THE MONEY LAUNDERING STATUTES: CURRENT ISSUES

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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):

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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

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.

— Or the defendant could engage in repeated conduct, *e.g.*, depositing his fraud proceeds into various bank accounts on a regular basis

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)

— That means that the money laundering offense may be prosecuted in any district through which the money moves

- *United States v. Stern,* 2017 WL 4676660 (S.D.N.Y. Oct. 17, 2017) (defendant who conducts a transaction by receiving money after it has been transported through multiple districts may be prosecuted in any of the districts through which the money moved; watch dealer in E.D.N.Y. who receives money from courier who crossed the Verrazano-Narrows Bridge may be prosecuted in SDNY);

- *United States v. Louissaint,* 2016 WL 3145145 (W.D.N.Y. June 3, 2016) (defendant who used fraud proceeds derived from E.D.N.Y. to promote another offense in S.D.N.Y. by first sending money to account in W.D.N.Y. could be prosecuted in W.D.N.Y.);

— Moreover, in response to *Cabrales*, 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

- That's because money laundering is a continuing offense that begins when the money starts to move

    - *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);

    - *United States v. Myers*, 854 F.3d 341, 353-54 (6th Cir. 2017) (following Nichols; defendant who stole motorhome in Michigan and transported it to another state where, in selling it, he committed a money laundering offense, could be prosecuted in Michigan for the money laundering offense under § 1956(i)(1)(B));

    - *United States v. Carryl*, 2019 WL 1139501 (W.D.N.C. Mar. 12, 2019) (defendant who commits fraud in W.D.N.C. by inducing victim to send money to NY, and then commits § 1957 violation there by spending the money, may be charged with § 1957 violation in W.D.N.C. because he caused the SUA proceeds to be moved from that district to the place where they were laundered);

- Note that venue for a conspiracy lies wherever any overt act takes place, and the SUA is itself an overt act in furtherance of the conspiracy.

    - *United States v. Myers,* 854 F.3d 341, 354 (6th Cir. 2017) (venue for a § 1956(h) conspiracy lies wherever any overt act takes place – even though proof of an overt act is not required; because the SUA itself is an overt act in furtherance of the conspiracy, a § 1956(h) conspiracy may be prosecuted in the district where the SUA occurred);

    - *United States v. Logan*, 542 Fed. Appx. 484, 493 (6th Cir. 2013) (sale of drugs is an overt act in furtherance of a conspiracy to launder drug proceeds, so defendant who launders proceeds in California may be prosecuted for money laundering conspiracy in Michigan, even though he was never there, because a co-conspirator sold drugs there);

    - *United States v. Micciche*, 165 Fed. Appx. 379, 386 (6th Cir. 2006) (affirming denial of Rule 21(b) motion for change of venue; section 1956(h) conspiracy may be prosecuted in any district where the conspiracy was formed or where an overt act occurred);

3. 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. RJR Nabisco, Inc. v. European Community,* ___ U.S. ___, 136 S. Ct. 2090 (2016) (Government may base a RICO prosecution under § 1962 on acts committed outside of the United States if the pattern of racketeering includes predicate acts, such as money laundering, that apply extraterritorially, but a private RICO plaintiff proceeding under § 1964(c) must allege and prove a "domestic injury" to its business or property, and may not recover for foreign injuries), abrogating *United States v. Chao Fan Xu,* 706 F.3d 965 (9th Cir. 2013) with regard to RICO;

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);

The Sixth Circuit recently issued an opinion regarding the procedure for contesting extraterritorial jurisdiction.

- *United States v. Martirossian,* 917 F.3d 883 (6th Cir. 2019) (to challenge the extraterritorial jurisdiction of the money laundering statute, a defendant whose motion to dismiss the indictment on jurisdiction grounds is denied must stand trial and be convicted before he may appeal; there is no right not to be tried in a money laundering case that would allow the defendant to take an interlocutory appeal from the denial of his motion);

  Martirossian Note: Defendant, a citizen of Armenia living in China, was indicted on money laundering charges in the Southern District of Ohio. He moved, through counsel, to dismiss the indictment on jurisdictional grounds. Because he had never traveled to the United States, he said, he could not have committed any offense over which a US court would have jurisdiction.

