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The Money Laundering Control Act of 1986: Creating a New Federal Offense or Merely Affording Federal Prosecutors an Alternative Means of Punishing Specified Unlawful Activity?

Jimmy Gurule

Notre Dame Law School, jimmy.gurule.1@nd.edu

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THE MONEY LAUNDERING CONTROL ACT OF 1986: CREATING A NEW FEDERAL OFFENSE OR MERELY AFFORDING FEDERAL PROSECUTORS AN ALTERNATIVE MEANS OF PUNISHING SPECIFIED UNLAWFUL ACTIVITY?

Jimmy Gurulé*

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I. INTRODUCTION

A. *Legislative History*

Money laundering has been characterized as the "lifeblood" of international narcotics trafficking and traditional organized crime.¹ The Money Laundering Control Act ("MLCA") of 1986 makes it a federal crime to launder proceeds from specified unlawful activity.² In enacting federal

* Associate Professor of Law, Notre Dame Law School. The author served as Assistant Attorney General for the Office of Justice Programs in the U.S. Department of Justice during the Bush Administration. He also worked as a federal prosecutor from 1985 to 1989.

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1. See 132 CONG. REC. 18,486-18,487 (1986) (statements of Senators Thurmond and Hatch); PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING* 4-8 (1984) [hereinafter *THE CASH CONNECTION*]; *United States v. Daccarett*, 6 F.3d 37, 43 (2d Cir. 1993).

2. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 18 U.S.C. §§ 1956-57 (1988)).

legislation criminalizing the laundering of illicit proceeds, Congress was responding to the spiraling growth and pervasiveness of money laundering in the United States and the nexus between money laundering and organized crime.³ Congress's primary intent was to criminalize the "process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate."⁴ The MLCA also aimed to stem the flow of illicit profits back to the criminal enterprise, where profits provide the capital needed to expand criminal activity.⁵

3. The revenues generated from drug trafficking alone have been estimated annually at over \$300 billion worldwide, \$100 billion of which is from trafficking in the United States. Carl P. Florez & Bernadette Boyce, *Laundering Drug Money*, FBI L. ENFORCEMENT BULL., Apr. 1990, at 22-23. To put this in perspective, the Department of Justice observed that this figure represents approximately two percent of the gross national product and is larger than the entire U.S. automobile market. Emily J. Lawrence, Note, *Let The Seller Beware: Money Laundering, Merchants and 18 U.S.C. §§ 1956, 1957*, 33 B.C. L. REV. 841, 841 n.2 (1992); see also *House Comm. on Banking, Housing, and Urban Affairs, Comprehensive Money Laundering Prevention Act*, H.R. REP. NO. 746, 99th Cong., 2d Sess. 16 (1986):

[T]here is more money being laundered than ever before, involving more people, and the schemes to wash dirty money are now often so sophisticated that it is not unusual to find an intricate web of domestic and foreign bank accounts, dummy corporations and other business entities through which funds are moved, almost instantaneously, by means of electronic transfers.

4. THE CASH CONNECTION, *supra* note 1, at 4. In July 1983, the President established the Commission on Organized Crime, charging it with submitting recommendations to the President on legislative changes to combat organized crime and improve the administration of justice. In October 1984, the Commission issued an interim report entitled, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING. The report contained legislative proposals to stem the flow of illicit money back to drug suppliers and other organized criminals. See *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1474-77 (10th Cir. 1994) (explaining that the statute prohibits activities designed to further a "launderer's goal of 'plac[ing] illicit bulk cash in an economy [so] it becomes increasingly difficult to uncover their money laundering operation' ") (citations omitted).

5. Senator D'Amato, a chief sponsor of the Senate Bill, posited:

Money laundering permits the drug traffickers to evade taxes and to conduct their operations and finance their drug networks behind a veil of secrecy. It allows them to buy more drugs for resale, and to acquire the planes, boats, and front corporations they use to smuggle drugs into the United States.

Drug Money Laundering: Hearing Before the Senate Comm. On Banking, Housing, and Urban Affairs, 99th Cong., 1st Sess. 7 (1985) [hereinafter *Drug Money Laundering Hearing*]; see also, e.g., International Narcotics and Control Act of 1992, Pub. L. No. 102-583, 106 Stat. 4914 (1992) (codified at 12 U.S.C. § 635, 22 U.S.C. §§ 2151, 2291 (Supp. V 1993)).

