



6-1-1999

# 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)

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## Recommended Citation

Maura E. Fenningham, *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).

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## NOTES

### **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)**

#### I. INTRODUCTION

No one can debate that crime is profitable. The international narcotics industry is the largest growth industry in the world, with revenues exceeding \$500 billion annually. The profits alone draw interest upwards of three million dollars *per hour*.<sup>1</sup> To convert these profits into legally obtained income, the “dirty” proceeds generated by the multi-billion dollar economy of the narcotics industry and other lucrative criminal organizations are “washed” to appear legitimate.<sup>2</sup> This process of “washing” illegally obtained monies is appropriately labeled money laundering. Since money laundering converts illegal acts into profitable transactions without any link to the owner of the illegal funds, Congress called money laundering “the lifeblood of the drug trade and other criminal organizations.”<sup>3</sup> Congressional sponsors recognized the need to criminalize money laundering transactions. As Senator Joseph Biden commented, “[m]oney laundering is a crucial financial underpinning of organized crime and narcotics trafficking. Without [it], drug traffickers would literally drown in cash. . . . [They] need money laundering to conceal the billions of dollars in cash generated annually in drug sales and to convert [their] cash into manageable form.”<sup>4</sup>

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1 J. MILLS, *THE UNDERGROUND EMPIRE* 3 (1986). See also James Cook, *The Paradox of Antidrug Enforcement*, *FORBES*, Nov. 13, 1989, at 105. The author quotes David Wilson, chief of the financial operations section of the United States Drug Enforcement Agency, who commented on the financial dimensions of the drug trade: “It’s like those black holes the astronomers tell us about. . . . We know it’s out there, and we know it is quite big, but how big is it? It doesn’t really emit a whole lot of light, so we don’t really know.” *Id.* at 106. Estimates of the amount of money involved in the drug business are so tenuous as to be worth little. As the author explains, different government agencies arrive at different figures. *Id.*

2 It has been determined that drug dealers and other criminals now launder as much as \$300 billion annually through the nation’s financial system. Dean Foust, *The New, Improved Money Launderers*, *BUS. WK.*, June 28, 1993, at 91.

3 S. REP. NO. 433, 99th Cong., 2d Sess. 4 (1986).

4 *Id.* Senator Joseph Biden (D-Del.), the Ranking Minority Member of the Senate

To drain the monetary incentive out of organized crime and drug trafficking, Congress first passed statutes proscribing specific illegal activity, such as narcotics distribution,<sup>5</sup> fraud,<sup>6</sup> and continuing criminal enterprise.<sup>7</sup> Congress also imposed statutory reporting requirements on financial institutions for certain transactions.<sup>8</sup> Initially, however, Congress did not prohibit the structuring of transactions to avoid those filing requirements.<sup>9</sup> Although these efforts did combat the profitable crime industry to some extent, such approaches did not effectively deter criminals or prevent the growth of criminal organizations. The cash generated through narcotics deals and organized crime "businesses" still posed a serious problem. As stated in the Senate Report, "every dollar laundered means another dollar available to support new supplies of

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Committee on the Judiciary, *id.* at 4. Interestingly, in the period from 1984 to 1986, an estimated 89% of the \$177.4 billion of cash in circulation outside banks was apparently "held in unreported hoards, 'underground' for illegal purposes, or offshore." Laura M.L. Maroldy, Note, *Recordkeeping and Reporting in an Attempt to Stop the Money Laundering Cycle: Why Blanket Recording and Reporting of Wire and Electronic Funds Transfers Is Not the Answer*, 66 NOTRE DAME L. REV. 863, 865-66 n.11 (1991) (quoting *Changes in the Use of Transactions Accounts and Cash from 1984 to 1986*, 73 FED. RES. BULL. 179, 191 (1987)).

Although cash is difficult to trace, criminals desire to launder "dirty money" for a number of reasons. One author explained:

[I]llegal-source cash can be difficult to handle due to its sheer physical volume, particularly with large amounts of cash in small denominations. In addition, criminals need to use their funds without attracting suspicion as to their source. This is why laundering illegally generated cash is so important to the success of large-scale criminal enterprises.

Maroldy, *id.* at 866. See also PRESIDENT'S COMM'N ON ORGANIZED CRIME, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 7 (Oct. 1984). In this interim report, the Commission noted that "the degree of sophistication and complexity in a laundering scheme is virtually infinite, and is limited only by the creative imagination and expertise of the criminal entrepreneurs who devise such schemes." *Id.* Law enforcement agencies believe that cash from narcotics trafficking comprises the lion's share of money laundering. *Id.*

5 Controlled Substance Act, Pub. L. No. 91-513, Title II, § 401, 84 Stat. 1260 (1970) (current version at 21 U.S.C. § 841 et seq. (1988 & Supp. V 1993)).

6 Act of June 25, 1948, ch. 645, 62 Stat. 749 (codified as amended at 18 U.S.C. § 1001 et seq. (1988 & Supp. V 1993)).

7 Controlled Substance Act, Pub. L. No. 91-513, Title II, § 401, 84 Stat. 1260 (1970) (current version at 21 U.S.C. § 848 (1988 & Supp. V 1993)).

8 See Sarah N. Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 FLA. L. REV. 287, 288-89 (1989); see also Currency and Foreign Transactions Reporting Act of 1970, Pub. L. No. 91-508, Title II, 84 Stat. 1118 (1970) (current version at 31 U.S.C. §§ 5311-5324 (1988 & Supp. V 1993)) [hereinafter BSA]. The regulations required financial institutions to file a report for cash transactions over \$10,000. See discussion *infra* Part II.B.

9 See discussion *infra* Part II.B.

cocaine and heroin on the streets of this country."<sup>10</sup> Since "the growth of money laundering has been a corollary of the spread of profitable illegal enterprises,"<sup>11</sup> Congress finally recognized the importance of enacting a new federal statute proscribing money laundering. As part of the Anti-Drug Abuse Act, Congress enacted the Money Laundering Control Act of 1986, and for the first time, criminalized transactions in which criminals use the proceeds of their illegal activity.<sup>12</sup> Through this Act, Congress intended to render the money derived from illegal activities worthless and hit the criminal "where he bruises, and that is right in the pocket-book."<sup>13</sup>

This Note explores one provision of the Money Laundering Control Act, 18 U.S.C. § 1956(a)(1)(A)(i). This "Promotion Statute" criminalizes any financial transaction in which criminals spend their ill gotten gains "with the intent to promote the carrying on of specified unlawful activity."<sup>14</sup> Federal appellate courts have addressed "promotion" with varying perceptions of congressional intent. The difficulty has especially manifested itself in cases where the specified unlawful activity is already completed.<sup>15</sup> This Note discusses how the federal circuits have construed both section

10 S. REP. NO. 433, *supra* note 3, at 4.

11 *Id.* at 2.

12 Money Laundering Control Act of 1986, Pub. L. No. 99-570, Title I, Subtitle H, §§ 1351-67, 100 Stat. 3207-18 & 3207-39 (1986) (codified as amended at 18 U.S.C. §§ 1956-57 (1988 & Supp. V 1993)).

13 H.R. REP. NO. 855, 99th Cong., 2d Sess. 13 (1986). In 1991, the Attorney General of the United States, Richard Thornburgh, expanded this theory: "The warning motto we want to brand upon the minds of drug profiteers is 'You make it, we'll take it.' And if we take away their ugly profits, we can truly help turn the corner in this fight against international traffickers and their financial minions." Richard Thornburgh, Money Laundering, Address Before the City Club Forum Luncheon, Cleveland, Ohio (May 11, 1990), in VITAL SPEECHES OF THE DAY, July 15, 1990, at 578, 580.

14 18 U.S.C. § 1956(a)(1)(A)(i) (1988). In its entirety, the "Promotion Statute" provides:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity; . . .

shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

*Id.*

15 See discussion *infra* Parts V.A & B.

1956(a)(1)(A)(i) and the circumstances under which a person "promotes the carrying on of specified unlawful activity."<sup>16</sup> After articulating the expanded definition of "promotion," this Note argues that the circuit courts are obscuring congressional intent in applying the statute. Part II contains a brief history of money laundering legislation as it examines the relevant doctrinal threads which foreshadowed its enactment. Part III provides an overview of congressional intent behind the Money Laundering Control Act of 1986. Part IV examines the structure of the statute and the basic principles of its relevant terms. Part V analyzes several recent federal circuit court opinions which have addressed and applied "promotion" under section 1956(a)(1)(A)(i). Part VI explores the consequences and practical repercussions of the current view of "promotion." This Part suggests that the courts may have expanded this section beyond congressional intent.

Part VII concludes that section 1956(a)(1)(A)(i) does not proscribe "promotion" to *completed* specified unlawful activity as judicially applied. Rather, Congress specifically intended to thwart the flow of illicit profits *back* to the criminal enterprise so as to prevent the capitalization and ever-increasing expansion of criminal activity. Thus, it is incumbent upon the Supreme Court to address diverse rulings of the circuit courts to establish a uniform standard of prosecutorial application and judicial oversight.

## II. THE HISTORY AND EVOLUTION OF THE MONEY LAUNDERING CONTROL ACT OF 1986

Prior to the enactment of the Money Laundering Control Act of 1986, money laundering itself was not a crime. Most of the focus on money laundering activities, and prosecutions thereof, involved a combination of conspiracy charges and violations of currency reporting requirements.<sup>17</sup> This discussion of the doctrinal threads of modern money laundering law reveals the basis of section 1956(a)(1)(A)(i) and the foundation for its language, language which Congress deliberately included to formulate consensus money laundering legislation.

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<sup>16</sup> See *supra* note 14.

<sup>17</sup> See G. Richard Strafer, *Money Laundering: The Crime of the '90's*, 27 AM. CRIM. L. REV. 149, 150 (1989). The author cites the conspiracy provisions of Title 21 and Title 18, and Title 31 currency transaction reporting ("CTR") violations as the focus of money laundering provisions. See also *United States v. Ospina*, 798 F.2d 1570, 1574 (11th Cir. 1986) (upholding conviction based upon a combination of Title 21, Title 31, and Title 18 conspiracy charges).

### A. *Money Laundering as Acts of Conspiracy*

The legislative history of the Money Laundering Control Act reveals that Congress derived some of the statute's language from both conspiracy law and aiding and abetting prosecutions. Specifically, the "intent to promote the carrying on" language of section 1956(a)(1) is intended to encompass situations "like those prosecuted under the aiding and abetting statute in which a defendant knowingly furnishes substantial assistance to a person whom he or she is aware will use that assistance to commit a crime."<sup>18</sup> An understanding of the basis for section 1956(a)(1)(A)(i) terminology is a helpful tool for delineating its scope.

Case law developed in the 1940s which permitted prosecutions for "aiding and abetting" or "conspiring to aid and abet" criminals in their illegal ventures by providing otherwise legitimate goods and services. Specifically, professionals and businessmen were targets of this conspiracy prosecution.<sup>19</sup> These participants in illegal ventures were prosecuted if, through their goods and services, they "facilitated the illegal objectives of the conspiracy," and "provided the services with an intent to facilitate the illicit objectives of the enterprise."<sup>20</sup> Mere knowledge of the intended illegal use of their products was not enough. As Judge Learned Hand explained, "[i]t is not enough that a [businessman] does not forego a normally lawful activity, of the fruits of which he knows that others make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in the outcome. . . ." <sup>21</sup> Knowl-

18 S. REP. NO. 433, *supra* note 3, at 10. The "aiding and abetting statute" states:

- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
- (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Ch. 321, § 332, 35 Stat. 1152 (1909) (codified as amended at 18 U.S.C. § 2 (1988)).

19 Strafer, *supra* note 17, at 150. Professionals and businessmen provided such goods and services to the criminals; thus, they were an easy target as "aiders and abettors." *Id.*

20 *Id.* The prosecution had to prove each of these conditions for a successful conviction.

21 *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940). In this case, the Second Circuit held merchants not guilty of aiding and abetting when they sold large quantities of sugar to bootleggers even though the merchants acted with knowledge that illegal use was made of their product. Judge Hand differentiated the mere knowledge and moral obligation to refrain from selling goods from the act of physically participating in the venture: "We may agree that morally the defendants at bar

edge was a prerequisite to a criminal violation, but intent to promote and identify with the criminal venture ensured a conviction.<sup>22</sup>

The next expansion of conspiracy law occurred in the latter part of the 1970s when the government applied the concept to narcotics-related money laundering. Typically, the defendants who participated in the narcotics ring of the conspiracy were also "washing" the money derived from such activity and promoting the conspiracy by purchasing more drugs.<sup>23</sup> This link between the defendant who "washed" money and the underlying drug transaction persisted as a necessary requirement to convict the defendant under conspiracy laws.<sup>24</sup> Money laundering was not itself a crime until 1986 when Congress realized that those who merely "wash" the money of illegal activity *do* promote and participate in the underlying criminal activity, even in the absence of a more direct link to the proscribed crime.<sup>25</sup>

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should have refused to sell to illicit distillers; but, both morally and legally, to do so was totally different from joining with them in running the stills." *Id.* at 581. *See also* Strafer, *supra* note 17, at 151.

22 *See, e.g.*, *Direct Sales v. United States*, 319 U.S. 703, 713 (1943). Here, the defendant, a registered drug manufacturer and wholesaler, sold large quantities of morphine sulfate to a doctor who subsequently dispensed vast quantities of the drug to and through drug addicts. Because of the defendant's willingness to distribute large quantities to a private physician, the doctor continually increased his order. The court recognized that although knowledge and intent to engage in a conspiracy to violate narcotics laws are not the same, intent can be inferred from the act of providing goods of an inherently unlawful or highly regulated kind. The court held that "there is more than suspicion, more than knowledge, acquiescence, carelessness, indifference . . . . There is informed and interested cooperation, stimulation, instigation." *Id.*

23 *See* *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979). In this case, the defendants not only washed the money but personally bought and delivered large quantities of drugs. *Id.* at 132. Money laundering was not *the* crime, but was merely used to show knowledge and participation enough to promote illegal activity. The court held that money launderers who were also participants in the narcotics ring were part of a "chain conspiracy" and were prosecuted as conspirators, not as money launderers. *Id.* at 155.

24 Strafer, *supra* note 17, at 154. *See also* *United States v. Dela Espriella*, 781 F.2d 1432, 1436 (9th Cir. 1986) (holding that since money laundering is itself not a crime, the government must show a sufficient link between "a defendant's money laundering and the underlying drug transaction to demonstrate that defendant was a member of a conspiracy").

25 *See* *United States v. Orozco-Prada*, 732 F.2d 1076 (2d Cir.), *cert. denied*, 446 U.S. 907 (1984). This case was the first to introduce the concept that a money laundering service involving currency deposits and check and wire transfers operated as a means by which to *further* the conspiracy. The defendants were convicted as part of a chain conspiracy; they washed the dirty drug money. The new statute, the Money Laundering Control Act of 1986, which proscribed the specific crime of money laundering, was enacted two years later.

