

Money Laundering: How Prosecutors Clean Up under 18 USC Sections 1956 and 1957

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A recent case profiled in The New Yorker magazine demonstrates the dangers of the aggressive use of the money laundering statutes.¹ In that case, Henry Cisneros's former lover, Linda Jones, received a three and a half year sentence for her part in obtaining a bank loan to buy a house. Jones's crime? She had her sister and brother-in-law falsely state that the house was going to be used as their primary residence. The bank sustained no loss in the case. Yet, Jones and her relatives were charged by the Office of Independent Counsel investigating Cisneros with bank fraud, false statements, obstruction of justice and money laundering. All for conduct that, according to former Clinton Administration acting Solicitor General, Walter Dellinger, another "fifty million Americans" have probably engaged in.

The fact that the Jones prosecution included a money laundering charge reflects the times: Money laundering charges are being brought with ever greater frequency in federal court these days. The reasons for this are not surprising. The United States Sentencing Guidelines set forth draconian punishment for money laundering. For example, for a violation of 18 U.S.C. section 1956 (a)(1)(A) – conducting a financial transaction knowing that the property involved represents the "proceeds of some form of unlawful activity," with the intent to promote the carrying on of "specified unlawful activity"-- the base offense level is 23 (U.S.S.G. § 2S.1.1(a)(1)), three levels higher than the base offense level for robbery (U.S.S.G. § 2B.3.1(a)). Moreover, as illustrated by the case of Linda Jones, the filing of a money laundering charge or the threat to do so, functions as a coercive tool in plea bargaining.

In order to know when a prosecutor's threat to charge money laundering is an empty one, and when you might have a viable defense to such a charge, it is important to know precisely what conduct is covered by the money laundering statutes, what the elements of the offenses are, and what defenses you may be able to raise.

The Statutes: A General Overview

The Money Laundering Control Act of 1986 is found at 18 U.S.C. §§ 1956 and 1957. Section 1956 criminalizes the knowing and intentional transportation or transfer of money derived from specified unlawful activities. Broadly, section 1956(a)(1) prohibits knowingly engaging in a broad range of transactions involving the proceeds of criminal activity either with the intent to promote the unlawful activity, or with the intent to violate certain sections of the Internal Revenue Code, or with the knowledge that the transaction is designed (1) to conceal some information concerning the funds (ownership, control, source, etc.) or (2) to avoid currency

¹ Jane Mayer, *The Lover in Jail*, The New Yorker, page 55, November 30, 1998.

transaction reporting requirements. Section 1956 (a)(2) prohibits the transportation of monetary instruments in foreign commerce with the same mens rea or knowledge. Section 1956 (a)(3) (added by the Anti-Drug Abuse Act of 1988) prohibits engaging in transactions with the intent either to promote the carrying on of a specified unlawful activity, or to conceal some information concerning the funds, or to avoid a transaction reporting requirement, if the property is represented by a law enforcement officer to be the proceeds of specified illegal activity or property used to conduct or facilitate such activity.

Section 1957 prohibits transactions involving non-monetary property derived from specified unlawful activities. Section 1957 prohibits knowingly engaging in virtually any ordinary banking transaction involving a financial institution which involves “criminally derived property” of a value greater than \$10,000. Thus, section 1956 covers a broad range of commercial activity in “proceeds of . . . unlawful activity” without setting any minimum amount, while section 1957 is confined to transactions in “criminally derived property” made “by, through, or to a financial institution” in an amount greater than \$10,000. The intent and knowledge requirements of section 1956 transactions involving tainted money or proceeds are somewhat stricter than those of section 1957. A useful overview to the money laundering statutes appears in the United States Attorney’s Manual at section 9-105.100.

Together, these statutes encompass far more than what is commonly thought of as “money laundering.” They are not limited to transactions involving the proceeds of drug sales or organized crime. Rather, virtually any federal offense and many state offenses that generate money can give rise to a money laundering charge as soon as the person engages in a financial transaction with that money. Indeed these statutes are not even limited to monetary transactions with financial institutions; the most routine of commercial transactions can constitute money laundering. To understand the broad range of activity that is punishable as money laundering, it is necessary to review the statutes in some detail.

A. Section 1956

Section 1956 prohibits three different types of conduct: transaction money laundering, transportation money laundering and sting operations.

Section 1956(a)(1) is directed at “transaction money laundering,” where an individual conducts or attempts to conduct a financial transaction with money derived from specified unlawful activity. The four specific offenses are: (1) conducting a financial transaction with the intent to promote specified unlawful activity, § 1956(a)(1)(A)(i); (2) conducting a financial transaction with the intent to engage in tax evasion, § 1956(a)(1)(A)(ii); (3) conducting a financial transaction knowing the transaction is designed to conceal or disguise the nature, location, source, ownership or proceeds of specified unlawful activity; § 1956(a)(1)(B)(i); and conducting a financial transaction knowing that the transaction is designed to avoid state or federal reporting requirements, § 1956(a)(1)(B)(ii).

Section 1956(a)(2) prohibits “transportation money laundering,” or the moving of

criminally derived proceeds into or out of the United States. The three offenses covered by this subsection are moving such money into or out of the country (1) with the intent to promote specified unlawful activity, section 1956(a)(2)(A); (2) with knowledge that the funds represent the proceeds of unlawful activity and that the transfer is designed to conceal or disguise the proceeds, section 1956(a)(2)(B)(i); and (3) with knowledge that the funds represent the proceeds of unlawful activity and that the transfer is designed to avoid state or federal reporting requirements section 1956(a)(2)(B)(ii).