  The district court declined to consider the motion. Applying the fugitive disentitlement doctrine, it held that it would address Defendant's challenge to the extraterritorial application of the money laundering statute only when he appeared in Ohio to answer

the charges, and that there was no right to an interlocutory appeal.

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,

- *United States v. Diggles*, 928 F.3d 380 (5th Cir. 2019) (where defendant was the perpetrator of the underlying fraud, it was reasonable for the jury to find that he "was not oblivious to the unlawful source of these funds");

- *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. Leman,* 574 Fed. Appx. 699, 706-07 (6th Cir. 2014) (once the jury convicted defendant of the underlying SUA, it could not fail to find that he knew the laundered funds were proceeds of some form of unlawful activity; omitted jury instruction on that point was therefore harmless);

– but the launderer need not be person who committed the underlying offense

– he could have been acquitted or never charged with the SUA yet be guilty of money laundering

- *United States v. Rivas-Estrada,* 761 Fed. Appx. 318 (5th Cir. 2019) (that money laundering defendant was also charged with the SUA but was acquitted is immaterial; third party may be guilty of laundering the proceeds of someone else's SUA);

- *United States v. Odiase,* 2018 WL 2926626, *2 (S.D.N.Y. Jun. 12, 2018) (defendant's acquittal on the underlying fraud SUA was not inconsistent with jury's finding that she knew the money came from an illegal source);

-- 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. Farrell,* 921 F.3d 116, 139 (4th Cir. 2019) (lawyer who acts as consigliere or "fixer" from drug organization and boasts that he knows 'everything' about the organization, found to have knowledge of the source of the organization's money);

- *United States v. Rivera-Izquierdo,* 850 F.3d 38 (1st Cir. 2017) (circumstantial evidence that defendant knew money given to him by his stepdaughter to buy two cars was fraud proceeds included their family relationship and his participation in luring victims into her fraud scheme);

- *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. Pendleton,* 761 Fed. Appx. 339 (5th Cir. 2019) (that intermediary who purchased property for drug dealers and was reimbursed with drug proceeds knew the money was illegally derived established from direct evidence he knew client was a drug dealer and circumstantial evidence: speaking in codes, awareness of client's modest legitimate income);

– or the unusual nature of the transaction:

- *United States v. Rivas-Estrada,* 761 Fed. Appx. 318 (5th Cir. 2019) (that money transmitter received tens of thousands of dollars in shoe boxes from couriers, and assisted the couriers in structuring the transactions to avoid reporting requirements and suggested fake names for the senders was sufficient to establish knowledge of the illegal source);

- *United States v. Odiase,* ___ Fed. Appx. ___, 2019 WL 4745383 (2nd Cir. Sep. 30, 2019) (defendant's inability to produce documents supporting her claim that her receipt of a third party's money into her bank account, and her transfer of that money to another account, was part of a legitimate business transaction, was circumstantial evidence of her knowledge of the illegal source and that the purpose was to conceal or disguise);

- *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*, 673 Fed. Appx. 13 (2nd Cir. 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);

- The timing of the transactions:

  - *United States v. Gordon,* 754 Fed. Appx. 171 (4th Cir. 2018) (evidence establishing knowledge included oddly-timed transactions – writing checks to persons defendant had never met immediately after depositing money from the co-defendant -- and co-defendant's statement that he told the defendant they needed to keep the transactions "off the Government's radar screen");

  - *United States v. Townsend*, 720 Fed. Appx. 976 (11th Cir. 2017) (the timing of the transactions involving the victim and the victim's money may be circumstantial evidence of the defendant's knowledge of the illegal source; that the money was taken from the defrauded victim only minutes before it was deposited into accounts controlled by the defendant was circumstantial evidence that the defendant knew that the money was derived from the fraud);

- Implausible or false story:

  - *United States v. Stevenson,* 663 Fed. Appx. 831 (11th Cir. 2016) (following *Brown;* if jury found defendant's denial that she knew money involved in the financial transaction was drug money to be incredible, it was entitled to conclude that the opposite was true and that defendant did know it was drug money);

  - *United States v. Odiase,* 2018 WL 2926626, *3 (S.D.N.Y. Jun. 12, 2018) (implausible story regarding source of the money was itself evidence that defendant knew money was illegally derived and was an attempt to avert suspicion from herself);

Knowledge may also be shown by willful blindness:

- *United States v. Farrell,* 921 F.3d 116, 145 (4th Cir. 2019) (the knowledge element may be proved in two ways: "by evidence of [the defendant's] subjective knowledge that the proceeds were derived from an unlawful source, or alternatively, by evidence that he made himself 'deliberately ignorant' of that fact");

- This may include affirmative efforts to remain ignorant, as in *Puche,* or ignoring "red flags" that a reasonable person would recognize as indicating that the money came from an illegal source

- Examples:

- *United States v. Haire,* 806 F.3d 991 (8th Cir. 2015) (courier who carried $33,000 in a vacuum-sealed bag on behalf of a known drug dealer, using a one-way train ticket, was at least willfully blind to the illegal source of the money);

- *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);

It is unclear whether there is an affirmative duty to investigate the source of the money

- *E.g.,* does a real estate developer in NY have a duty to inquire about the source of the Russian being invested in his property?

- If so, the failure to exercise such due diligence may constitute willful blindness:

  - *United States v. Gordon,* 754 Fed. Appx. 171 (4th Cir. 2018) (third party money launderer's duty to investigate was not lessened just because the person giving him the money was an attorney);

In all events, the Government must prove that the defendant had the required knowledge *at the time the financial transaction took place*

- Proof that he learned it later is not good enough

  - *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);

- Which is another reason why it is important to choose the right financial transaction

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

Foreign SUAs

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 there are only six categories of foreign crimes that qualify as SUAs under § 1956(c)(7)(B)

i. drug trafficking
ii. crimes of violence
iii. bank fraud
iv. bribery and public corruption
v. arms trafficking, and
vi. human trafficking and sexual exploitation of children

When money comes in the US from overseas, it may be apparent from the circumstantial evidence that it is criminal proceeds

— but it is not always possible to say from what crime the proceeds were derived or even from what country it came

— nevertheless, it is necessary to do so to prove that the conduct is "an offense against a foreign nation" – you cannot prove the conduct was an offense in a given country if you don't know what country you're talking about – and that it falls into one of these six categories

There are two new cases explaining what the Government has to prove re: the elements of the foreign offense:

- *United States v. Chi,* 936 F.3d 888 (9th Cir. 2019) (Government alleged that the laundered funds were the proceeds of the bribery of a public official – a seismologist working for the South Korean government -- in violation of the applicable South Korean statute, and the court instructed the jury in accordance with the elements of that offense; there was no requirement to prove the elements of 18 U.S.C. § 201, the analogous federal bribery statute);

- *United States v. Thiam*, 934 F.3d 89 (2nd Cir. 2019) (Government acknowledges that when a defendant is charged with laundering the proceeds of a foreign crime, and there has been no trial or conviction for that offense in a foreign court, the Government must show that each of the elements of the foreign offense was satisfied; but in deciding what the terms in a foreign criminal statute mean, the court should give them the meaning that they would be given in the foreign court, not the meaning that they would have in a US court; declining to reverse conviction of the minister of mines for the Republic of Guinea because trial court did not interpret "official act" under Guinean law in accord with the Supreme Court's decision in *McDonnell*)

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

- *United States v. Colon,* 919 F.3d 510 (7th Cir. 2019) (the Government is not required to tie or trace the cash deposited into a bank account to a particular drug sale);

— 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. 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. Kelerchian,* ___ F.3d ___, 2019 WL 3955381 (7th Cir. Aug 22, 2019) (machineguns illegally obtained from a vendor in violation of the wire fraud statute were proceeds of the fraud; their resale was therefore a violation of § 1957);