Senator Joseph Biden, Jr., the Ranking Minority Member of the Senate Committee on the Judiciary, upon introduction of the Senate Bill, emphasized:

Money laundering is a crucial financial underpinning of organized crime and narcotics trafficking. Without money laundering, drug traffickers would literally drown in cash. Drug traffickers need money laundering to conceal the billions of dollars in cash generated annually in drug sales and to convert his [sic] cash into manageable form. Regrettably, every dollar laundered means another dollar available to support new supplies of cocaine and heroin on the streets of this country.

S. REP. NO. 433, 99th Cong., 2d Sess. 4 (1986). Senator Dennis DeConcini remarked that "[w]ithout the means to launder money, thereby making cash generated by a criminal enterprise appear to come

Additionally, the enormous profits generated by organized crime and the drug cartels have created, out of necessity, a new profession within criminal circles—the professional money launderer.⁶ Congress was concerned with the increasing number of professionals, such as lawyers, accountants and bankers, who were either willing to look the other way or to become active participants in the laundering of illicit monies.⁷ Congressman Shaw, one of the sponsors of the House Bill, declared, “I am sick and tired of watching people sit back and say, ‘I am not part of the problem, I am not committing the crime, and, therefore, my hands are clean even though I know the money is dirty I am handling.’”⁸ According to one commentator, the MLCA was intended to put a stop to the activities of both those who make, and those who take, dirty money.⁹

Finally, Congress intended the MLCA to address the so-called “structuring” loophole problem. Prior to the enactment of the MLCA, the Bank Secrecy Act of 1970 (“BSA”) required financial institutions to file a Currency Transaction Report (“CTR”) with the Department of Treasury for currency transactions in excess of \$10,000.¹⁰ To avoid the reporting requirements of the BSA, a single currency transaction would often be structured into multiple transactions of less than \$10,000 each. Individuals known as “smurfs” provided the structuring service by engaging in multiple banking transactions of less than \$10,000. Since none of the transactions exceeded \$10,000, no CTR would be filed.¹¹ Moreover, courts specifically held that the BSA did not

from a legitimate source, organized crime could not flourish as it now does.” *Money Laundering: Hearing Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 30 (1985).

6. H.R. REP. NO. 746, *supra* note 3, at 16. In a hearing before the Senate Committee on Banking, Housing, and Urban Affairs, the United States Treasury Department provided figures highlighting the success of the Organized Crime and Drug Enforcement (OCDE) task forces in dismantling 18 major money laundering organizations. The Treasury Department provided a breakdown revealing that the 18 criminal organizations laundered approximately \$2,793,000,000. *Drug Money Laundering Hearing*, *supra* note 5, at 13-14. A federal investigation of the Orozco organization helped dismantle a money laundering operation that had laundered in excess of \$151 million during a 13-month period. *Id.* In the so-called “Pizza Connection” investigation, the Treasury Department reported that over a five-year period this organization distributed \$1.65 billion worth of heroin and laundered at least \$28 million in heroin proceeds in a 33-month period. *Id.* These astounding figures underscore the enormous wealth generated by the narcotics trade.

7. Senator Sasser commented that “it’s no secret that for some banks, paying the \$10,000 fine [for failure to file a report under the Bank Secrecy Act] or the risk of paying it is really a small price to pay for the large cash deposits that may find their way into the vaults of these particular banks.” *The Drug Money Seizure Act and The Bank Secrecy Act Amendments: Hearing Before The Senate Comm. on Banking, Housing, and Urban Affairs*, 99th Cong., 2d Sess. 17 (1986).

8. Markup by the Subcommittee on Crime of H.R. 5077, Money Laundering Control Act of 1986, Transcript, pp. 22-23, *quoted in* The Money Laundering Control Act of 1986, H.R. REP. NO. 855, 99th Cong., 2d Sess. 13 (1986).

9. Lawrence, *supra* note 3, at 849.

10. Currency and Foreign Transactions Reporting Act of 1970, Pub. L. No. 91-508, 84 Stat. 1118 (1970) (codified at 31 U.S.C. §§ 321, 5311-5314, 5316-5322 (1988 & Supp. V 1993)).

11. The MLCA closed the structuring loophole by enacting 31 U.S.C. § 5324, known as the

prohibit such "structuring" of transactions to avoid the CTR filing requirement.¹² In short, by enacting the MLCA, "Congress intended simply to add a new criminal offense to punish activity that was not previously punished criminally."¹³

B. The Statutory Scheme

The MLCA makes it a crime to knowingly engage in a financial transaction with the proceeds of some form of unlawful activity either with the intent to promote the carrying on of specified unlawful activity (18 U.S.C. § 1956(a)(1)(A)(i)), or with the design of concealing the nature, location, source, ownership, or control of the illicit proceeds (18 U.S.C. § 1956(a)(1)(B)(i)).¹⁴ Sections 1956(a)(1)(A)(i) and (a)(1)(B)(i) are aimed

"anti-smurfing statute." The statute provides:

No person shall for the purpose of evading the reporting requirements of section 5313(a) . . . with respect to such transaction—

- (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a) . . . ;
- (2) cause or attempt to cause a domestic financial institution to file a report required under 5313(a) . . . that contains a material omission or misstatement of fact; or
- (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions . . .

31 U.S.C. § 5324 (1988 & Supp. V 1993).

12. See *United States v. Bucey*, 876 F.2d 1297, 1309 (7th Cir.), *cert. denied*, 493 U.S. 1004 (1989); *United States v. Mastronardo*, 849 F.2d 799, 804 (3d Cir. 1988); *United States v. Gimbel*, 830 F.2d 621, 625-26 (7th Cir. 1987); *United States v. Dela Espriella*, 781 F.2d 1432, 1435 (9th Cir. 1986); *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986); *United States v. Denmark*, 779 F.2d 1559, 1562-69 (11th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676, 681 (1st Cir. 1985).

13. *United States v. Dimeck*, 24 F.3d 1239, 1244 (10th Cir. 1994) (quoting *United States v. Edgmon*, 952 F.2d 1206, 1213-14 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 3037 (1992)).

14. 18 U.S.C. § 1956 (a)(1) provides in relevant part:

(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; or
- (ii) with intent to . . . [violate] 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 . . .

For cases setting forth the elements of § 1956(a)(1)(B)(i), see *Garcia-Emanuel*, 14 F.3d at 1473; *United States v. Baker*, 985 F.2d 1248, 1252 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 682 (1994); *United States v. Jackson*, 983 F.2d 757, 766 (7th Cir. 1993); *United States v. Levine*, 970 F.2d 681, 686 (10th Cir.), *cert. denied*, 113 S. Ct. 289 (1992). The requisite elements to support a conviction under § 1956(a)(1)(A)(i) are detailed in *United States v. Piervinanzi*, 23 F.3d 670, 680 (2d Cir. 1994); *United States v. Puig-Infante*, 19 F.3d 929, 937 (5th Cir. 1994); *United States v. Thomas*, 12 F.3d 1350, 1360 (5th Cir.), *cert. denied*, *Gregg v. United States*, 114 S. Ct. 2119 (1994); *United States v. Paramo*, 998

at different activities, "the first at the practice of plowing back proceeds of 'specified unlawful activity' to promote that activity [the "promotion" provision], the second at hiding the proceeds of the activity [the "concealment" provision]."¹⁵ Section 1956(c)(7) defines the term "specified unlawful activity" as encompassing a broad array of statutorily designated felony offenses.¹⁶ As defined in the statute, "specified unlawful activity" includes bank fraud,¹⁷ illegal gambling business and interstate transmission of wagering information,¹⁸ mail fraud,¹⁹ violation of the Hobbs Act,²⁰ and narcotics trafficking.²¹

The MLCA also prohibits international money laundering. Section 1956(a)(2) proscribes the transportation or transfer of monetary instruments or funds internationally with the intent to promote the carrying on of specified unlawful activity, or knowing that the monetary instruments or funds represent the proceeds of some form of unlawful activity, with the design to conceal or disguise the nature, location, source, ownership, or control of the illicit proceeds.²² Section 1956(a)(2) is " 'designed to illegalize international money laundering transactions,' and 'covers situations in which money is being laundered . . . by transferring it outside the United States.' "²³

F.2d 1212, 1216 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1076 (1994); *United States v. Brown*, 944 F.2d 1377, 1387 (7th Cir. 1991); *United States v. Montoya*, 945 F.2d 1068, 1077 (9th Cir. 1991).

15. *United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991); *see also* *United States v. Samour*, 9 F.3d 531, 535 (6th Cir. 1993) ("A central focus of subsection (a)(1)(B)(i) is to criminalize the 'conversion of cash into goods and services as a way of concealing or disguising the wellspring of cash.' ") (quoting *Jackson*, 935 F.2d at 840).

16. Section 1956(c)(7)(A) defines a specified unlawful activity as any act that would constitute "racketeering activity" under the RICO statute, 18 U.S.C. § 1961(1) (1988 & Supp. V 1993). Section 1961(1), in turn, designates numerous felony offenses that would support a finding that the defendant engaged in a pattern of racketeering activity. Section 1956(c)(7)(D) details other federal felony offenses that constitute specified unlawful activity.

17. *See Piervinanzi*, 23 F.3d at 679.

18. *See United States v. LeBlanc*, 24 F.3d 340, 346 (1st Cir. 1994); *United States v. Miller*, 22 F.3d 1075, 1077 (11th Cir. 1994).