Section 1956(a)(3) is directed at punishing persons engaged in money laundering sting operations. This provision is intended to foreclose defense arguments in sting operation cases that the proceeds involved are not actually proceeds of specified unlawful activity. Under this subsection, it is illegal to conduct a financial transaction involving property *represented to be* the proceeds of specified unlawful activity (1) to promote specified unlawful activity, section 1956(a)(3)(A); (2) to conceal or disguise the nature, location, source, ownership or control of property believed to be the proceeds of specified unlawful activity, section 1956(a)(3)(B); or (3) to avoid state or federal reporting requirements, section 1956(a)(3)(C).

B. Section 1957

This section prohibits knowingly engaging in a monetary transaction in criminally derived property that is worth more than \$10,000 and is derived from specified unlawful activity. While the statute requires proof that the defendant “knowingly” engaged in a transaction involving criminally-derived property, see, e.g., United States v. Turman, 122 F.3d 1167, 1169 (9th Cir. 1997), there is no requirement that the defendant actually intend to conceal the source of the funds or to further any unlawful activity. Furthermore, the statute provides that “the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.” 18 U.S.C. § 1957(c). The congressional intent behind the statute apparently was to dissuade people from engaging in any sort of commercial transactions with persons suspected of being involved in criminal activity. (See H.R. Rep. No. 99-855, pt. 1 at 14 (1986).) However, some commentators believe that section 1957 is broad enough to criminalize a wide range of routine and even legitimate commercial transactions.

Elements

There are certain elements common to almost all of the different varieties of money laundering discussed above, and within each lie possible defenses to a money laundering charge. The five that we will focus on are: (1) knowledge; (2) proceeds; (3) specified unlawful activity; (4) financial transaction; and (5) intent.

1. Knowledge

A. Actual Knowledge

Actual knowledge is required for all money laundering offenses, but the precise type of knowledge varies with the offense.

Under section 1956, the defendant must “know[] that the property involved in a financial transaction represents the proceeds of some form of unlawful activity.” 18 U.S.C. § 1957(a)(1). The statute further clarifies that the person must know “the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony.” 18 U.S.C. § 1956(c)(1). Therefore, while the person must know that the underlying activity constituted a felony, he does not need to know what precisely the illegal activity was. Furthermore, the Ninth Circuit has held that while “the defendant must have known that the primary predicate activity . . . was unlawful, see United States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991), he need not have known that the secondary act of laundering the proceeds was unlawful.” United States v. Stein, 37 F.3d 1407, 1409 (9th Cir. 1994).

Section 1956 imposes an additional knowledge requirement on certain transaction and transportation money laundering offenses. Under sections 1956(a)(1)(B) and (a)(2)(B), the government must show that the defendant knew that the transaction or transportation of proceeds of specified unlawful activity was designed in whole or in part to conceal the proceeds or avoid reporting requirements.

The knowledge requirement is somewhat looser under section 1957 than under section 1956. While the government must prove that the defendant “knowingly engages or attempts to engage in a monetary transaction in criminally derived property,” as discussed above, the person need not know from what specific criminal activity the property was derived, or whether it was derived from felonious conduct. See 18 U.S.C. §§ 1957(a) & (c). (But see United States v. Turman, 122 F.3d 1167, 1169 (9th Cir. 1997) (in section 1957 prosecution, “government was required to prove defendant knew the laundered funds were derived from wire fraud.”)) However, the statute leaves open the question of mens rea as to two other elements of the offense: that the transaction was a “monetary transaction” and that it was “in criminally derived property of a value greater than \$10,000.” It might be possible to argue that the government must prove that the defendant knew that the transaction in which she was involved constituted a “monetary transaction” as defined in § 1957(f)(1) and that the criminally derived property was worth more than \$10,000.

Under both sections 1956 and 1957, the Ninth Circuit has held that it is error to give the jury a general instruction defining “knowingly” along with the standard money laundering instruction because the two instructions conflict. See United States v. Knapp, 120 F.3d 928 (9th Cir. 1997) (Section 1956); Turman, 122 F.3d 1167 (Section 1957) (although error did not warrant reversal in either case). The general “knowingly” instruction, which states that the government is not required to prove the defendant knew his acts were unlawful, conflicts with the requirement that the government prove knowledge that the laundered funds were derived from illegal activity.

B. Willful Blindness

While both sections 1956 and 1957 require proof of actual knowledge, rather than the lower standards of “reason to know” or “reckless disregard,” courts have allowed convictions based upon “willful blindness.” The Senate Report accompanying the legislation in fact states explicitly that the “knowing” requirements of the law are intended to be construed to include instances of “willful blindness.” S. Rep. No. 433, 99 Cong., 2d. Sess. 9-10 (1986). Courts have unhesitatingly taken up this invitation. In United States v. Campbell, 977 F.2d 854 (4th Cir. 1992), a real estate broker who admitted she suspected the buyer might have been a drug dealer and who was aware of his expensive cars, large amounts of cash, cellular phone, and the irregular nature of the transaction was found to be willfully blind to the facts. Similarly, in United States v. Antzoulatos, 962 F.2d 720 (7th Cir. 1992), where the defendant knew of rumors of his friends’ involvement in drug sales and had close friendships with the drug dealers whose money he was accused of laundering, he was held to be at least closing his eyes to the source of his friends’ money.

However, the argument can be made that the trial court should be more reluctant to give a willful blindness instruction in the context of a money laundering prosecution than in other cases. Where the government already does not need to prove precisely what knowledge the defendant is consciously avoiding, a willful blindness instruction can allow a conviction to be based on evidence that the defendant had business dealings with someone the government can show is “a criminal.” As a result, the threshold of proof of a serious offense can become very low indeed. See G. Richard Strafer, *Money Laundering: The Crime of the 90's*, 27 Am.Crim.L.Rev. 149, 169 (1989).