- *United States v. Myers,* 854 F.3d 341 (6th Cir. 2017) (rejecting defendant’s claim that he had no proceeds of stealing motorhomes until he sold the vehicles; the vehicles themselves were the proceeds of § 2312, so defendant’s sale of the motorhomes was properly charged as a money laundering offense);

- *United States v. Meade*, 677 Fed. Appx. 959 (6th Cir. 2017) (stolen motorcycles were the proceeds of transporting stolen vehicles under § 2312; transferring title was thus a money laundering offense);

Proceeds need not be tangible or actual assets:

- *United States v. Hill*, 167 F.3d 1055, 1072 (6th Cir. 1999) (line of credit constitutes SUA proceeds where such proceeds were used to fund the line of credit in the first place);

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. Rivera-Izquierdo,* 850 F.3d 38 (1st Cir. 2017) (when fraud proceeds are used to gamble, the gambling winnings are "derived from" the fraud proceeds, and a subsequent transaction involving those winnings can therefore be a money laundering offense);

- *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. McQueen,* 636 Fed. Appx. 652 (6th Cir. 2016) (evidence that Defendant used fraudulently-obtained investor funds to purchase a motorcycle which he, in turn, used as a trade-in to obtain a second motorcycle, was sufficient to establish that the acquisition of the second motorcycle was an offense under § 1957);

The knowledge element places – as a practical matter – a limit on the Government's ability to claim that money remains SUA proceeds as it changes form and time passes

- *United States v. Markham,* 2019 WL 485959 (E.D. La. Feb. 7, 2019) (the "no attenuation" rule that proceeds remain proceeds as they change form does not deprive the defendant of due process, because if the attenuation is so great that the defendant is not aware that the property is criminally derived, the Government will not be able to prove the knowledge element; rejecting due process challenge where money defendant stole from public library moved through many intervening transactions before it was used to commit the money laundering offense);

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);

    - *United States v. Mithavayani,* 2019 WL 2125833, *7 (E.D. Ky. May 15, 2019) (that defendants may have funneled criminal proceeds through legitimate business did not prevent jury from finding that money used to conduct money laundering offense was SUA proceeds; citing the "parallel or dependent transaction" language in § 1956(a)(1));

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. Colon,* 919 F.3d 510 (7th Cir. 2019) ("there is nothing wrong with circumstantial evidence;" the jury is entitled to infer from the evidence that cash deposits included drug proceeds);

- *United States v. Gibson*, 875 F.3d 179 (5th Cir. 2017) (forensic accountant's testimony that fraud proceeds were deposited into one bank account and that transfers from that account to a second account preceded cash withdrawals from the second account that were used to pay kickbacks was sufficient to show defendants conspired to pay the kickbacks with fraud proceeds);

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

- *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. Prevezon Holdings, Ltd.,* 251 F.Supp.3d 684 (S.D.N.Y. 2017) (timing and pattern of transactions may serve as circumstantial evidence that the money moving through a complex series of transactions is traceable to the original SUA);

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. Colon,* 919 F.3d 510 (7th Cir. 2019) (where defendant used his business as a front for a drug operation, and the legitimate business was losing money, that cash deposits from both the business and the drug operation exceeded the legitimate revenue allowed jury to infer that at least some of the cash was drug proceeds);

- *United States v. Banks,* 884 F.3d 998 (10th Cir. 2018) (evidence that defendant was a drug dealer with no legitimate source of income sufficient to establish that the money he used to purchase money orders was drug proceeds);

- *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);

- *United States v. Foreste*, 751 Fed. Appx. 48 (2nd Cir. 2018) (defendant's lack of legitimate income – evidenced by his tax returns – combined with testimony that his drug customers made deposits into his bank account on the dates the promotion money laundering transactions allegedly occurred – sufficient to sustain jury's verdict on the proceeds element);