19. *See United States v. Cavalier*, 17 F.3d 90 (5th Cir. 1994); *Paramo*, 998 F.2d at 1216-18.

20. *See Montoya*, 945 F.2d at 1076.

21. *See United States v. Carr*, 25 F.3d 1194, 1206 (3d Cir. 1994); *Jackson*, 935 F.2d at 841.

22. 18 U.S.C. § 1956(a)(2); *see* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6471(b), 102 Stat. 4181, 4378 (1988); *see also Carr*, 25 F.3d at 1206; *Piervinanzi*, 23 F.3d at 678-80; *United States v. Monroe*, 943 F.2d 1007, 1015 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1585 (1992); *United States v. Lee*, 937 F.2d 1388, 1396 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 977 (1992).

23. *Piervinanzi*, 23 F.3d at 680 (quoting S. REP. NO. 433, *supra* note 5, at 11). *See Samour*, 9 F.3d at 536 ("In subsection (a)(2), Congress outlawed the physical transportation or wire transfer of tainted funds across United States borders.").

In 1988 Congress amended the MLCA, adding a "sting" provision. Section 1956(a)(3) prohibits engaging in a financial transaction in which a law enforcement officer represents property to be the proceeds of specified unlawful activity. The "sting" provision requires that the defendant engage in the financial transaction with the intent to promote the carrying on of specified unlawful activity, or to conceal or disguise the nature, location, source, ownership, or control of the property. The enactment of the "sting" provision was intended to negate an impossibility defense where a law enforcement officer, acting undercover, poses as a drug dealer and the defendant agrees to launder the purported drug proceeds. *See United States v. Perez*, 992 F.2d 298 (11th Cir. 1993).

C. *The Statutory Construction Dilemma*

Applying the MLCA has confounded the courts. The federal circuits are divided on two issues: (1) whether the payment for drugs with the proceeds of drug sales violates section 1956(a)(1); and (2) whether the receipt and transportation of drug proceeds by the drug seller (or drug money courier acting on his behalf) violates section 1956(a)(1). Specifically, the circuits have split over whether the payment of monies for drugs or the transportation of drug proceeds constitutes a "financial transaction" as defined under section 1956(c)(3).²⁴ This division has resulted in the inconsistent application of the money laundering statute, with some circuits affirming a money laundering conviction, and others overturning a factually similar drug-related conviction.

Equally troublesome is whether payment for illegal drugs with funds derived from drug sales satisfies the additional statutory requirement that the defendant conduct the financial transaction either "with the intent to promote the carrying on of specified unlawful activity," or "knowing that the transaction is designed . . . to conceal or disguise the nature, the location, [or] the source . . . of the proceeds of specified unlawful activity."²⁵

The government has aggravated the problem by its sometimes erratic and incongruous filing of charges under the MLCA. In certain cases, federal prosecutors have charged the defendant with a violation of section 1956(a)(1)(A)(i) (the "promotion" provision) under the theory that the payment of monies for drugs promoted the carrying on of specified unlawful activity.²⁶ In other factually comparable cases, the government has charged the defendant with a violation of section 1956(a)(1)(B)(i) (the "concealment" provision), maintaining instead that the payment for drugs was intended to conceal the source or nature of the drug proceeds.²⁷ The courts have consistently held that neither the exchange of money for drugs, nor the transportation of the proceeds of drug sales, by itself, constitutes a violation of section 1956(a)(1)(B)(i).²⁸ The circuits, however, have inconsistently construed the MLCA in deciding whether this same drug-related activity is proscribed by section 1956(a)(1)(A)(i).

24. See *United States v. Dimeck*, 24 F.3d 1239, 1246 (10th Cir. 1994) (movement of drug proceeds may constitute "transaction"); *United States v. Puig-Infante*, 19 F.3d 929, 939 (5th Cir. 1994) (existence of "financial transaction" depends upon whether the evidence supports a finding of "disposition," i.e., that the drug money was given over to the care or possession of another); *Samour*, 9 F.3d at 536 (merely transporting cash does not constitute "financial transaction").

25. 18 U.S.C. §§ 1956(a)(1)(A)(i), (a)(1)(B)(i).

26. See *United States v. Heaps*, 39 F.3d 479 (4th Cir. 1994); *Puig-Infante*, 19 F.3d at 929; *United States v. Skinner*, 946 F.2d 176 (2d Cir. 1991); *United States v. Hamilton*, 931 F.2d 1046 (5th Cir. 1991).

