United States v. Cedeno-Perez,* 579 F.3d 54 (1st Cir. 2009) (*Cuellar* applies to §

1956(a)(1)(B)(i), but a jury could infer from the convoluted and surreptitious way the transaction was conducted that it was designed to conceal or disguise the attributes of the criminal proceeds);

- *United States v. Williams,* 605 F.3d 556, 566 (8th Cir. 2010) (*Cuellar* applies to § 1956(a)(1)(B)(i), but defendant's structuring his cash transactions was evidence not only of his intent to conceal his money from the Government while conducting the transaction, but also that the *purpose* of the transaction was to conceal the nature of his money);

- *United States v. Valdez,* 522 Fed. Appx. 25, 28 (2nd Cir. 2013) (under *Cuellar*, purpose of the transaction can be shown with circumstantial evidence, such as evidence that defendant engaged in massive international scheme to move drug proceeds overseas through foreign banks);

- *United States v. Arledge*, 524 Fed. Appx. 83, 86 (5th Cir. 2013) (use of drug money to buy a car satisfied *Cuellar* where defendant used cash to make the purchase, signed a "lease" even though he was buying the car so that he could recover it if the Government seized it, and misrepresented the source of the purchase money on the "lease" as income from his work as a barber);

In all events, the simple deposit, transportation, or transmission of proceeds does not satisfy conceal or disguise requirement:

- *United States v. Corchado-Peralta*, 318 F.3d 255, 259 (1st Cir. 2003) (simple deposit of checks representing drug money into family bank account conceals nothing);

- *United States v. Ramming*, 915 F. Supp. 854, 867 (S.D. Tex. 1996) (where defendants left a "clean paper trail so well defined that the regulators could follow it" and there were no unusual or convoluted transactions, there was insufficient evidence of intent to conceal or disguise);

- *United States v. Herron*, 97 F.3d 234, 237 (8th Cir. 1996) (defendant's use of *West*ern Union to transfer funds cannot by itself satisfy the concealment element of the offense);

4. Transaction reporting requirement

Conducting a transaction with the intent to evade the CTR, CMIR or Form 8300 currency reporting requirements is an offense under § 1956(a)(1)(B)(ii)

- *United States v. Calmes,* 574 Fed. Appx. 295, 301 (5th Cir. 2014) (motorcycle dealer convicted of § 1956(a)(1)(B)(i) and (ii) for selling vehicles to drug dealers with the intention of not filing Form 8300s);

- *United States v. Delgado,* 653 F.3d 729, 737-38 (8th Cir. 2011) (using cash to

buy two cashier's checks, each for less than $10,000, at different banks on the same day, violated § 1956(a)(1)(B)(ii));

- *United States v. Bronzino*, 598 F.3d 276, 280 (6th Cir. 2010) (structuring the cashing of casino chips received in satisfaction of an illegal gambling debt violated § 1956(a)(1)(B)(ii));

— this is easier to prove than a "conceal or disguise" offense under § 1956(a)(1)(B)(i)

- *United States v. Stephenson*, 183 F.3d 110 (2d Cir. 1999) (buying car in cash installments under $10,000 may not be sufficient to establish a conceal or disguise offense; concealment entails deception beyond avoiding compelled disclosure; but it might violate (B)(ii));

International Money Laundering Offenses Under Section 1956(a)(2)

Section 1956(a)(2) is the international money laundering statute;

— it applies when property is moved into or out of the United States

Like § 1956(a)(1), it has multiple parts

— it has a "promotion" prong in § 1956(a)(2)(A)

— a concealment prong in § 1956(a)(2)(B)(i)

— and a currency reporting avoidance prong in § 1956(a)(2)(B)(ii)

— it *does not* have a tax evasion prong

For each of the three prongs of § 1956(a)(2), the elements are the same as they are for their counterparts, with two important exceptions

-- 1) instead of a "financial transaction," you need to show transportation, transfer or transmission of proceeds in or out of the U.S.