C. Circumstantial Evidence

All federal circuits, including the Ninth, have allowed the government to use circumstantial evidence to prove knowledge. See, e.g. United States v. McDougald, 990 F.2d 259, 263-64 (6th Cir. 1993) (holding circumstantial evidence sufficient to prove knowledge where defendant agreed to purchase car for drug dealer and lied to police and court about purchase); United States v. Gallo, 927 F.2d 815, 822 (5th Cir. 1991) (finding knowledge shown where defendant met drug dealer in parking lot, received box of money and departed). For more information on the ways in which courts have permitted circumstantial evidence to prove knowledge (and on other uses of circumstantial evidence in money laundering cases), see Thomas M. DiBiagio, *Money Laundering and Drug Trafficking: A Question of Understanding the Elements of the Crime and the Use of Circumstantial Evidence*, 28 U.Rich.L.Rev. 255 (1994).

2. Proceeds

A. Defined

The term “proceeds” is nowhere defined in the Money Laundering Control Act. As a result, several courts, including the Ninth Circuit, have adopted dictionary definitions that define the term broadly. See, e.g., United States v. Estacio, 64 F.3d 477, 480 (9th Cir. 1995). Recently, the Ninth Circuit, relying on dictionary definitions, held that the term “proceeds” “has the broader meaning of ‘that which is obtained . . . by any transaction.’” United States v. Akintobi,

159 F.3d 401, 403 (9th Cir. 1998). Using such broad definitions, the Ninth Circuit has held that proceeds need not consist of money or some tangible asset, but can be a fraudulently obtained line of credit resulting in an artificially inflated bank balance, Estacio, 64 F.3d at 480, or fraudulently created credit derived from paying credit card balances with bogus checks, Akintobi, 159 F.3d at 404. See also, United States v. Werber, 787 F.Supp. 353, 356 (S.D.N.Y. 1992) (finding that automobiles purchased with counterfeit bank cashier's checks were "proceeds" of utterance of counterfeit checks). The Ninth Circuit has also held that "criminally derived property" under § 1957 is equivalent to "proceeds" under § 1956. United States v. Savage, 67 F.3d 1435, 1442 (9th Cir. 1995).

B. Proceeds of Prior Criminal Activity

For the purposes of a money laundering prosecution, the proceeds of illegal activity cannot simply be the receipt of payment for the underlying illegal activity. In Estacio, the Ninth Circuit cited approvingly United States v. Edgmon, 952 F.2d 1206 (10th Cir. 1991) which held that the government must prove that the defendant knowingly used the proceeds of unlawful activity in a separate financial transaction, because "Congress aimed the crime of money laundering at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior 'specified unlawful activity.'" 952 F.2d at 1213-14. Similarly, in United States v. Savage, 67 F.3d 1435, 1441 (9th Cir. 1995), the court held that "'proceeds' are funds obtained from prior separate criminal activity," and noted that "Congress considered money laundering to be separate conduct occurring after completion of the underlying criminal offense."

As the court noted in United States v. Christo, 129 F.3d 578 (11th Cir. 1997), "[t]he main issue in a money laundering charge, therefore, is determining when the predicate crime becomes a 'completed offense' after which money laundering can occur." That determination has rarely been made in favor of criminal defendants. In Savage, for example, the defendant was charged with engaging in a fraud scheme in which he would solicit \$5,000 investments with the promise of generating large profits in currency arbitrage. A co-schemer then transferred part of the proceeds overseas. The court found that the mail fraud scheme was complete after the investors wired the \$5,000 to the defendant, and that the subsequent transfer of that money outside the U.S. was an additional transaction using ill-gotten proceeds. 67 F.3d at 1437-42. Similarly, in United States v. Leahy, 82 F.3d 624, 635-36 (5th Cir. 1996), the court rejected an argument that there was no completed offense, finding that when the defendants had placed funds fraudulently obtained in an escrow account and then distributed the funds to a business account, they had engaged in money laundering since the fraud was complete when the money was deposited into the escrow account. But see United States v. Gaytan, 74 F.3d 545, 555-56 (5th Cir. 1996) (holding that "a transaction to pay for illegal drugs is not money laundering, because the funds involved are not proceeds of an unlawful activity when the transaction occurs, but become so only after the transaction is complete"). For more on the question of what is a completed crime, see Maura E. Fenningham, *A Full Laundering Cycle is Required: Plowing Back the Proceeds to Carry on Crime is the Crime Under 18 U.S.C. § 1956(a)(1)(A)(i)*, 70 Notre Dame L.Rev. 891 (1995).

C. Tracing

Courts have not required the government to prove that the funds involved in a money laundering scheme can be traced back to a particular offense. For example, the court in United States v. Jackson, 983 F.2d 757, 766 (7th Cir. 1993) sustained a money laundering conviction where it was shown that the defendant engaged in drug transactions around the time that he purchased automobiles with cash. Similarly, in United States v. Blackman, 904 F.2d 1250, 1257 (8th Cir. 1990), the government was allowed to rely on evidence of the defendant's involvement in drug trafficking and his lack of any legitimate source of income to raise an inference that money he had wired represented the proceeds from drug distribution. However, as the court held in Blackman, the government cannot rely exclusively on a defendant's lack of a source of income as evidence of unlawful activity. 904 F.2d at 1257.

Courts have rejected the defense that the funds are not the proceeds of illegal activities because they come from an account that contains legally-obtained money. In United States v. Marbella, 73 F.3d 1508, 1515 (9th Cir. 1995), the court explained that "under the money laundering statutes, due to the fungibility of money, it is sufficient to prove that the funds in question came from an account in which tainted proceeds were commingled with other funds."

