FORFEITURE AND MONEY LAUNDERING

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I. INTRODUCTION

This presentation will cover both asset forfeiture and money laundering

- With respect to forfeiture, I will start with an overview of why asset forfeiture is an important part of criminal law enforcement, and why you should be thinking about the forfeiture aspects of the case from the beginning of your investigation

- Then I will talk about what can be forfeited in the cases that you investigate – proceeds, in a limited number of cases facilitating property, and all property involved in money laundering

- And then about forfeiture procedure: administrative, civil and criminal forfeiture

- And if time allows before the coffee break, I give some examples of recent cases that employed some of the more advanced tools that are available to law enforcement under the forfeiture statutes

After the break, we'll focus on money laundering

- The different types of money laundering – promotional, concealment, and transactional, and self-money laundering versus third party money laundering

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— And then go through the elements of a money laundering offense under federal law and the way to prove each of the elements

In both segments – that is, with respect to both forfeiture and money laundering – I intend to blend the basics for those new to the subject with some more advanced or complex issues that may be of interest to those of you who have a lot of experience in this area

II. WHY DO FORFEITURE

There are lots of reasons to invest the time to do an asset forfeiture case

- *Kaley v. United States,* 571 U.S. 320, 323 (2014) (forfeiture serves to punish the wrong-doer, deter future illegality, lessen the economic power of criminal enterprises, compensate victims, improve conditions in crime-damaged communities, and support law enforcement activities such as police training);

1. Punish the wrongdoer

— don't just put him jail; take away the fruits of the crime;

— people commit crimes to make money and buy expensive things

— letting them keep the money and the "toys" rewards them for committing the crime; it is the opposite of punishment

— taking it all away is punishment

- *United States v. Waked,* 969 F.3d 1156 (11th Cir. 2020) (criminal forfeiture is punitive, not remedial; thus, in a money laundering case, the defendant may be ordered to forfeit the amount of money involved in the offense whether or not the victim of the underlying crime suffered any loss that a forfeiture order was needed to remedy);

2. Deter other wrongdoers

— if the point of committing the crime was to make money and the defendant does not get to keep the money, there is less incentive for the next person to commit the same offense

- *United States v. Carpenter,* 941 F.3d 1, 3 (1st Cir. 2019) (citing *Kaley*; one of the purposes of forfeiture is deterrence; "there would be no effective deterrence if the sums forfeited were no greater than the sums [the defendant] gained through his

scheme;" thus, a criminal forfeiture order is not limited to the "disgorgement of ill-gotten gains");

3. Incapacitation: Take away the tools of the trade and the economic resources

— we don't want drug dealers to keep the airplane so they can use it again,

— the same is true for letting the child pornographer keep the computer and cameras that he used

— or letting the money launderer keep the business through which he laundered his money

4. Disrupt the organization

— money is the glue that holds organized criminal enterprises together; they have to recycle the money to keep the scheme going

— it is harder for a drug organization to replace the money than to replace the drugs

— taking the money does more to interrupt the cycle of drug trafficking than any number of buy/bust arrests

> *Caplin & Drysdale v. United States*, 491 U.S. 617, 630 (1989) ("a major purpose motivating congressional adoption and continued refinement of the racketeer influenced and corrupt organizations (RICO) and continuing criminal enterprise (CCE) forfeiture provisions has been the desire to lessen the economic power of organized crime and drug enterprises");

— the same is true for persons engaged in wildlife trafficking; seizing the money flowing from Asian markets back to the poaching enterprises is more effective than arresting the guy with the truck and the gun in Africa

— figuring out how terrorism is financed, and taking away the money before it can be used, is a critical part of the anti-terrorism effort

— and seizing money destined for sanctioned countries like N. Korea and Iran disrupts their ability to evade those sanctions

5. Get money back to the victim

— forfeiture is a more effective way of recovering money for victims than ordering the defendant to pay restitution

- *United States v. Blackman,* 746 F.3d 137, 143 (4th Cir. 2014) ("The Government's ability to collect on a [forfeiture] judgment often far surpasses that of an untutored or impecunious victim of crime . . . Realistically, a victim's hope of getting paid may rest on the Government's superior ability to collect and liquidate a defendant's assets" under the forfeiture laws);

6. Protect the community

— Taking guns off the street is an obvious way to protect the community, but other ways are more subtle

— you don't want organized crime or drug organizations that have acquired great wealth use it to control markets or institutions

— you don't want to let corrupt leaders of developing countries use your financial system to loot their treasuries and safeguard a nest egg to use when they have to go into exile

— and forfeiture ensures that the playing field is level, so that people trying to run businesses honestly don't have to compete with capital from illegal sources

7. Recycle the money

— forfeited funds used to fund law enforcement programs.

— and some forfeited property can be put into official use or handed over to community organizations

— this is the controversial feature of forfeiture

III. WHAT CAN BE FORFEITED?

Every crime carries with it a different description of the property subject to forfeiture

— in general, the Government can forfeit the proceeds of the offense

— for many crimes, it can forfeit facilitating property; that is, property used to make the crime easier to commit

— for money laundering, it can forfeit all property involved in the financial transaction

— for RICO, it can for the defendant's entire interest in the RICO enterprise

— and in terrorism cases the Government can take everything the terrorist owns, whether he used it to commit the terrorism offense or not

— so, the prosecutor needs to check the statute to see what he can forfeit in a particular case

1. Proceeds

What constitutes proceeds in most cases is fairly obvious

— it's whatever the defendant acquired as a result of the offense, or stated differently, what he would not have "but for" having committed the offense

— If a person sold drugs, the money that he received is the proceeds

— If he robbed a bank, the money that he stole is the proceeds

— If he took a bribe, the bribe money is the proceeds

— If he *paid* a bribe, whatever he got in return would be the proceeds

- *e.g.,* if a contractor obtains a contract by paying a bribe or kickback, the contract itself would be the proceeds of the crime, because he wouldn't have it but for having paid the bribe

In cases involving crimes investigated by the Secret Service, the statute authorizing the forfeiture of the proceeds is 18 U.S.C. § 981(a)(1)(C)

— That's the statute that authorizes the civil or criminal forfeiture of the proceeds of any offense listed as a "specified unlawful activity" (SUA) in the money laundering statute

— Mail and wire fraud (§§ 1341 and 1343), access device fraud (§ 1029), and counterfeiting (§§ 471-73, 500-503, and 513) are all SUAs

— So the proceeds of those offenses are subject to forfeiture under 981(a)(1)(C)

The scope of the term "proceeds" can be quite broad:

— Again, courts generally apply a "but for" test: whatever the defendant would not have but for having committed the offense constitutes the proceeds

- *United States v. Shabudin,* 701 Fed. Appx. 599 (9th Cir. 2017) (salary that defendant would not have received but for his unlawful conduct in committing securities fraud is forfeitable as "proceeds" under § 981(a)(1)(C));

- *United States v. Cekosky*, 171 Fed. Appx. 785, 787-88 (11th Cir. 2006) (because defendant would not have been able to open his bank account but for having committed an identity theft offense, the interest he earned on the deposits in that bank account represented the proceeds of the offense, even though the deposits themselves were made with legitimate funds);

— under the "but for" test, an entire business, and all of its revenue and assets, are subject to forfeiture if the business would not exist but for the investment of criminal proceeds to start the business or to keep it going.

- *United States v. Warshak*, 631 F.3d 266, 329-330 (6th Cir. 2010) (all proceeds of defendant's business are forfeitable because the business was "permeated with fraud;" but even if a part of the business was legitimate, the proceeds of that part are nevertheless forfeitable if the legitimate side of the business would not exist but for the "fraudulent beginnings" of the entire operation);

- *United States v. Smith,* 749 F.3d 465, 488-89 (6th Cir. 2014) (following *Warshak*; if business is so pervaded by fraud that its revenue stream would not have existed but for the fraud, any asset derived from that revenue stream is forfeitable as proceeds);

— and it includes not only property obtained directly by the defendant as a result of the offense, but also property *retained* by the defendant, or obtained by the defendant through a third party

- *United States v. Esquenazi*, 752 F.3d 912, 931 (11th Cir. 2014) (money defendant retained by having its debt reduced in exchange for promise to pay a bribe was the proceeds of the bribery offense);

- *United States v. Torres*, 703 F.3d 194, 199 (2d Cir. 2012) (all that is required is a "causal nexus between the wrongdoer's possession of the property and her crime"; money that defendant saved or retained as a consequence of the crime is proceeds obtained "indirectly");

- *United States v. Wong,* 2014 WL 6976080, *2 (C.D. Cal. Dec. 9, 2014) (money

defendant saved on import fees by paying others to undervalue and misclassify goods is the "proceeds" of his offense; following *Torres*);

- *United States v. Peters*, 732 F.3d 93, 102 (2nd Cir. 2013) (because the statute makes defendant liable for property obtained "directly or indirectly," he is liable for proceeds obtained by a corporation that he dominates or controls, even if he did not obtain the money himself);

Traceable property; Appreciation

"Proceeds" also includes any property traceable to the proceeds,

— if the person who sold drugs or robbed a bank used the money to buy a car, the car can be confiscated as property traceable to, or derived from, the crime

— and that is true regardless of how much time has passed or how many times the property as changed form

— if the defendant used the criminal proceeds to buy a house and used the house as collateral for a loan, the loan proceeds – and anything purchased with them -- are proceeds traceable to the crime.