27. See *United States v. Heaps*, 39 F.3d 479 (4th Cir. 1994); *Dimeck*, 24 F.3d at 1239; *Samour*, 9 F.3d at 531; *United States v. Gonzalez-Rodriguez*, 966 F.2d 918 (5th Cir. 1992).

28. See *Skinner*, 946 F.2d at 177-78; *Hamilton*, 931 F.2d at 1051-52.

Two circuits, the Second and Fifth, have concluded that the payment of money for drugs promotes the carrying on of specified unlawful activity, and have sustained money laundering convictions under section 1956(a)(1)(A)(i).²⁹ In each of these cases, the legal analysis in support of the court's conclusion was minimal, at best. Moreover, the Second Circuit completely misconstrued Congress's intent in enacting the MLCA.³⁰

In contrast, the Fourth Circuit held that the wire transfer of money as payment for drugs received on consignment did not promote unlawful activity within the meaning of the statute.³¹ Likewise, the Sixth Circuit, in overturning a money laundering conviction, ruled that the mere transportation of narcotics proceeds does not violate section 1956(a)(1)(A)(i).³² The Fifth Circuit, on similar facts, reached the opposite conclusion.³³

In attempting to resolve the issue of whether exchanging money for drugs, or merely transporting drug proceeds, is proscribed conduct under the MLCA, most courts have engaged in a strict construction of the statutory elements. These courts place their emphasis on whether the defendant engaged in a "financial transaction," and if so, whether the defendant had the intent to promote the carrying on of specified unlawful activity, or had knowledge that the transaction was designed to conceal or disguise the nature or source of the illicit proceeds.

The Tenth and Fourth Circuits, by contrast, have looked primarily to legislative intent. The Tenth Circuit has posited that Congress intended to criminalize conduct that "follows in time" the underlying crime that generated the funds to be laundered, rather than merely affording an alternative means of punishing the prior "specified unlawful activity."³⁴ In order to sustain a conviction under section 1956(a)(1)(B)(i), the Tenth Circuit has required more proof than merely that the financial transaction promoted the commission of the underlying offense. The Tenth Circuit would require proof that the defendant took the additional step of attempting to legitimize the proceeds to make it appear that the funds were derived from legal enterprises.³⁵

In construing section 1956(a)(1)(A)(i) (the "promotion" provision), the Fourth Circuit reasoned that Congress intended money laundering activity and the "specified unlawful activity" to be separate offenses which are

29. See *Skinner*, 946 F.2d at 177-78; *Hamilton*, 931 F.2d at 1051-52.

30. See *Skinner*, 946 F.2d at 177-78 (reading statutory language to show that Congress "sought to reach conduct that went beyond the concealment of proceeds of criminal activity" and "to make unlawful a broad array of transactions designed to facilitate numerous federal crimes").

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

32. *Samour*, 9 F.3d at 536.

33. See *United States v. Gallo*, 927 F.2d 815, 822 (5th Cir. 1991).

34. See *Edgmon*, 952 F.2d at 1214; see also *Dimeck*, 24 F.3d at 1246.

35. *Dimeck*, 24 F.3d at 1247.

separately punishable.³⁶ That court has held that “[t]he statute should not be interpreted to make any drug transaction a money laundering crime.”³⁷

The thesis of this article is that in enacting the MLCA, Congress intended to punish criminal activity not otherwise proscribed by federal law. Moreover, the payment for drugs with money derived from illegal narcotics sales, as well as the transportation of drug proceeds, falls within the meaning of the term “financial transaction” as defined in subsections 1956(c)(3) and (4). However, neither the payment for drugs with the proceeds of drug sales, nor the mere transportation of narcotics proceeds, without more, is prohibited conduct under section 1956(a)(1)(B)(i). Finally, mere payment made by the purchaser to the seller of the drugs with money derived from drug sales, as well as the receipt and delivery of drug proceeds, is insufficient to sustain a conviction for a violation of section 1956(a)(1)(A)(i), absent evidence that the proceeds of specified unlawful activity were being plowed back to promote the carrying on of the drug distribution business.³⁸

Part II of this article will analyze how the federal circuits have inconsistently and, in some cases, erroneously construed the term “financial transaction.” Part III will examine section 1956(a)(1)(B)(i) and explain why neither the payment for drugs nor the transportation of drug proceeds constitutes a violation of this section. Part IV will examine section 1956(a)(1)(A)(i), and discuss whether the promotion of the above-described drug-related activity, executed either domestically or internationally, is proscribed conduct under this provision of the MLCA. Additionally, Part IV will examine whether the proceeds of specified unlawful activity must be plowed back to promote the continuation of that activity in order to support a violation of the statute.