3. Specified Unlawful Activity

Section 1956(c)(7) defines the term "specified unlawful activity" for purposes of both section 1956 and 1957.² In a list (expanded by the Anti-Terrorism and Effective Death Penalty Act 1996) that runs well over a page of the annotated code, "specified unlawful activity" includes virtually every federal felony offense and a sizable number of state offenses as well. Section 1956(c)(7) now incorporates the definition of racketeering found at section 1961(1), and thus such prosecutorial staples as mail fraud, wire fraud, financial institution fraud and narcotics offenses, murder, kidnaping, robbery, extortion, as well as, bribery, dealing in obscene matter, counterfeiting, extortionate credit transactions, unlawful procurement of citizenship or naturalization, obstruction of justice, obstruction of criminal investigations, tampering with a witness, false statement in application and use of a passport, misuse of passport, fraud and misuse of visas, permits, and other documents, slavery, racketeering, interstate transportation of wagering paraphernalia, gambling, arson, and, money laundering itself under both sections 1956 and 1957.³ All of these listed offenses are stated with reference to other statutory provisions.

² See also, 18 U.S.C. § 1957 (f)(3).

³ "Specified unlawful activity" also includes any act constituting a continuing criminal enterprise under 21 U.S.C. § 848. 18 U.S.C. § 1956(c)(7)(C). In addition, the definition includes a laundry list of offenses ranging from the destruction of aircraft, assassination of Cabinet officials, theft by bank officers, prohibited transactions involving nuclear materials and others. Id. § 1956(c)(7)(C). Felonies involving water pollution and any offense involving federal health care are also included. Id. § 1956 (c)(7)(C). Specific offenses against foreign nations, involving controlled substances, murder, kidnaping, robbery, extortion,

For example, mail fraud references section 1341, financial institution fraud references section 1344, and so on. Commentators have argued that this specificity ought to require the government to plead more than generic kinds of criminal conduct. Andrew J. Camelio and Benjamin Pergament, *Money Laundering*, 35 Am. Crim. L. Rev. 965, 975 (1998). Nonetheless, these commentators acknowledge that courts generally have not required an “overly stringent degree of particularity in the pleadings” in the face of challenges to the allegations of specific unlawful activity. *Id.* at n. 78, citing, *inter alia*, United States v. Sierra- Garcia, 760 F.Supp. 252, 258 (E.D.N.Y.1991) (holding that indictment that charged “narcotics distribution” sufficiently pleaded specific unlawful activity as discrete act).

There nonetheless are potential pitfalls for the government at the pleading stage. For example, when dealing with a money laundering indictment predicated on drug trafficking offenses, defense counsel should be diligent in scrutinizing the asserted drug trafficking offense against the definition of racketeering activity found at section 1961(1). This is because section 1961(1) references section 102 of the Controlled Substances Act, which applies only to *narcotics or dangerous drugs*, not other kinds of drugs. Indeed, the Department of Justice has recognized that proper pleading of charges under section 1956 requires diligence in complying with the appropriate terminology from RICO. See Camelio and Pergament, supra, at 974.

Ultimately, however, the courts grant the government considerable leeway in making a case of money laundering and do not require a tight nexus between the specified unlawful activity and the corpus of the funds. In section 1956 prosecutions, the government need prove only that *some of the funds* used were proceeds of a specified unlawful activity. See, e.g., United States v. Jackson, 935 F.2d 832, 839–40 (7th Cir. 1991). Moreover, in the case of sting operations, as the Second Circuit has held, “so long as the cash is *represented* to have come from any of these [specified unlawful] activities, a defendant is guilty of the substantive offense of money laundering.” United States Stavroulakis, 952 F.2d 686, 691 (2nd Cir. 1992), cert. denied, 504 U.S. 926 (1992).

The link with the specified unlawful activity is even more attenuated in section 1957 prosecutions. In those instances, the property over \$10,000 need be only *derived* from criminal activity.

4. Financial Transaction

The central concept at the heart of transaction money laundering and money laundering in sting operations under section 1956 is that of the “financial transaction.” Defined at section 1956 (c)(4), the term is not limited to financial or banking institution transactions: [T]he term “financial transaction” means (A) a transaction which in any way or degree affects

destruction of property by explosion or fire, and fraud against a foreign bank if there is a financial transaction occurring in whole or in part in the United States are also included. 18 U.S.C. § 1956 (c)(7)(B).

interstate or foreign commerce (i) involving the movement of funds by wire, or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving of the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree. 18 U.S.C. § 1956(c)(4).

In order to be a “financial transaction” within this definition, the activity must first be a “transaction,” which in turn is defined at section 1956 (c)(3) to include virtually any exchange of money or credit. Accordingly, broad ranges of commonplace commercial activity meet the definition of financial transaction under section 1956 and become prosecutable if the transaction has a substantial affect on interstate commerce and satisfies the mens rea element requirements of section 1956 (a) (1)(A)–(B).⁴

The courts have interpreted the term “financial transaction” as broadly as the statutory language permits. For example, the Ninth Circuit in United States v. Gough, 152 F.3d 1172, 1173 (9th Cir. 1998) found that a defendant who hired his co-defendant to drive a van loaded with monetary proceeds of drug transactions, with knowledge of the source of that money, and who waited in a nearby room while the money was unloaded from the van, was involved in a “financial transaction” within the meaning of the statute. The Eighth Circuit in United States v. Blackman, 904 F.2d 1250, 1257 (8th Cir. 1990) held that the transfer of title to a truck constituted a “financial transaction.” Similarly, both the Fourth and the Seventh Circuits have held that the sale of automobiles constitutes a “financial transaction.” See, e.g., United States v. McLamb, 985 F.2d 1284, 1292 (4th Cir.1993); United States v. Kaufmann, 985 F.2d 884, 889 (7th Cir.), *cert. denied*, 508 U.S. 913 (1993). Moreover, the Third Circuit in United States v. Paramo, *supra*, 998 F.2d at 1215 found that writing a check from the proceeds of fraudulently obtained loans to pay the interest on those loans constituted an independent “financial transaction.” Consistent with this broad reading of the statute, Congress amended section 1956 (c)(3) in 1992 to overrule the Seventh Circuit’s opinion in United States v. Bell, 936 F.2d 337 (7th Cir. 1991) which had held that placing money in a safety deposit box did not constitute a “transaction” under the statute. Attempts to engage in a transaction, even without completing it, also qualify under the statute. See, e.g. McLamb, 95 F.2d at 1292 (upholding conviction under money laundering statute where defendant was arrested before completion of transaction); Kaufmann, 985 F.2d at 892–94 (same).