It is important to understand, however, that if the defendant used commingled money to buy an asset, only the portion of the asset that is traceable to the proceeds is forfeitable under a proceeds theory

- *United States v. Miller*, 2009 WL 2949784, *7 (D. Kan. Sept. 10, 2009) (where defendant made down payment on boat and airplane with untainted funds and then made loan payments with fraud proceeds, only the portion traceable to the latter is forfeitable under § 982(a)(2);

— as we'll see, it's different if the forfeiture is based on money laundering

Traceable property includes any appreciation in the value of the proceeds or the traceable property

— a person who buys a lottery ticket for one dollar and wins a million dollars forfeits the entire million, because the ticket appreciated in value

- *United States v. Betancourt*, 422 F.3d 240, 251 (5th Cir. 2005) (if defendant buys a lottery ticket with drug proceeds, the lottery winnings are traceable to the offense even though the value of the ticket appreciated enormously when it turned out to contain the winning number);

- *United States v. Hawkey*, 148 F.3d 920, 928 (8th Cir. 1998) (if property is

subject to forfeiture as property traceable to the offense, it is forfeitable in full, including any appreciation in value since the time the property became subject to forfeiture; the reason for the appreciation does not matter; defendant may be made to pay money judgment or forfeit traceable property, but not both);

- *United States v. Hill*, 46 Fed. Appx. 838, 839 (6th Cir. 2002) (stock that appreciates in value is forfeitable as property traceable to the originally forfeitable shares);

If the defendant purchased the asset with commingled funds, the Government is entitled to a *pro rata* share of the appreciation

— So, if the defendant uses $50,000 in fraud proceeds and $50,000 in clean money to buy a yacht, and the yacht appreciates in value, he must forfeit 50 percent of the value of the yacht, including 50 percent of the appreciation

- *United States v. Tartaglione,* 2018 WL 1740532, *28 (E.D. Pa. Apr. 11, 2018) (if renovations paid for with criminal proceeds account for 37 percent of defendant's equity in an asset, she must forfeit 37 of the appreciation of the asset as property traceable to the offense), motion for reconsideration denied, 2018 WL 9457036 (May 10, 2018);

- *United States v. Wahlen*, 459 F. Supp. 2d 800, 814 (E.D. Wis. 2006) (if property that is acquired with commingled funds appreciates in value, the fraction of the property subject to forfeiture is assumed to have appreciated at the same rate; thus, the Government is entitled to forfeit the same fraction of the appreciated value as it could have forfeited if there was no appreciation);

Gross v. Net Proceeds

The forfeiture of proceeds is not a new concept, but there are some issues that are very much alive in the courts right now

— one has to do with whether the gross proceeds rule should apply in white collar cases, or whether the defendant should be given credit for value actually provided

Section 981(a)(2) defines "proceeds" in two ways:

— it says that for telemarketing and health care fraud and other offenses that are inherently unlawful – like drug trafficking -- the defendant must forfeit "gross proceeds"; § 981(a)(2)(A)

— but for crimes that involve conduct that is not inherently unlawful, the defendant is entitled to deduct his direct costs; 981(a)(2)(B)

— The problem is that it is not at all clear when something is "inherently unlawful" activity, and when it is illegal but not inherently unlawful.

Drug trafficking is inherently unlawful, but what about white collar crimes?

— Is someone who commits access device fraud, or credit card fraud, or runs a Ponzi scheme doing something that is inherently unlawful, or doing something lawful in an illegal way?

The cases, unfortunately, do not provide much guidance:

— In one case, a court held that food stamp fraud is inherently unlawful because there is no lawful way to sell food stamps

- *United States v. Uddin*, 551 F.3d 176, 181 (2nd Cir. 2009) (affirming forfeiture of gross proceeds under § 981(a)(2)(A) in a criminal forfeiture cases involving food stamp fraud; defendant must forfeit the amount he received from the Government for the food stamps without credit for the amount he had to pay for them);

— In another case, the court rejected the defendant's argument that because managing a 401(k) plan was a lawful service, he was entitled to deduct his costs when he was convicted of embezzling money from the plan

— embezzlement, the court said, is an inherently unlawful activity regardless of the context because there is no lawful way to embezzle funds.

- *United States v. Bodouva*, 853 F.3d 76 (2nd Cir. 2017);

- *United States v. George*, 886 F.3d 31 (1st Cir. 2018) (following *Bodouva*; embezzlement is an inherently illegal activity that cannot be done lawfully; thus, § 981(a)(2)(A) applies; that the embezzlement involved the provision of a legal service did not mean defendant could deduct his direct costs under § 981(a)(2)(B))

— The same is true for a variety of white collar crimes including Ponzi schemes and other investment frauds, and "honest-services fraud" committed by a public official.

- *United States v. Bonventre,* 646 Fed. Appx. 73 (2nd Cir. 2016) (Ponzi scheme in the Madoff case does not qualify as providing lawful services in an illegal manner; defendants must forfeit gross proceeds);

- *United States v. Tartaglione*, 2018 WL 1740532, *23 n.29 (E.D. Pa. Apr. 11, 2018) (defendant who defrauds company of which she is president must forfeit gross proceeds under § 981(a)(2)(A)) (collecting cases);

- *United States v. Holden,* 2016 WL 4191046, *2-3 (D. Or. June 30, 2016) (inducing investors to invest in a biodiesel company that manufactured no biofuel was inherently illegal, so § 981(a)(2)(A) applies);

- *United States v. Sigillito*, 899 F. Supp.2d 850, 864-65 (E.D. Mo. 2012) (defendant in an investment fraud scheme must forfeit the gross amount he took from investors, without credit for his use of the later investments to pay the early investors; 981(a)(2)(A) applies because the scheme was entirely unlawful);

- *United States v. Gartland,* 540 Fed. Appx. 136, 139 (3rd Cir. 2013) (public official convicted of honest services fraud was required to forfeit the gross proceeds of his offense under § 981(a)(2)(A));

— I assume that it is obvious that counterfeiting is inherently unlawful.

On the other hand, courts have held that Section 981(a)(2)(B) applies in other white-collar cases.

— For example, in *United States v. Contorinis,* the Second Circuit held that Section 981(a)(2)(B) applies in securities fraud cases, because the buying and selling of securities is *not* an inherently unlawful activity, but rather is a lawful activity that may be conducted in an unlawful way, as occurs when a person trades on insider information.

- *United States v. Contorinis*, 692 F.3d 136, 145 n.3 (2d Cir. 2012) (distinguishing *Uddin*); buying and selling securities is not inherently unlawful; therefore in an insider trading case, forfeiture is limited to the net gain after deducting the costs pursuant to § 981(a)(2)(B));

- *United States v. Mahaffy*, 693 F.3d 113, 137-38 (2d Cir. 2012) (proceeds of the fraud in the sale of securities are the net proceeds paid to the broker as his commission, not the gross amount paid to his firm; § 981(a)(2)(B) applies because buying and selling securities is not inherently unlawful);

— And in *United States v. Shkreli,* the same court applied Section 981(a)(2)(B) to the fraud committed by a hedge fund manager.

- *United States v. Shkreli*, 779 Fed. Appx. 38 (2nd Cir. 2019) (hedge fund manager who defrauded investors is entitled to deduct his costs, but the returns paid to defrauded investors are not "costs"; "at the very least, the gains to [Defendant] include the money he caused his investors to invest via fraud");

- *United States v. Swenson,* 2014 WL 3748301, *5 (D. Idaho July 29, 2014) (§ 981(a)(2)(B) applies in securities fraud cases because the defendant "did not sell investors an illegal product; he sold investors lawful goods and services in an illegal manner");

This debate comes up frequently in Government contracting cases

— is it inherently illegal to obtain a contract through bribery, or by misrepresenting your eligibility, or do you get credit for what you actually provide?

— The cases go both ways:

- *United States v. Martin,* 2014 WL 221956, *5 (D. Idaho Jan. 21, 2014) (contractor who obtains a Government contract by falsely claiming eligibility for a program for disadvantaged businesses must forfeit the net profits, not the gross proceeds, of the fraudulently-obtained contracts);

- *United States v. Pinson,* 2015 WL 1578726 (D.S.C. Apr. 9, 2015) (defendant who would not have submitted any invoice to the Government but for an illegal agreement that allowed him to submit inflated invoices must forfeit gross proceeds without credit for services actually performed);

2. Facilitating Property

The term "property used . . . to facilitate the commission of the offense" is very broad

— facilitating property is anything that makes the crime easier to commit or harder to detect

- *United States v. Schifferli*, 895 F.2d 987, 990-91 (4th Cir. 1990) (dentist's office "provided an air of legitimacy and protection from outside scrutiny," and thus made the crime of writing false prescriptions less difficult to commit and "more or less free from obstruction or hindrance";

- *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005) (facilitating property is anything that "makes the prohibited conduct less difficult or more or less free from hindrance");

- *United States v. Rivera*, 884 F.2d 544, 546 (11th Cir. 1989) (defining facilitating property broadly to include livestock used to make heroin operation appear to be a ranch);

In cases stretching back over decades, courts have upheld the forfeiture of real

property, vehicles, and other personal assets as facilitating property

- *United States v. Diaz*, 413 Fed. Appx. 704, 708 (5th Cir. 2011) (real property where owner allowed drug dealers to park their tractor-trailers while waiting to transport drugs and money across the border forfeited as facilitating property);

- *United States v. Ortiz-Cintron*, 461 F.3d 78, 80 (1st Cir. 2006) (residences where defendants packaged drugs and stored drug money, and where telephone calls were made, was forfeitable as facilitating property);

- *United States v. Singh*, 390 F.3d 168, 190 (2d Cir. 2004) (a medical license is forfeitable as facilitating property under section 853(a)(2) if the doctor uses the license to distribute controlled substances in violation of the Controlled Substances Act; under section 853(b), property includes "rights, privileges, interests, claims, and securities");

- *United States v. Harris*, 903 F.2d 770, 777 (10th Cir. 1990) (under section 853(a)(2), property used to facilitate a drug offense is forfeitable in its entirety, even if only a portion of the property was used for the illegal purpose);