II. SATISFYING THE “FINANCIAL TRANSACTION” REQUIREMENT

To sustain a conviction under either section 1956(a)(1)(A)(i) or (a)(1)(B)(i), the government must prove that the defendant engaged in a “financial transaction” with the requisite intent. “Transaction” is broadly defined in section 1956(c)(3) to include “purchase, sale, loan, pledge, gift, transfer,

36. *Heaps*, 39 F.3d at 486 (“Congress intended to prevent an ill other than those already prohibited by other laws.”).

37. *Id.* at 486.

38. For example, if the drug buyer took funds derived from the sale of narcotics and made payment to the drug supplier to pay off an outstanding drug debt (drugs received on consignment), but with no intention of continuing to distribute drugs in the future, this conduct would not support a violation of section 1956(a)(1)(A)(i). On the other hand, if the drug purchaser made the payment to ensure a continuous source of supply for drug distribution in the future, *i.e.*, the drug supplier refused to sell the defendant any more drugs until he paid off his outstanding drug debt, this would constitute plowing back illicit proceeds to promote the carrying on of specified unlawful activity, and would sustain a violation of the statute.

delivery, or other disposition”³⁹ With respect to a financial institution, the term transaction includes “a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution by whatever means effected.”⁴⁰

“Financial transaction” is defined in section 1956(c)(4). It involves the movement of funds by wire or other means which in any way or degree affects interstate or foreign commerce.⁴¹ In the statutory definition, section 1956(c)(4) lists many different types of financial transactions, including the purchase, sale, or disposition of real property, vessels, aircraft, and automobiles.⁴²

Whether the mere transportation of illicit narcotics proceeds constitutes a financial transaction has divided the circuits. In *United States v. Samour*,⁴³ the defendant was convicted at trial of four counts of money laundering for transporting successive payments of \$20,000, \$68,000, \$70,000, and \$20,000 from Ohio to Arizona to purchase quantities of marijuana.⁴⁴ The Sixth Circuit reversed the conviction, holding that the transportation of drug proceeds did not constitute a “financial transaction” under the statute.⁴⁵

The *Samour* court framed the issue in the case as “whether transporting money concealed either in an automobile or on one’s person is a ‘financial transaction’ ” under the MLCA.⁴⁶ The court, however, proceeded to answer

39. 18 U.S.C. § 1956(c)(3) (1988). See *United States v. Dimeck*, 24 F.3d 1239, 1246 (10th Cir. 1994) (“Subsection 1956(c)(3) defines ‘transaction’ to include ‘delivery’ of the illegal proceeds.”); *United States v. Jackson*, 935 F.2d 832, 841 (7th Cir. 1991).

40. 18 U.S.C. § 1956(c)(3).

41. Section 1956(c)(4) provides in relevant part:

(c) As used in this section—

(4) the term “financial transaction” means (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

42. *Id.*; see also *United States v. Samour*, 9 F.3d 531, 535 (6th Cir. 1993) (discussing the statutory construction of the terms transaction and financial transaction); *United States v. Turner*, 975 F.2d 490, 497 (8th Cir. 1992) (conviction for money laundering affirmed where evidence showed that defendant was a drug dealer and made over \$600,000 in payments on a building and its renovation in cash), *cert. denied*, 113 S. Ct. 1053 (1993); *Jackson*, 935 F.2d at 841 (writing a check, whether for cash or to a vendor for services provided falls within the definition of “financial transaction”); *United States v. Martin*, 933 F.2d 609, 610 (8th Cir. 1991); *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990) (transferring title of defendant’s pickup truck found to constitute a “financial transaction”).

43. 9 F.3d 531 (6th Cir. 1993).

44. *Id.* at 533-34.

45. *Id.* at 535.

46. *Id.*

an entirely different question. In disposing of the matter, the Sixth Circuit did not rely on whether the term "financial transaction" encompassed the interstate transportation of illicit drug proceeds. Instead, the court focused on the mens rea element of section 1956(a)(1)(B)(i), which requires that the defendant conduct a financial transaction knowing that it was designed to conceal the nature or source of the proceeds.⁴⁷ Finding the evidence insufficient to support the requisite intent to conceal or disguise the nature or source of the illicit proceeds, the court concluded that the government had failed to establish a violation of either section 1956(a)(1)(A)(i) or (a)(1)(B)(i).⁴⁸

While the *Samour* court reached the right result, it misconstrued the requisite elements of the statute. The court confused the "financial transaction" requirement with the scienter element, the latter of which requires that the defendant have knowledge that the financial transaction was designed to conceal the nature or source of the tainted proceeds. The "financial transaction" and scienter elements are separate statutory requirements, both of which must be met to sustain a violation of section 1956(a)(1)(A)(i). Whether the defendant engaged in a financial transaction is a separate issue from whether he had knowledge that the financial transaction was designed to conceal or disguise the nature or source of the proceeds.⁴⁹

47. The *Samour* court cited with approval the Fifth Circuit's decision in *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 926 (5th Cir. 1992). The Fifth Circuit, however, had held that absent any evidence of intent to conceal or disguise the nature or source of the proceeds, transporting \$8,000 in cash in a public airport was not a violation of § 1956(a)(1)(B)(i).