Although Congress eliminated its complete reliance on conspiracy laws to prosecute money launderers, the analysis by Judge Learned Hand and the legal arguments of those who prosecuted under the conspiracy doctrine are embodied in the Money Laundering Control Act of 1986. Thus, the "promotion" of the unlawful activity, which was critical to a conviction involving money laundering in 1940, is now codified as a necessary element of section 1956(a)(1)(A)(i).

### B. *The Bank Secrecy Act*<sup>26</sup>

Prior to 1986, many of the crimes which were described as "money laundering" were violations of currency reporting requirements. The reporting requirements were part of the Bank Secrecy Act of 1970 (BSA) in which Congress attempted to combat the common practice of moving illegal profits into bank accounts and "borrowing" the money back through fictitious loans.<sup>27</sup> This method not only laundered income, but also provided a benefit to the launderer from income tax deductions claimed as "interest" on the fictitious loan.<sup>28</sup> The BSA required financial institutions to file a Currency Transaction Report relative to each cash transaction of \$10,000 or more.<sup>29</sup> The failure to report such transactions constituted a violation of the BSA.<sup>30</sup>

Significant loopholes in the BSA forced Congress to reexamine money laundering as a crime in itself. Before 1986, the reporting regulations included no provision expressly prohibiting structured transactions—deposits of less than \$10,000 with different banks or at different branches of the same bank. In one day, the large sum of cash was converted easily into more portable, less suspicious instruments, and the launderer successfully evaded the

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26 BSA, *supra* note 8.

27 Patrick T. O'Brien, *Tracking Narco-Dollars: The Evolution of a Potent Weapon in the Drug War*, 21 U. MIAMI INTER-AMER. L. REV. 637, 640 (1990).

28 *Id.*

29 See Emily J. Lawrence, Note, *Let the Seller Beware: Money Laundering, Merchants and 18 U.S.C. §§ 1956, 1957*, 33 B.C. L. REV. 841, 843 (1992).

30 Financial institutions have incentive to comply with the reporting requirements. The civil penalty for one violation is the greater of \$100,000 or the amount involved in the transaction. The criminal penalty for a violation of the Treasury's regulations carries a fine of \$250,000 and/or five years' imprisonment. 31 U.S.C. § 5321 (1988 & Supp. V 1993); 31 C.F.R. § 103.47 (1990). See Maroldy, *supra* note 4, at 879-80. These penalties are enhanced if the government proves a "pattern of illegal activity." 31 U.S.C. § 5322 (1988 & Supp. V 1993).



reporting requirements.<sup>31</sup> "Smurfs" structured the transactions for those who wished to launder money but did not want the transaction to be reported for fear that the filing would draw the attention of revenue or law enforcement agents.<sup>32</sup> Circuit courts overturned convictions of defendants who structured their transactions, since the BSA did not give fair warning to defendants that structuring transactions was illegal.<sup>33</sup> As a result, this approach to prosecuting money laundering proved ineffective in deterring criminals from laundering money through financial institutions.

Though Congress enacted an anti-structuring provision in 1986 to fill the wide gap in the BSA,<sup>34</sup> its pre-1986 loopholes weakened its effectiveness in the battle against money laundering and provided an additional impetus for Congress to proscribe money laundering as a crime in itself. Before 1986, the type of transactions criminalized under the BSA was extremely limited and failed to cut off the "lifeblood" of the crime industry or "hit crimi-

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31 Maroldy, *supra* note 4, at 881. See Welling, *supra* note 8, at 296-97.

32 See Lawrence, *supra* note 29, at 843; Welling, *supra* note 8, at 297 (those who engaged in such transactions were "smurfs" because they were everywhere, just like the cartoon characters of the 1980s).

33 See *United States v. Mastronardo*, 849 F.2d 799, 804 (3d Cir. 1988) (finding no provision in the law which makes it illegal to structure transactions); *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986) (structuring by an individual is not prohibited by the statute); *United States v. Anzalone*, 766 F.2d 676, 681 (1st Cir. 1985) (nothing in the law suggests that an individual structured transaction is illegal). *But see United States v. Cook*, 745 F.2d 1311 (9th Cir. 1985), *cert. denied*, 469 U.S. 1220 (1986) (structured transactions held illegal).

34 31 U.S.C. § 5324(a)(3) (1988 & Supp. V 1993). This statute makes it illegal to "structure" a transaction for the purpose of evading the reporting requirement. In addition, 31 U.S.C. § 5322 sets out criminal penalties for a person "willfully violating" the anti-structuring provision. See, Welling, *supra* note 8, at 304.

For a more recent treatment of the scienter required for a "willful" violation of the anti-structuring provision, see *Ratzlaf v. United States*, 114 S. Ct. 655 (1994) (holding that to give effect to section 5322(a)'s "willfulness" requirement, the Government must prove that the defendant acted with knowledge that the structuring undertaken by the defendant was unlawful, not simply that the defendant's purpose was to circumvent the bank's currency reporting obligation).

Although these anti-structuring provisions were enacted in 1986, enforcement of this law has also proven difficult for the government which receives over 7 million currency reports from banks each year. Jonathan Beaty, *A Torrent of Dirty Dollars*, *TIME*, Dec. 18, 1989, at 50-53. Additionally, reports on millions of legitimate transactions each year are beginning to overwhelm the government's ability to trace the trail of illicit funds. Money launderers have also discovered other ways to evade the government's surveillance system. For example, launderers turn to certain nonbank providers of financial services, such as Western Union, which cash checks for the launderers. Although these nonbank providers are supposed to file currency reports as well, these businesses are rarely checked by governmental authorities to make certain they are complying with the reporting requirements. Foust, *supra* note 2, at 91.

nals right where they bruise: in the pocketbook."<sup>35</sup> In response, Congress fashioned new approaches which do not specifically proscribe the criminal's activity. Rather, these new approaches deny criminals the profitable fruits of their illegal activities by criminalizing the financial transactions conducted with the illicit proceeds.

### III. CONGRESSIONAL INTENT

Although this Note targets one provision of the Money Laundering Control Act of 1986, it is necessary to obtain a comprehensive understanding of the congressional intent behind the Act as a whole. As described in Part II, the crime of money laundering has evolved from the concept of the underlying activity as the sole illegal act, through the approach requiring financial institutions to report certain transactions in order to alert enforcement officials to possible illegal proceeds, to the current view that money laundering is itself a serious act and a distinct crime.

As the legislative history reveals, Congress established an independent federal offense to eliminate the laundering of money gained from illegal activity.<sup>36</sup> Congress intended this offense to provide the government with greater enforcement tools to investigate criminal organizations who survive on the "lifblood" of professional money launderers.<sup>37</sup> Since money laundering is a "crucial financial underpinning of organized crime and narcotics trafficking,"<sup>38</sup> Congress also desired a tool which authorized the government to seek forfeiture of assets and profits of money launderers<sup>39</sup> and promoted stiffer penalties in an effort to deter those

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35 H.R. REP. NO. 855, *supra* note 13, at 13; *infra* p. 904 & note 42.

36 S. REP. NO. 433, *supra* note 3, at 1.

37 *Id.* See also Foust, *supra* note 2, at 91. Government agents claim that while they cannot stop the flood of illicit cash, they have made life difficult for launderers. *Id.*

38 Senator Joseph Biden, the Ranking Minority Member of the Senate Committee on the Judiciary, S. REP. NO. 433, *supra* note 3, at 4.

39 See 18 U.S.C. §§ 981-82 (1988 & Supp. V 1993). These statutes provide for the civil and criminal forfeitures relating to but not necessarily involving money laundering. Specifically, they authorize the civil forfeiture of any real or personal property that represents the gross receipts obtained, directly or indirectly, through a violation of 18 U.S.C. § 1956 and § 1957 or is traceable to either of these statutes. § 981(a)(1)(A). The statutes further proscribe forfeiture for any proceeds of a violation of the drug laws; that violation also amounts to a U.S. felony. § 981(a)(1)(B). Finally, any coin or currency is subject to forfeiture if it is involved in a transaction violating the currency reporting requirements or the anti-structuring statute. § 981(a)(1)(C). See also Peter J. Kacarab, *An In-depth Analysis of the New Money Laundering Statutes*, 8 *ARRON TAX J.* 1, 2-3 n.4 (1991).

who engage in money laundering.<sup>40</sup> Thus, Congress wanted a powerful tool not only to close the loopholes of the BSA, but to transform money laundering suspects into "commercial pariahs" that bankers, businessmen, and other individuals would shun.<sup>41</sup>

The statute also applies to persons who assist the criminal in promoting the illegal activity if, in exchange for goods and services, they accept money known to be the proceeds derived from illegal activity. As one Congressional sponsor of the Money Laundering Control Act stated:

The only way we will get at this problem is to let the whole community, the whole population, know that they are part of the problem and they could very well be convicted of it if they knowingly take these funds. If we can make a drug dealers money worthless, then we have really struck a chord, and we have hit him where he bruises, and that is right in the pocket-book.<sup>42</sup>

As a result, Congress structured the statute to apply to all those who engage in a financial transaction with the requisite knowledge that the proceeds involved were derived from illicit profits.<sup>43</sup> This expansive reach of the statute is intended to curb the flow of illicit profits back to the unlawful enterprises that created such proceeds. Thus, this process is designed to prevent the capitalization and expansion of criminal activity and to deflate the criminal's motivation for laundering money by targeting the criminal's "Achilles heel"—the need to have the money earned from the illegal activity marketable in the community.<sup>44</sup>

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40 See *supra* note 14 and accompanying text. The penalties for a violation of the statute are clearly defined: Whoever is in violation of the statute "shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years or both." § 1956(a)(1). Thus, the statute intends "to authorize forfeiture of the profits earned by launderers . . . and to enhance the penalties under existing law in order to further deter the growth of money laundering." S. REP. NO. 433, *supra* note 3, at 1.

41 Strafer, *supra* note 17, at 171.

42 H.R. REP. NO. 855, *supra* note 13, at 13.

43 18 U.S.C. § 1956(a)(1)-(3); 1957(a) (1988 & Supp. V 1993). All of these sections begin with "whoever." See *supra* note 14 for the full text of § 1956(a)(1)(A)(i); see also S. REP. NO. 433, *supra* note 3, at 9-15.

44 See Kacarab, *supra* note 39, at 1; see also Mark J. Kadish, 36 EMORY L.J. 793 (1987). Some commentators have suggested that this expansive reach of the statute has significantly diluted the attorney-client privilege. If attorneys represent clients whose financial resources are of possible suspicious origin, § 1956 can subject those attorneys to criminal and civil penalties. The attorney does not have to share the client's intent to promote specified unlawful activity or conceal the source, or origin of the proceeds. It is sufficient to show, by direct or circumstantial evidence, that the attorney was aware of

Finally, Congress intended the money laundering statute to be a separate crime distinct from the underlying offense that generated the money to be laundered.<sup>45</sup> Throughout the Senate Report, Congress manifested a desire to fill the gap in criminal law in the area of post-crime hiding of the ill-gotten gains of specified unlawful activity.<sup>46</sup> In essence, Congress did not intend for this law to be a “tag-along charge” to the substantive charge.<sup>47</sup> The statute does not require the government to prove the defendant’s participation in the substantive underlying activity. In fact, it is increasingly difficult for the government to bring substantive charges against such defendants since many of them are skilled at insulating themselves from such proscribed illegal activity. Money laundering has its greatest impact in this area.<sup>48</sup> Congress is not offering an alternative means to prosecute the prior specified unlawful activity; rather, the underlying crime and the money laundering are separate crimes which are punished separately.<sup>49</sup>

The legislative intent of the Money Laundering Control Act of 1986 has been reviewed by several federal courts. In *United States v. Edgmon*,<sup>50</sup> the Tenth Circuit tracked the legislative intent of the money laundering statute amid challenges by the defendant that a conviction for conversion and a separate conviction for money laundering violated the Double Jeopardy Clause of the Fifth Amendment. Co-defendant, Jimmy W. Edgmon, Sr., participated in a scheme to defraud the Farmers’ Home Administration (FmHA) by selling cattle which served as collateral for the loan FmHA

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the client’s design or purpose. This dilution perhaps threatens the basic attorney/client confidentiality, “chills the adversarial nature of formal proceedings, and denies the client full and fair representation.” *Id.* at 795-97.

45 See S. REP. NO. 433, *supra* note 3, at 4 (stressing the “importance of enacting a new Federal offense against money laundering); *United States v. Heaps*, 39 F.3d 479, 485 (4th Cir. 1994) (noting that “Congress intended the statute to aim directly at the activity of laundering the money gained from illegal activity”); *United States v. Edgmon*, 952 F.2d 1206, 1213 (10th Cir. 1991) (recognizing that Congress intended the statute to be a separate crime distinct from the underlying offense).

46 See S. REP. NO. 433, *supra* note 3, at 1-4; *Edgmon*, 952 F.2d at 1213 (stating that “Congress intended simply to add a new criminal offense to punish activity that was not previously punished criminally”).

47 See Kacarab, *supra* note 39, at 18. The author notes that “Congress’ intent . . . was to provide an indirect means for the government to investigate such criminal activity and organizations by criminalizing certain transactions conducted with the proceeds of illegal activities.” *Id.*

48 *Id.* at 71.

49 S. REP. NO. 433, *supra* note 3, at 1-9.

50 952 F.2d 1206 (10th Cir. 1991).

issued to his son. He used the proceeds from the conversion to purchase more land and a new tractor,<sup>51</sup> and subsequently used the equity in the land and the tractor to obtain a loan from a local bank. Edgmon, Sr. was convicted of money laundering under 1956(a)(1)(B)(i),<sup>52</sup> conversion of FmHA collateral, and conspiring to convert.<sup>53</sup> On appeal, the court found the evidence sufficient to support a finding under section 1956(a)(1)(B)(i) that Edgmon, Sr. intended to conceal the origin or nature of the proceeds of his unlawful activity, the conversion.<sup>54</sup>

The court rejected the defendant's challenge that a conviction for both conversion and money laundering violates the Double Jeopardy Clause.<sup>55</sup> Specifically, he asserted that his convictions constituted multiple punishments for the same offense.<sup>56</sup> Although the crime of conversion is an element of money laundering,<sup>57</sup> the court looked to legislative intent to determine if Congress intended the statutory violations to be separate punishable offenses.<sup>58</sup> As the *Edgmon* court explained, "Congress appears to

51 *Id.* at 1208-10. Gary A. Edgmon, the son, was also convicted of four counts of conversion in violation of 18 U.S.C. § 658 (1988 & Supp. V 1993) and one count of conspiracy to convert in violation of 18 U.S.C. § 371 (1988).

52 18 U.S.C. § 1956(a)(1)(B)(i) (1988). In its entirety, this statute provides:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .

shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

*Id.* This statute has been called the "Concealment Statute" to differentiate it from § 1956(a)(1)(A)(i), the "Promotion Statute."