— in fact, an entire business and/or all of its assets could be forfeited as facilitating property

- *United States v. $7708.78 in U.S. Currency,* 2011 WL 3489835, *3 (S.D. Miss. Aug. 9, 2011) (facilitating property is anything that makes the crime "less difficult or more or less free from obstruction or hindrance;" a pharmacy used as a cover for the illegal distribution of drugs is forfeitable as facilitating property, and hence so are all of its assets; including funds in its bank accounts that include money traceable to legitimate sales);

- *United States v. Segal*, 432 F.3d 767, 779 (7th Cir. 2005) (if a business is forfeited, then so are all of its assets, including any subsidiary business that is wholly owned by the forfeited business; that there is no independent basis for the forfeiture of the subsidiary does not matter);

But the Government does have to show that the connection between the property and the offense was more than "incidental or fortuitous"

— 18 U.S.C. § 983(c)(3) requires a "substantial connection" between the property and the offense

— if the connection is too tangential, the forfeiture will not succeed

- *United States v. Herder*, 594 F.3d 352, 364-65 (4th Cir. 2010) (the substantial connection test applies in both civil and criminal forfeiture cases, but the test is

satisfied by showing that the property made the offense less difficult to commit, or more or less free from obstruction or hindrance; cash in defendant's pocket at the time of his arrest forfeited as property used to facilitate possession with intent to distribute);

- *United States v. Heldeman*, 402 F.3d 220 (1st Cir. 2005) (forfeiture of the residence where physician wrote illegal prescriptions for steroids and painkillers satisfies the requirement; it served as a base of operations as surely as the place where a drug dealer stores and delivers drugs; it makes no difference that the offense could as easily have been committed in another place);

- *United States v. Coffman,* 364 Fed. Appx. 192, 193-94 2010 WL 373773, *2 (6th Cir. 2010) (evidence that defendant sold drugs to guests at his residence sufficient to establish substantial connection);

Unfortunately, for most of the crimes that Secret Service enforces, such as mail and wire fraud, there is no authority to forfeit facilitating property

— The most important exception to that is Section 492, which says that you can forfeit any "articles, devices and other things made, possessed, or used in violation" of the counterfeiting statutes

- *United States v. Von Nothaus,* 2021 WL 2355397 (W.D.N.C. June 9, 2021) (counterfeit coins minted by defendant forfeitable under § 492 as property used to commit the offense);

- *United States v. Simmons*, 2000 WL 33138083, *3 (E.D. Cal. 2000) (claimant cannot oppose forfeiture of counterfeit coins on ground that seizure was illegal; counterfeit coins are illegal to possess, and must be forfeited to United States Secret Service);

Also, Section 1029(c)(1)(C) authorizes the *criminal* forfeiture of any personal property "used or intended to be used to commit" an offense under an access device offense in violation of Section 1029(a).

— Notice, however, that this is limited to *personal property* and so does not include real property, and it is limited to criminal forfeiture

Another possibility is to bring a civil forfeiture action under 49 U.S.C. § 80303

— Which authorizes the forfeiture of any vessel, vehicle, or aircraft used to transport contraband, including counterfeit currency, or counterfeiting equipment

- *United States v. 2004 Ferrari 360 Modeno,* 544 Fed. Appx. 545, 545 (5th Cir. 2013) (Ferrari driven to shopping mall where defendant tried to pass counterfeit money forfeited under § 80303 as vehicle used to transport contraband);

3. Money Laundering

One way around the lack of authority to forfeit facilitating property is to use the money laundering statute

If you prove the money laundering offense, you can forfeit "all property involved" in the offense

— this term is broader than proceeds and facilitating property

— it includes, for example, any clean money commingled with the proceeds when the money laundering offense takes place

- *United States v. Huber,* 404 F.3d 1047 (8th Cir. 2005) (the SUA proceeds involved in a financial transaction, as well as any clean money commingled with it, constitute the corpus of the money laundering transaction; both are subject to forfeiture);

- *United States v. McGauley*, 279 F.3d 62 (1st Cir. 2002) (withdrawal of $243,000 from various bank accounts that contained commingled funds, of which only $55,000 was fraud proceeds, supported forfeiture of entire amount because the clean money was used to conceal or disguise the tainted funds);

- *United States v. Tencer*, 107 F.3d 1120 (5th Cir. 1997) (entire bank account balance is forfeitable even though less than half the balance was criminal proceeds if the purpose of the deposit was to conceal or disguise proceeds among legitimate funds);

— and it includes the property that is acquired in the course of the money laundering transaction, even if commingled funds are involved

— so, if the defendant's money laundering offense was the purchase of a condo in Miami with criminal proceeds commingled with other money, the entire condo would be subject to forfeiture as property involved in the money laundering offense

- *United States v. Kivanc*, 714 F.3d 782, 794-95 (4th Cir. 2013) (residence in which fraud proceeds were invested is subject to forfeiture in its entirety as property involved in a money laundering offense, even though legitimate funds were also invested in the property);

- *United States v. Miller*, 911 F.3d 229, 232 (4th Cir. 2018) ("Property involved in a money laundering offense is forfeitable in its entirety, even if legitimate funds have also been invested in the property;" if the offense is the use of SUA proceeds to make improvements to the property, it doesn't matter that the improvements account for a fraction of the equity; following *Kivanc*);

- *United States v. Miller,* 2019 WL 6792762 (E.D. Va. Dec. 12, 2019) (same case following return of jury verdict at trial; forfeiture based on both the concealment laundering of fraud proceeds and the use of $10,000 in fraud proceeds in violation of § 1957);

The substantial connection test, however, applies to the forfeiture of property "involved in" money laundering

- *United States v. 1989 Jaguar XJ6,* 1993 WL 157630 (N.D. Ill. May 13, 1993) (the role of car driven to the place where a money laundering / access device fraud took place was too incidental);

IV. OVERVIEW OF FORFEITURE PROCEDURE

A. Administrative and Civil Forfeiture

There are three kinds of forfeiture: administrative, civil and criminal

Administrative forfeiture:

— most forfeitures start out as administrative forfeitures handled by the seizing agency;

— these can be purely federal cases or cases that the federal agency adopts from State or local law enforcement

— the agency sends out notice and if no one claims the property, it is forfeited by default;

— there is no prosecution; no court or prosecutor gets involved

- *see* 18 U.S.C. § 983(a)(1) and (2), and 19 U.S.C. § 1602, *et seq.,* setting forth the procedures governing administrative forfeitures

— all of the adoptive highway stop cases are administrative forfeitures, at least at first

— in 80 percent of the cases, no one files a claim to the property – often because there is a parallel criminal prosecution

Note: to be able to do this, your agency must have administrative forfeiture authority

— I assume the Secret Service has administrative forfeiture authority in fraud and access device cases where the forfeiture is brought pursuant to 18 U.S.C. § 981(a)(1)(C)

— I do not believe there is administrative forfeiture authority in counterfeiting cases brought under § 492 because § 492 does *not* incorporate the Customs laws

Civil judicial forfeiture

If someone does contest the forfeiture the Government the option of doing it civilly or criminally, *see* 18 U.S.C. § 983(a)(3)

— civil forfeiture cases are *in rem* actions against the property; that's why they have funny names

— civil forfeiture is simply a procedural device designed to get everyone with an interest in the property in the courtroom at the same time

- *United States v. Ursery*, 518 U.S. 267, 295-96 (1996) (Kennedy, J. concurring) (proceedings *in rem* are simply structures that allow the Government to quiet title to criminally-tainted property in a single proceeding in which all interested persons are required to file claims contesting the forfeiture at one time);

- *United States v. Real Property Located at 475 Martin Lane*, 545 F.3d 1134,1144 (9th Cir. 2008) ("*in rem* actions are generally considered proceedings against the world" in which "the court undertakes to determine all claims that anyone has to a thing in question");

There are two important things to know about civil forfeiture

— The first is that it doesn't require a conviction or even a criminal case,

- Nevertheless, it is still a law enforcement action, and the Government still has to prove that a crime was committed *and* that the property was derived from or used to commit that crime

The second thing that it is important to understand is that the focus in on the property, not on the property owner

- The question is whether the property it derived from or used to commit the offense, not whether the owner of the property is the one who committed the crime

- I could use someone else's property to commit a crime, making that property subject to forfeiture in a civil forfeiture case

- if the owner is not the wrongdoer, however, he can assert an innocent owner defense

So, for example, if someone uses his wife's car to commit a crime but she knew nothing about it, the Government must return the car to the wife and pay her attorney's fees

- but if the wife knew all about the crime and let her property be used to commit it, we can forfeit the car in civil case even though the wife is not charged with any crime

    - *Bennis v. Michigan*, 516 U.S. 442, 446 (1996) (innocent property owners have no protection from civil forfeiture under the Due Process Clause; unless the legislature enacts an innocent owner defense by statute, property may be forfeited based solely on its use in the commission of an offense);

    - 18 U.S.C. § 983(d) (creating a statutory innocent owner defense for civil forfeiture cases);

The same would be true in a money laundering case:

- if the bad guy launders his money by selling it to someone who needs dollars, the buyer is protected if his is a bona fide purchaser, but not if he is not

    - *United States v. $822,694.81 in U.S. Currency*, 2019 WL 4369936 (D. Conn. Sep. 12, 2019) (denying summary judgment to account holder who was willfully blind to the source of the money deposited into his account, and who conducted no inquiry in the face of "red flags");

In a moment, I am going to give you a list of instances in which you may need to use civil forfeiture to recover tainted property

- Cases where the property belongs to a non-innocent third party is one of them.

Civil forfeiture procedure is set forth in Supplemental Rule G of the Federal Rules of Civil Procedure and 18 U.S.C. § 983.