48. *Samour*, 9 F.3d at 535-36. Circuit Judge Kennedy authored a dissenting opinion, stating that he would have affirmed the 18 U.S.C. § 1956(a)(1)(A)(i) conviction. While agreeing with the majority that mere transportation of cash is not a financial transaction, Judge Kennedy observed that the facts of the case established more than the mere transportation of cash. The funds in *Samour* were used to purchase marijuana. The purchase constituted a "transaction" as defined in subsection (c)(3) and a "financial transaction" (a transaction which in any way or degree affects interstate or foreign commerce) under subsection (c)(4). Judge Kennedy would have followed the Second Circuit's decision in *United States v. Skinner*, 946 F.2d 176, 180 (2d Cir. 1991), which affirmed a conviction for money laundering based upon the mailing of money orders to purchase drugs. *Samour*, 9 F.3d at 538-39.

49. The Sixth Circuit in *Samour* advanced a second argument to support its conclusion. The court observed that Congress addressed the mere transportation of funds in § 1956(a)(2), the international money laundering provision. The Sixth Circuit expressed its reluctance to conclude that a physical transportation of money constitutes a "financial transaction" within the meaning of § 1956(a)(1), because Congress specifically created a separate subsection for mere transportation of funds. *Samour*, 9 F.3d at 536.

A similar argument was rejected by the Fifth Circuit in *United States v. Hamilton*, 931 F.2d 1046, 1051 (5th Cir. 1991). In *Hamilton*, the defendant argued that his conviction for money laundering should be reversed because if § 1956(a)(1) is construed to prohibit *all* mailings of drug proceeds, then § 1956(a)(2) adds nothing. Hamilton argued that he was charged under the wrong statute, and that the mere act of mailing proceeds is covered by § 1956(a)(2), rather than § 1956(a)(1). *Id.* at 1051. The Fifth Circuit dismissed Hamilton's interpretation of the two subsections of the statute. The court emphasized that unlike § 1956(a)(1), "section 1956(a)(2) reaches beyond individual drug transactions

In support of its conclusion that the transportation of currency does not constitute a "financial transaction," the Sixth Circuit cited with approval *United States v. Bell*⁵⁰ and *United States v. Gonzalez-Rodriguez*.⁵¹ The court's reliance on these cases is misplaced.

In *Bell*, the Seventh Circuit held that placing money in a safe deposit box cannot be considered a "banking transaction" under the statute.⁵² In response to the *Bell* decision, Congress amended the definition of "transaction" in section 1956(c)(3) to specifically proscribe "use of a safe deposit box."⁵³ Thus, the *Bell* decision is clearly inapplicable to *Samour*.

In *Gonzalez-Rodriguez*, the Fifth Circuit overturned a money laundering conviction based upon insufficient evidence of a design to conceal the nature and source of the drug proceeds.⁵⁴ *Gonzalez-Rodriguez* was decided solely on the basis of this mens rea concealment issue. In fact, the court indicated that the defendant's possession of \$8,000 cash in the Houston airport was sufficient to prove a financial transaction.⁵⁵

Unlike the Sixth Circuit in *Samour*, the Second Circuit reached the opposite conclusion on the financial transaction issue where the defendant mailed the proceeds of narcotics trafficking as payment for drugs. In *United States v. Skinner*, the defendant received quantities of cocaine in Vermont from her source of supply in Alaska via Express Mail.⁵⁶ Skinner then sold the cocaine to buyers in Vermont. To pay her supplier for the cocaine, Skinner used the proceeds of the cocaine sales to purchase U.S. Postal Service money orders which she sent to her cocaine supplier in Alaska.⁵⁷ In affirming Skinner's conviction for money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i), the court declared that "the words of this provision of the statute, in conjunction with the definitions provided in 18 U.S.C. § 1956(c) [which defines "financial transaction"⁵⁸], demonstrate that Congress intended to make unlawful a broad array of transactions designed to facilitate numerous federal crimes, including the sale of cocaine."⁵⁹

Furthermore, the Fifth Circuit has reached inconsistent results in applying the term "financial transaction." In *United States v. Hamilton*, the defendant

and encompasses the international transportation of 'monetary instruments or funds' that would contribute to the growth and capitalization of the drug trade or other unlawful activities." *Id.*

50. 936 F.2d 337, 341-42 (7th Cir. 1991).