53 *Edgmon*, 952 F.2d at 1208.

54 *Id.* at 1211.

55 U.S. CONST. amend. V. The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

56 *Edgmon*, 952 F.2d at 1212.

57 *See* *Blockburger v. United States*, 284 U.S. 299 (1932). *Edgmon*, Sr. argued that the *Blockburger* test is the appropriate test to determine Double Jeopardy Violations. Under this test, the inquiry is whether each statutory provision defining the crimes requires proof of a fact or element that the other does not. *Id.* at 304. The crime of conversion and money laundering does not require proof of different facts. Thus, they do not survive the *Blockburger* test. However, the court noted that *Blockburger* is not dispositive; it is only one method of determining a Double Jeopardy violation.

58 *Edgmon*, 952 F.2d at 1213. In, *Garrett v. United States*, 471 U.S. 773 (1985), the Supreme Court addressed the challenge that Double Jeopardy barred prosecution for a

have intended the money laundering statute to be a separate crime distinct from the underlying offense that generated the money to be laundered.<sup>59</sup> The Tenth Circuit reasoned that Congress intended to add an entirely new criminal offense to punish activity that had not been formerly proscribed and punished criminally. The statute proscribes conduct that “follows in time the underlying offense” and provided punishment “in addition to other punishment” rather than replacing one form for another.<sup>60</sup> The court drew an analogy to the offense of a continuing criminal enterprise and its predicate offenses, concluding that money laundering and specified unlawful activity are “separate offenses separately punishable.”<sup>61</sup> Therefore, prosecution and punishment for both money laundering and its predicate offense, conversion of collateral, do not violate the Double Jeopardy Clause.<sup>62</sup>

More recently, the Second Circuit revisited congressional intent and concurred with the Tenth Circuit. In *United States v. Holmes*,<sup>63</sup> the court rejected the defendant’s contention that Congress did not intend to impose multiple punishments for embezzlement and money laundering since the embezzled funds were also the subject of the laundering and structuring violations.<sup>64</sup> The defendants, Clyde Holmes and Salvatore Frasca, embezzled several hundred thousand dollars from the United Services Employees Union Local 377. Specifically, they embezzled the money from the union’s benefit program through two fraudulent schemes which processed fictitious medical claims in the names of union

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continuing criminal enterprise (CCE) offense in violation of 21 U.S.C. § 848 (1988 & Supp. V 1993), and an importation of marijuana offense in violation of 21 U.S.C. §§ 952, 960 (1988) and 18 U.S.C. § 2 (1988). *Garrett*, 471 U.S. at 773-74. The Court used a two-step analysis. Where the same conduct violates two statutory provisions, “the first step in the analysis is to determine whether the legislature . . . intended that each violation be a separate offense . . . and whether one violation was intended to be a lesser included offense of the other.” *Id.* at 779. If Congress intended the statutory violations to be separately punishable violations, the second step of the analysis determines “whether separate prosecutions or punishments for the offenses violates the Due Process Clause.” *Id.* at 786. *Garrett* indicated that the *Blockburger* test is not controlling when the legislative intent is clear from the face of the statute or its legislative history. The court held that the legislative history and statutory framework of the CCE statute clearly indicated that “Congress intended it to be a separate and supplemental offense, in addition to, rather than instead of, the predicate offenses.” *Id.* at 784-86.

59 *Edgmon*, 952 F.2d at 1213.

60 *Id.*

61 *Id.* at 1213-14.

62 *Id.* at 1214-15.

63 Nos. 93-1873, 93-1893, 1995 U.S. App. LEXIS 1280 (2d Cir. Jan. 23, 1995).

64 *Id.* at \*7-8.

members without the members' knowledge or consent.<sup>65</sup> Holmes was convicted of conspiring to embezzle union funds in violation of 18 U.S.C. §§ 371 and 664, embezzlement of union funds in violation of 18 U.S.C. § 664, money laundering by concealing embezzled funds in violation of 18 U.S.C. § 1956(a)(1)(B)(i), and money laundering by structuring financial transactions in violation of 18 U.S.C. § 1956(a)(1)(B)(ii).<sup>66</sup>

On appeal, the defendants asserted that their indictment was multiplicitous since the embezzlement, money laundering and structuring were all based upon a single scheme which amounted to a single, continuous offense.<sup>67</sup> In response, the *Holmes* court reiterated the conclusion in *Edgmon*: "Congress clearly signaled its intent to treat the money laundering and structuring as an offense separate from the underlying criminal conduct that generated or structured funds. It also intended to impose separate punishments for these offenses."<sup>68</sup> Therefore, the court concluded that the crime of embezzlement and the crimes of money laundering by structuring and concealing financial transactions are "separate offenses and not part of one continuous offense."<sup>69</sup>

Like *Edgmon*, the Second Circuit interpreted the intent and purpose of section 1956 as creating an entirely separate criminal offense which directly targets certain types of transactions used to "wash" the funds from unlawful activity. As a result, section 1956 provides an additional punishment, and in the process, brandishes an effective weapon against the organized criminal groups which "reap profits from unlawful activity by camouflaging the proceeds through elaborate laundering schemes."<sup>70</sup> Since embezzlement and money laundering are separate offenses separately punishable, the *Holmes* court affirmed both convictions and used Congress's

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65 *Id.* at \*2.

66 *Id.* Holmes was also charged and convicted of witness tampering in violation of 18 U.S.C. § 1512(b)(1), filing false Internal Revenue Service documents in violation of 18 U.S.C. § 1027, and other violations of the Internal Revenue Code. His co-defendant, Frasca, was charged and convicted of the same crimes except for the money laundering violations.

67 *Id.* at \*5-6.

68 *Id.* at \*8.

69 *Id.* at \*7. The court explained: "One may embezzle union funds without laundering the money or structuring financial transactions with it; one may also structure cash transactions or launder money without having acquired the funds through embezzlement." *Id.*

70 *Id.* at \*9 (quoting S. REP. NO. 433, *supra* note 3, at 9).

weapon appropriately to sentence the defendants for each offense.<sup>71</sup>

Thus, Congress created a new federal offense which not only is distinct from its underlying specified unlawful activity, but applies broadly to those who come in contact with the money launderer and, with knowledge of the illegal source of the proceeds, take the dirty money so as to effectively conceal the source of the funds. Formulated with the historical underpinnings of conspiracy law and the efforts to remedy the BSA in mind, section 1956 has become a powerful tool for the government to prosecute those already involved in money laundering and to deter those enticed by the large profits of the drug trade and other lucrative criminal organizations. Congress has, in effect, removed the incentive to engage in money laundering.

#### IV. STATUTORY CONSTRUCTION

To interpret section 1956(a)(1)(A)(i), the starting point is the language of the statute itself. The first canon of statutory construction is that "a legislature says in a statute what it means and means in a statute what it says there."<sup>72</sup> It is essential, therefore, to address the language of the statute to understand how the courts apply section 1956(a)(1)(A)(i) to different factual scenarios.<sup>73</sup> To prosecute under section 1956(a)(1)(A)(i), the government must prove five different elements of the substantive money laundering charge. There are essentially four core elements of section 1956(a)(1).<sup>74</sup> In addition, there are four alternative choices which, when chosen by the government to fit the facts of the case, comprise the fifth element necessary to satisfy the criteria for a successful prosecution under section 1956(a)(1).<sup>75</sup>

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71 The court did find merit, however, in the defendant's argument that the money laundering and the structuring violation constituted one offense in a single financial transaction. The defendant deposited the money to avoid structuring requirements and also knew that he was concealing the proceeds of the embezzlement in violation of § 1956(a)(1)(B)(i). The court concluded that Congress intended only a single punishment for each transaction even though the defendant had "two improper purposes in mind." *Holmes*, 1995 U.S. App. LEXIS 1280, at \*13.

72 *United States v. Piervinanzi*, 23 F.3d 670, 676 (2d Cir. 1994) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980)).

73 For a discussion of the different ways in which courts apply this section, see *infra* Parts V-VI.

74 See *supra* note 14. The four core elements are: knowledge, conducts or attempts to conduct a financial transaction, financial transaction, and proceeds in fact from specified unlawful activity. 18 U.S.C. § 1956(a)(1) (1988).

75 The four additional choices for the fifth element of proof are §§



A. *Four Core Elements of Section 1956(a)(1)*

1. Knowledge

The first element is established by the statute's prefatory phrase: "[W]hoever, knowing that the property involved represents the proceeds of some form of unlawful activity . . ." Congress concluded, after debating the issue at length, that the standard of knowledge in this context is one of scienter rather than a "reason to know" or "reckless disregard" standard.<sup>76</sup> However, this element does include actions of "willful blindness."<sup>77</sup> The Senate Report reveals that the government must meet a two-part test to prove scienter: The government must prove not only that "the defendant knew the property involved in a transaction was the proceeds of a crime but also that the defendant intended to facilitate a crime or knew that the transaction [was] designed to con-

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1956(a)(1)(A)(i) & (ii); (B)(i) & (ii):

(A) (i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal Law . . .

18 U.S.C. § 1956(a)(1) (1988).

<sup>76</sup> The term "scienter" is "used in pleading to signify an allegation . . . setting out the defendant's previous knowledge of the cause which led to the injury complained of, or rather his previous knowledge of a state of facts which it was his duty to guard against . . . . The term is frequently used to signify the defendant's guilty knowledge." BLACK'S LAW DICTIONARY 1345 (6th ed. 1990).

<sup>77</sup> S. REP. NO. 433, *supra* note 3, at 9-10. See Kacarab, *supra* note 39, at 5-6. Willful blindness, under certain circumstances, can substitute for provable actual knowledge on the part of the accused in a case involving money laundering. *U.S. Wins Major Court Victory on "Willful Blindness,"* MONEY LAUNDERING ALERT Dec. 1992, at 1.

ceal the proceeds of a crime."<sup>78</sup> Mere speculation about the nature and purpose of the transaction is not enough.<sup>79</sup>

The Fourth Circuit squarely addressed the knowledge requirement and tested its parameters in a case involving the sale of a home in North Carolina. Although the case involved a prosecution under section 1956(a)(1)(B)(i), the standard by which the Fourth Circuit determined the defendant knew the proceeds represented the proceeds of some form of unlawful activity is equally applicable to section 1956(a)(1)(A)(i). In *United States v. Campbell*,<sup>80</sup> the court reversed the judgment of acquittal of a realtor who engaged in money laundering when she included unreported cash in the sale of a home to a drug dealer, Mark Lawing.<sup>81</sup> Lawing drove

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78 S. REP. NO. 433, *supra* note 3, at 9-10. The Senate Report explained by way of an example:

[A] currency exchanger who participates in a transaction with a known drug dealer involving hundreds of thousands of dollars in cash and accepts a commission far above the market rate, could not escape conviction, from the first tier of the offense, simply by claiming that he did not know for sure that the currency involved . . . was derived from the crime. On the other hand, an automobile car dealer who sells a car at market rates to a person whom he merely suspects of involvement with crime, cannot be convicted of this offense in the absence of a showing that he knew something more about the transaction or the circumstances surrounding it.

*Id.* at 10. See also H.R. REP. NO. 855, *supra* note 13, at 13-14. The House Judiciary Committee offered its understanding through an example of a grocer. If the grocer had knowledge that a customer was buying groceries with proceeds of illegal activity because the grocer knew the customer had no other source of income, the grocer is accountable just as if he had seen the customer on the street selling drugs before the customer walked into the store. *Id.* But, can the grocer be charged with promotion simply because he sells food that enables a person to sustain herself so as to carry on with her life, including unlawful activity? Under *United States v. Jackson*, 935 F.2d 832 (7th Cir. 1991), much like a promotion prosecution concerning funds used to maintain a lifestyle, a promotion prosecution of the grocer should not succeed. See *infra* notes 127-41 and accompanying text. *But see* note 141.

79 S. REP. NO. 433, *supra* note 3, at 10.

80 977 F.2d 854 (4th Cir. 1992). The United States District Court for the Western District of North Carolina set aside the jury's verdict convicting a real estate agent of § 1956 and § 1957 money laundering. The district court stated, "in a prosecution against a party other than the drug dealer," the Government must show "a purpose of concealment" and "knowledge of the drug dealer's activities." *United States v. Campbell*, 777 F. Supp. 1259, 1265 (W.D.N.C. 1991). For a complete analysis of the district court's opinion, see Lawrence, *supra* note 29, at 859-61.

81 The realtor, Ellen Campbell, was indicted under § 1956(a)(1)(B)(i). See *supra* note 52 for the full text of § 1956(a)(1)(B)(i). The scienter is different than § 1956(a)(1)(A)(i) (defendant must intend to promote the carrying on of specified unlawful activity). Yet both sections contain an initial requirement that the defendant knew the proceeds represented the proceeds of some form of unlawful activity. Because this case was brought under § 1956(a)(1)(B)(i), the court analyzed the knowledge requirement in

flashy cars and lived a carefree life, yet could not obtain a mortgage because of his poor credit rating.<sup>82</sup> The realtor accepted the balance of the purchase price, \$60,000, "under the table" in cash and failed to include that portion in the closing statement.<sup>83</sup> She also received a "tip" of a "couple of hundred dollars" for her services.<sup>84</sup> Although she did not know the true occupation of Lawing, the court determined that the "knowledge component" does not require knowledge of the drug dealer's activities; rather, the component boils down to this inquiry: "Did she know that [the purchaser's] funds were derived from an illegal source and that the transaction was designed to conceal the proceeds?"<sup>85</sup> If she deliberately closed her eyes to what should have been obvious, she is deemed to have the requisite knowledge to satisfy this element of the statute.<sup>86</sup> This doctrine of "willful blindness" softens the actual subjective knowledge component of the statute and extends the statute's application. Thus, the Fourth Circuit used the expansive reach of the statute to ultimately send a warning signal to those who would otherwise "close their eyes" and engage in profitable transactions with criminals.

In crafting section 1956, Congress included a definitional section, section 1956(c), to provide a clear understanding of all of its relevant terms. Section 1956(c)(1) requires only that the government show that the defendant had knowledge that the proceeds were involved in *some* form of illegal activity; it does not require the government to prove knowledge of the specific illegal

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terms of that section. However, the Fourth Circuit fashioned a standard by which to determine this initial knowledge required by both § 1956 (a)(1)(A)(i) and (a)(1)(B)(i).

82 When meeting with Campbell, Mark Lawing, the drug dealer, would travel in a red Porsche he owned or in a friend's Porsche. He would bring his cellular phone, and at one time, he carried a briefcase filled with \$20,000 in cash to prove his ability to pay for the house. However, he was unable to secure a loan and asked the owners to accept \$60,000 under the table and to lower the contract price for the house. All agreed. *Campbell*, 977 F.2d at 855.

83 *Id.* The closing documents reflected a sales price which excluded the \$60,000 entirely.