- The procedure is as follows:

1) The Government seizes the property, usually with a warrant

2) It has 60 days to send notice of the forfeiture proceeding to the property owner who has 30 days to make a claim

3) If a claim is filed, the Government must commence a judicial forfeiture action within 90 days so that the property owner can contest the forfeiture in court

4) In that proceeding the rules of evidence apply, and the property owner has the right to have the forfeiture determined by a jury

5) In the trial, the Government must prove the two things that I have already mentioned: that someone has committed a crime, and that the property in question was derived from or used to commit that crime

6) If the Government proves both of those things by a preponderance of the evidence, the property will be forfeited unless the property owner can establish an innocent owner defense

7) To establish an innocent owner defense, the property owner must show that he did not know that the person who committed the crime was using his property to do so, or that he acquired the property as a bona fide purchaser for value

8) Alternatively, he can attempt to show that forfeiture would be grossly disproportional to the gravity of the offense

If civil forfeiture is so wonderful, why doesn't the Government forfeit everything civilly instead of including it as part of a criminal case?

— first, it's a lot of extra work for something that can be done easily if there is a criminal case

— also, civil forfeiture has a serious limitation

— recall the second requirement: that the Government must prove the property was derived from or used to commit the crime

— because it is an *in rem* action against specific property, there are no substitute assets or money judgments in civil forfeiture cases

— so, if the Government cannot establish the connection between the particular asset and the underlying crime, there can be no forfeiture

— so civil forfeiture should be reserved for cases where the criminal forfeiture is not possible, or where a criminal case is not ready to indict

When would you use civil forfeiture?

Examples

1. when the property is seized but the forfeiture is unopposed

2. when the wrongdoer is dead or is incompetent to stand trial;

3. when the defendant is a fugitive or a foreign national beyond jurisdiction of the United States;

4. when the statute of limitations has run on the criminal case;

5. when we have recovered the property but do not know who committed the crime giving rise to the forfeiture;

6. when the defendant pleads guilty to, or has been convicted at trial, of a crime different from the one giving rise to the forfeiture;

7. when there is no federal criminal case because the defendant has already been convicted in a state or foreign or tribal court;

8. when there is no criminal case because the interests of justice do not require a conviction;

9. when the evidence is insufficient to prove that the defendant committed the offense beyond a reasonable doubt;

10. when the defendant uses someone else's property to commit the crime and that person is not an innocent owner.

11. When the criminal case is not ready and there is an immediate need to preserve the property.

Again, the key disadvantage to civil forfeiture is that there is no possibility of obtaining a money judgment or forfeiting substitute assets

— the Government can only forfeit property that is traceable to the offense

In a few minutes, I will give you some examples of recent civil forfeiture cases – particularly in the international context – that illustrate how it can be used and the tools that are available in a moment.

— But first, I must say a few words about criminal forfeiture.

Criminal Forfeiture

The Supreme Court has held that criminal forfeiture is part of the defendant's sentence.

- *Libretti v. United States*, 516 U.S. 29, 39 (1995) ("criminal forfeiture is an aspect of punishment imposed following conviction of a substantive criminal offense"); *see* Rule 32.2(b)(3) (the order of forfeiture "shall be made part of the sentence and included in the judgment");

- *United States v. Smith,* 770 F.3d 628, 637 (7th Cir. 2014) ("Criminal forfeiture is considered to be punishment and therefore is part of the sentencing process;" therefore, the Government's burden at the forfeiture hearing is preponderance of the evidence, and the rules of evidence do not apply);

Because forfeiture is part of sentencing, it's an *in personam* punishment

— the punishment is directed against the defendant, not his property

— which means we are not limited, as we are in civil forfeiture cases, to the traceable property

— criminal forfeiture's claim to fame is that when that happens, we can still get an order of forfeiture in the form of a money judgment

- *United States v. Vampire Nation*, 451 F.3d 189, 202 (3d Cir. 2006) (expressly rejecting the argument that a forfeiture order must order the forfeiture of specific property; as an *in personam* order, it may take the form of a judgment for a sum of money equal to the proceeds the defendant obtained from the offense, even if he no longer has those proceeds, or any other assets, at the time he is sentenced);

- *United States v. Hampton,* 732 F.3d 687, 691-92 (6th Cir. 2013) (following all other circuits and holding that forfeiture being a mandatory part of the defendant's sentence, the court may enter a money judgment in the amount of the proceeds of the offense even though the defendant has dissipated the traceable property and has no other funds with which to satisfy the judgment);

— the entry of a money judgment is mandatory

- *United States v. Blackman,* 746 F.3d 137, 143 (4th Cir. 2014) (§ 2461(c) makes criminal forfeiture mandatory in all cases; "The word 'shall' does not convey discretion . . The plain text of the statute thus indicates that forfeiture is not a discretionary element of sentencing. . . . Insofar as the district court believed that it could withhold forfeiture on the basis of equitable considerations, its reasoning was in error.");

- *United States v. Newman*, 659 F.3d 1235, 1240 (9th Cir. 2011) ("When the Government has met the requirements for criminal forfeiture, the district court must impose criminal forfeiture, subject only to statutory and constitutional limits"); *id.* (the district court has no discretion to reduce or eliminate mandatory criminal forfeiture; overruling district court's refusal to enter money judgment);

— moreover, pursuant to 21 U.S.C. § 853(p), we can satisfy the money judgment by forfeiting substitute assets

— the forfeiture of substitute assets is mandatory, and can be any property the defendant owns, even though it is not traceable to the offense

- *United States v. Fleet*, 498 F.3d 1225, 1231 (11th Cir. 2007) (Congress chose broad language providing that *any* property of the defendant may be forfeited as a substitute asset; it is not for the courts "to strike a balance between the competing interests" or to carve out exceptions to the statute; thus, defendant's residence can be forfeited as a substitute asset notwithstanding state homestead and tenancy by the entireties laws);

- *United States v. Carroll*, 346 F.3d 744, 749 (7th Cir. 2003) (defendant may be ordered to forfeit "every last penny" he owns as substitute assets to satisfy a money judgment);

- *United States v. Alamoudi*, 452 F.3d 310, 314 (4th Cir. 2006) ("Section 853(p) is not discretionary… [W]hen the Government cannot reach the property initially subject to forfeiture, federal law requires a court to substitute assets for the unavailable tainted property");

- *United States v. Garza*, 407 Fed. Appx. 322, 324 (10th Cir. 2011) (same; following *Alamoudi*); *United States v. McCrea,* 548 Fed. Appx. 157, 158 (4th Cir. 2014) (same; there is no exception for the defendant's residence);

- *United States v. Weitzman*, 936 F. Supp.2d 218, 221 (S.D.N.Y. 2013) (there is no exception in § 853(p) for the defendant's IRA account; it may be forfeited as a substitute asset);

Third parties – the limits of criminal forfeiture

The criminal forfeiture statutes allow the court to order the forfeiture of any property derived from or used to commit the offense, but because third parties are excluded from the criminal case, property that belongs to third parties cannot be forfeited

— it would violate his right to due process to forfeit a third party's property in a proceeding in which he was not allowed to participate

— this is the flip side to the *in personam* nature of criminal forfeiture

— we don't have to prove the property belonged to the defendant; we only have to prove the nexus to the offense

- *De Almeida v. United States,* 459 F.3d 377, 381 (2d Cir. 2006) (criminal forfeiture is not limited to property owned by the defendant; "it reaches *any* property that is involved in the offense;" but the ancillary proceeding serves to ensure that property belonging to third parties who have been excluded from the criminal proceeding is not inadvertently forfeited);

- *United States v. Watts*, 477 Fed. Appx. 816, 817-18 (2d Cir. 2012) (following *De Almeida*; property may be forfeited based on its nexus to the offense, regardless of ownership; the purpose of the ancillary proceeding is to allow third parties to challenge the forfeiture on ownership grounds);

- *United States v. Dupree*, 919 F. Supp.2d 254, 274-275 (E.D.N.Y. 2013) (criminal forfeiture is not limited to property of the defendant; it reaches any property derived from or used to commit the offense; in the case of proceeds, the *in personam* nature of forfeiture is satisfied if the property is the proceeds of the crime the defendant committed; older cases such as *O'Dell* and *Gilbert* were based on former Rule 31(e) which was replaced by Rule 32.2 and are no longer good law);

- *United States v. Molina-Sanchez,* 298 F.R.D. 311, 312-13 (W.D.N.C. 2014) (same);

— but in a post-trial ancillary proceeding, a third party has the right to ask the court to exempt property that belongs to him from the forfeiture order

So, if the defendant launders money through a third party's business or bank account, the business or bank account cannot be forfeited unless the third party is also convicted

— this is the major *disadvantage* to criminal forfeiture

— there is, of course, a procedure for forfeiting the property of third parties who knowingly allowed their property to be used to commit a crime

— it's called civil forfeiture

Criminal Procedure

OK, so how do we make sure we forfeit the property in a criminal case

— the procedure is set forth in Rule 32.2 of the Federal Rules of Criminal Procedure and 21 U.S.C. § 853 (which applies to all criminal forfeitures by virtue of 28 U.S.C. § 2461(c));

1. Include Forfeiture in the Indictment.

2. Preserve the Property Pending Trial.

3. Include the Forfeiture in the Plea Agreement

4. Get a Consent Order of Forfeiture

5. If the Defendant Goes to Trial and is Convicted, Establish the Grounds for Forfeiture in a Separate Forfeiture Hearing

6. Include the Forfeiture Order at Sentencing

7. Deal with Third Parties in the Ancillary Proceeding

V. International Forfeiture Examples

1. Prevezon / Magnitsky

In cases involving crimes occurring overseas, it is not always possible to lay hands on the bad guy and prosecute him in the United States

— If we could, we could use criminal forfeiture to recover the money

— But where we cannot, civil forfeiture is the only alternative

The first example of the use of civil forfeiture in that situation involves the proceeds of a foreign crime were laundered in the United States, and invested in property here

— this is the Prevezon case

— It involved the theft of $230 million from the Russian treasury

— The laundering of that money through numerous shell companies and bank accounts in Eastern Europe

— And eventually in the investment of a portion of the money in real estate in New York

According to the complaint filed in a civil forfeiture action in New York to recover the apartments, the scheme worked like this:

- a Russian company (the victim) owned three businesses
- a Russian criminal organization stole the identities of the three companies by stealing corporate documents
- the criminals then orchestrated a series of sham lawsuits against the stolen companies, obtained default judgments against them,
- and used those judgments to apply for tax refunds, claiming that the losses so reduced the companies' profits as to negate their tax liability.
- The result was that the Russian treasury sent $230 million in false tax refunds to the three businesses, which were now controlled by the criminals.