-- 2) 1956(a)(2)(A) does not contain the "proceeds" element

Transport, transmit or transfer

Just as the financial transaction is the *actus reus* of the domestic money

laundering offense, the transportation, transmission or transfer of the money is the *actus reus* of the international offense

- the difference is that instead of having to prove that there was a financial transaction as defined in § 1956(c)(4), you have to prove that the property was sent in some fashion across the border

The offense may be committed by the physical transportation of currency or monetary instruments as the defendant was attempting to do in *Cuellar*

- but it can also include the transfer of money to or from the United States by means of a wire transfer or hawala transaction in which no money actually moves across the border

    - *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789, 797 (N.D. Ill. 1999) (the Government must prove that the money came from outside United States to satisfy the elements of section 1956(a)(2)(A));

- it is sufficient to show that an offsetting set of debits and credits had *the effect* of moving money across the border

    - *United States v. Dinero Express*, 313 F.3d 803, 806-07 (2d Cir. 2002) (course of conduct — *i.e.,* sending money through money remitter—that begins with sum of money in one country and ends with related sum in another country constitutes a transfer even though the transaction was accomplished through offsetting debits and credits so that no single step involved the movement of money across the border);

As mentioned earlier, under the extra-territoriality provision, the transfer of money from one foreign country to another can be a violation of § 1956(a)(2) if the money passes through the United States

- *United States v. Jenkins*, 633 F.3d 788, 805 (9th Cir. 2011) (wire transfer that begins in Canada, involves an exchange between two U.S. banks, and ends with a credit to a recipient in Antigua is a transfer within the scope of § 1956(a)(2));

- *United States v. All Assets Held at Bank Julius Baer & Co.,* 571 F. Supp. 2d 1 (D.D.C. 2008) (transfer of dollars between foreign banks can be a violation of section 1956(a)(2) because it comprises two transfers: one into a New York bank acting as intermediary, and one from that bank to the receiving bank);

- Both the sender and the receiver can be guilty as a principal:

- *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789, 797 (N.D. Ill. 1999) (violation applies equally to the sender and the receiver);

– so is a person who directs a third party to move the money:

- *United States v. Ramirez,* 555 Fed. Appx. 315, 320-21 (5th Cir. 2014) (persons who transfer drug proceeds to others with the intent that it be transported to Mexico to further an ongoing drug operation are guilty of conspiracy to commit promotion money laundering under § 1956(a)(1)(A)(i) and 1956(a)(2)(A));

- *United States v. Cornelio-Legarda*, 381 Fed. Appx. 835, 841-42 (10th Cir. 2010) (defendant who directed subordinate to transfer $500 to Mexico to obtain methamphetamine guilty of § 1956(a)(2)(A));

Promotion money laundering under § 1956(a)(2)(A)

It is a violation of § 1956(a)(2)(A) to send money into or out of the U.S. for the purpose of promoting an SUA offense (including a foreign SUA listed in § 1956(c)(7)(B))

– the "promotion" element of § 1956(a)(2)(A) is the same as it is for § 1956(a)(1)(A)(i):

- *United States v. Trejo*, 610 F.3d 308, 314 (5th Cir. 2010) (because the language in § 1956(a)(1)(A)(i) is identical to § 1956(a)(2)(A), the case law defining "promotion" under the former is applicable to cases brought under the latter);

– so if someone sends money out of the U.S. to promote a drug offense or a foreign crime, or into the U.S. to promote terrorism, there is a violation of §1956(a)(2)(A);

- *United States v. Caplinger,* 339 F.3d 226, 233 (4th Cir. 2003) (circumstantial evidence sufficient to show defendant used funds transferred overseas to keep scheme going—i.e., by maintaining corporate airplane, paying salaries and expenses, and keeping up appearances to lull investors into fraud scheme);

- *United States v. Lee*, 937 F.2d 1388, 1396-97 (9th Cir. 1991) (transfer of monetary instruments from United States to China promotes smuggling of fish in violation of section 545 and Lacey Act);

- *United States v. Monroe*, 943 F.2d 1007, 1015-16 (9th Cir. 1991) (wire transfer to Hong Kong to pay for marijuana shipment);

– and as is true for § 1956(a)(1)(A)(i), the transaction can at once be both a money laundering offense and a violation of the SUA being promoted

- *United States v. Piervinanzi*, 23 F.3d 670, 679-83 (2d Cir. 1994) (because section 1956(a)(2)(A) contains no proceeds requirement, there is no merger problem when the defendant wires money out of the United States to promote fraud against bank and the wire transfer constitutes both the money laundering offense and the bank fraud);