84 *Id.* at 856.

85 *Id.* at 857-58. The court stated that, in this case, "the fraudulent nature of the transaction itself provides a sufficient basis from which a jury could infer Campbell's knowledge of the transaction's purpose, if . . . Campbell also knew of the illegal source of Lawing's money." *Id.* at 858.

86 *Id.* at 859.

activity in question.<sup>87</sup> The activity, however, must constitute a felony under state or federal law.<sup>88</sup>

## 2. Conducts or Attempts to Conduct a Transaction

Section 1956(c)(2) defines “conducts or attempts to conduct” to include “initiating, concluding, or participating in initiating, or concluding a transaction.”<sup>89</sup> As such, Congress intended the statute to reach participants, other than the principal criminals, who engage in a financial transaction with the knowledge that the transaction involved the proceeds of specified unlawful activity. This section also supports prosecutions of those who never laundered any money for the principal criminal but agreed to launder illegal proceeds through a legitimate business.<sup>90</sup> The “attempt” language of the statute, therefore, targets those with an intent to launder regardless of whether or not the design was actually implemented.

## 3. Financial Transaction

Although section 1956 provides guidance with respect to the definition of “financial transaction,” courts have consistently grappled with its application to different facts. Perhaps the confusion arises as a result of the breadth of the definition which construes “financial transaction.” Initially, section 1956(c)(3) defines “transaction” to include all manners of dealing which encompass such occurrences as “purchase, sale, loan, gift,” and also includes those transactions related to a financial institution, i.e. deposits,

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87 18 U.S.C. § 1956(c)(1) (1988 & Supp. V 1993). This subsection states the term “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 of *some* form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law” as defined by subsection (c)(7). See S. REP. NO. 433, *supra* note 3, at 9-10; Kacarab, *supra* note 39, at 7.

88 18 U.S.C. § 1956(c)(1) (1988 & Supp. V 1993).

89 18 U.S.C. § 1956(c)(2) (1988 & Supp. V 1993).

90 Kacarab, *supra* note 39, at 8. The author gives an example of this inchoate offense. Suppose the government, through an undercover operation, obtains evidence that a jeweler or other businessman has agreed with a drug dealer to launder drug profits through his business. Even if the actual laundering of drug profits never occurs because the drug dealer was arrested or the operation was shut down by sufficient evidence to prosecute the dealer and others for drug violations and money laundering, the jeweler or business may be charged under the “attempt” language regardless of whether money was ever laundered.

withdrawals, or transfer of money between accounts.<sup>91</sup> Then, section 1956(c)(4) describes "financial transaction:

(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 degree. . . .<sup>92</sup>

Thus, "financial transaction" is not limited by section 1956 to encompass only those activities conducted in conjunction with a financial institution; rather, it includes almost every imaginable type of commercial activity, as long as it affects interstate or foreign commerce in some way.<sup>93</sup>

Additionally, section 1956(c)(5) defines "monetary instruments" to include any type of coin or currency as well as other forms of negotiable instruments, including personal or traveler's checks and investment securities.<sup>94</sup> "Financial institutions" run the gamut from federally insured banks to single individuals.<sup>95</sup>

In *United States v. Puig-Infante*,<sup>96</sup> the Fifth Circuit addressed the application of the term "financial transaction." The court reversed the conviction of Abigail Puig for money laundering under section 1956(a)(1)(A)(i) since her mere transportation of the proceeds of marijuana sales from Florida to Texas did not constitute a financial transaction within the statute.<sup>97</sup> Puig had initially

91 18 U.S.C. § 1956(c)(3) (1988 & Supp. V 1993). For a more detailed list of transactions, see the text of the statute.

92 18 U.S.C. § 1956(c)(4) (1988 & Supp. V 1993).

93 *Id.* See S. REP. NO. 433, *supra* note 3, at 13; Kacarab, *supra* note 39, at 10. *But see* *United States v. Bell*, 936 F.2d 337 (7th Cir. 1991), wherein the Seventh Circuit concluded that placing money in a safe deposit box did not constitute a transaction within the meaning of § 1956(a)(1). The court analogized the use of the safety box to the use of a locker at an airport terminal, noting that the individual retains control over the contents in each situation. Congress intended to include those activities where the bank actually retains control over the money, makes a record of it, and perhaps pays interest on it.

94 18 U.S.C. § 1956(c)(5) (1988 & Supp. V 1993).

95 S. REP. NO. 433, *supra* note 3, at 13. Under, 18 U.S.C. § 1956(c)(6), "financial institution" has the definition "given that term in 31 U.S.C. § 5312(a)(2) (1988 & Supp. V 1993) which interprets the term broadly. The broad definition is designed to encompass professional money launderers as well. For a list of such financial institutions, see 31 U.S.C. § 5312(a)(2)(A)-(Y) (1988). See also Kacarab, *supra* note 39, at 8-9.

96 19 F.3d 929 (5th Cir. 1994).

97 The defendant was involved in a conspiracy to supply marijuana to the United States from Mexico. This conspiracy began in 1986 and developed a "standard operating

driven from Laredo, Texas to San Antonio, Texas where she received a load of marijuana; she subsequently sold this marijuana in Florida.<sup>98</sup> She and a co-defendant, Gloria Valles, then returned to Laredo with the money from the sale.<sup>99</sup> As the court stated, "there was no evidence of what, if anything, happened to the money thereafter."<sup>100</sup>

The court reviewed section 1956(c)(3) and concluded that a financial transaction not involving a financial institution must effect a *disposition* of the proceeds of the activity. As the court explained, "the statute makes plain that for something (not involving a financial institution or its facilities) to be a transaction, it must be a "disposition."<sup>101</sup> Disposition most commonly means "a placing elsewhere, a giving over to the care or possession of another."<sup>102</sup> Since there was no evidence that the defendant did anything further with the money once she transferred it from Florida to Texas, the court reversed her conviction for money laundering under section 1956(a)(1)(A)(i): "Without such proof, her mere transportation of the proceeds of unlawful activity is not a transaction within the statute."<sup>103</sup> Thus, the statute's application is limited to factual situations which are consistent with both the language of the statute and the underlying congressional intent.<sup>104</sup>

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procedure" in which the defendant participated by making a marijuana run to Florida in 1989. In addition to money laundering, the defendant was convicted of other crimes, including conspiracy to import in excess of \$1,000 kilograms of marijuana, in violation of 21 U.S.C. §§ 963, 952(a), and 960(a)(1). The district court sentenced the defendant to concurrent sentences totally 292 months, followed by 10 years' supervised release. *Id.* at 934.

98 *Id.* at 937.

99 *Id.*

100 *Id.*

101 *Id.* at 938.

102 *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 654 (1961)).

103 *Puig-Infante*, 19 F.3d at 938. Although the court did not find a financial transaction based on mere transportation of the proceeds of illegal activity, it can be argued that Puig participated in a financial transaction when she actually sold the marijuana for profit in Florida. The valuable portion of this opinion is its treatment of the definition of "financial transaction" under § 1956(a)(1)(A)(i). However, the court applied its own analysis rather tenuously to the facts in this case. The facts do suggest that Puig engaged in a financial transaction under § 1956(a)(1)(A)(i). Yet § 1956(a)(1)(A)(i) still would not apply because Puig never *promoted* the marijuana conspiracy through subsequent conduct. See *United States v. Jackson*, 935 F.2d 832 (7th Cir. 1991); discussion *infra* Part V.A.

104 See also *United States v. Samour*, 9 F.3d 531, 535 (6th Cir. 1993) (holding that "merely transporting [drug money concealed in an automobile] does not meet the definition of 'financial transaction' for purposes of money laundering statute").

Nevertheless, Congress intended "financial transaction" to cover a wide variety of transactions to further deter the criminal from engaging in money laundering. If the other elements of section 1956 are satisfied, the statute criminalizes even simple transactions between two individuals who merely transfer illegal proceeds provided the transfer either involves a financial institution or effects a disposition of the proceeds of the specified illegal activity. Thus, Congress broadened each element to stretch the boundaries of money laundering in an effort to halt the flow of illicit cash through the nation's financial system. As an even greater deterrence, each transaction is intended to be a separate offense.<sup>105</sup>

#### 4. Proceeds in Fact of Specified Unlawful Activity

Congress intended, by this fourth element, to limit the application of section 1956(a)(1). Specifically, Congress carefully selected "specified unlawful activity" to encompass that activity described in section 1956(c)(7).<sup>106</sup> It does not cover *all* unlawful activity. The activities are selected to represent those with identifiable proceeds which benefit both the criminal directly and others who participate in financial transactions conducted by the criminal with the illegally derived profits.<sup>107</sup> These activities include such offenses as RICO predicate offenses defined by 18 U.S.C. § 1961, foreign narcotics violations, continuing criminal enterprise acts defined by 21 U.S.C. § 848, and those activities appearing in the laundry list of offenses in section 1956(c)(7)(D), such as bribery,

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<sup>105</sup> Kacarab, *supra* note 39, at 10.

<sup>106</sup> 18 U.S.C. § 1956(c)(7) (1988 & Supp. V 1993). The statute includes a host of activities which constitute such "specified unlawful activity." For a complete list, see 18 U.S.C. § 1956(c)(7): (A); (B)(i), (ii), (iii); (C); (D); and (E). Some of the other activities cited in § 1956(c)(7)(D) include:

an offense under section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money property, or records), . . . section 657 (relating to lending, credit, and insurance institutions) . . . .

*Id.*

<sup>107</sup> Kacarab, *supra* note 39, at 12.

theft, embezzlement, and fraud.<sup>108</sup> Thus, the government must limit prosecutions to those activities defined by the statute.

Another limiting factor in the application of section 1956(a)(1) arises from the plain language of the statute: It requires proof that the financial transaction “in fact involves the proceeds of specified unlawful activity.”<sup>109</sup> Unlike the knowledge element which requires merely that the defendant know the proceeds were derived from some unlawful activity, the government must further prove that those proceeds did, in fact, constitute the illegal proceeds of the specified unlawful activity.<sup>110</sup>

One of the hurdles that the government must address in meeting this burden is that section 1956 contains no definition of “proceeds in fact.” As a result, the first canon of statutory construction is inapplicable.<sup>111</sup> In addition, the element escapes ordinary meaning since it has been used as a flexible term by the government in a host of factual situations. It is unclear whether Congress intended to include only those funds directly exchanged for narcotics or funds derived from such exchanges or both.<sup>112</sup> This distinction is critical in situations where “direct tracing” proof—proof that monies involved in a financial transaction were the very same funds directly derived from illegal activity—is not available to the government. If the statute embodies this narrow interpretation and strict burden of proof, the government cannot prosecute a significant number of money launderers since most take great care in failing to learn the source of the proceeds they “wash.”<sup>113</sup> Money launderers often have very little direct involvement with the criminal organization which produces the dirty proceeds; in fact, in a complex criminal organization, only the select few who either directly generate the proceeds or those who represent the “top brass” have concrete proof that the money washed derives from specified unlawful activity.

In response to the need for a more flexible interpretation, recent case law has supported a broader reading of the require-

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108 See *supra* note 106.

109 See *supra* note 14 and accompanying text.

110 Kacarab, *supra* note 39, at 13. The author suggests that proving the proceeds “in fact” were derived from a specified unlawful activity may be a much heavier burden than showing, usually through circumstantial evidence, that the defendant knew, or was willfully blind to the fact, that the proceeds or property were from some unlawful activity.

111 See *supra* note 72 and accompanying text; see also Strafer, *supra* note 17, at 182.

112 Strafer, *supra* note 17, at 185.

113 Kacarab, *supra* note 39, at 14.



ment that the proceeds are, in fact, derived from a specified unlawful activity. Courts do not interpret the statute to require the government to prove that the proceeds were derived from a *particular* sale of narcotics or a *specific* activity of a criminal organization.<sup>114</sup> If the government can prove that the defendant has no other legitimate source of income and that, with all probability, the funds were derived from an illegal source, the "proceeds in fact" requirement is satisfied.<sup>115</sup> In meeting this burden, circumstantial evidence of the defendant's activities can shed light on the possibility that the money was derived from specified unlawful activity. In addition, as stated before, the government need not prosecute the specified unlawful activity itself to bring a money laundering charge; money laundering is a separate and distinct crime from the underlying offense.<sup>116</sup> Thus, these recent rulings tend to support the flexibility of section 1956(a)(1) in order to provide the government with a more powerful tool to investigate and prosecute those financial transactions designed to "wash" illegally derived money or to use the income derived therefrom.

### B. "Promotion" as the Fifth Element of Proof

Section 1956(a)(1) provides four alternatives for the fifth element of proof.<sup>117</sup> Based upon the facts in each case, the gov-

114 See *United States v. Moore*, 27 F.3d 969 (4th Cir. 1994) (in determining whether the funds used are proceeds of specified unlawful activity, the government is not required to prove that no untainted funds were involved, or that funds used in transaction were exclusively derived from specified unlawful activity); *United States v. Heath*, 970 F.2d 1397 (5th Cir. 1992) (holding that the government need not trace tainted funds through each separate interstate transfer from a bank account even though account also contained untainted funds exceeding amount of transfers), *cert. denied*, 113 S. Ct. 1643 (1993); *United States v. Blackman*, 904 F.2d 1250, 1256-57 (8th Cir. 1990) (holding that because the statute "does not require that the government trace the proceeds to a particular sale," "the government must present sufficient circumstantial evidence from which a juror could infer each element of the money laundering offense beyond a reasonable doubt"); see also Kacarab, *supra* note 39, at 17-18.

115 *Blackman*, 904 F.2d at 1257.

116 See discussion *supra* notes 45-49 and accompanying text.

117 In addition to § 1956(a)(1)(A)(i), three other alternatives are embodied in the § 1956:

- (A) (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
- (B) knowing that the transaction is designed in whole or in part—
  - (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
  - (ii) to avoid a transaction reporting requirement under State or Federal Law.

ernment can seek to apply one of these sections. This Note addresses primarily section 1956(a)(1)(A)(i). Again, this section is the basis for prosecuting those who, with the knowledge that the property involved represents the proceeds of some form of unlawful activity, conducts or seeks to conduct a financial transaction with such proceeds with the intent to promote the carrying on of specified unlawful activity.<sup>118</sup> In contrast to section 1956(a)(1)(B)(i) which requires only that the potential money launderer know that the ensuing transaction is designed by the criminal to conceal the nature of the proceeds, section 1956(a)(1)(A)(i) mandates proof of a specific intent to promote the underlying activity.<sup>119</sup>

Although section 1956 contains no definition of the phrase "promote the carrying on of specified unlawful activity," the statutory language of this section is relatively unambiguous. The defendant must engage in a financial transaction with the requisite knowledge<sup>120</sup> of the illegal proceeds,<sup>121</sup> and, through that transaction, must intend to promote the carrying on of activity that the defendant knew was illegal. In plain ordinary meaning, "promotion" entails the act of contributing to the growth of something or adding to its prosperity.<sup>122</sup> In addition, "carrying on" specified illegal activity connotes the continued existence of the specified unlawful activity. Thus, the defendant must intend to contribute to the growth or prosperity of the specified unlawful activity by promoting the carrying on of its existence.