That's how they stole the money

— Now, how did they launder it

The money laundering

— Here's how: this is a diagram that only a forensic accountant could love

— It comes from the civil forfeiture complaint and details how the money moved from the Russia bank to the New York property in just over 60 days

— The judge in the case called this "a Byzantine web of conduit accounts"

— I don’t know if anyone in ancient Byzantium ever used this many bank accounts to conduct business, but I agree that it is complex

— Let me simplify it for you

The $230 million started out in three accounts at the two Russian banks

— It then moved through the accounts of no fewer than 14 shell companies at nine different Russian banks,

— Was deposited it in the correspondent account of yet another Russian bank for the benefit of four more shell companies,

— and ultimately was placed in the accounts of two Moldovan shell corporations with accounts at Banca di Economii in Moldova

— all within a period of 60 days.

Finally, part of the money, commingled with other funds, was transferred from the Moldovan companies to three entities:

— a New Zealand shell company and a British Virgin Islands shell company that had accounts at an Estonian bank,

— and another BVI company with an account at a Lithuanian bank

— finally, $4 million was transferred from the Moldovan and Lithuanian banks to the Swiss bank account of Prevezon Holdings,

— which used a portion of it to acquire the parcels of property in Manhattan.

There were a host of legal issues, but the bottom line is that the US was able to show that the apartments in New York were subject to forfeiture because the money used to buy them was involved in a money laundering scheme

— the money laundering theory was based on the fact that most of these transactions were in dollars, which means that the money passed through

banks in the US even though the money was being sent between two banks in two other countries

— that meant that US money laundering law applied

— moreover, all of the commingling was part of the money laundering scheme

— under US law, commingled money in a money laundering case is just as forfeitable as the criminal proceeds being laundered

— That meant that the Government did not have to trace all of the money used to buy the apartments back to the Russian bank fraud

— Under the money laundering theory, all of it was forfeitable

In the end, Prevezon Holdings, the company that was the ultimate purchaser of the property in New York, decided to settle the case, paying the US $5.9 million, which was more than the purchase price of the New York apartments

- *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 foreign crime);

2. Shadman / Section 981(k)

The next example again involves a foreign bad guy that we cannot lay hands on to prosecute

— But this time the proceeds are in a foreign bank account, not in the United States

— civil forfeiture has some tools that make it well-suited for this situation

— This example involves a person named Hikmatullah Shadman

Shadman obtained more than $77 million from the U.S in payments for transporting military supplies that he did not transport

— He deposited the money in a number of foreign banks, including over $10 million in Afghanistan International Bank ("AIB") in Afghanistan.

— Initially, the US attempted to recover the money by filing a civil forfeiture action against the funds in the foreign banks, but the Afghan Government declined to enforce the arrest warrants *in rem*

The civil forfeiture statutes have a provision designed to deal with this problem

— It is 18 U.S.C. § 981(k) and it works like this

— If the bad guy has deposited criminal proceeds in a foreign bank account, and the foreign bank has money in a correspondent account in the US,

— The US can seize and file a civil forfeiture action against the foreign bank's money in the correspondent account as if it were the criminal proceeds

— The idea is that as long as the bad guy still has money in the foreign bank, the bank can make itself whole by debiting the bad guy's account if the Government succeeds in its forfeiture action against the funds in the correspondent account

— Thus, the foreign bank has no interest in opposing the forfeiture action and lacks standing to do so

— Only the bad guy may file a claim and contest the forfeiture.

In Shadman's case, the Government seized over $10 million from AIB's correspondent account in New York

— when it determined that Shadman had only $4.3 million on deposit at AIB in Afghanistan, it was required to release the balance

— But it was able to bring a forfeiture action against $4.3 million that was in the correspondent account

- *United States v. $70,990,605*, 2017 WL 573499 (D.D.C. Feb. 13, 2017)
- *United States v. Sum of $70,990,605,* 128 F. Supp.3d 350 (D.D.C. 2015)

3. North Korea Sanctions Cases

The same tool – Section 981(k) – could be used when money has passed through the United States on its way to North Korea in violation of IEEPA and the North Korea sanctions

- If the money was sent, say, to a Chinese bank that has a correspondent account in the US
- And the money destined for North Korea is still in the Chinese bank
- The US can use § 981(k) to seize the money from the Chinese bank's correspondent account
- Of course, it would be better if the money could be intercepted *while it was moving through the United States*
- the next case shows how that could be done

The complaint alleges that that a Chinese company called Dandong Zhicheng Metallic Material Co. and four related companies were acting as "front companies" for North Korea

- that they were using various tactics to disguise the use of US dollars obtained through the US financial system to purchase coal from North Korea in violation of international sanctions, with 95 percent of the money going to fund North Korea's weapons program

Specifically, the complaint alleged that the Chinese company had received over $700 million through the US financial system for this purpose over a period of years

- And that money has passed through eight correspondent accounts at US financial institutions in New York
- with each of eight correspondent banks processing the transfer of at least $20 million to Dandong

Any money being sent to North Korea in violation of the sanctions is subject to forfeiture under US law under several theories

— The problem, however, is that the $700 million that had been sent to China through these correspondent accounts in the past was already gone

— What could the US do to stop the flow of this money in the future?

Damming warrant

The answer is that the Government applied to the court for what is called a "damming warrant"

— That is, a warrant that permits the Government not to seize money already in a bank account that was involved in a crime that occurred in the past

— But a warrant that acts as a net to catch new money as it flows through a particular bank account on a date sometime in the future

In this case, the Government had probable cause to believe that these eight correspondent bank accounts at US banks in New York had been used in the past to send money to the Chinese companies in violation of US law

— And that the illegal activity was ongoing ($52 million in the last 7 months)

And accordingly, that there was probable cause to believe that additional money, also forfeitable under US law, would be moving through those same accounts in the near future

— So, the court issued eight warrants, authorize the Government to freeze any money moving through those eight accounts to Dandong Metallic for a period of 14 days

At the end of that time, the Government had captured $1.9 million in its net, and filed its civil forfeiture action against that money

— Anyone with an interest in the money could have filed a claim contesting its forfeiture,

— But no one did so

- *United States v. All Wire Transactions Involving Dandong Zhicheng Metallic Material Co.,* 2017 WL 3233062 (D.D.C. May 22, 2017);

- *United States v. $4,083,935.00 of Funds Associated with Dandong Chengtai Trading, Ltd.*, 2018 WL 8108633 (D.D.C. Sep. 17, 2018).

4. Subpoenas for Foreign Bank Records

Sometimes, to make these cases, the Government needs to obtain records from a foreign bank

— Such records may be necessary to prove that the money or property found in the United States is in fact the proceeds of a foreign crime

— Or to prove that the money is in fact intended to go to a sanctioned country like North Korea

— The most recent – and the best – example of this is the very recent case from DC again involving money going to North Korea through Chinese banks

In this case, the FBI was investigating a Chinese company that served as a front for an entity involved in North Korea's nuclear weapons program.

— The investigation concerned possible violations of the money laundering statute, the International Emergency Economic Powers Act (IEEPA), and the Bank Secrecy Act.

— In other words, the allegation is that money moved through the US financial system to the Chinese entity fronting for North Korea in violation of US law

The Chinese company had accounts at 3 Chinse banks

— And the Government wanted records from those accounts to show that money going to North Korea had passed through the correspondent bank accounts in the U.S.

To obtain records of the Chinese entity's financial transactions, the Government

served grand jury subpoenas on two Chinese banks that have branches in the United States

- and another subpoena on a third Chinese bank that has no branches in the U.S. but does maintain a correspondent account at a U.S. bank.

- All three subpoenas sought records of transactions occurring in China.

All three banks resisted the subpoenas, arguing that the proper procedure was to make a request under the Mutual Legal Assistance Agreement (MLAA) between the US and China.

- But after waiting nearly a year …

- … during which time the Department of Justice sent two delegations to China in an unsuccessful attempt to gain China's compliance …

- the Government filed motions in a federal court in Washington, DC, to compel compliance with the three subpoenas.

First, the court considered the enforceability of a subpoena that is served on the US branch of a foreign bank requesting records that the branch's parent maintains in a foreign country

- in this case, two of the Chinese banks had branches in the US but the subpoena requested records of transactions that occurred not at the branches in the US, but at the parent bank in China

- we call this a *Bank of Nova Scotia* subpoena after the case from the 1980s that first upheld the use of grand jury subpoenas in this situation

Does a US court have jurisdiction to enforce such a subpoena by ordering the foreign branch to comply?