- *United States v. Nazemzadeh,* 2014 WL 310460, *12 (S.D. Cal. Jan. 28, 2014) (following *Piervinanzi*; wire transfer to U.S. did not merge with the IEEPA offense that it was intended to promote);

Like an offense under the domestic statute, a person may commit a money laundering offense under § 1956(a)(2)(A) if his intent is to promote an offense committed by someone else

– For example, a payment processor who sends money into the US to pay winning bettors in someone else's internet gambling scheme would be guilty of money laundering under § 1956(a)(2)(A)

- *United States v. Arthur*, 582 F.3d 713, 719 (7th Cir. 2009) (wife commits promotion money laundering when she deposits funds husband is concealing from bankruptcy trustee into her bank account, thus promoting his fraud);

- *United States v. Bueno*, 585 F.3d 847, 850 (5th Cir. 2009) (currency courier who knew he was working with a drug organization intended to promote their operation when he transported money on their behalf);

- *United States v. Nektalov*, 2004 WL 2389826, *2 (S.D.N.Y. 2004) (merchant who understands that the gold and diamonds he sells to drug dealers will be taken to Colombia and converted to cash appreciates his role in the money laundering cycle and is therefore guilty of promoting the underlying drug offense), ***aff'd***, 461 F.3d 309 (2d Cir. 2006);

- *United States v. Bodmer*, 342 F. Supp. 2d 176, 191 (S.D.N.Y. 2004) (defendant need not be the one who would commit the offense being promoted; defendant, a non-resident foreign national who could not, by the terms of the statute, commit a violation of the Foreign Corrupt Practices Act, could be convicted of laundering money with the intent to promote the violation);

- *Cf. United States v. Trejo*, 610 F.3d 308, 317-18 (5th Cir. 2010) (one-time, low-level participant in drug organization who is paid merely for performing the act for which he was hired, without concern for the ongoing success of the organization, does not have the required intent to promote);

- *But see United States v. Calderon*, ___ Fed. Appx. ___, 2016 WL 7187375 (5th Cir. Dec. 9, 2016) (distinguishing *Trejo;* low-level functionary may act without specific

intent to promote, but defendant's extensive awareness of the inner workings of the organization and repeated involvement in its operation provided circumstantial proof that he had specific intent to promote the organization's unlawful purpose).

No "proceeds" element

The big difference between the domestic and the international money laundering statutes is that the "promotion" prong does not contain a proceeds element

- thus, a person can commit a violation of § 1956(a)(2)(A) by sending "clean" money into or out of the United States *as long as the intent was to promote an SUA*

- it's a "reverse money laundering" statute:

  - *United States v. Cornelio-Legarda,* 381 Fed. Appx. 835, 841-42 (10th Cir. 2010) (wiring $500 to Mexico to buy methamphetamine is a violation of § 1956(a)(2)(A); there is no requirement that the money be SUA proceeds);

  - *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789 (N.D. Ill. 1999) (sending property into the U.S. to promote foreign terrorism violates § 1956(a)(2)(A); the property need not be the proceeds of any offense; it need only be sent with intent to promote an SUA offense);

  - *United States v. Narviz-Guerra*, 148 F.3d 530 (5th Cir. 1998) (sending money from Mexico to U.S. to buy a ranch to be used for marijuana distribution constitute § 1956(a)(2)(A) violation);

- for that reason, in § 1956(a)(2)(A) cases there is no "merger" problem regarding the source of the money

- in promotion money laundering cases under § 1956(a)(1)(A)(i), we have to be sure that the act that generated the money and the money laundering transaction are separate offenses because the money has to be "proceeds" when the crime occurs

- but in international promotion cases, the money *does not* have to be proceeds of an SUA, so we don't have to worry about any merger

Likewise *Santos* was never an issue in § 1956(a)(2)(A) cases

- if there is no proceeds element, there is no need to worry if "proceeds" means "gross proceeds" or "net profits"

- *United States v. Krasinski,* 545 F.3d 546, 551 (7th Cir. 2008) (§ 1956(a)(2)(A) contains no proceeds element; therefore the Supreme Court's decision in *Santos* defining proceeds has no application in § 1956(a)(2)(A) case);