5. Intent

⁴ The four sets of mens rea identified in section 1956 (a)(1)(A)–(B) are as follows: (1) intent to promote the carrying on of specified unlawful activity; (2) intent to engage in a violation of section 7201 or section 7206 of the Internal Revenue Code; (3) intent to conceal or disguise the nature, location, the source, the ownership, or the control of the proceeds of specified unlawful activity; and (4) intent to avoid a reporting requirement under state or federal law. 18 U.S.C. § 1956 (a)(1)(A)–(B)

A. Section 1956

Section 1956(a)(1)

The mens rea element as to each of the laundering offenses set forth in section 1956(a)(1) is as follows:

(i). Conducting a Financial Transaction with the Intent to promote Specified Unlawful Activity in violation of § 1956(a)(1)(A)(i)

The focus of the government's burden is on the defendant's intent in conducting the prohibited transaction, not on the intent of the person who initially committed the specified unlawful activity that produced the illegal proceeds. In effect, section 1956(a)(1)(A)(i) requires a stricter knowledge requirement than that set forth at the threshold of subsection 1956(a)(1). The prosecution must prove not only that the defendant knew that property involved in the transaction represented "the proceeds of some form of unlawful activity" but also that the defendant acted "with the intent to promote the carrying on of a *specified unlawful activity*." Accordingly, to prove a violation of Section 1956(a)(1)(A)(i), the government as a practical matter will usually have to prove that the defendant knew that the property constituted proceeds from a *specified unlawful activity*.

The courts have held firm, at least in principle, to the idea that the transactions must in fact promote the carrying on of specified unlawful activity. For example, in United States v. Jackson, 935 F.2d 832, 841 (7th Cir. 1991) the Seventh Circuit held that the purchase of mobile phones and the receipt of rent checks by defendant constituted the mere spending of ill-gotten gains, and did not promote defendant's drug activities. These transactions maintained the defendant's lifestyle, but the government had to show how they *promoted* the illegal activity. Id. at 841. In contrast, the Seventh Circuit held that defendant's purchase of beepers to distribute to his drug runners constituted a "plowing back" of proceeds of his drug business to promote that business. Id. at 841-42. Having said that, however, the courts have failed to apply this principle rigorously, and have allowed convictions to stand where little real evidence of "promotion" exists. The courts have held that a defendant's use of wire fraud proceeds to repay a home mortgage and buy a luxury car promoted the underlying fraud because the car and the home were used to impress potential investors in the scheme. United States v. Johnson, 971 F.2d 562, 566 (10th Cir. 1992). See also United States v. Alford, 999 F.2d 818, 824 (5th Cir. 1993) (proceeds of wire fraud enabled defendant to hold himself out as a successful entrepreneur). A disturbing example of judicial distortion of the "plowing back the proceeds" theory of promotion⁵ emerges from the Ninth Circuit decision in Montoya, *supra*, 945 F.2d at 1077. In Montoya, the Ninth Circuit held that a state legislator promoted a bribery scheme when he deposited the proceeds of the scheme into his bank account, because he could not have made use of the money otherwise and because the deposit made the funds look legitimate -- the legislator characterized the funds

⁵ Fenningham, *supra*, at 920.

as a legitimate honorarium. In contrast to Jackson, then, the defendant in Montoya never “plowed back” the proceeds into his bribery scheme -- the bribery was completed on his receipt of the check. Yet, the Ninth Circuit held that receipt of the proceeds of the crime itself promotes the crime. This reading essentially allows the government to prosecute the same conduct twice – once under the law prohibiting the underlying criminal conduct and once under section 1956. Other examples of this legal bootstrapping are United States v. Paramo, *supra*, 998 F.2d at 1218 (relying on Montoya to hold that cashing of embezzled check and use of disbursements on purely personal items, unrelated to mail fraud scheme, promotes mail fraud because “promotion” encompasses the idea of contribution to the growth and prosperity of the activity); United States v. Cavalier, 17 F.3d 90, 93 (5th Cir. 1994) (third party transfer of check, caused by defendant, promotes defendant’s prior mail fraud). The doctrinal impetus behind these rulings is the perception of the statutory goal as not only “thwart[ing] the flow of illicit profits back to the criminal enterprise so as to prevent the capitalization and ever-increasing expansion of criminal activity” but also “thwarting the pocketbook of crime in any manner.”⁶

(ii). Conducting a Financial Transaction with the Intent to engage in Tax Evasion, § 1956(a)(1)(A)(ii)

Section 1956(a)(1)(A)(ii) makes it crime to conduct or attempt to conduct a financial transaction, knowing that the property involved represents the proceeds of some form of unlawful activity “with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Code of 1986.” The language “intent to engage in conduct constituting a violation” presumably was chosen to defeat arguments that the defendant did not know his behavior violated the tax laws and therefore did not intend to violate those specific sections. See John K. Villa, *Banking Crimes: Fraud, Money Laundering and Embezzlement*, 935 PLI Corp 445, 485 (1996).