- Yes, the court held that the foreign banks agreed to submit to US jurisdiction when they requested permission to open branches in the US

— So, with respect to the two banks that had US branches, there was an element of consent

Section 5318(k)

But what about the bank that had no US branch? This is where this gets interesting

— A *Bank of Nova Scotia* subpoena is useful if there is a US branch of the foreign bank on which to serve the subpoena

— But with respect to the third bank, there was no US branch, so a *Bank of Nova Scotia* subpoena would not do

At the same time that it enacted § 981(k), Congress enacted a statute (31 U.S.C. § 5318(k)) that says essentially this:

> "If a foreign bank avails itself of access to the US financial system by maintaining a correspondent account at a US bank, it must appoint a person to receive service of any subpoena for records maintained the bank in its home country that are relevant to transactions occurring through the correspondent account"
>
> "And the bank must comply with that subpoena, for if it does not, the US can bar that bank from having a correspondent account in the US"

As you might suppose, because having a correspondent account at a US bank is essential to conducting dollar-denominated transactions anywhere in the world,

> this gives the US a great deal of leverage in compelling compliance with its Section 5318(k) subpoenas

But the question in this case was whether the court would find that the Section 5318(k) subpoena would be enforced

— Although the statute was enacted in 2001, this was the first time a foreign bank had resisted the subpoena and challenged the ability of a US court to enforce it.

What was the bank's argument?

- That the statute only authorized the demand for records of transactions occurring in the correspondent account and not records of transactions occurring in China

And what did the court hold?

The purpose of a Section 5318(k) subpoena, the court said, is to determine the source of the money that funded the later movement of money through the correspondent account in the US.

- That would include ledgers, account statements and records of cash deposits and wire transfers showing the source of the money deposited into the Chinese bank in China.

- Thus, the request that the bank produce such records fell within the scope of the statute and was enforceable.

The rationale for § 5318(k) is that even if a foreign bank does not have a US branch, it is nevertheless availing itself of access to the US financial system by maintaining a correspondent account at a US bank.

- Thus, the US may, as a condition of allowing a foreign bank to have such access, require it to comply with a subpoena for foreign bank records.

Section 5318(k) subpoenas are rarely used;

- the Justice, Treasury and State Departments are quite skittish about what they consider the option of last resort, and do not readily grant requests by law enforcement agencies to issue such subpoenas.

- But this case illustrates that permission can be obtained in some cases. *SDC*

    - *In Re: Sealed Case,* 932 F.3d 915 (D.C. Cir. 2019);

VI. Money Laundering Overview

The first question I want to address is a very basic one:

- Why charge someone with money laundering, and why include the financial side of the offense in the investigation?

    1. **Expand the universe of defendants**: some subjects may have been involved only in the movement of the money *after* the crime was complete

        - By including the financial side in the investigation, you bring in subjects who could not be charged with the underlying crime, but could be charged with money laundering

            - *United States v. Tolliver*, 949 F.3d 244 (6th Cir. 2020) (defendant acquitted of drug conspiracy but convicted of laundering the drug proceeds);

            - *United States v. Silver,* 948 F.3d 538 (2nd Cir. 2020) (there is no requirement that the defendant be convicted of the SUA or even that he was the perpetrator; it is sufficient to prove, beyond a reasonable doubt, that *someone* committed each of the elements of the SUA, and that the defendant knew the money was criminally derived);

    2. **Extend the statute of limitations:** The statute of limitations for the underlying crime runs from when that crime occurred

        - It is generally five years (unless extended, *e.g.*, by the wartime statute of limitations provision)

        - But the statute of limitations for money laundering runs from the date of the financial transaction

        - So, you could have someone who committed theft or fraud 10 years ago but conducted a transaction involving the proceeds yesterday

        - In which case you would have five more years to bring the money laundering offense

            - *United States v. Silver,* 948 F.3d 538 (2nd Cir. 2020) (the statute of limitations for money laundering runs from the date of the financial transaction, which is the *actus reus* of the crime, not from the date of the

SUA; thus, a money laundering conviction may be based on transactions involving proceeds of an SUA that occurred outside the 5-year limitations period for money laundering);

- *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);

3. **Expand the evidence admissible at trial:** When the defendant is charged only with the underlying crime, courts will generally allow only evidence relevant to that crime into evidence.

   — That can lead to some very colorful and effective evidence regarding what the defendant did with the money – bought expensive cars, hid it in bank accounts in third party names – being excluded

   — But if the defendant is charged with money laundering, all of that is relevant and admissible

   - *United States v. Arledge*, 553 F.3d 881, 896 (5th Cir. 2008) (evidence of defendant's lavish spending was relevant to the money laundering counts, was not an improper appeal to class prejudice, and did not have a spillover prejudicial effect on other counts);

4. **Sentencing:** The sentencing guidelines provide for a bump of one or two offense levels for a defendant who is convicted of money laundering in addition to the predicate offense.

   - U.S.S.G. § 2S1.1

5. **Forfeiture:** Making the financial investigation part of the case from the beginning will lead to the discovery of assets that can be seized or restrained to preserve them for trial

   — If you wait until the end of the case, the assets will likely be gone

   — And forfeiture for money laundering is much broader than it is for the SUA

- So, by charging the defendant with money laundering, you expand the list of assets that can be recovered.

Basic concepts

So, you want to include money laundering in your investigation

- Now, we need to talk about what money laundering is, beginning with some basic concepts

Money laundering is a term that can mean many different things

- the classic meaning is that money laundering is the act of concealing or disguising criminal proceeds

- that is, concealing the source, location, ownership, nature or control of the criminal proceeds

- that is what is called *concealment money laundering*

- but “money laundering” can mean other things as well

Some money laundering statutes focus not on the concealment of the source or ownership or location of money derived from a crime that occurred in the past, but on the use of money – tainted or untainted – to promote a new offense in the future

- this is called *promotion money laundering*

Others make it a crime merely to receive, to spend or simply to possess the proceeds of crime

- this is called transactional money laundering

Moreover, all three of these types of money laundering may be applied when the defendant is laundering the proceeds of his own crime;

- what is called self-money laundering

Or may be applied to a third party – a family member, co-conspirator, accountant or lawyer or professional money launderer who launders money on behalf of the one who committed the original crime

- What is called *third-party money laundering* (or sometimes *stand-alone money laundering* if the underlying predicate crime is not charged)

These are the basic concepts we should keep in mind when discussing which money laundering statute to use and what the Government has to prove

VII. The Elements of a Money Laundering Offense

The currency reporting statutes in Title 31 are money laundering statutes

- They require reports to be filed with FinCEN when someone conducts a transaction involving more than $10,000 in cash with a bank or a trade or business

- they make it a crime to structure transactions to avoid having to file those reports

- They require a Customs report when someone carries or sends more than $10,000 in currency into or out of the country

- And they make bulk cash smuggling to avoid filing a report a crime

- But we are going to focus on the money laundering offenses 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

— That is, it is both a *concealment* money laundering statute and a *promotion money* laundering statute

- 18 U.S.C. § 1956(a)(2) ("international money laundering") similarly makes it an offense to transport money into or out of the United States with certain specific intent

  — It is also a *concealment* and *promotion money* laundering statute, with an important twist on the promotion side that we will talk about

- 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.

  — Section 1957 is the *transactional* money laundering statute

We are going to focus on § 1956(a)(1), and then discuss how the other sections are different

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

We will discuss each of the elements and how to prove them.

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. Gonzalez,* 918 F.3d 808 (10th Cir. 2019) (wire transfer between bank accounts is a transaction);

- *United States v. Gonzalez,* 918 F.3d 808, 815 n.7 (10th Cir. 2019) (using a safe deposit box is a transaction under § 1956(c)(3); the "use" need be nothing more than accessing funds in the box; proof that defendant added or subtracted funds from the box is not required);

- *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);

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 be 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)

— 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);

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 begins to move

— So proving that the defendant participated in moving the proceeds from one district to another is what you need to show to have venue in the "SUA district"

- *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. Gowder*, 841 Fed. Appx. 770 (6th Cir. 2020) (pill mill doctor who wrote prescriptions to patients knowing that they would sell them in E.D. Ky. and that they would bring the proceeds back to Tennessee where they were laundered, knowingly participated, at least indirectly, in the transfer of SUA

proceeds from E,D. Ky. to Tennessee and thus could be prosecuted in E.D. Ky. under § 1956(i)(1)(B));

– The defendant, however, does not have to move the money personally

- *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 $350,000 to NY, and then commits § 1957 violation there by spending the money instead of investing it as he promised to do, 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 acts 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);

3. Extraterritorial Jurisdiction

While we're talking about venue, I should say something about extraterritorial jurisdiction for money laundering

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

- *United States v. Tarkoff*, 242 F.3d 991, 993-94 (11th Cir. 2001) (defendant, a U.S. citizen, convicted of § 1956(a)(1)(B)(i) offense when he transferred funds from Curaçao to Israel; distinguishing § 1956(a)(2), which requires transfer to or from United States);

- *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 violations of §§ 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);

4. Statute of limitations

As I've already mentioned, 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, by choosing the right financial transaction you can extend the statute of limitations even if the underlying crime occurred many years ago

5. 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

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. Stern,* 2017 WL 4676660 (S.D.N.Y. Oct. 17, 2017) (defendant "conducts" a continuing transaction touching on multiple districts when he takes delivery of drug money from a courier);

- 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);

  - *United States v. Gross*, 661 Fed. Appx. 1007 (11th Cir. 2016) (defendant can be guilty of § 1957 if he directs a subordinate to transfer funds; that defendant was not a signatory on the account from which the funds were transferred is irrelevant);

- or any member of a money laundering conspiracy may be liable for a financial transaction conducted by any other member of the 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);

  - *United States v. Ramirez*, 724 Fed. Appx. 704 (11th Cir. 2018) (chiropractors who joined a conspiracy to use insurance fraud proceeds to keep the scheme going by paying the participants are liable under *Pinkerton* not only for the payments to themselves, but for the payments made to other participants, such as the recruiters who recruited people to stage fake accidents);

- generally, it is not difficult to prove, as a factual matter, that the defendant is the one who conducted the financial transaction

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 (self-money laundering), 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");

  Diggles Note: Defendant was the founder of a charitable Foundation that administered hurricane-relief funds for the benefit of storm victims, and was also the pastor of the church out of which the Foundation ran its programs. The money laundering conviction was based on Defendant's movement of more than $10,000 of the fraud proceeds from the Foundation's accounts to the church's accounts in the course of the fraud scheme.