- *United States v. Moreland,* 622 F.3d 1147, 1166-67 (9th Cir. 2010) (because the international promotion money laundering statute, § 1956(a)(2)(A), contains no proceeds element, *Santos* is irrelevant);

So Section 1956(a)(2)(A)(i) is a powerful tool that we can use when money is sent into our out of the United States and we don't know its source

– <u>But the Government still has to prove that the purpose of the transfer is to promote an SUA</u>

Concealment money laundering under § 1956(a)(2)(B)(i)

Concealment cases under § 1956(a)(2)(B)(i), on the other hand, are the same as concealment cases under § 1956(a)(1)(B)(i)

– under *Cuellar,* you have to show that the *purpose* of the transportation or transfer of the property was to conceal it, not just that the property was concealed so that the defendant could transport it

  - *United States v. Ness,* 565 F.3d 73, 78 (2d Cir. 2009) (reversing conviction in light of *Cuellar*; evidence that defendant received millions of dollars in drug proceeds from drug traffickers with instructions to ship it to Europe without creating a paper trail, and that he did so by hiding the money in packages of jewelry, only proved that he concealed to transport, not that the purpose of the transportation was to conceal);

  - *United States v. Roberts,* 2009 WL 1833389, *4 (E.D.N.Y. June 25, 2009) (granting Rule 29 motion as to § 1956(a)(2)(B)(i) counts; evidence of concealing drug proceeds on flight to Jamaica showed only that funds were concealed for purpose of transportation; purpose of the transportation was likely to distribute the proceeds or buy more drugs; following *Cuellar* and *Ness*);

– cases distinguishing *Cuellar*:

  - *United States v. Mercedes*, 283 Fed. Appx. 862, 864 (2d Cir. 2008) (distinguishing *Cuellar*; there was sufficient basis for concluding purpose and not just manner of transaction was to conceal where defendant admitted at her guilty plea that she believed the purpose of the transaction was to conceal drug money; moreover, a highly secretive transaction -- involving $700,000 in currency, money

counting machines and ledgers -- implies a purpose to conceal);

- *United States v. All Funds Held in the Name of Kobi Alexander*, 2008 WL 3049895, *6 & n.6 (E.D.N.Y. 2008) (distinguishing *Cuellar*; defendant's sending millions of dollars to a foreign country upon learning he was under criminal investigation would be sufficient to prove concealment money laundering; it is the timing and circumstances of the transfer, not (as in *Cuellar*) the *manner* of the transfer, that establishes the design to conceal or disguise);

V. Section 1957

Section 1957 was designed to freeze criminal proceeds out of the banking system and to make the criminals proceeds worthless

- *United States v. Hatcher*, 132 Fed. Appx. 468, 477 n.3, 2005 WL 1253867 (4th Cir. 2005) ("Section 1957 is designed to make the drug dealer's money worthless"), quoting legislative history;

-- it makes it an offense for anyone to conduct a financial transaction with more than $10,000 in criminal proceeds

- *United States v. Kratt*, 579 F.3d 558, 561 (6th Cir. 2009) ("Section 1956 criminalizes classic money laundering, while § 1957 criminalizes moving around at least $10,000 in criminal proceeds for any purpose through a financial institution");

- *United States v. Allen*, 129 F.3d 1159 (10th Cir. 1997) (Congress's primary concern in enacting § 1957 may have been with third parties who give criminals opportunity to spend ill-gotten gains, but the statute nevertheless reaches conduct of wrongdoers who conduct transactions with fruits of their own criminal acts);

So, a banker cannot knowingly accept $10,000 in criminal proceeds for deposit, and a car dealer cannot knowingly accept $10,000 in proceeds in payment for a car

- *United States v. Johnson*, 971 F.2d 562, 568 (10th Cir. 1992) (the statute criminalizes the actions of third parties who have aided drug dealers by allowing them to dispose of drug proceeds but whose conduct is not covered by conspiracy law);

The "knowledge" and "proceeds" elements are the same as they are for § 1956

— the defendant must conduct a monetary transaction involving more than

$10,000 in SUA proceeds, and must know that the property represents the proceeds of some form of criminal activity.