The language used in section 1956(a)(1)(A)(i) is not only similar to conspiracy law,<sup>123</sup> but also reflects the same purpose as

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18 U.S.C. § 1956(a)(1) (1988).

118 See *supra* note 14 for the full text of § 1956(a)(1)(A)(i).

119 See *United States v. Conley*, 37 F.3d 970, 980-81 (3d Cir. 1994). The promotion and carrying on can be related to the same specified unlawful activity. But the crux of this Note addresses whether that underlying activity need be ongoing or simply completed.

120 See *supra* Part IV.A.1.

121 See *supra* Part IV.A.4.

122 BLACK'S LAW DICTIONARY 712 (6th ed. 1990). Specifically, the verb "promote" means "to contribute to growth, enlargement, or prosperity of; to forward; to further; to encourage; to advance." *Id.*

123 See discussion *supra* Part II.A. If the participants "facilitated" the illicit objectives of the enterprise by washing the money through their businesses or other organizations, they were charged for aiding and abetting or conspiring to aid and abet criminals in their illegal ventures. See also S. REP. NO. 433, *supra* note 3, at 10. The Senate Report explains that the "intent to facilitate" language of § 1956 is intended to "encompass situations like those prosecuted under the aiding and abetting statute in which a defen-

the language used in the Travel Act, 18 U.S.C. § 1952(a)(3).<sup>124</sup> Courts apply section 1952(a)(3) to those defendants who facilitate or further criminal activity even though the underlying crime is not actually committed or fully completed.<sup>125</sup> Thus, this choice for the fifth element becomes an effective tool for law enforcement officials who possess documented proof of a financial transaction which promoted the criminal activity, but do not possess sufficient evidence to charge the principals and their participants with the underlying crime. Those who participate in such transactions are money launderers even if they are never informed of the exact nature of the underlying unlawful activity that generated the illegal proceeds.

To further the underlying goal of section 1956—rendering useless the illegally derived proceeds of unlawful activity—recent court rulings broadly interpret transactions which “promote” the carrying on of specified unlawful activity.<sup>126</sup> While a broad interpretation may expand the government’s arsenal in the war on crime, the courts have a responsibility to fashion rulings consistent with congressional intent. In some decisions, the courts have advanced this “promotion” element beyond that which Congress expressly intended, but which the courts hold Congress impliedly authorized.

## V. JUDICIAL INTERPRETATION OF SECTION 1956(a)(1)(A)(i)

In recent years, several circuit courts have reviewed the scope of section 1956(a)(1)(A)(i). As discussed above, courts apply the

dant knowingly furnishes substantial assistance to a person whom he or she is aware will use that assistance to commit a crime.”

124 18 U.S.C. § 1952(a)(3) (1988 & Supp. V 1993) provides, in relevant part:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carry on of unlawful activity . . . .

The government can prosecute under this section even if the underlying crime is not fully completed or actually committed; the activity must simply further the objective of unlawful activity. Thus, the language and meaning of this statute and § 1956 are quite similar.

125 See *United States v. Campione*, 942 F.2d 429, 434 (7th Cir. 1991) (“[T]he Travel Act targets those with intent to promote or carry on or facilitate the promotion or carrying on of any unlawful activity; it is not limited to those who engaged in the unlawful activity”); *United States v. Loucas*, 629 F.2d 989 (4th Cir. 1980) (only intent to violate, not actual violation of gambling law, was necessary for conviction), *cert. denied*, 450 U.S. 1030 (1987).

126 See discussion *infra* Part V.

section differently and emerge with varying results. Sacrificing congressional intent and plain meaning, some of the circuit courts have extended the section beyond its original purpose.

### A. *The Jackson Rationale*

In *United States v. Jackson*,<sup>127</sup> the Court of Appeals for the Seventh Circuit affirmed the conviction of Reverend Joseph Davis under section 1956(a)(1)(A)(i).<sup>128</sup> Davis was a “small-time, hell-fire and brimstone country preacher” who “served” his parishioners by running two crack houses and actively selling crack.<sup>129</sup> He deposited the money derived from his enterprise into two separate accounts to commingle the funds with other legitimate income.<sup>130</sup> Davis wrote checks from these accounts to cash (for personal use) and to local vendors who provided beepers and mobile phones for Davis.<sup>131</sup> In addition, Davis signed rent checks and purchased cars from those accounts.<sup>132</sup>

The court rejected Davis’ challenge to the sufficiency of the evidence for the money laundering conviction. The court reasoned that commingled funds derived, in part, from specified unlawful activities do not absolve the defendant from a conviction simply because the government cannot trace the origin of the funds to determine which funds were used for each transaction.<sup>133</sup> Otherwise, criminals could easily prevent prosecution under the money laundering statute simply by commingling funds derived from specified unlawful activities with legitimate sources.<sup>134</sup>

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127 935 F.2d 832 (7th Cir. 1991).

128 In addition, Davis was also indicted and convicted of one count of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848 and one count of conspiring to distribute over fifty grams of cocaine base in violation of 21 U.S.C. § 841(a)(1) and 846. Mandell Jackson and Romano Gines were also convicted under 21 U.S.C. §§ 841(a)(1) and 846. The court affirmed the convictions of all defendants but remanded the Gines conviction for resentencing.

129 *Jackson*, 935 F.2d at 836.

130 *Id.* at 836-37. The two accounts were the “Development Corporation Account, and the “Church Account;” these accounts also included funds from more legitimate activities, such as “bird-dogging” in which Davis steered his parishioners and others to used car outlets in the East St. Louis area in return for commissions from the dealers.

131 *Id.* at 837.

132 *Id.*

133 *Id.* at 839.

134 *Id.* The court added that “the commingling in this case is itself suggestive of a design to hide the source of ill-gotten gains that the government must prove under section 1956(a)(1)(B)(i).” *Id.*

Most significantly, the court recognized that a conviction under section 1956 involves more than simply conducting transactions using dirty money.<sup>135</sup> The court explained that the government bears the burden of proving beyond a reasonable doubt that "the party engaged in the transaction knew that the funds used represented, *in whole or in part*, proceeds of unlawful activity and intended the transaction to promote one of the varieties of criminal conduct identified in section 1956(c)(7)."<sup>136</sup>

The court agreed that Davis' purchase of beepers promoted his continuing criminal enterprise.<sup>137</sup> Since section 1956(a)(1)(A)(i) is aimed at the "practice of plowing back the proceeds of specified unlawful activity to promote that activity,"<sup>138</sup> the purchase of the beepers did, in fact, plow back the proceeds of narcotics sales to promote the efficiency of that activity. Davis' drug runners used the beepers to keep in contact with Davis. Thus, they were an integral part of the enterprise and furthered its goals of illegal narcotics sales.<sup>139</sup> The court therefore held that Davis violated section 1956(a)(1)(A)(i).<sup>140</sup>

Interestingly, the court found that neither the mobile phone purchases nor the rental payments were intended to promote the continuing criminal enterprise as required by section 1956(a)(1)(A)(i).<sup>141</sup> The phones did not further the drug activity in any way. Likewise, the rental checks and checks written to cash "maintained Davis' lifestyle, but more than this is needed to establish that they promoted his drug activities."<sup>142</sup> Thus, the court

135 *Id.* at 840. See also Lawrence, *supra* note 29, at 851.

136 *Jackson*, 935 F.2d at 840 (emphasis added).

137 *Id.* at 841.

138 *Id.* at 842.

139 *Id.* at 840. As the court stated,

Pierre Manley testified that Davis gave him a beeper when he began to serve as one of Davis' runners, and that Davis would call Manley's beeper to tell him to contact Davis. . . . This and other evidence of the use of beepers as an integral part of Davis' conduct of his continuing criminal enterprise suffice to establish that the use of the funds derived from Davis' drug activities to purchase beepers was intended to promote this activity, establishing a violation of § 1956(a)(1)(A)(i).

*Id.*

140 *Id.* at 840.

141 *Id.* at 841.

142 *Id.* The court, however, did find that these activities fell within the ambit of § 1956(a)(1)(B)(i) since Davis converted cash into goods and services as a way of concealing or disguising the source of funds. Checks were written to conceal or disguise the true nature of the proceeds. A conviction under § 1956(a)(1)(B)(i) requires only that the defendant knew the purpose of the transaction was to conceal the source or nature

established a stringent definition of promotion: The defendant must intend to use the proceeds to further the specific underlying crime, rather than to merely *spend* the ill-gotten gains of his crime.

The Tenth Circuit further applied a strict interpretation of section 1956(a)(1). In *United States v. Sanders*,<sup>143</sup> the court rejected the argument that the money laundering statute should be interpreted broadly to encompass *all* transactions which involve the proceeds of unlawful activity. The *Sanders* court cautioned, “[t]o so interpret the statute would, in the court’s view, turn the money laundering statute into a ‘money spending statute’.”<sup>144</sup>

In *Sanders*, the court declined to apply the money laundering statute to the defendants’ purchase of two automobiles. Although the purchases were made with the knowledge that the money used for the transaction represented the proceeds of a drug sale, the *Sanders* court recognized that this transaction did not fall within the scope of the money laundering statute, specifically section 1956(a)(1)(B)(i); the *Sanderses* did not attempt to conceal their identity as the car purchasers.<sup>145</sup> In essence, the *Sanderses* merely spent their dirty money in an ordinary transaction with neither the intent to promote their underlying drug sales nor the intent to conceal the source or nature of the proceeds from such activity. As the court explained, Congress intended that the transactions criminalized under the statute must fall within the express terms of the statute.<sup>146</sup> Thus, the *Sanders* court, like *Jackson*, recognized the need for courts to limit application of the money laundering

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of the illegal proceeds. See *supra* note 52.

143 This case actually encompasses two prosecutions: *United States v. Sanders*, 929 F.2d 1466 (10th Cir. 1991) (defendant was Renee Armstrong Sanders) and, *United States v. Sanders*, 928 F.2d 940 (10th Cir.) (defendant was Johnny Lee Sanders, husband of Renee Armstrong Sanders), *cert. denied*, 502 U.S. 845 (1991). In the interest of simplicity, subsequent cites to these cases are taken from the latter opinion.

144 *Sanders*, 928 F.2d at 944.

145 *Id.* This case was brought under § 1956(a)(1)(B)(i): “knowing the transaction is designed in whole or in part — to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; . . . shall be sentenced to a fine . . . or imprisonment for not more than twenty years or both.” Although the focus of this Note is on § 1956(a)(1)(A)(i), the court’s interpretation of congressional intent is relevant and consistent with the *Jackson* rationale.

146 *Sanders*, 928 F.2d at 944. Here, the court focused on the express terms of § 1956(a)(1)(B)(i). The court insisted that the purpose of the money laundering statute is to reach transactions intended to disguise the relationship of the items purchased with the person providing the proceeds from specified unlawful activity. Similarly, Congress intended only to reach those transactions designed to promote the carrying on of specified unlawful activity under § 1956(a)(1)(A)(i).

statute to factual situations which warrant its use. By extension, section 1956(a)(1)(A)(i) criminalizes transactions which "promote the carrying on" of specified unlawful activity. To read this section broadly to encompass *any* transaction would ignore its particular and distinguishable purpose.

### B. *The Montoya Rationale*

After *Jackson*, several circuit courts sought to expand section 1956(a)(1)(A)(i) beyond its express scope. In the process, the *Jackson* rationale evolved as circuit courts broadened its rationale and limited its interpretation of the statute's target—to criminalize the practice of "plowing back the proceeds" of the specified unlawful activity to promote that activity.

In *United States v. Montoya*,<sup>147</sup> the Court of Appeals for the Ninth Circuit affirmed the conviction of California State Senator Joseph B. Montoya for money laundering under section 1956(a)(1)(A)(i).<sup>148</sup> Montoya was convicted after he deposited into his personal checking account a \$3000 check he received from Peach State Capitol, an Alabama shrimp company that was lobbying for passage of certain legislation.<sup>149</sup> Peach State Capitol was, in fact, a fictitious FBI front company designed to investigate unlawful corruption by certain members of the California legislature. Montoya was a member of the legislative committee which was considering the bill, and records indicate that he did, in fact, vote in favor of its passage.<sup>150</sup> In essence, the \$3000 check was derived from the proceeds of a bribery transaction under both state and federal law, and the bribery transaction constituted "specified unlawful activity" under section 1956(c)(7)(D).<sup>151</sup>

On appeal, Montoya advanced two arguments for reversal of his conviction, both of which the court summarily rejected. First, he argued that the check was a "legitimate honorarium" deposited without any attempt to conceal the transaction; therefore, he

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147 945 F.2d 1068 (9th Cir. 1991).

148 Senator Montoya was also convicted of racketeering in violation of 18 U.S.C. § 1962(c) (1988). However, the court reversed his convictions for extortion and attempted extortion under color of official right in violation of 18 U.S.C. § 1951 (1988) ("Hobbs Act").

149 *Montoya*, 945 F.2d at 1074.

150 *Id.* at 1077. It is undisputed that Montoya told another member of the California Senate that he expected at least \$2,500 for his support, and ultimately, set the payment \$3,000, commenting that "you don't want to appear ridiculous." *Id.*

151 *Id.* at 1074, 1075 & n.5.

lacked the intent to launder.<sup>152</sup> The court responded with a clarification of section 1956(a)(1)(A)(i): “[A]n intent to launder, disguise or thwart detection of the source or purpose of monies deposited into a bank is not a required element of [section 1956(a)(1)(A)(i)].”<sup>153</sup> The section requires a different element of proof—the “intent to promote the carrying on of specified activity.”

Second, Montoya argued that the deposit could not have promoted the bribery since the bribery was already completed upon receipt of the check from the undercover agent.<sup>154</sup> Therefore, there existed no ongoing unlawful activity to further or facilitate. The court again responded in a somewhat short and pointed manner. Montoya promoted the carrying *out* of the illegal bribery by depositing the check and characterizing the funds as a legitimate honorarium.<sup>155</sup> Otherwise, Montoya could not have made use of the funds without such a deposit. Although the statute’s literal words require the intent to promote the carrying *on* of specified unlawful activity, the court applied it to Montoya even though the bribery was essentially completed upon receipt of the check. Essentially, Montoya never plowed back the proceeds of the specified unlawful activity, for the criminal enterprise was already dismantled before he deposited the check.