- *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 (third party money laundering);

– he could be 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);

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

Circumstantial evidence of knowledge

Often, the Government must 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. White,* 718 Fed. Appx. 353 (6th Cir. 2017) (sister of drug dealer who knew he had no legitimate employment and, on many occasions, purchased or sold vehicles in her name using his property, and engaged in convoluted transactions that had no legitimate purpose, was at least willfully blind to the source of the money);

- *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);

  Pendleton Note: Defendant accepted cash from drug dealers and agreed to purchase several vehicles and houses – e.g., $81,000 for a Mercedes; $90,000 for a Porsche; $150,000 for two apartment complexes and $97,000 to remodel them. He used the cash to make structured deposits totaling $1.5 million in a three-year period, with no deposit exceeding $10,000. Evidence that he knew the money was drug proceeds included testimony one of the drug dealers that he told Defendant that he was a drug dealer, that Defendant knew his $2,000 per month in legitimate income from a construction job was insufficient to enable him to purchase the items that Defendant purchased for him, that the cash he gave Defendant reeked of marijuana, and that he and Defendant spoke in code words (they referred to drugs as "applesauce" which surely misled any law enforcement agents who happened to overhear).

– 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);

  Rivas-Estrada Note: Defendants operated money transmitting businesses that were used by Mexican drug traffickers to remit large sums of money from Texas to their home base in Michoacán, Mexico. Defendants accepted gift bags, shoe boxes and suitcases containing as much as $40,000 in currency at a time from couriers, and assisted the couriers in breaking the money into smaller increments to avoid currency reporting requirements. Defendants also assisted the couriers

in choosing fake names to use as the senders of the money, and on some occasions turned off the security cameras at the money transmitting business so that the transactions would not be recorded. Defendants did not have to be involved in drug trafficking themselves to know that transactions riddled with such "red flags" involved the proceeds of unlawful activity. At the very least, the evidence allowed the jury to find that Defendants were "deliberately blind" to the illegal source of the money.

- *United States v. Odiase, ,* 788 Fed. Appx. 760 (2nd Cir. 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, which 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);

— 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);

— or the use of third parties or other deception:

- *United States v. Farrell,* 921 F.3d 116, 139 (4th Cir. 2019) (that lawyer who received money from drug organization, falsified his own records to conceal the source of the money, exhibited "guilty knowledge of the illegal source of those funds");

- *United States v. Thompson,* 758 Fed. Appx. 398 (6th Cir. 2018) (use of intermediaries by Tennessee drug distributors to send drug money to Ohio supplier in Wal-Mart to Wal-Mart transactions so that true sender and receiver would not be identified sufficient to show defendant knew the money was criminal proceeds);
- *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);

— 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 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");

— 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);

So, if there are red flags that would prompt a reasonable person to conclude that the money comes from an illegal source, there is willful blindness

— But it is unclear if there is an affirmative duty to investigate:

— The Fourth Circuit suggests that there is:

- *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 of the illegal source later is not good enough

— Which, as I mentioned earlier, is one of the reasons it is important to focus on the right financial transaction

- *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

Altogether, there are some 250 money laundering predicates

- the MLARS 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

- We'll talk about foreign SUAs and what the Government must prove when it alleges that the laundered funds are the proceeds of a foreign SUA in a minute

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 into 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.

Then, at trial, you have to prove that the elements of the foreign crime are established,

— Which likely means that you will need foreign witnesses and documents

- *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 Government seismologist who received $1 million in violation of the applicable South Korean statute, and the court instructed the jury in accordance with the elements of that offense, using the ordinary, contemporary meaning of "bribery", not the elements of the US equivalent, § 201);

- *United States v. Thiam*, 934 F.3d 89 (2nd Cir. 2019) (Minister of Mines of Republic of Guinea received $8.5 million from Chinese company; 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

because trial court did not interpret "official act" in a case where the SUA was bribery under Guinean law in accord with the Supreme Court's decision in *McDonnell*);

- *But see United States v. Inniss*, 2019 WL 6117987 (E.D.N.Y. Nov. 18, 2019) (Government concedes that it must prove each element of a foreign predicate offense, notwithstanding a foreign statute shifting the burden of proof to the defendant as to one of those elements);

Tracing

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. 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);

- *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. Kelerchian,* 937 F.3d 895 (7th Cir. 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);

Kelerchian Note: Defendant and others perpetrated a scheme to obtain machineguns in violation of the National Firearms Act by falsely telling the vendor

that the guns were being purchased for use by a law enforcement agency. The Government's money laundering theory was that the machineguns, having been fraudulently obtained, were themselves the proceeds of a specified unlawful activity (SUA), and that in selling the machineguns, Defendant conducted transactions involving such proceeds.

— *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);

— *United States v. Alabed*, 2020 WL 114415 (N.D. Ga. Jan. 9, 2020) (when defendant purchased gift cards from third parties who had obtained them illegally, he was conducting a transaction involving criminal proceeds);

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");

- *United States v. Frank*, 354 F.3d 910, 923 (8th Cir. 2004) (car that defendant would not have retained if he had complied with order to disclose all assets to the court for purposes of satisfying a restitution order is the proceeds of the fraud upon the court in violation of sections 1341 and 1343 and obstruction of justice);

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 limitation 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));

  Mithavayani Note: Defendants ran pill mill operation, transferring their drug proceeds to an account that held only legitimate income from their medical practice before committing the money laundering offense. The court held that even if the defendants were able to show that they transferred the tainted funds to Account A at a legitimate business, and used other funds from Account B at that business to conduct the money laundering transaction, such that it was apparent that the latter funds were *not* the tainted funds, that the transaction involving the funds from Account B was dependent on the defendants' having placed the tainted funds into Account A, meant that the transaction involving the Account B funds could still be a money laundering offense involving SUA proceeds.

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 (3rd 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) (where there have been numerous intervening transactions, the timing and pattern of transactions may serve as circumstantial evidence that the money moving is traceable to the original SUA);

But the circumstantial evidence that is used most often to establish the proceeds element is the defendant's lack of legitimate income:

— 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);

  Colon Note: Defendant owned and operated a shopping mall in Indianapolis that also served as the front for his drug business. He purchased large quantities of cocaine and heroin from Arizona and sold it to local drug dealers in Indiana, depositing the cash proceeds into his business bank account, commingled with legitimate cash income. He argued that because the shopping mall and the drug business both generated cash income, there was no way the Government could prove that the cash deposits into his bank account were drug deposits and not mall deposits.

  The court held, however, that the Government was entitled to rely on circumstantial evidence that the deposits included at least some drug money. Most important, the evidence showed that the shopping mall was losing money and that in the particular month in which Defendant made the eight deposits that led to his conviction, he made cash deposits that exceeded the gross cash revenue from the shopping mall by nearly $20,000.

- *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);

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. Mithavayani,* 2019 WL 2125833, *7 (E.D. Ky. May 15, 2019) (following *Bencs*; that pill mill had some legitimate patients did not prevent jury from finding that funds drawn from business account involved SUA proceeds);

- *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. Thompson,* 758 Fed. Appx. 398 (6th Cir. 2018) (evidence that Tennessee drug dealer's drug proceeds were the greater part of his overall income, which included income from an auto-repair business, sufficient to show that money wired to his Ohio drug supplier "involved" commingled drug proceeds; applying *Warshak);*

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 sent 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*

- this is another reason why it is important to focus on 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"); *United States v. Richard*, 234 F.3d 763, 769 (1st Cir. 2000) (same; quoting *Butler*);

- 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. Capacho,* 2018 WL 1334812 (S.D. Tex. Mar. 15, 2018) (if a kickback is paid in two steps, the second step involves SUA proceeds and may be charged as a money laundering offense; denying motion to dismiss the indictment);

- *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. 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*, 928 F.3d 380, ___ n.3 (5th Cir. 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);

- *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. 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);

- *United States v. Markham,* 2019 WL 485959 (E.D. La. Feb. 7, 2019) (that money laundering act was charged as an overt act in the underlying fraud conspiracy did not mean the money laundering merged with the fraud; the property being laundered could be the proceeds of a completed phase of the fraud conspiracy; otherwise a defendant could never be prosecuted for money laundering as long as the underlying conspiracy of which the money laundering was a part was still underway);

- *United States v. Chavez,* 2018 WL 6251387 (W.D. Ky. Nov. 29, 2018) (Defendant perpetrated the scheme by stealing the identities of legitimate health care providers, billing for services in the names of those providers, and depositing the checks that he received from insurance companies into accounts in another state that he opened in names that were similar but not identical to the names of the actual providers; when defendant received checks from insurance companies, he had health care fraud proceeds in his possession; subsequent deposit of the checks into accounts set up to conceal what defendant was doing was a money laundering offense even if it was also part of the scheme to defraud);

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

— But 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. 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. 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. 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);

- 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 have the *mens rea* to satisfy one of the four conditions of the statute

1. Promotion money laundering

Section 1956(a)(1)(A)(i) is 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. Azmat*, 805 F.3d 1018 (11th Cir. 2015) (using proceeds of pill-mill to pay rent, salaries and overhead expenses (cable TV) is promotion money laundering; such reinvestment allows the defendants to continue seeing "pill-seeking patients" and to "enrich themselves by dispensing controlled substances");

- *United States v. Agundiz-Montes,* 679 Fed. Appx. 380 (6th Cir. 2017) (using drug proceeds to buy more drugs and to pay rent on storage facility is promotion money laundering);

— 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. 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,* 832 F.3d 934 (8th Cir. 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 promotion 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. 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);

– 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);

There is no "merger" issue: the same financial transaction may constitute the money laundering offense and the SUA being promoted:

- *United States v. Wilkinson*, 137 F.3d 214, 221 (4th Cir. 1998) (same transaction may constitute money laundering offense and next step in overall fraud scheme; there is no merger problem with the promotion prong of the offense; distinguishing *Heaps*, *infra*);

- *United States v. Piervinanzi*, 23 F.3d 670, 679-81 (2d Cir. 1994) (wiring money out of bank to an overseas account to commit bank fraud is an act intended to promote the bank fraud of which the wire transfer is a part);

- *United States v. Root,* 777 Fed. Appx. 536 (2nd Cir. 2019) (§ 1956(a)(2)(A) contains no requirement that the money laundering offense be "analytically distinct" from the offense being promoted; following *Piervinanzi*);

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. Williamson,* 656 Fed. Appx. 175, 184 (6th Cir. 2016) (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 prosecutors to treat very carefully.