- *United States v. Kratt*, 579 F.3d 558, 560-61 (6th Cir. 2009) ("proceeds" means the same thing in §§ 1956 and 1957);

- *United States v. Savage*, 67 F.3d 1435, 1442 (9th Cir. 1995) (criminally derived property means the same thing as proceeds under section 1956); *United States v. Castellini*, 392 F.3d 35, 44 n.7 (1st Cir. 2004) (same);

- *United States v. Campbell*, 977 F.2d 854, 858-60 (4th Cir. 1992) (merchant doing business with drug dealer can be convicted under section 1957 if he or she knows of, or is willfully blind to, customer's source of funds);

— what's different is that there is no specific intent element:

— it's enough that the defendant simply spent or moved the criminally derived money

- *United States v. Huber*, 404 F.3d 1407, 1057 (8th Cir. 2005) (section 1956 differs from section 1957 with respect to the specific intent element; "no intent to promote or knowledge of a design to conceal is required, but the transaction must consist of property with a value greater than $10,000");

- *United States v. Nickolas*, 2014 WL 5811127, *1 (D. Ariz. Nov. 10, 2014) (§ 1957 requires no mens rea greater than the defendant's knowledge that he engaged in a monetary transaction involving criminally derived property);

Accordingly, many otherwise routine transactions involving criminal proceeds may be charged as § 1957 offenses:

- *United States v. Igbokwe*, 518 F.3d 550, 552 (8th Cir. 2008) (simple wire transfer in excess of $10,000 from account containing Medicare fraud proceeds is a section 1957 violation);

- *United States v. Diamond*, 378 F.3d 720, 729 (7th Cir. 2004) (purchase of cashier's check with fraud proceeds is a section 1957 offense);

- *United States v. McClendon*, 195 F.3d 598, 599 (11th Cir. 1999) (transferring proceeds of health care fraud offense to personal bank account violated section 1957);

- *United States v. Ramirez*, 196 F.3d 895, 897 (9th Cir. 1999) (using fraud proceeds to make extravagant personal expenditures);

- *United States v. Caldwell*, 302 F.3d 399, 407 (5th Cir. 2002) (simple deposit of check representing fraud proceeds was a section 1957 violation);

But the transaction must involve 1) more than $10,000, and 2) a financial institution

Financial institution

The cases illustrate the wide variety of transactions involving financial institutions that qualify as § 1957 offenses:

- *United States v. Huff*, 641 F.3d 1228, 1230 (10th Cir. 2011)(depositing a check is a monetary transaction);

- *United States v. Pizano,* 421 F.3d 707, 713 (8th Cir. 2005) (making down payments on real property with check and wire transfer were monetary transactions);

- *United States v. Deason,* 622 Fed. Appx. 350 (5th Cir. 2015) (purchasing a cashier's check is a monetary transaction affecting interstate commerce because it constitutes a transfer of funds by a financial institution and the use of a financial institution);

- *United States v. Wright,* 341 Fed. Appx. 709, 713 (2d Cir. 2009) (because a car dealer is a financial institution under 31 U.S.C. 5312(a)(2)(T), leasing a car is a monetary transaction);

- *United States v. Hawkey*, 148 F.3d 920, 924-25 (8th Cir. 1998) (use of funds misappropriated from charitable organization to buy vehicles for personal use constituted section 1957 violation);

$10,000 Requirement

Unlike § 1956 which has no dollar threshold, there is no § 1957 offense unless the monetary transaction involved more than $10,000 in SUA proceeds

- *United States v. Wright*, 651 F.3d 764, 770-72 (7th Cir. 2011) (the transaction must have involved more than $10,000 in SUA proceeds at the time the transaction occurred; using $8,000 in proceeds to buy real property is not a § 1957 violation even though the property later appreciated in value);

- *United States v. Adams*, 74 F.3d 1093, 1101 (11th Cir. 1996) (at least $10,000 of the property involved in the monetary transaction must be traceable to SUA proceeds);

-- one issue is whether several transactions can be aggregated to satisfy the $10,000 requirement

-- generally, the answer is no, but if the transactions are installments on a single purchase, it may be possible to aggregate them

- *United States v. George*, 363 F.3d 666, 674-75 (7th Cir. 2004) (purchasing car with cash in two installments of $6,000 and $9,000 satisfies the $10,000 requirement);

- *United States v. Caldwell*, 302 F.3d 399, 406 (5th Cir. 2002) (noting that district court set aside jury's verdict on one section 1957 count on ground that amount could not be aggregated; no Government appeal);