(iii). Conducting a Financial Transaction knowing the Transaction is designed to conceal or disguise the Nature, Location, Source, Ownership or Proceeds of Specified Unlawful Activity, § 1956(a)(1)(B)(i)

Unlike the mens rea element in subsection (a)(1)(A), which focuses on the defendant’s intent, this part of the money laundering statute allows a conviction based solely on the defendant’s knowledge of the intent of some other party to the transaction. The government must prove both that the defendant knew that the person conducting the transaction was engaging in it for the purpose of hiding or disguising an important characteristic of the funds and that the defendant intentionally conducted the transaction armed with this knowledge. As with subsection (a)(1)(A), the government must prove that defendant knew the transaction was designed to conceal or disguise “proceeds of specified unlawful activity.” Accordingly, this stricter knowledge requirement than that set up at the threshold section 1956(a)(1) usually will require proof that the property at issue constituted proceeds of specified unlawful activity, rather

⁶ Fenningham, *supra*, at 894, 929.

than “some form of unlawful activity.”

At first blush, the case law appears to suggest that the intent element in a “conceal or disguise” case is a worthwhile focus for attack in that several cases have been overturned on appeal on insufficiency of the evidence (as it pertains to intent to conceal the source of funds used in the transaction.) For example, in United States v. Dimeck, 24 F.3d 1239, 1246 (10th Cir. 1994), the Tenth Circuit held that defendant drug courier’s collection and deliverance of proceeds of drug sales to a drug seller was not designed to disguise or conceal attributes of illegal proceeds. In United States v. Garcia-Emanuel, 14 F.3d 1469,1474 (10th Cir. 1994), the Tenth Circuit held that the statutory requirement that transactions be “designed” to conceal proceeds of unlawful activity required more than trivial motivation to conceal. Similarly, in United States v. Rockelman, 49 F.3d 418, 422 (8th Cir. 1995) the Eighth Circuit held that the evidence was insufficient to establish required intent to conceal, where the defendant did not attempt to conceal anything from realtors in his purchase of a cabin. Nonetheless, the courts’ twinning of the wilful blindness standard with the circumstantial evidence quantum of proof has meant that juries have a free hand to infer intent to conceal in cases that fall far short of actual knowledge that the proceeds emanate from unlawful activity.

The Campbell case, *supra*, 977 F.2d at 858, is a good example of this phenomenon. In Campbell, a case where the defendant was charged with laundering somebody else’s funds, a real estate broker who dealt with a flashily dressed, luxury car-driving client who used a cellular phone and conducted a home purchase in an irregular fashion, was held to have been willfully blind to the fact that her client was a drug dealer. Moreover, the Ninth Circuit’s willingness in Montoya to stray from the common understanding of “promote” in the context of a section 1956(a)(1)(A)(i) prosecution bodes ill for the kind of restrained and fact-driven analysis of the term “designed to conceal” engaged in by the Tenth Circuit in Dimeck and Garcia-Emanuel.

(iv). Conducting a Financial Transaction knowing that the Transaction is designed to avoid State or Federal Reporting Requirements, § 1956(a)(1)(B)(ii)

As with a violation of subsection (a)(1)(B)(i), the mens rea element on the avoiding reporting requirements of the money laundering statute may be satisfied by proof of the defendant’s knowledge of the intent of another party to the transaction, in addition to proof of the defendant’s intent to conduct the transaction. Commentators have emphasized that Congress’s use of the word “avoid” rather than “evade” in this subsection is important. Villa, *supra*, at 488–89. Pointing out that this subsection represents a departure from prior law, Villa notes that Congress here equates the traditionally lawful activity of tax avoidance with the unlawful activity of tax evasion. Accordingly, this subsection “criminalizes avoidance behavior when it involves the knowing receipt of criminal proceeds.” *Id.* One court has held that this subsection is violated when a defendant conducts a transaction through a middle man who files a CTR in his own name. United States v. Beddow, 957 F.2d 1330, 1335 (6th Cir. 1992).

Section 1956(a)(2)

The mens rea element as to each of the laundering offenses set forth in section 1956(a)(2) is as follows:

- (i) **Moving Criminally Derived Proceeds into or out of the Country with the Intent to promote Specified Unlawful Activity, § 1956(a)(2)(A)**

This mens rea element on this subsection mirrors the mens rea element for the identical provision in section 1956(a)(1).

- (ii) **Transportation with knowledge that the Funds represent the Proceeds of Unlawful Activity and that the Transfer is designed to conceal or disguise the Proceeds, § 1956(a)(2)(B)(i) or that it is designed to avoid State or Federal Reporting Requirements, § 1956(a)(2)(B)(ii)**

The mens rea element of these two subsections is drawn from those in section 1956(a)(1)(B), discussed above.

Section 1956(a)(3)

The mens rea element as to each of the laundering offenses set forth in section 1956(a)(3) is as follows:

- (i) **Conducting a Financial Transaction involving Property *represented to be* the Proceeds of Specified Unlawful Activity with Intent to promote Specified Unlawful Activity, § 1956(a)(3)(A)**

As within the similar provision in section 1956(a)(1)(A)(i), the focus of the government's burden is on the defendant's intent in conducting the prohibited transaction, not on the intent of the person who initially committed the specified unlawful activity that produced the illegal proceeds.

- (ii) **Conducting a Financial Transaction involving Property *represented to be* the Proceeds of Specified Unlawful Activity with Intent to conceal or disguise the Nature, Location, Source, Ownership or Control of Property believed to be the Proceeds of Specified Unlawful Activity, § 1956(a)(3)(B)**

Like the other mens rea branches of the statute, but unlike the otherwise similar element of section 1956(a)(1)(B)(i), this language focuses on the defendant's intent, not that of anyone else who may be involved in the scheme. One court has held that placing title to a car in the name of someone other than the customer is evidence of the dealer's intent to conceal where there is other evidence that the dealer knew that the funds were illicit and that the buyer wanted to conceal the asset, even where there was evidence that the dealer believed the customer wanted to conceal the car from his wife. United States v. Kaufmann, 985 F.2d at 894 (distinguishing cases decided under section 1956(a)(1) on this basis).