Indeed, Montoya benefited *personally* from the deposit of the check, yet as the *Jackson* court recognized, “more than that is needed” to establish that it promoted the bribery transaction.<sup>156</sup> The defendant must *further that activity in some way*. However, the specified unlawful activity (bribery) was essentially completed when Montoya placed the check in his suit coat. It seems logically incon-

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152 *Id.* at 1074. Montoya argued that a legitimate honorarium is permissible under state law and was therefore not deposited into his personal bank account “with the intent to promote the carrying on of specified unlawful activity.” *Id.*

153 *Id.* at 1076. The court noted that § 1956(a)(1)(B)(i) requires the government to prove that the defendant deposited the funds “to conceal or disguise the nature, the location, or source, the ownership, or the control of the proceeds of specified unlawful activity.” *Id.* Sections 1956(a)(1)(A)(i) and (a)(1)(B)(i) are aimed at different activities. Montoya was not charged under § 1956(a)(1)(B)(i).

154 *Id.*

155 *Id.* This standard (“carrying *out*”) represents a seemingly subtle variation of the statutory standard, yet *Montoya* signaled an expansive but erroneous view contrary to the narrow scope applied by the Seventh and Tenth Circuits in *Jackson* and *Sanders*, respectively.

156 *See* *United States v. Jackson*, 835 F.2d 832, 836 (7th Cir. 1991); discussion *supra* Part V.A.



sistent to equate the carrying *out* of the underlying unlawful activity with the statutory requirement that Montoya "promoted the carrying *on*" of bribery after the bribery transaction was already completed. Nevertheless, this interpretation of "promoting the carrying on" has led to a trend for circuit courts to uphold proof of this element of section 1956(a)(1) even in the absence of an ongoing venture which promises future criminal conduct.

In *United States v. Paramo*,<sup>157</sup> for example, the Court of Appeals for the Third Circuit upheld Alberto Paramo's conviction for money laundering under section 1956(a)(1)(A)(i).<sup>158</sup> Paramo's conviction resulted from his participation in a scheme to embezzle IRS tax refund checks. Paramo retrieved the tax refund checks mailed by an IRS tax examiner to a fictitious payee at a New York City mailing address.<sup>159</sup> He then mailed the checks to his brother in Philadelphia who deposited them into his own account. His brother then withdrew the money and distributed the proceeds.<sup>160</sup> Although Paramo argued that none of the proceeds obtained from earlier acts of mail fraud were used to facilitate the subsequent acts of fraud, the jury returned a guilty verdict, perhaps assisted by the trial court's hesitant instruction: "To determine whether the defendant promoted or facilitated . . . the carrying on the—carrying *out* of the *past* mail fraud . . . you can promote, facilitate, or assist in ways other than—prospectively or in the future. . . . It could be a past mail fraud."<sup>161</sup>

The court conceded the lack of evidence that any of the participants reinvested, or funneled, their proceeds back into the mail fraud scheme or purchased any equipment to assist them in continuing the scheme.<sup>162</sup> As the court explained,

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157 998 F.2d 1212 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1076 (1994).

158 The government offered Paramo and two other defendants an opportunity to enter plea agreements after they all agreed to cooperate and explain the criminal enterprise. The other two defendants accepted the agreement and pled guilty to the charges against them. They received sentences of eighteen months and twenty-four months respectively. Paramo, however, refused to plead guilty to money laundering charges and argued instead that the specified section under which he was charged, § 1956(a)(1)(A)(i), did not apply to his conduct and participation in the criminal enterprise. At trial, he conceded all of the factual predicates of the money laundering charges, but denied that these facts supported a conviction under § 1956(a)(1)(A)(i). *Id.* at 1214-15.

159 *Id.* at 1214.

160 *Id.* Paramo was also charged with mail fraud and money laundering as an aider and abettor under 18 U.S.C. § 2.

161 *Id.* at 1215 (emphasis added). This jury instruction, which was clearly derived from the *Montoya* rationale, blurred the requisite element of promoting the carrying *on* of subsequent acts of fraud.

162 *Id.* at 1216. Paramo based his argument on the insufficiency of evidence to estab-

"[u]ncontradicted evidence shows that Paramo and the other participants spent their respective shares of the mail fraud proceeds on personal items for themselves and their family members."<sup>163</sup>

In this context, the *Jackson* rationale should be triggered: The intent to promote the carrying on of unlawful activity cannot be inferred merely because the defendants used their proceeds to pay personal expenses or to purchase consumer goods.<sup>164</sup> Although the money from the IRS checks may have helped maintain Paramo's lifestyle, as the rental payments and mobile phone purchases did for Jackson, "more than this is needed" to establish that he promoted his mail fraud. As the *Sanders* court suggested, the money laundering statute is not a "money spending statute."<sup>165</sup> Rather, evidence that the defendant plowed back the proceeds of the specified unlawful activity should have been necessary to support a conviction.<sup>166</sup>

Since the facts of this case did not support such a finding, the court ignored the *Jackson* rationale as a necessary element for a violation of section 1956(a)(1)(A)(i) and recharacterized the government's argument in terms consistent with *Montoya*: Paramo intended to promote mail fraud when the checks were converted into cash, not when he used the money for personal supplies.<sup>167</sup> The court explained that although section 1956(a)(1)(A)(i) is aimed at the practice of plowing back the proceeds of the specified unlawful activity, "nowhere did the court [in *Jackson*] . . . delineate the universe of conduct prohibited under [section] 1956(a)(1)(A)(i), or decide whether a defendant could violate that section other than by plowing back the proceeds of unlawful activity."<sup>168</sup> Ignoring the teachings of *Jackson*, the court specifically relied on *Montoya* and adopted its reasoning. Since "promotion" involves a contribution to the growth and prosperity of the activity, the court deduced that Paramo *could* engage in financial transactions which promote ongoing future activity as well as *prior* activi-

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lish the requisite intent of the statute.

163 *Id.* at 1217.

164 See discussion *supra* Part V.A.

165 *United States v. Sanders*, 928 F.2d 940, 944 (10th Cir. 1991). See discussion *supra* Part V.A. The *Sanders* court cautioned against a broad interpretation of § 1956 to encompass *all* transactions which involve the proceeds of unlawful activity.

166 See discussion *supra* Part V.A.

167 *Paramo*, 998 F.2d at 1217.

168 *Id.* at 1218.

ty.<sup>169</sup> As such, Paramo, like Montoya, promoted his specified unlawful activity by depositing and, in the instant case, cashing the checks. Although each offense of mail fraud was technically completed upon receipt of the check in New York, the court reasoned that Paramo nevertheless believed that the checks were worthless unless exchanged for cash or negotiable currency.<sup>170</sup> Therefore, his check cashing promoted each antecedent fraud and contributed to its growth by creating value out of an otherwise valueless scheme; Paramo specifically intended a profitable enterprise by mail fraud.

The *Paramo* court addressed both *Jackson* and *Montoya* to further expand the scope of section 1956(a)(1)(A)(i). However, the court was eager to adopt the reasoning of *Montoya* and to disregard the statutory boundaries recognized in *Jackson*. While, like *Montoya*, the *Paramo* court carefully analyzed the element of "promotion," it simply read "promote the carrying on of specified unlawful activity" out of the statute. Nowhere does the evidence reflect that Paramo promoted the carrying on of mail fraud by depositing the checks; the mail fraud did not carry on beyond the actual receipt of the tax refund check in the mail. Nevertheless, following *Paramo*, section 1956(a)(1)(A)(i) not only encompasses the practice of plowing back the proceeds of specified unlawful activity to promote it, but also includes transactions which contribute to the completion of *prior* unlawful activity.<sup>171</sup> This recent expansion, which reads the additional step of "carrying on the specified unlawful activity" out of the statute, begs the question: Can the courts construe the statute to extend this far in light of the unambiguous language of section 1956(a)(1)(A)(i)?

A fifth recent case answered in the affirmative. In *United States v. Cavalier*,<sup>172</sup> the Court of Appeals for the Fifth Circuit followed the Third and Ninth Circuits' expansion of "promotion" under the statute. Cavalier was indicted and convicted for conducting a financial transaction involving the proceeds of mail fraud, with the

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169 *Id.* at 1217.

170 *Id.* The court looked to Paramo's state of mind to avoid being hindered in its analysis by the lack of evidence of ongoing unlawful activity.

171 After the Ninth Circuit opinion in *United States v. Montoya*, 945 F.2d 1068 (9th Cir. 1991), some argue that § 1956(a)(1)(A)(i) encompassed those activities which promote not only ongoing or future activity but also prior unlawful activity. See *supra* notes 146-55 and accompanying text. Nevertheless, *Paramo* solidified this broad interpretation and offered added strength to *Montoya* so that other circuit courts would read the statute with the same expansive scope.

172 17 F.3d 90 (5th Cir. 1994).

intent to promote the carrying on of the mail fraud, in violation of section 1956(a)(1)(A)(i).<sup>173</sup> The conviction was based upon evidence of Cavalier's scheme to defraud Allstate Insurance Corporation by fraudulently reporting the theft of his nephew's van after shipping and selling it in Honduras.<sup>174</sup> As a result of this scheme, Allstate mailed GMAC a check to satisfy a lien on the van.<sup>175</sup> Although Cavalier himself did not conduct the financial transaction involving the illegal proceeds of his mail fraud—the mailing of the pay-off check to GMAC—he was punished as a principal since he caused the transaction to be conducted.<sup>176</sup> Cavalier was charged with aiding and abetting mail fraud for his use of the mail to deliver the false theft report and with money laundering based upon the financial transaction involving the proceeds of his mail fraud, i.e., Allstate's transfer of the check to GMAC.<sup>177</sup>

Cavalier set forth the "completion argument" as his defense: The mail fraud scheme was completed when he mailed the false claim to Allstate. Therefore, Allstate's act of transferring the check to GMAC could not promote the already completed specified unlawful activity, the mail fraud.<sup>178</sup> Citing *Paramo* and *Montoya*, the court rejected Cavalier's argument and reiterated the principle that a defendant can conduct a financial transaction with the intent to promote an already completed activity.<sup>179</sup> Here, the transfer of the check from Allstate promoted the overall scheme to defraud Allstate by extinguishing the lien on the van and relieving Cavalier of further payments.<sup>180</sup> Although the court conceded that the specified unlawful activity, i.e., mail fraud, was completed

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173 *Id.* at 91.

174 *Id.*

175 *Id.* at 91. Cavalier devised this scheme after he could no longer make payments on the van himself. The car was sold for \$10,000 in Honduras. Allstate mailed GMAC a check for \$9,749.50.

176 *Id.* at 92. This argument is sustained under 18 U.S.C. § 2(b) (1988) which provides: "whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

177 *Id.* at 91. "Aiding and abetting mail fraud" violates 18 U.S.C. §§ 1341, 1342.

178 *Cavalier*, 17 F.3d at 92.

179 *Id.*

180 *Id.* The district court decision also noted that the "satisfaction of . . . debt to GMAC was an integral part of the overall [fraud] scheme involving the van." Therefore, the transfer of the check effectively promoted this integral part of the mail fraud. *Id.* at 93 n.4.

prior to Allstate's action, it found that the check contributed to its success.<sup>181</sup>

The court, however, did not differentiate this type of "promotion" from the type proscribed by *Jackson*. In fact, unlike *Paramo*, the court employed the language of *Jackson* to describe Cavalier's activities. As the court concluded, "Cavalier caused to be reinvested or *plowed back* the proceeds of his mail fraud to promote his overall scheme to defraud Allstate."<sup>182</sup> He did not simply spend his ill-gotten gains on personal items. Perhaps the court's use of such deliberate terminology as "plowing back the proceeds" reflects a desire to both adhere to congressional intent and target the specific conduct which the statute seeks to criminalize.<sup>183</sup> Although *Cavalier* rested upon *Paramo* and *Montoya* to the extent it finds "promotion" in relation to prior or completed unlawful activity, *Cavalier* implicitly recognized the need for a consistent application of "promotion" to advance the overall goals of section 1956(a)(1). Yet *Cavalier* still neglected to acknowledge the equally important criteria under section 1956(a)(1)(A)(i): The financial transaction must promote the *carrying on* of the specified unlawful activity. As a result, the rule of *Montoya*—conduct can promote the carrying on of completed activity—remains the focal point of inconsistency among the circuit courts in the application of section 1956(a)(1)(A)(i).

Most recently, the Second Circuit analyzed section 1956(a)(1)(A)(i) and aligned with the Fifth Circuit in adopting the *Montoya* rationale. The court declared that a violation of this section is not limited to laundering which only promotes subsequent criminal activity. In *United States v. Piervinanzi*,<sup>184</sup> the Second Circuit addressed section 1956(a)(1)(A)(i) and its application to factual situations in which the specified unlawful activity is already completed. The defendant was convicted for attempted money laundering charges arising from his scheme to fraudulently wire transfer funds overseas from an account in the United States in

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181 As the court explained, "It is undisputed that Allstate's transfer of a check to GMAC furthered Cavalier's scheme to defraud by extinguishing the lien on the van. . . . [B]y furthering the overall scheme of which the completed mail fraud was a part, Allstate's transfer . . . contributed to the prosperity of, and therefore promoted the completed mail fraud." *Id.* at 93.

182 *Id.* at 93 (emphasis added).

183 See *United States v. Jackson*, 953 F.2d 832, 842 (7th Cir. 1991); discussion *supra* Part V.A.

184 23 F.3d 670 (2d Cir.), *cert. denied*, 115 S. Ct. 259 (1994).

two separate but related bank fraud schemes.<sup>185</sup> Piervinanzi was charged with a host of crimes, including conspiracy to commit wire fraud, bank fraud, and money laundering.<sup>186</sup> Although this case involved the prosecution of the defendant under section 1956(a)(2),<sup>187</sup> the court analyzed the similar language of section 1956(a)(1)(A)(i), that a financial transaction be undertaken "with the intent to promote the carrying on of specified unlawful activity." Piervinanzi argued that to promote his activity, the proceeds from his wire fraud and attempted bank fraud must have been "plowed back." However, the court referenced its previous ruling in this area<sup>188</sup> and affirmed its view that the language of this sec-

185 The two bank fraud schemes, the Irving Trust Scheme and the Morgan Guaranty Scheme, were never consummated. In the first scheme, a co-conspirator left out the identity of the American correspondent bank for the bank in the Cayman Islands to which the defendants were trying to wire \$14 million. In the second scheme, the clerk at the bank from which the funds were wired reported the suspicious nature of the transaction, and the wire transfer of \$24 million to a bank in London was immediately stopped and reversed. In both schemes, Piervinanzi was recruited to provide security for the operation since his ties to organized crime gave him experience in this area.

186 Specifically, in count one, he and another defendant were charged with conspiracy to commit wire fraud, bank fraud, and money laundering in violation of 18 U.S.C. § 371. Count two charged him and another defendant with attempted bank fraud in violation of 18 U.S.C. §§ 1344 and 2. Count three charged him with attempted money laundering in violation of 18 U.S.C. §§ 1956(a)(2) and 2. Count four charged him with wire fraud in violation of 18 U.S.C. §§ 1343 and 2. Count five charged him with attempted bank fraud, violating 18 U.S.C. §§ 1344 and 2. Count six charged him with attempted money laundering in violation of 18 U.S.C. §§ 1956(a)(2) and 2. Finally, count seven charged him with money laundering in violation of 18 U.S.C. §§ 1957(a) and 2. Piervinanzi was convicted on all counts at the initial trial. *Piervinanzi*, 23 F.3d at 674.