- *United States v. Wright,* 341 Fed. Appx. 709, 713 (2nd Cir. 2009) (initial deposit and monthly payments to lease a car aggregated to satisfy the $10,000 requirement);

The other issue is whether the $10,000 requirement is satisfied if the bank account in question contains commingled funds

-- this has led to a peculiar rule in the Ninth Circuit

- *United States v. Rutgard*, 108 F.3d 1041 (9th Cir. 1997) (withdrawal of commingled money does not meet $10,000 threshold if the remaining balance exceeds the amount of the tainted funds; dirty money is presumed to be "last out"; characterizing *United States v. Moore*, 27 F.3d 969 (4th Cir. 1994), as creating a presumption that transfer from commingled account involves proceeds and declining to follow it);

- *United States v. Loe*, 248 F.3d 449, 467 n.81 (5th Cir. 2001) (because aggregate of withdrawals from commingled account was less than amount of clean funds, Government failed to establish $10,000 threshold

– on the other hand, the Tenth Circuit says that any $10,000 withdrawal from a commingled account containing at least $10,000 in SUA proceeds is good enough

- *United States v. Johnson*, 971 F.2d 562, 570 (10th Cir. 1992) (in the context of a withdrawal, the Government is not required to prove that no untainted funds were commingled with the unlawful proceeds for section 1957 purposes);

– cases continue to go both ways, but the recent cases follow *Johnson*

- *United States v. Moore*, 27 F.3d 969, 976-77 (4th Cir. 1994) (because money is fungible, it may be presumed in section 1957 cases that transacted funds, up to the amount of criminal proceeds in an account, constitute such proceeds);

- *United States v. Mooney*, 401 F.3d 940 (8th Cir. 2005) (deposit of five checks drawn on an account containing commingled funds was a section 1957 offense even though there was enough clean money in the account to cover the checks; "the Government need not trace each dollar to a criminal source to prove a violation of 1957");

- *United States v. Dazey*, 403 F.3d 1147 (10th Cir. 2005) (following *Johnson*; as a general matter, tracing is not required to rule out the presence of legitimate funds; moreover, it was mathematically impossible for $100,000 transaction not to involve at least $10,000 in SUA proceeds because defendant had, at most, $46,000 in legitimate funds in the commingled account);

When would the Government use Section 1957:

- When it can prove that the defendant knowingly moved tainted money but cannot establish his motive

- When it wants to illustrate to the jury what happened to the defendant's criminal proceeds

VI. Conspiracy

The elements of a money laundering conspiracy, charged under 18 U.S.C. § 1956(h), are stated differently from circuit to circuit,

- but the key ingredients are an agreement to commit money laundering – i.e. to conduct a financial transaction with one of the specific intents – and knowing (or believing) that the property to be laundered is criminal proceeds

  - *United States v. Broughton*, 689 F.3d 1260, 1280 (11th Cir. 2012) (the only elements of a § 1956(h) conspiracy are 1) an agreement to commit a money laundering offense, and 2) knowing and voluntary participation in that agreement by the defendant);

  - *United States v. Slagg*, 651 Fed. Appx. 832, 844 (8th Cir.2011) (the Government must prove that "the defendant agreed with another person to violate the substantive provisions of the money laundering statute");

- *United States v. Green*, 599 F.3d 360, 374 (4th Cir. 2010) (§ 1956(h) requires proof of an agreement to commit money laundering, that defendant knew that at least some of the money was criminally derived, and that he intended to join the conspiracy);

- *United States v. Wittig,* 575 F.3d 1085, 1103 (10th Cir. 2009) (under § 1956(h), the Government must prove "(1) that there was an agreement between two or more persons to commit money laundering and (2) that the defendant joined the agreement knowing its purpose and with the intent to further the illegal purpose"); proof that the property they agreed to launder was, in fact, criminal proceeds is not required; proof that the defendants agreed to obtain criminal proceeds and to launder them is sufficient);

- *United States v. Arthur*, 582 F.3d 713, 717 (7th Cir. 2009) (for a conspiracy conviction, the Government must prove that the defendant agreed to launder money, and that she knew it represented the proceeds of an illegal activity);