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

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

    - *United States v. Sheridan,* 679 Fed. Appx. 492 (7th Cir. 2017) (defendant who opened bank accounts used to funnel drug money from Illinois to California, withdrew the money and gave it to drug dealer, knew transaction was designed to conceal drug dealer's connection to the drug proceeds);

    - *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. Colon,* 919 F.3d 510 (7th Cir. 2019) (where defendant deposits commingled cash, it is only necessary to show that each cash deposit "included at least some drug proceeds;" given scale of defendant's drug operation and his use of his business as a front, jury could infer that every one of defendant's cash deposits included at least some drug money);

- *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. Bencs*, 28 F.3d 555, 562 (6th Cir. 1994) (money launderer may not escape liability by commingling drug proceeds with other assets);

- *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);

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*

— this is another reason why it is important to choose the right financial transaction

— 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);

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

— 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 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. 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. Diggles,* ___ F.3d ___, ___ n.3, 2019 WL 2608829 (5th Cir. Jun. 26, 2019) (where defendant's fraud involved receiving hurricane-relief funds in account of Foundation he controlled and then moving that money to the account of a church where he was pastor, "the fraud got the money into the Foundation's account; the money laundering got it into the church's");

- *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);

Gross v. net proceeds:

In *United States v. Santos,* 553 U.S. 507 (2008), the Supreme Court held that "proceeds" meant "net profits"

- This caused all kinds of disruption in the case law:
  - *United States v. Kratt*, 579 F.3d 558, 562-63 (6th Cir. 2009) (because Justice Stevens opinion in *Santos* controls, the "net profits" definition applies only when a conviction for money laundering creates a merger problem that would lead "to a radical increase in the statutory maximum sentence" for the SUA; because bank fraud carries a higher maximum penalty than money laundering under § 1957, *Santos* does not apply);
- But Congress legislatively overruled *Santos* by defining "proceeds" to mean "gross receipts" for offenses committed after May 20, 2009
  - *United States v. Gibson,* 875 F.3d 179 (5th Cir. 2017) ("Congress effectively overruled *Santos* by amending the statute to define "proceeds" more broadly, and that law took effect on May 20, 2009;" in proving a conspiracy that straddles that date, the Government may rely on the new definition);
  - *United States v. Stoddard*, 892 F.3d 1203, 1213 n.2 (D.C. Cir. 2018) (*Santos* was legislatively overruled by § 1956(c)(9)); *United States v. Gross*, 661 Fed. Appx. 1007 (11th Cir. 2016) (same);
  - *United States v. Martinovich,* 2013 WL 4881019 (E.D. Va. Sept. 11, 2013) (the 2009 amendment applies only if both the financial transaction and the underlying SUA occur after May 20, 2009);

Specific Intent

At the time of the financial transaction, the defendant must have the *mens rea* to satisfy one of the four conditions of the statute

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. Stanford,* 823 F.3d 814 (5th Cir. 2016) (using proceeds of sales of analog drugs to pay lawyer who promoted the business by misrepresenting the drugs' legality was promotion money laundering; that the lawyer thereafter used the money only for personal expenses was irrelevant);

    - *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);

- 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);

  - *United States v. McGahee*, 257 F.3d 520, 527 (6th Cir. 2001) (following Brown; paying home mortgage and other household expenses did not promote fraud scheme even though defendant conducted scheme from his residence because purpose of payments was primarily to maintain property as a residence and not to perpetuate the fraud);

- 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. Gibson*, 875 F.3d 179 (5th Cir. 2017) (using proceeds of Medicare fraud to pay kickbacks to recruiters to bring in more patients promote the continuation of the scheme by providing opportunities to submit new fraudulent bills);
    - *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. 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. 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);
- 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);
    - *United States v. Manafort,* 318 F.Supp.3d 1 (D.D.C. 2018) (moving money through layers of international transactions by corporate entities may promote a violation of FARA by concealing the relationship between the defendant and his foreign clients);