187 18 U.S.C. § 1956(a)(2) (1988). The relevant portion of the statute provides:

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

(A) with the intent to promote the carrying on of specified unlawful activity; . . .

shall be sentenced to a fine of \$500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both . . . .

*Id.* Section 1956(a)(2) targets international money laundering; § 1956(a)(1)(A)(i) applies to domestic money laundering. Although § 1956(a)(2) does not require that the "proceeds" used are generated first by unlawful activity followed by a financial transaction, the similar language of § 1956(a)(2) employed in this section provides an additional guide to an interpretation of § 1956(a)(1)(A)(i). The court's analysis is therefore relevant to the discussion of the scope of "promoting the carrying on" of specified unlawful activity since this statutory requirement is identical in both sections.

188 See *United States v. Skinner*, 945 F.2d 176 (2d Cir. 1991) (holding that §

tion applies to specified unlawful activity already completed but nevertheless promoted by subsequent transactions which contribute to its growth and prosperity. As the court explained, "[b]ecause transferring the funds overseas . . . was integral to the success of both fraudulent schemes, it is undeniable that the attempted transfers were designed to 'promote' the underlying bank fraud."<sup>189</sup>

Piervinanzi also advanced the argument that the prohibition against "carrying on" of the specified unlawful activity is rendered meaningless unless "carrying on" specifically proscribes continuous criminal activity, which the facts did not support in his case.<sup>190</sup> In response, the court dissected this phrase and concluded that "carrying on" in section 1956(a)(2) has essentially the same meaning as "conducts" in section 1956(a)(1); it does not necessarily connote "continuous criminal activity."<sup>191</sup> Additionally, the court interpreted "specified unlawful activity" to include singular offenses; thus, a violation of section 1956 is satisfied "by the carrying on of a single offense of bank fraud" even if the offense is already completed.<sup>192</sup> The court applied this rather specious analysis and rejected Piervinanzi's argument based upon the *Jackson* rationale, since, in the court's view, *Jackson* never established that a defendant may be deemed to promote the carrying on of unlawful activity *only* when the money laundering promotes subsequent criminal activity. As the court implied without further analysis, section 1956 is not limited to such a narrow universe of conduct.<sup>193</sup> Thus, both section 1956(a)(2) and section 1956(a)(1)(A)(i) encompass situations other than those geared to "plow back the proceeds" of illegal activity. The court validated this broad interpretation of the statute by citing *Montoya*, *Paramo*, and *Cavalier*.<sup>194</sup>

The *Piervinanzi* court dismissed *Jackson* as a limited holding designed to establish only one avenue to prove a violation of the

1956(a)(1)(A)(i) applied to the transportation of money orders since the money orders facilitated the sale of cocaine even though the cocaine purchases were completed before the money orders were transported).

189 *Piervinanzi*, 23 F.3d at 679.

190 *Id.* at 680.

191 *Id.*

192 *Id.* The court attempted to derive justification from § 1956(c)(7) since that section describes the specified unlawful activity as "any act or activity constituting an offense" and "an offense."

193 *Id.* at 681. The court was unpersuaded by the defendant's references to *Jackson* in this context. Like *Paramo*, the court limited *Jackson's* holding to proscribe only one way to violate the section of the statute. *Jackson* did not, as the *Piervinanzi* court suggested, structure the outer boundaries of the conduct prohibited by § 1956(a)(1)(A)(i).

194 *Piervinanzi*, 23 F.3d at 681-82.

statute, i.e., plowing back the proceeds of unlawful activity to capitalize and expand the criminal enterprise.<sup>195</sup> Under such reasoning, *Jackson* never established that the language of the statute applies only when the laundering promotes subsequent or continuous unlawful activity. As the court concluded, “such a reading would not accord with the plain meaning of the statute.”<sup>196</sup>

Thus, *Piervinanzi*, like *Montoya*, *Paramo*, and *Cavalier*, fashioned an application of section 1956(a)(1)(A)(i) to the facts of the case. The courts seem bent on recognizing the “plain meaning” of the statute as authorization for prosecution of *any* type of subsequent activity performed with the proceeds of specified unlawful activity, whether or not that activity is consistent with the ordinary meaning of “promoting the carrying on of specified activity.” Is this what Congress intended? As an expansive tool for the prosecution of money launderers, judicial interpretation and application of the statute to uphold such convictions would seem to align with the ultimate goal of the statute, but not with congressional intent therein. The only justification for this “reach” by the courts is to further the ultimate goal of thwarting the pocketbook of crime in any manner.

## VI. CONSEQUENCES AND PRACTICAL REPERCUSSIONS

As a result of the *Montoya* interpretation of section 1956(a)(1)(A)(i), other circuit courts have followed its reasoning without considering the statutory language or the underlying congressional intent. Perhaps the *Montoya* rationale furnishes an easy solution to factual situations which pose a potential money laundering scenario. Even if the specified unlawful activity is essentially complete, defendants have laundered money if, in fact, they convert the proceeds obtained into a manageable form for personal use. The *Montoya* rationale thus can be followed to its logical extreme: Every sale of drugs is an automatic money laundering violation as soon as the money changes hands. Not only is this extension inconsistent with congressional intent, but it potentially converts the money laundering statute into the “money spending statute” which the *Sanders* court carefully avoided.<sup>197</sup> In contrast, Congress targeted very narrow conduct to fill the gap in criminal

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195 *Id.* at 681.

196 *Id.*

197 *See* United States v. Sanders, 928 F.2d 440, 444 (10th Cir.), *cert. denied*, 502 U.S. 845 (1991); discussion *supra* Part V.A.



law in the area of post-crime hiding of ill-gotten gains of specified unlawful activity.<sup>198</sup> Yet understood in a *Montoya* context, section 1956(a)(1)(A)(i) would criminalize the very same conduct already criminalized by previous drug laws and other statutes which prescribe the substantive crime.<sup>199</sup>

In 1994, an additional Tenth Circuit opinion and a Fourth Circuit ruling have countered the *Montoya* trend by focusing the money laundering inquiry back within the purview of the statutory language, while an additional Third Circuit ruling further clouds the issue.<sup>200</sup>

In *United States v. Dimeck*,<sup>201</sup> the Tenth Circuit reversed the defendant's conviction of conspiring to launder money under section 1956(a)(1)(B)(i). The conviction was based merely on the delivery of alleged drug money by the defendant to a second courier, who was to deliver the money to the seller of the drugs.<sup>202</sup> Although the defendant was prosecuted under section

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198 See *supra* note 14 and accompanying text; *United States v. Dimeck*, 24 F.3d 1239, 1243 (10th Cir. 1994) (recognizing that Congress intended simply to add a new criminal offense to punish activity not previously punished criminally).

199 To criminalize virtually every transaction conducted with the proceeds of unlawful activity runs afoul of Congress's intention to add an entirely new criminal offense to punish activity not formerly proscribed. See discussion *supra* Part III; see also *United States v. Paramo*, 998 F.2d 1212, 1223 (3d Cir. 1993) (Rosenn, J., dissenting). As Judge Rosenn observed, "[s]imply enjoying the fruits of illegal conduct does not further or promote that conduct; rather, that is part of the original crime for which the defendant has typically already received punishment." *Id.*

200 *United States v. Conley*, 37 F.3d 970 (3d Cir. 1994). See discussion *infra* notes 233-43 and accompanying text.

201 24 F.3d 1239 (10th Cir. 1994). This case deals primarily with § 1956(a)(1)(B)(i), but is relevant to this Note in terms of its focus on the congressional intent of § 1956(a)(1) in general.

202 *Id.* at 1239. The defendant Dimeck argued that a more appropriate charge would have been § 1956(a)(1)(A)(i) rather than § 1956(a)(1)(B)(i). The court declined to express an opinion on this argument since this issue was not before the court. However, Dimeck's argument has merit. Dimeck's sole role in this marijuana conspiracy was to collect the Detroit funds and to deliver them to the courier (a government informant) in a hotel room for delivery back to the supplier. Dimeck did arrive in his company van bearing a "Michigan Satellite Systems" logo and did transport the \$60,000 in a box with the same name. Therefore, the money was not in plain view. However, the box was unsealed and untaped. As noted before, § 1956(a)(1)(B)(i) criminalizes financial transactions conducted with the proceeds of specified unlawful activity knowing that the transaction was designed to conceal or disguise the nature, the source or ownership of the proceeds. It can be argued that Dimeck did not intend to conceal the money directly by using a box with his company's logo on it; it seems the box was probably used simply for easy transportation. A stronger argument could be advanced under § 1956(a)(1)(A)(i) since Dimeck essentially promoted the continuing marijuana sales by plowing back the Detroit funds to the criminal enterprise itself. Dimeck knew that those funds would ultimately find their way into the original supplier's hands.

1956(a)(1)(B)(i), the court's analysis of congressional intent of section 1956(a)(1) as a whole provides relevant insight.

Reflecting on the legislative history of section 1956, the court stressed that the statute intended to create a new federal offense for money laundering, rather than to "afford an alternative means of punishing the prior 'specified unlawful activity.'"<sup>203</sup> The court also reviewed *Edgmon*<sup>204</sup> and *Sanders* as it reexamined the purpose of section 1956: "Congress intended simply to add a new criminal offense to punish activity that was not previously punished criminally."<sup>205</sup> The court carefully dissected the evidence to determine if, in fact, it revealed the kind of transaction prohibited by the specified section of the statute.<sup>206</sup> Because the government failed to show that the defendant's conduct fit within the language of the statute—the conduct was designed to disguise or conceal the attributes of the illegal proceeds—the court declined to extend the scope of the statute to encompass *any* transaction which involves the proceeds of specified unlawful activity.<sup>207</sup>

Thus, the Tenth Circuit squarely underscored a difference in approach of the circuit courts as they consider convictions brought under section 1956. The specific facts must be analyzed to determine whether they fit within the exact language of the statute even if this heightened scrutiny results in the reversal of convictions. In essence, some transactions simply are not those targeted by the statute. If courts ignore the narrow purpose of the statute simply to convict more defendants, they are ignoring their responsibility to construe the law consistent with congressional intent.

Recently, in *United States v. Heaps*,<sup>208</sup> the Fourth Circuit declined to extend section 1956(a)(1)(A)(i) to the transfer of money orders which represented the proceeds of a drug sale to a DEA agent. The defendant's conviction at the trial level arose out of his participation in a conspiracy to possess and distribute methylenedioxyamphetamine (MDA), commonly known as "ecstasy."<sup>209</sup> The defendant supplied ecstasy to other distributors who

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203 *Id.* at 1244 (quoting *United States v. Edgmon*, 952 F.2d 1206, 1213-14 (10th Cir. 1991)).

204 See discussion *supra* notes 50-62 and accompanying text.

205 *Dimeck*, 24 F.3d at 1239 (quoting *Edgmon*, 952 F.2d at 1213-14).

206 *Dimeck*, 24 F.3d at 1245. Again, the specified subsection is § 1956(a)(1)(B)(i) which differs from § 1956(a)(1)(A)(i) in the kind of transactions prohibited. See *supra* notes 14 & 52 for the sections' specific statutory language.

207 *Id.* at 1245.

208 39 F.3d 479 (4th Cir. 1994).

209 *Id.* at 479-80. The defendant was charged and convicted of conspiracy to possess

then resold the pills, unknowingly, to DEA Agent Valentine.<sup>210</sup> Heaps instructed his customers to send him a money order through Western Union in the name of "Stacey Maire," the defendant's girlfriend.<sup>211</sup> These money orders were payments for ecstasy previously supplied and represented the proceeds of the sale of ecstasy to the DEA agent. The money orders were cashed upon receipt.<sup>212</sup> The money was then stored in a money box in a drawer of the defendant's house.<sup>213</sup> The trial court held that the wire transfer to Stacey Maire promoted the carrying on of the specified unlawful activity under section 1956(a)(1)(A)(i).<sup>214</sup>

On appeal, the defendant argued that, for two reasons, the evidence was insufficient to support a conviction under section 1956(a)(1)(A)(i): "[T]he government never established that [the defendant] knew the money represented the proceeds of unlawful activity . . . and the government failed to prove that the transaction was intended to promote the carrying on of specified unlawful activity . . . ." <sup>215</sup> In response, the court used circumstantial evidence to show that the defendant had actual subjective knowledge that the proceeds were derived from drug sales.<sup>216</sup> The evidence revealed not only that the defendant was friends with those to whom he supplied ecstasy, but that his supply was their primary means of support.<sup>217</sup> Thus, a jury could reasonably

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and distribute ecstasy, in violation of 21 U.S.C. § 846; conspiracy to commit money laundering, in violation 18 U.S.C. § 371; distribution of ecstasy, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and 2; and, money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 2.

210 *Heaps*, 39 F.3d at 481. Heaps sold a substantial amount of pills to Gillian Beck and Geoffrey Boccia who then, unknowingly, sold them to an undercover DEA agent, Robert Valentine.

211 *Id.* Stacey Maire and the defendant were later married.

212 *Id.* at 482. Specifically, there were two money orders. One was sent in the amount of \$1500 and the other for \$500. After the wire transfer and at the direction of the defendant, Stacey Maire picked up the \$2000 in New York.

213 *Id.*

214 *Id.* at 483. The conviction was also brought under § 1956(a)(1)(B)(i) since the wire transfers "were designed to disguise the source, ownership, or control of the proceeds of the unlawful activity." *Id.*

215 *Id.* at 483. See *supra* note 14 for the full text of § 1956(a)(1)(A)(i). Heaps also argued that the government failed to prove that the transaction was designed to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity. See *supra* note 52 for the full text of § 1956(a)(1)(B)(i).

216 *Heaps*, 39 F.3d at 484. See *United States v. Campbell*, 977 F.2d 854 (4th Cir.), *cert. denied*, 113 S. Ct. 1331 (1993); discussion *supra* Part IV.A.1; see also *supra* note 78 and accompanying text.