- *United States v. Singh*, 518 F.3d 236, 248 (4th Cir. 2008) (to prove a section 1956(h) conspiracy, the Government must establish (1) an agreement to commit money laundering existed between one or more persons; (2) the defendant knew that the money laundering proceeds had been derived from an illegal activity; and (3) the defendant knowingly and voluntarily became part of the conspiracy);

Section 1956(h) does not require proof of an overt act:

- *Whitfield v. United States*, 125 S. Ct. 687 (2005) (when Congress omits an overt act requirement from a conspiracy statute, the common law rule—which does not require proof of an overt act—applies; section 1956(h) does not require proof of an overt act);

- *United States v. Huber,* 404 F.3d 1047 (8th Cir. 2005) (same, following *Whitfield*);

Agreement:

The cases holding that there was sufficient evidence of the defendant's intent to join the conspiracy are always fact-bound and we always seem to prevail:

- *United States v. George,* 761 F.3d 42, 49 (1st Cir. 2014) (circumstantial evidence of the existence of an agreement included defendant's report to a third party that he had found a reliable person to launder his money and all was "set to go");

- *United States v. Alaniz*, 726 F.3d 586, 603 (5th Cir. 2013) (jury could infer agreement among defendant's family members to launder from their knowledge of his source of income and their willingness to engage in inexplicable financial transactions);

- *United States v. McBride,* 724 F.3d 754, 757 (7th Cir. 2013) (conspiracy requires proof that at least two people agreed to conduct transactions involving criminally

derived property; if the second person does not know the money is dirty, there is no conspiracy; but defendant convicted of conspiring with girlfriend who was willfully blind);

- *United States v. Chao Fan Xu,* 706 F.3d 965, 982 (9th Cir. 2013) (agreement to transfer more than $10,000 in criminal proceeds may be inferred from defendants' acts or other circumstantial evidence);

- *United States v. Tobin,* 676 F.3d 1264, 1291 (11th Cir. 2012) (existence of an agreement with "persons unknown" is sufficient to support a conviction under § 1956(h), and may be shown by circumstantial evidence B such as repeated, unexplained transfers of substantial amounts of money B that defendant was not acting alone);

- *United States v. Diaz-Pellegaud,* 666 F.3d 492, 498-99 (8th Cir. 2012) (evidence that defendant in Arizona gave co-defendant in different state a list of bank account numbers, that the money was later withdrawn in Arizona, and that drugs continued to arrive in the other state was sufficient to show agreement by Arizona defendant to commit promotion money laundering);

- *United States v. Ulbricht,* 2014 WL 3362059, *11 (S.D.N.Y. July 9, 2014) (setting up an online marketplace with the specific intent to facilitate the anonymous laundering of criminal proceeds may be charged as a money laundering conspiracy);

Knowledge element:

Some courts say that proof that the money to be laundered is criminally derived is an element of the money laundering conspiracy:

- *United States v. Cedeno-Perez,* 579 F.3d 54, 58 n.4 (1st Cir. 2009) (although the defendant is charged only with conspiracy, the Government must prove that he had the mental state required for the substantive offense);

- *United States v. Johnson*, 440 F.3d 1286, 1295-96 (11th Cir. 2006) (defendant cannot be convicted of money laundering conspiracy if there is no evidence that the only other conspirator had the required knowledge and intent);

- *United States v. Silvestri,* 409 F.3d 1311 (11th Cir. 2005) (to prove conspiracy to violate § 1956 or § 1957, Government must prove defendant knew money was proceeds of some form of unlawful activity);

– but others have recognized that in a conspiracy case, factual impossibility is not a defense

– so the defendant only has to have *believed* that the property to be

laundered was criminally derived

- *United States v. Threadgill*, 172 F.3d 357, 367 (5th Cir. 1999) (knowledge that money is criminal proceeds is not an element of a conspiracy offense and need not be alleged or proved);

- *United States v. George*, 839 F. Supp. 2d 430, 436 (D. Mass. 2012) (because factual impossibility is not a defense to conspiracy, the Government need only show that the defendant believed the money was SUA proceeds and that he agreed to launder it);

- *United States v. Wittig*, 568 F. Supp. 2d 1284 (D. Kan. 2008) (acquittal on the SUA does not mean defendant cannot be guilty of a section 1956(h) conspiracy; that there was no SUA does not mean defendants could not have agreed to launder SUA proceeds; factual impossibility is not a defense);