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. Christy,* 916 F.3d 814 (10th Cir. 2019) (Section 1956(a)(1)(A)(ii)

is a specific intent crime; the Government must show that the defendant conducted the financial transaction for the purpose of evading taxes or filing a false return; simply using unreported income to pay off personal loans is "money spending" not money laundering; that the defendant used such income to engage in financial transactions is not enough to show that the purpose of the transactions was to make it easier to file a false return in violation of § 7206);

- *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);

Defendant who is not the perpetrator of the SUA need not intend to conceal or disguise, but need only be aware that the perpetrator's intent is to conceal or disguise:

— Contrast this with the promotion money laundering offense where the *defendant* must intend to promote an SUA

— In concealment cases, the defendant may not be the person to designed the transaction; she may simply be a third party assisting in the money laundering offense

— In such cases, the defendant's intent is irrelevant; what matters is that she was aware of the intent of the person who designed the transaction

- *United States v. Farrell,* 921 F.3d 116, 140 (4th Cir. 2019) (following *Campbell*; lawyer who knows that drug dealer is giving him money to hire lawyers for other members of the drug organization, instead of hiring them himself, is doing so to disguise the source of the money, knows that the transaction was designed to conceal or disguise, even though he concealed nothing himself);

- *United States v. Campbell*, 977 F.2d 854, 859 (4th Cir. 1992) (real estate agent aware that client's purpose is to conceal or disguise drug money);

- *United States v. White,* 718 Fed. Appx. 353 (6th Cir. 2017) (sister of drug dealer was at least "tacitly aware" that she was engaging in transactions designed to conceal the ownership and control of criminal proceeds when she agreed to buy and sell cars in her name, using her brother's property);

When the defendant is a third party money laundering, however, knowledge that the purpose of the transaction was to conceal or disguise almost always has to be shown by circumstantial evidence

- *United States v. Brown,* 730 Fed. Appx. 638 (10th Cir. 2018) (circumstantial evidence of concealment includes unusual secrecy, structuring, use of third parties, unusual transactions and expert testimony on the practices of criminals), quoting *United States v. Shepard,* 396 F.3d 1116, 1121 (10th Cir. 2005);

- *United States v. Prevezon Holdings, Ltd.,* 251 F.Supp.3d 684 (S.D.N.Y. 2017) ("Use of circumstantial evidence, particularly in complex financial cases . . ., is perhaps the only way to prove money laundering. … [H]amstringing a party's use of circumstantial evidence to prove the design to conceal or disguise the nature, location, source, ownership, or control of a multi-layered money laundering scheme would immunize money launderers sophisticated enough to use shell companies that regularly flush their accounts");

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

- *United States v. Oloyede,* ___ F.3d ___, 2019 WL 3432459 (4th Cir. Jul. 31, 2019) (evidence of concealment included the use of other people's bank accounts, instructions to a co-conspirator to structure cash transactions in amounts under $10,000, writing himself 11 checks totaling $70,000 to move money from one account to another, and engaging in a pattern of maxing out ATM withdrawals);

- *United States v. Prince,* 214 F.3d 740, 768 (6th Cir. 2000) (directing victim to send money through third party and having third party convert it to cash and deliver it to defendant is an elaborate scheme designed to avoid a paper trail and shows intent to conceal or disguise);

- *United States v. Agundiz-Montes,* 679 Fed. Appx. 380 (6th Cir. 2017) (depositing funds in amounts under $10,000 into six bank accounts and shuffling the money between business and personal accounts is concealment money laundering);

- *United States v. Stern,* 2017 WL 4676660 (S.D.N.Y. Oct. 17, 2017) (that exporter in BMPE case received bundles of cash in payment for goods from unknown third parties without asking source or purpose of the money was circumstantial evidence that he knew the purpose of the transaction was to conceal or disguise);

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

- *United States v. Banks,* 884 F.3d 998 (10th Cir. 2018) (drug dealer's use of third parties to buy blank money orders instead of doing it himself, and directing them to send them to a third party associated with his co-defendant, showed intent to conceal the source of the money);

- *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);

— . Using shell companies:

- *United States v. Patel,* 651 Fed. Appx. 468 (6th Cir. 2016) (use of two shell companies to move Medicare fraud proceeds from one coconspirator to another shows that at least one purpose of the transaction was concealment);

- *United States v. Prevezon Holdings, Ltd.,* 251 F.Supp.3d 684 (S.D.N.Y. 2017) (use of coded language and "corporate shells" is evidence of a design to conceal, as is engaging in unnecessary transactions to add extra degrees of separation between the defendant and the source of the funds);

-- 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) ("commingling 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);

— 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. Stoddard,* 892 F.3d 1203 (D.C. Cir. 2018) (where drug dealer and his cousin went together to car dealership to buy car in cousin's name with drug dealer's money and for drug dealer's exclusive use, there was insufficient evidence purpose of the transaction was to conceal the ownership or source of the money);

— 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. White,* 718 Fed. Appx. 353 (6th Cir. 2017) (defendant who purchased cars in her name on behalf of drug dealer did not conceal her identity but did conceal and disguise the ownership and control of the vehicles);

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. Bikundi,* 926 F.3d 761 (D.D.C. 2019) (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);

- *United States v. Gonzalez,* 918 F.3d 808 (10th Cir. 2019) (that use of safe deposit box held in defendant's name did not conceal his identity was irrelevant; concealing location or control of SUA proceeds is sufficient);

- *United States v. Stewart,* 902 F.3d 664 (7th Cir. 2018) (creating a business and opening a business account solely to make deposited drug proceeds appear to be legitimate business revenue was sufficient to show intent to conceal even though defendant made no effort to conceal his identity as the business owner);

- *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);

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. Bikundi,* 926 F.3d 761 (D. C. Cir. 2019) (that defendant's scheme was "vulnerable to dogged investigation" by a Government agent

who traced defendants' fraud proceeds from one bank account to another doesn't mean that in moving tens of millions of dollars through sham companies they weren't trying to conceal the source of their money; distinguishing *Adefehinti*);

- *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");

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 most 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);

- *United States v. Rodriguez*, 727 Fed. Appx. 24 (2nd Cir. 2018).(following Garcia; delivering drug proceeds to an undercover agent, ostensibly to buy more drugs, is not concealment money laundering, even if conducted in a secretive way; it is the purpose not the manner of the transaction that must conceal or disguise);

— However, 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 in 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);

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));

Mens rea requirement:

- *United States v. Bronzino*, 598 F.3d 276, 281 (6th Cir. 2010) (defendant need not know that a casino would file a CTR; it was sufficient that he knew that the $10,000 threshold would trigger identification and record-keeping procedures);

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

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. 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);

    - *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. 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);

- 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

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

- But you still have to prove that the purpose of the transfer is to promote an SUA

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);

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:

- *United States v. Abboud*, 438 F.3d 554, 594-95 (6th Cir. 2006) (unlike section 1956, section 1957 does not require proof that the transaction was intended to conceal or disguise);

— 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);

- *United States v. Martinez,* ___ F.3d ___, 2019 WL 1613530 (5th Cir. Apr. 16, 2019) (because aggregate of all withdrawals was more than $10,000 greater than clean funds in the account, any withdrawal of more than $10,000 involved more than $10,000 in tainted funds);

– 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. Silver,* 864 F.3d 102 (2nd Cir. 2017) (collecting cases and following the majority rule; “The Government is not required to trace criminal funds that are commingled with legitimate funds to prove a violation of Section 1957;” such a rule would allow defendants to defeat money laundering by commingling);

- *United States v. Green,* 818 F.3d 1258 (11th Cir. 2016) (to satisfy the $10,000 threshold requirement for a conviction under Section 1957, the Government may rely on the ratio of tainted to untainted funds in a bank account, and assume that the same ratio applies to the commingled funds involved in the Section 1957 transaction);

- *United States v. Mithavayani*, 2019 WL 2125833, *7 n.11 (E.D. Ky. May 15, 2019)(following *Silver* in the absence of Sixth Circuit authority);

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