2. Evasion of income taxes

Because income tax evasion is not an SUA, Congress had to enact a subsection of § 1956 that deals specifically with the promotion of a tax offense

— This section is rarely used because it requires the approval of the Tax Division, but there are a few cases

- *United States v. Christy,* 916 F.3d 814 (10th Cir. 2019) (§ 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 a portion of $400,000 in embezzled funds 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; conviction reversed);

- *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. 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. Concealment money laundering

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.

— This is called "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. Gonzalez,* 918 F.3d 808 (10th Cir. 2019) (creating the appearance of legitimate wealth is one way to commit concealment money laundering but it is not necessary; concealing any of the attributes will suffice);

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

- Contrast this with promotion money laundering where the Government must show that the defendant intended to promote

- *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 someone who is laundering money at someone else's direction, the defendant's 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 that the purpose was to conceal or disguise:

- *United States v. Oloyede,* 933 F.3d 302 (4th Cir. 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. Pendleton,* 761 Fed. Appx. 339 (5th Cir. 2019) (unusual financial moves suggest transaction was designed to conceal; accepting cash from drug dealer in exchange for cashier's check that he could use to show legitimate source for down payment was evidence of concealment);

- *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. Allen,* 2013 WL 593925, *7 (E.D. Tenn. Feb. 15, 2013) (indictment alleging deposit of numerous checks from investors into account in third party's name, followed immediately by withdrawal of cashier's checks sufficiently alleged concealment money laundering to withstand motion to dismiss), *aff'g* magistrate's report and recommendation, 2012 WL 7150022, *10 (E.D. Tenn. Dec. 6, 2012);

- *United States v. Nasher-Alneam,* 2019 WL 2618189 (S.D. W.Va. Jun. 26, 2019) (that medical doctor transferred fraud proceeds from his business account to his personal account before transferring the money to family members overseas does not, by itself, establish that the purpose of the transaction was to conceal or disguise);

-- Structuring cash transactions:

- *United States v. Walton,* 745 Fed. Appx. 15 (9th Cir. 2018) (funneling is "a method typically employed by money launderers to conceal the source of funds");

- *United States v. Prince*, 214 F.3d 740, 768 (6th Cir. 2000) (evidence of structuring of cash transactions to evade CTRs is probative of intent to conceal or disguise);

- *United States v. Ortiz,* 2018 WL 3945604 (E.D. Ky. Aug. 16, 2018) (smurf's knowledge that transaction was designed to evade the reporting requirement included testimony of co-defendants that they knew transactions had to be kept below $10,000 to prevent tellers from asking questions, and that defendant was told not to act suspiciously at the bank);

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

- *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. Sheridan,* 679 Fed. Appx. 492 (7th Cir. 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. 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);

-- commingling dirty money and clean money

- *United States v. Cessa,* 861 F.3d 121 (5th Cir. 2017) ("Evidence that the defendant commingled illegal proceeds with legitimate business funds is sufficient to support a conviction under § 1956");

- *United States v. Stewart,* 854 F.3d 472 (8th Cir. 2017) (evidence that defendant deposited drug proceeds in account held in the name of a band, and commingled the money with the legitimate proceeds of a glass pipe business, sufficient to show concealment);

— 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. 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);

— You need something more than that the defendant spent 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);

— For example, in *White*, the drug dealer's sister who was buying cars for him was not simply spending the money; she was concealing his ownership

- *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 of 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);

  Bikundi Note: Defendants, husband and wife, operated a home healthcare service that obtained $80 million from the District of Columbia Medicaid program, much of it through fraud. They argued that the transactions in question, whereby they moved fraud proceeds from their business bank accounts to accounts held by other entities that they owned in their own names, did not conceal the money, and were in fact so transparent that a novice law enforcement agent who had little experience with money laundering investigations was easily able to trace it. But the panel was not impressed with either argument.

- Among other things, the court noted that Defendants conducted tens of thousands of transactions to move tens of millions of dollars in fraud proceeds from their business accounts to the accounts of "sham companies" that did no business or

had no relationship with the health care business other than their common ownership. In one set of transactions, for example, Defendants used 84 cashier's checks totaling over $7.7 million to move fraud proceeds from their business accounts to the accounts of the other entities that they controlled, and from there to their personal accounts.

- While Defendants may have made no effort to conceal the *ownership* of the funds in question, the court said, the evidence was sufficient to allow the jury to conclude that Defendants' purpose was to conceal or disguise the *source* of their funds.

- *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);

- *United States v. Odiase,* 2018 WL 2926626 (S.D.N.Y. Jun. 12, 2018) (defendant's transferring money between accounts in her own name does not mean she was not trying to conceal its source; she may have been attempting to "elongate the trail" between the money and the source; that she might have been more "cunning" is not a defense);

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*);

Knowledge that the purpose of the transaction was to conceal or disguise may be shown through willful blindness:

  - *United States v. Stern,* 2017 WL 4676660 (S.D.N.Y. Oct. 17, 2017) (like the knowledge that property is illegally derived, the defendant's knowledge that the purpose of the transaction was to conceal or disguise may be shown by willful blindness);

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));

Like the defendant's knowledge that the transaction was designed to conceal in a concealment money laundering case, his knowledge that the transaction was designed to evade a currency reporting requirement may be show through willful blindness

- *United States v. Macias Martinez*, 797 Fed. Appx. 974 (6th Cir. 2020) (willful blindness may be used to establish defendant's knowledge that the transaction was designed to avoid a reporting requirement; courier's knowledge that sub-$10,000 bundles of cash she was depositing into multiple banks on the same day came from a much larger stash was sufficient to establish the knowledge element of § 1956(a)(1)(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));

— so, the one-person movement of the money that is not an offense under § 1956(a)(1) would be covered by § 1956(a)(2)

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. Feldman,* 931 F.3d 1245 (11th Cir. 2019) (defendant committed international promotion money laundering when he received investments from relatives in Europe in his fraudulent business and returned dividends to them so that they would maintain their investments and thus allow him to keep the scheme going);

- *United States v. Maddux,* 917 F.3d 437 (6th Cir. 2019) (evidence that defendant sent money overseas to buy cigarettes that she later sold without collecting taxes was sufficient to show she sent the money with the intent to promote wire fraud by defrauding the Government of tax revenue);

  Maddux Note: Defendant sent money to cigarette wholesalers in Israel, Ukraine and Kyrgyzstan to buy cigarettes that they then sold in the United States without collecting federal or state taxes. She argued that there was insufficient evidence that she sent the money overseas with the intent to promote the scheme, but the court held that her personal role in sending the money and tracking where it was sent, coupled with her use of phony credit-card and check-processing accounts to conceal that the product she was selling was cigarettes, was sufficient to prove that she sent the money with the intent to defraud the Governments of their tax revenue.

- *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);

– 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. Tajideen,* 319 F.Supp.3d 445 (D.D.C. 2018) (following *Piervinanzi;* same transaction can be a money laundering offense under § 1956(a)(2)(A) and the IEEPA offense being promoted);

- *United States v. Harder*, 2016 WL 807942, *10 (E.D. Pa. Mar. 2, 2016) (paying a bribe to a foreign official is a violation of § 1956(a)(2)(A) that does not merge with the FCPA offense being promoted);

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);

– But a low-level participant who simply does what he is told and doesn't care whether the business succeeds or not may lack the intent necessary to convict:

  - *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);

  - *United States v. Stoddard*, 892 F.3d 1203 (D.C. Cir. 2018) (following *Trejo*; insufficient evidence that drug dealer's cousin, who agreed to title drug dealer's car in his name and pay for it with drug dealer's money, intended to promote the drug business);

- *But see United States v. Calderon*, 665 Fed. Appx. 356 (5th Cir. 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. 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);

  - *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

It follows that if there is no proceeds element in § 1956(a)(2)(A), there is no requirement that the defendant knew the property was criminally derived

- intent to promote is the only *mens rea* requirement

    - *United States v. Carozza,* 608 Fed. Appx. 532, 535 n.1 (9th Cir. 2015) (unlike the other parts of the money laundering statute, § 1956(a)(2)(A) does not require proof that the defendant knew the property was illegally derived);

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 we don't know its source

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

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);

Elements of Section 1957

Section 1957 is the transactional money laundering statute

— It 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 (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

-- the Fifth and Ninth Circuits apply a drugs in / last out rule, which means that the total of all withdrawals from an account must exceed the value of the tainted funds by more than $10,000 before there can be a § 1957 offense

- *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);

- *But see United States v. Martinez,* 921 F.3d 452 (5th Cir. 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. 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. 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.