(iii) **Conducting a Financial Transaction involving Property *represented to be the Proceeds of Specified Unlawful Activity with Intent to avoid State or Federal Reporting Requirements, § 1956(a)(3)(C)***

Again, like the other mens rea branches of the statute, and unlike the otherwise similar element of section 1956(a)(1)(B)(ii) the language of this subsection focuses on the defendant's intent, not that of anyone else who may be involved in the scheme.

B. Section 1957

For discussion of the mens rea element in a section 1957 prosecution, see discussion under Knowledge and Willful Blindness headings, *supra*, outlining the fact that the defendant must be shown only to know, or be wilfully blind to the fact that the property at issue is “criminally derived.” The marriage of the willful blindness standard and the circumstantial evidence quantum of evidence creates a special problem in the context of prosecutions under section 1957-- that of chilling normal commercial activity. As one commentator has noted, the ease with which merchants could be prosecuted might encourage them to avoid dealing with certain kinds of customers on the basis of purely stereotypical characteristics such as race, manner of dress, accent and the like. Emily J. Lawrence, *Let the Seller Beware: Money Laundering, Merchants and 18 U.S.C. §§ 1956, 1957*, 33 B.C.L. Rev. 841, 871-72 (1992). Accordingly, a merchant who, on the basis of these characteristics, might suspect his customer of being involved in criminal activity, might decline to engage in everyday commerce with such a customer. Id. While the threshold requirement of a \$10,000 monetary transaction in a section 1957 prosecution is asserted as a safeguard preventing most everyday commercial activities from falling afoul of the law, id., the fact remains that realtors, car dealers and the like are put to the burden of scrutinizing the habits and manners of their customers, lest they blind themselves to obvious clues as to the provenance of their customers' money.

Defense Strategies

Despite the enormous power vested in prosecutors by the money laundering statutes and the potential of abuse of that power in cases such as that of Linda Jones, the courts have acted resolutely to foreclose avenues of defense. For example, as outlined above, a number of circuit courts of appeal have held that mere receipt of proceeds from unlawful activity can “promote” the carrying on of specified unlawful activity. Nonetheless, the sheer complexity of the money laundering statutes generates the possibility for original motions work and practitioners are well advised to read the indictment carefully against the particular subsection of the money laundering statute charged.

1. Completed Unlawful Activity

One potential defense lies in the obverse of the judicial holding on promotion noted above, i.e., that in order for “proceeds” to exist and therefore to be capable of “promoting” or concealing the ownership of specified unlawful activity, or indeed for “criminally derived

property” to exist and be capable of being used in a monetary transaction, the “proceeds” and the “criminally derived property” must be realized from a completed unlawful activity and be under defendant’s control. Thus, the theory goes, if the activity which gives rise to the proceeds is still not complete, then it is impossible for “proceeds” or “criminally derived property” to be used in laundering money from that unlawful activity.

This theory gained currency with the Ninth Circuit in United States v. Savage, *supra*, 67 F.3d 1435 (9th Cir 1995), cert. denied, 516 U.S. 1136 (1996). In Savage, the defendant argued that his mail fraud scheme was not complete at the time that he transferred fraudulently obtained investor money overseas. Accordingly, defendant contended that the transfers overseas did not represent “proceeds.” The Court agreed with defendant’s assertion on appeal from a conviction under section 1956 (a)(2)(B)(i) that “‘proceeds’ are funds obtained from prior, separate criminal activity.” Id. at 1441. Nonetheless, the Savage Court held against defendant on the facts, concluding that defendant’s international money transfers involved “proceeds” because his mail fraud scheme was complete after the scheme’s investors wired money to defendant’s co-schemers within the United States. Id. at 1442. The subsequent transfers of those monies outside United States (in a manner controlled by defendant) were additional acts or transactions using ill gotten proceeds.⁷

To win on this kind of “proceeds” theory, a defendant would have to show that the “proceeds” alleged by the government have not been realized from completed criminal offense and therefore, no money laundering “financial transaction” can take place. As the Savage and Montoya cases indicate, however, the Ninth Circuit has been adroit in finding completed predicate unlawful activity, separate financial transactions and methods by which “proceeds” can be deemed to “promote” even past criminal activity. Accordingly, the fluidity of the judicial understanding of these concepts means that defenses based on grammar and logic seem to doomed to failure.

2. Intent to Conceal-- Prosecutions under Section 1956 (a)(1)(B)(i)

As noted above, the case law appears to suggest that the intent element in a “conceal or disguise” case is a worthwhile focus for attack, even in the Ninth Circuit at least for now. The best example of a stringent and disciplined reading of section 1956 (a)(1)(B)(i)’s “designed to conceal” language is the Tenth Circuit’s decision in United States v. Sanders, 929 F.2d 1466

⁷ Similarly, on defendant’s challenge to his conviction under section 1957, the Savage Court held that the term “criminally derived property” found in the section is equivalent to the term “proceeds” in section 1956. Id. at 1442. Accordingly, the Court held that the same rule applies to both sections: The “proceeds” or the “criminally derived property” must be “obtained by defendant before the defendant engages in the monetary transaction prohibited by Section 1957.” Id.