217 *Heaps*, 39 F.3d at 484. The court stated that the evidence was sufficient for a

infer that Heaps knew the wire transfer actually represented the proceeds of drug sales.<sup>218</sup>

The court then addressed the second prong of the defendant's argument—the evidence did not establish “promotion” under section 1956(a)(1)(A)(i). The government asserted that the transfers were completed to establish goodwill necessary to promote future sales of ecstasy.<sup>219</sup> Since the government presented no evidence that the payments promoted goodwill or that there were subsequent drug transactions, the court rejected this theory of promotion.<sup>220</sup> The Fourth Circuit characterized the payments as merely satisfying the debt of a completed and final transaction; they did not promote the carrying on of the drug sales by encouraging similar transactions.<sup>221</sup> Moreover, the court rejected the government's argument that the money orders completed the antecedent drug distributions, and therefore, such completion was sufficient to sustain the defendant's conviction in light of *Paramo*, *Montoya* and *Cavalier*.<sup>222</sup> The court distinguished these cases and held that Heaps' particular transaction simply was not the type of transaction targeted by section 1956(a)(1)(A)(i); it was merely the consummation of the sale of ecstasy, for which the defendant was already charged and convicted.<sup>223</sup> As the court stated, if the defendant's only crime, the acceptance of the payment for drugs, was deemed as the kind of transaction which promoted the underlying unlawful activity, then “virtually every sale of drugs would be an automatic money laundering violation as soon as money changed hands.”<sup>224</sup> This expansive reach of the statute does not conform with the underlying purpose of section 1956 since it

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rational trier of fact to conclude “that the defendant knew the money sent him as payment for illegal drugs was itself derived from the sale of illegal drugs.” *Id.*

218 *Id.*

219 *Id.* at 485.

220 *Id.* The court noted that none of the government's witnesses testified that the money orders were sent to encourage the defendant to supply more drugs. Those who sent the money orders explained that they were sent as payment for drugs previously supplied.

221 *Id.*

222 *Id.* at 484-85. The government relied on *Paramo*, *Montoya*, and *Cavalier* both to support its assertion that completion alone is sufficient to sustain the conviction and to argue that “the jury could have reasonably concluded that the defendant caused the proceeds from the drug sales to be plowed back to promote his overall scheme to possess and distribute drugs.” *Id.* The court distinguished all three cases and, accordingly, found the government's argument unpersuasive.

223 *Id.* at 485.

224 *Id.* at 485-86.

"criminalizes the very same conduct already criminalized by the drug laws."<sup>225</sup>

In support of its holding, the court tracked the legislative intent of section 1956(a)(1)(A)(i). Importantly, the court focused on the purpose of this section—to satisfy the need for a federal criminal offense "aimed directly at the activity of laundering the money gained from illegal activity."<sup>226</sup> Moreover, Congress intended money laundering and the specified unlawful activity to be separate crimes separately punishable.<sup>227</sup> As the court stated, "Congress intended to prevent an ill other than those already prohibited by other laws."<sup>228</sup> Thus, the court declined to interpret broadly the statute to encompass the mere receipt of a money transfer and the placement of cash in a drawer.<sup>229</sup> In effect, the court avoided this broad interpretation which would essentially make *any* drug transaction a money laundering crime.

The *Heaps* court also relied on the *Jackson* rationale to remove the case from the purview of section 1956(a)(1)(A)(i). Like *Jackson*, none of the available evidence established that the defendant "promoted the carrying on" of the possession and distribution of drugs. The mere receipt of defendant's money transfer and subsequent act of placing the cash in a money box in the defendant's home did not plow back the proceeds from the drug sales to promote the overall drug conspiracy.<sup>230</sup> Perhaps the money cashed was to contribute to the defendant's lifestyle, but "more than this is needed to establish that they promoted his drug activities."<sup>231</sup> Thus, the *Heaps* court established a standard for consistent application of section 1956(a)(1)(A)(i): The defendant must intend not only to consummate the sale of drugs (for which he or she is charged under other laws), but more specifically, to pro-

225 *Id.*

226 *Id.* at 486 (quoting *United States v. Edgmon*, 952 F.2d 1206, 1213-14 (10th Cir. 1991)). See discussion *supra* Part III; notes 45-49 and accompanying text.

227 *Heaps*, 39 F.3d at 486. See *supra* note 61 and accompanying text; discussion *supra* Part III.

228 *Heaps*, 39 F.3d at 486.

229 *Id.*

230 As the court stated, "[t]he only evidence as to what was done with the money after it was sent was that it was put in a box in a drawer of the defendant's house, behavior far more innocuous than even that considered by the Seventh Circuit in *Jackson*." *Id.* at 486.

231 *Id.* (quoting *United States v. Jackson*, 935 F.2d 832, 841 (7th Cir. 1991)). See discussion *supra* Part V.A.

mote the *carrying on* of the unlawful activity by using the money acquired to *that end* again.

Thus, this recent decision upholds the *Jackson* rationale as the controlling determination of what type of conduct "promotes the carrying on of specified unlawful activity." By inference, the *Heaps* court found the "completion" argument unpersuasive in light of both the specific facts of the case and congressional intent. Perhaps the *Heaps* court realized that *Montoya*, *Paramo*, *Cavalier* and *Piervinanzi* essentially read out of the statute the additional criteria required under section 1956(a)(1)(A)(i): The defendant must not only promote the activity, but intend to promote its *carrying on* into the future. The *Dimeck* and *Heaps* courts upheld the congressional intent of section 1956(a)(1)(A)(i) which had been obscured by previous decisions. *Dimeck*, *Heaps*, *Jackson* and *Sanders* return the section 1956(a)(1)(A)(i) inquiry to its intended scope. The use of the fruits of illegal conduct does not, in itself, further promote the carrying on of that conduct. Rather, such conduct is part of the original crime for which the defendant has been charged.<sup>232</sup> To provide punishment *in addition to* other punishment rather than *instead of* other punishment, promotion of future criminal conduct must exist, rather than the simple attainment of the fruits of past criminal conduct. The other circuits which have yet to address this issue should focus on each element required by section 1956(a)(1)(A)(i) and apply the statute accordingly.

Yet, ongoing confusion and varying applications of the *Jackson* and *Montoya* rationales are evident in a recent ruling by the Third Circuit in *United States v. Conley*.<sup>233</sup> Judge Mansmann, writing for

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232 See *United States v. Paramo*, 998 F.2d 1212, 1223 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1076 (1994) (Rosenn, J., dissenting). In the dissenting opinion, Judge Rosenn criticized the majority opinion, because the defendant did not plow back the proceeds into purchases to promote the mail fraud scheme and thus did not engage in money laundering. See also discussion *supra* Part VI.B.

233 37 F.3d 970 (3d Cir. 1994). In the Third Circuit's prior case, *United States v. Paramo*, the appellate panel consisted of Judges Cowen, Roth and Rosenn (dissenting). In *Paramo*, Judge Rosenn disagreed that the defendant engaged in money laundering under § 1956(a)(1)(A)(i). Again, in Judge Rosenn's view, the defendant did not "plow back the proceeds into purchases to promote the mail fraud scheme." Citing *Jackson*, the judge emphasized that "one can only contribute to the growth of a venture that is ongoing or to be conducted in the future: It does not logically follow that one can promote an enterprise that has already terminated." Additionally, the dissent argued that "simply enjoying the fruits of illegal conduct does not further promote that conduct; rather, that is part of the original crime for which the defendant has typically already received punishment." Finally, "to justify additional punishment, there must be promotion of future criminal conduct, rather than attainment of the fruits of past criminal conduct." *United States*

the panel in *Conley*, reinstated a money laundering conspiracy charge dismissed by the trial court.<sup>234</sup> The defendant was engaged in an illegal gambling business via video poker machines. The indictment alleged that Conley collected the proceeds of this business and deposited them into his bank account to purchase more machines and pay his employees.<sup>235</sup> The district court granted the defendant's motion to dismiss the money laundering conspiracy charge since "double jeopardy constraints prevented a defendant from being charged with both substantive illegal gambling offenses and substantive money laundering offenses."<sup>236</sup> The Third Circuit characterized the district court's holding as erroneous and held that the defendant's activities supported a conviction under section 1956(a)(1)(A)(i), even if the conviction is based on the income from illegal gambling, without an additional specified unlawful activity.<sup>237</sup> The defendant "promoted" his illegal gambling business by collecting the proceeds and using them for subsequent financial transactions.<sup>238</sup>

In support, the *Conley* court reviewed the *Paramo* holding and acknowledged as undisputed that "the underlying offense and specified unlawful activity were legally completed prior to the financial transaction comprising money laundering."<sup>239</sup> The court further explained that *Paramo* provided a broad interpretation of the "intent to promote" requirement, holding that a defendant can be convicted for engaging in financial transactions "that promote not only ongoing but future unlawful activity, but also prior unlawful activity."<sup>240</sup> Yet, the *Conley* decision also acknowledged, through its statement that "Congress did not enact money launder-

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v. *Paramo*, 998 F.2d 1212, 1223-24 (3d Cir. 1993) (Rosenn, J., dissenting).

234 *Conley*, 37 F.3d at 971.

235 *Id.* at 972-73.

236 *United States v. Conley*, 833 F. Supp. 1121, 1158 (W.D. Pa. 1993). The district court reviewed the defendant's double jeopardy challenges and concluded that a violation of the illegal gambling prohibition is a lesser included offense of money laundering.

237 *Id.* at 978. The court concluded that the elements for a money laundering conspiracy and a substantive illegal gambling offense are different. The conspiracy charge requires a financial transaction conducted with the proceeds of specified unlawful activity and committed with the intent to promote the specified unlawful activity. The gambling charge does not proscribe such an intent requirement. The money laundering activity and the illegal gambling activity do not constitute the same offense. Rather, the illegal gambling constituted a "specified unlawful activity" for purposes of the money laundering statute.

238 *Id.* at 979.

239 *Id.* at 980.

240 *Id.* at 978 n.11.

ing statutes simply to add to the penalties for various crimes in which defendants make money," that section 1956(a)(1) does not proscribe all financial dealings conducted with the proceeds of specified unlawful activity. The section only prohibits those financial transactions conducted with the intent to promote certain "further illegal activity, under subsection (A). . . ."241 *Conley* followed *Jackson*, requiring the intent element to relate to "the advancing or furthering of the illegal gambling business."<sup>242</sup>

Thus, it would follow that if *Conley* only collected the proceeds of the video poker machines, he could be indicted for conducting an illegal gambling business, but not for laundering money. How then can the court deem *Paramo* consistent with the *Jackson* rationale, since in *Paramo*, the defendant's financial transaction was merely the act of an intermediary placing checks in the mail to complete or carry out the underlying embezzlement of IRS checks through the mail? In *Paramo* as in *Montoya*, there was no "plowing back" of the proceeds by the defendant. Conversely, despite the *Conley* court's assertion of consistency with *Paramo*, the fact remains that the *Conley* decision reinstated the money laundering portion of the conspiracy indictment because the indictment charged that *Conley* "used illegal gambling proceeds to purchase more video poker machines," "to pay employees" involved in the vending enterprise, and to make payments to another business entity that would "service the poker machines."<sup>243</sup> The *Conley* court correctly applied an analysis of the carrying on element of section 1956(a)(1)(A)(i) by noting that the indictment included financial transactions that involved the use of proceeds "plowed back" to promote the further ongoing activity of the underlying gambling business.

## VII. CONCLUSION

As the legislative history of section 1956(a)(1) reveals, Congress perceived the enactment of the Money Laundering Control Act of 1986 as "imperative if our law enforcement agencies are to be effective against the organized criminal groups which reap profits from unlawful activity by camouflaging the proceeds through elaborate money laundering schemes."<sup>244</sup> Viewed as

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241 *Id.* at 979 (emphasis added).

242 *Id.*

243 *Id.* at 979 n.12.

244 S. REP. NO. 433, *supra* note 3, at 9.



such, the money laundering statutes are powerful weapons with which to combat the "lifblood of the drug trade and other criminal organizations."<sup>245</sup> Yet to effectively and fairly participate in the war on crime, these tools must be applied consistently in the federal courts. As one congressional sponsor stated, "We cannot afford to waste any time. We need this weapon against drug traffickers and organized criminals, and we need it now."<sup>246</sup>

It remains for the Supreme Court to address section 1956(a)(1)(A)(i) and establish a definitive interpretation in order to bring a unified application of this section to the federal trial and appellate courts. There are two primary reasons for the Supreme Court to entertain a review of a section 1956(a)(1)(A)(i) conviction. First, there is a need to establish an interpretation of section 1956(a)(1)(A)(i)<sup>247</sup> consistent with the plain language employed by Congress when it sought to proscribe the carrying *on* of specified unlawful activity. Accordingly, the Supreme Court should resolve the conflict between the federal circuit courts in favor of the *Jackson* rationale adopted by the Seventh Circuit<sup>248</sup> and followed by the Fourth<sup>249</sup> and Tenth Circuits.<sup>250</sup> Second, a definitive ruling will correct the anomaly of convictions for promoting the carrying *out* or completion of the underlying unlawful activity currently occurring in the Second,<sup>251</sup> Third,<sup>252</sup> Fifth,<sup>253</sup> and Ninth Circuit Courts of Appeal,<sup>254</sup> which follow the *Montoya* rationale first applied by the Ninth Circuit.

Again, these latter circuit courts have misinterpreted the plain language of section 1956(a)(1)(A)(i) in seeking to apply a broader proscription than Congress sought to establish. While this broad

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245 *Id.* at 4.

246 *Id.* (Senator Joseph Biden).

247 *See supra* notes 14 & 32.

248 *See* discussion *supra* Part V.A.

249 *See* United States v. Heaps, 39 F.3d 479 (4th Cir. 1994); discussion *supra* Part VI and notes 208-30.

250 *See* United States v. Sanders, 928 F.2d 940 (10th Cir.), *cert. denied*, 502 U.S. 845 (1991); discussion *supra* Part V.A and notes 143-45. *See also* United States v. Dimeck, 24 F.3d 1239 (10th Cir. 1994); discussion *supra* Part VI; notes 201-207.

251 *See* United States v. Piervinanzi, 23 F.3d 670 (2d Cir.), *cert. denied*, 115 S. Ct. 259 (1994); discussion *supra* Part V.B; notes 184-96 and accompanying text.

252 *See* United States v. Paramo, 998 F.2d 1212 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1076 (1994); discussion *supra* Part V.B; notes 157-71 and accompanying text.

253 *See* United States v. Cavalier, 17 F.3d 90 (5th Cir. 1994); discussion *supra* Part V.B; notes 172-83 and accompanying text.

254 *See* United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991); discussion *supra* Part V.B; notes 147-56 and accompanying text.

reach may further serve the ultimate legislative goal of thwarting crime through its pocketbook, it does so without legislative support. Equally important, *Montoya* and its progeny undermine constitutional precepts. Former Senator Montoya's money laundering conviction would not have been upheld by the Fourth, Seventh, or Tenth Circuit Courts of Appeal. Consistency and uniformity are the underpinnings of the constitutional framework supporting federal criminal prosecutions.

The completion of prior related specified unlawful activity simply should *not* give rise to a money laundering charge under section 1956(a)(1)(A)(i). Rather, it is proof of an intent to promote the carrying *on* of *subsequent* unlawful activity, i.e., the plowing back of the proceeds through a financial transaction, which constitutes the statutory violation.

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\* I thank my father, John C. Fenningham, and Professor Jimmy Gurulé for their help and guidance throughout every stage of this Note.