- *United States v. Kriz*, 1999 WL 33656974, *5 (N.D. Iowa 1999) (knowledge that the money came from drug activity is an element of the substantive crime of money laundering but is not an element of a section 1956(h) conspiracy);

Similarly, the property the defendants conspired to launder does not have to have in fact been SUA proceeds

- *United States v. Chao Fan Xu*, 706 F.3d 965, 980 (9th Cir. 2013) (that Government could not prove that funds transferred to the U.S. from China were traceable to the victim of a Chinese fraud did not preclude conviction for § 1956(h) conspiracy to violate § 1957; conspiracy does not require proof that transferred funds were actually SUA proceeds but only that defendants agreed to transfer such proceeds in a manner that would violate § 1957);

- *United States v. Neuman,* 621 Fed. Appx. 363 (9th Cir. 2015) (following *Chao Fan Xu*; conspiracy conviction requires only agreement to launder SUA proceeds; the underlying SUA need not be completed, charged or proved);

- *United States v. Wittig,* 575 F.3d 1085, 1097 (10th Cir. 2009) (Government need not prove that property defendants agreed to launder was in fact SUA proceeds; agreement to obtain and launder such proceeds is all that is required; therefore acquittal on substantive SUA counts does not bar conviction on money laundering conspiracy);

- *United States v. Hassan*, 578 F.3d 108 (2d Cir. 2008) (to obtain a conviction under § 1956(h), the Government does not have to prove that the money involved in the financial transactions the defendant conspired to conduct was the proceeds of specified unlawful activity; it is sufficient if the defendant believed the money was SUA proceeds and intended to launder it);

- *United States v. Adair*, 436 F.3d 520, 525-26 (5th Cir. 2006) (section 1956(h) does not require proof of the elements of the substantive offense; therefore, Government did not have to prove that the money defendants agreed to launder was in fact SUA proceeds);

Generally, indictments alleging § 1956(h) conspiracies charge a single conspiracy with multiple objects

– that is, the defendant may be charged with conspiring to commit promotion money laundering and concealment money laundering in the same count

- *United States v. Green*, 599 F.3d 360, 374 n.14 (4th Cir. 2010) (conviction for § 1956(h) conspiracy with multiple objects will be affirmed despite general verdict if the evidence was sufficient to support any one of the objects);

- *United States v. Fuchs*, 467 F.3d 889, 906 (5th Cir. 2006) (conviction on a multi-object section 1956(h) conspiracy will be affirmed if the evidence is sufficient as to either object).

Civil Money Laundering Enforcement: 18 U.S.C. § 1956(b)

Under section 1956(b), the Government may file a civil action against any person who commits an offense under any provision of section 1956(a) or 1957:

- *United States v. Haywood*, 864 F. Supp. 502, 507-08 (W.D.N.C. 1994) (civil suit against attorney for laundering proceeds);

- *United States v. Banco Internacional / BITAL S.A.*, 110 F. Supp. 2d 1272, 1279 (C.D. Cal. 2000) (claim preclusion doctrine bars section 1956(b) action when prior civil forfeiture arising out of same facts was dismissed with prejudice); *id.* (liability doctrine does not make bank liable for acts of employee unless employee acted, in part, to benefit the bank);

- *United States v. Banco Industrial de Venezuela*, CV 00-373 DOC (C.D. Cal. May 3, 2001) (granting motion for summary judgment on proceeds issue; transfer of funds from commingled account can be money laundering; but whether representation by undercover agent was sufficient for section 1956(a)(3) liability is issue of fact for trial);

Long-arm jurisdiction:

Section 1956(b)(2) gives a court long-arm jurisdiction over foreign defendants in section 1956(b) actions.

- *United States v. Prevezon Holdings, Ltd.,* 2015 WL 4719786, *15-17 (S.D.N.Y. Aug. 7, 2015) (overlapping ownership of foreign corporations and corporation that committed the money laundering offense, and foreign corporations' upstream role in the offense, sufficient for personal jurisdiction under NY long-arm statute; no reference to § 1956(b)(2));

Restraining orders and receivers:

Sections 1956(b)(3) and (4) authorize the court to restrain assets of a foreign defendant in a section 1956(b) action and to appoint a federal receiver to maintain the assets of the defendant.