(10th Cir), *cert. denied* 502 U.S. 846 (1991).⁸ In Sanders, the defendants bought two cars knowing that the purchase money represented the proceeds of a drug sale. The Tenth Circuit held that these transactions did not fall within the scope of section 1956 (a)(1)(B)(i) because the defendants did not attempt to conceal their identity as the purchasers. The Court held that the defendants merely spent ill-gotten gains in an ordinary transaction with neither the intent to promote the underlying drug sales nor the intent to conceal the source or nature of the proceeds from such activity. The Court held to a strict view of the Congressional intent, i.e., that the purpose of section 1956 (a)(1)(B)(i) was to outlaw transactions intended to disguise the relationship of the purchased items with the person providing the proceeds from specified unlawful activity. Id. at 944. Note, however, in taking this view that the transactions criminalized under the statute must fall within the express terms of the statute, rather than the expanded view of the statute favored by the Ninth Circuit in Montoya, at least insofar as section 1956(a)(1)(A)(i) is concerned, the Tenth Circuit's reading of section 1956 (a)(1)(B)(i) may not survive in the Ninth Circuit.

3. Venue

Although not a defense to money laundering, a venue challenge may be a useful arrow to have in one's quiver if the charging jurisdiction is more draconian in its approach to charging, plea bargaining or sentencing than the jurisdiction where venue could more properly be laid. In United States v. Cabrales, ___ U.S. ___, 118 S.Ct. 1772 (1998), the Supreme Court held that where money laundering occurred entirely in Florida, although the currency used in the laundering offense derived from the unlawful distribution of cocaine in Missouri and defendant was not alleged to have transported funds from Missouri to Florida, venue was not proper in Missouri. The Cabrales ruling overrules the Ninth Circuit's decision in United States v. Angotti, 105 F.3d 539, 544-45 (9th Cir. 1997) which held that venue in a money laundering case is proper also in the district in which the funds were unlawfully generated, even though the financial transaction occurred in another jurisdiction.

4. Interstate Commerce Element

The interstate commerce element of a section 1956 prosecution is housed in section 1956(c)(4)(B) which defines "financial transaction" as

(A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or

⁸ The Sanders case encompasses two separate prosecutions: United States v. Sanders, 929 F.2d 1466 (10th Cir. 1991) and United States v. Sanders, 928 F.2d 940 (10th Cir.), *cert. denied*, 502 U.S. 845 (1991).

degree;

18 U.S.C. § 1956(c)(4)(B). The leading case on the interstate commerce requirement in a money laundering prosecution is United States v. Ripinsky, 109 F.3d 1436 (9th Cir. 1997), *amended on denial of reh'g*, 129 F.3d 518 (1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 870 (1998).⁹ In Ripinsky, the Ninth Circuit held that the interstate commerce element is an essential element of the offense of money laundering under section 1957 that must be determined by the jury beyond a reasonable doubt. *Id.* at 1443. In Ripinsky the jury was instructed only that “the deposit of a check constitutes a monetary transaction,” an instruction the Court found to be inadequate. Nonetheless, on plain error review, the Court held that in light of the lack of dispute among the parties that the deposits in the case involved financial institutions engaged in interstate activities, the error was not plain and no new trial would be ordered. The Ripinsky Court held that where a transaction was “in” interstate commerce or utilized the instrumentalities of interstate commerce, it was sufficient to satisfy the interstate commerce comment. The Court went on to hold that

[o]nly if the transaction was purely intrastate must the government show that it had some effect on interstate commerce. Moreover, because the regulated activity here – making financial transactions – is commercial in nature, the government need only prove that the individual transactions in this case each had a minimal effect on interstate commerce that, through repetition by others similarly situated, could have a substantial effect on interstate commerce.

109 F.3d at 1444, citing Wickard v. Filburn, 317 U.S. 111 (1942). Accordingly, even absent the deferential plain error standard of review, the Ripinsky court demonstrates that the interstate commerce element is extremely easy to prove in the usual money laundering case.

5. Entrapment

Where the species of money laundering charged involves a sting operation, the entrapment defense lies. Once the defendant makes out a prima facie case of entrapment by the government, the burden of proof shifts to the government to refute the claim of entrapment beyond reasonable doubt. Jacobson v. United States, 503 U.S. 540 (1992). To discharge this burden, the government must prove either that it did not induce the defendant to commit the crime, or that the defendant was pre-disposed to committing it.

Conclusion

⁹ Ripinsky involved a section 1957 prosecution. Section 1957(f) requires that a monetary transaction be “in or affecting interstate commerce.” It also provides that this requirement is met by a transaction that would be a “financial transaction” within the meaning of section 1956 (c)(4)(B) which in turn defines “financial transaction” to include an interstate commerce element. Accordingly, for all practical purposes, analysis of the interstate commerce requirement is the same for both section 1956 and section 1957.

As commentators have noted, the money laundering statutes “make[] the subsequent use of criminal proceeds in any transaction illegal in perpetuity. Long after the original statute of limitations on the criminal offense . . . has run, those who conduct prohibited financial transactions or transport proceeds from those transactions are engaged in criminal conduct independent of the original income-producing crime.” Camelio and Pergament, *supra*, 35 Am. Crim. L. Rev. at 967.

For those who represent white collar clients or those alleged to be involved in drug trafficking, be aware that a money laundering charge is an increasingly likely weapon to be deployed at the plea bargaining stage. For those who represent grand jury witnesses – especially the low level “mules” in an alleged drug ring -- be sure to negotiate immunity for your client from money laundering charges. Given the breadth of what constitutes a specified unlawful activity, your client might well have committed money laundering, e.g., by buying a car for the drug dealer, or even holding proceeds in a safe deposit box.

Practitioners should exercise great care in preparing a defense to money laundering charges, not only because of the serious penalties involved, but because of the ease with which convictions can be obtained. The money laundering statutes, as interpreted by the courts, reach into many areas not traditionally thought of as money laundering. Particularly as applied to realtors, car dealers, bankers and the like, the statutes have an awesome reach. The case of Linda Jones, however, shows that even the common sins of home buyers can be transformed by the money laundering statutes from minor, no loss technical violations into criminal prosecutions of truly terrifying dimensions.