51. 966 F.2d 918, 926 (5th Cir. 1992).

52. 936 F.2d at 341.

53. See 18 U.S.C. § 1956(c)(3) (as amended 1992).

54. *Gonzalez-Rodriguez*, 966 F.2d at 926 ("In the absence of evidence that [defendant] endeavored to conceal or disguise, her conviction under 18 U.S.C. § 1956(a)(1)(B)(i) must be reversed.").

55. *Id.* at 924.

56. *Skinner*, 946 F.2d at 177.

57. *Id.*

58. See 18 U.S.C. § 1956(c) (1988 & Supp. V 1993) (defining, *inter alia*, the term "financial transaction").

59. *Skinner*, 946 F.2d at 178.

was convicted under section 1956(a)(1)(A)(i) for attempting to mail \$18,100, which constituted the proceeds of drug trafficking, from Mississippi to California.⁶⁰ The Fifth Circuit affirmed the conviction, holding that mailing the proceeds of drug sales is a financial transaction clearly prohibited under the statute.⁶¹ The Fifth Circuit declared that "the terms of the statute prohibit mailing the proceeds of drug sales, and absent a clearly expressed legislative intent to the contrary, that language must be regarded as conclusive"⁶²

In *United States v. Gallo*⁶³ the Fifth Circuit reached a similar result. While not directly addressing whether the evidence was sufficient to satisfy the "transaction" requirement under the statute, the Fifth Circuit affirmed the conviction of defendant Gallo for aiding and abetting a violation of section 1956(a)(1) involving the transportation in his automobile of \$299,985 in narcotics proceeds.⁶⁴ The *Gallo* decision subsequently has been cited by the Fifth Circuit for the proposition that transporting money in the trunk of a car

60. *Hamilton*, 931 F.2d at 1048.

61. *Id.* at 1051. The Fifth Circuit also rejected appellant's argument that the mailing of drug proceeds is not covered by section 1956(a)(1), but is exclusively covered by section 1956(a)(2), which prohibits the transfer or transportation of the proceeds of drug sales across U.S. borders. *Id.* at 1051-52. While acknowledging that there may be some overlap, the court reasoned that "the two subsections were passed to address two completely different problems." *Id.* at 1052. The Fifth Circuit emphasized that a person could, in effect, violate section 1956(a)(2) without actually participating in an unlawful transaction as defined by section 1956(a)(1).

The court set forth the following hypothetical to illustrate its point: A foreign drug cartel might transfer proceeds from a legitimate business enterprise into a bank account in the United States. Because the proceeds do not represent "proceeds of unlawful activities," the transfer of funds would not violate section 1956(a)(1). Under section 1956(a)(2), however, the same transfer would be prohibited if the legitimate proceeds of that bank account were intended to provide the funds necessary to expand the drug enterprise. The *Hamilton* court declared, "[u]nlike section 1956(a)(1), section 1956(a)(2) reaches beyond individual drug transactions and encompasses the international transportation of 'monetary instruments or funds' that would contribute to the growth and capitalization of the drug trade or other unlawful activities." *Id.*

62. *Id.* at 1051.

63. 927 F.2d. 815 (5th Cir. 1991).

64. *Id.* at 822. The court in *Gallo* addressed two issues: whether the evidence showed that the defendant had knowledge that the funds in his possession were drug proceeds, and whether the transfer of currency in his car "had any discernible impact on interstate commerce." *Id.* at 822-23. On the issue of knowledge, the court found the jury could reasonably infer that Gallo knew that he was transporting the proceeds of unlawful activity from the following: 1) Gallo had just accepted delivery of a box that contained \$299,985 from Cruz, a suspected drug dealer; 2) fingerprints on the box matched those of Balcazar, another known drug dealer; 3) Gallo made two false exculpatory statements to law enforcement officers about the car and the box; and 4) Cruz and Balcazar had made a similar exchange on the same day, Cruz tendering \$300,000 cash to Balcazar in exchange for twenty-five kilograms of cocaine. *Id.* at 822.

The Fifth Circuit has correctly ruled that the mere possession of drug proceeds does not constitute a "financial transaction." See *United States v. Ramirez*, 954 F.2d 1035, 1040 (5th Cir.) (money found by agents secreted in a shoe box in a closet of a house did not support an inference that defendant "transferred, delivered, moved, or otherwise disposed of the money"), *cert. denied*, 112 S. Ct. 3010 (1992).

constitutes a "financial transaction."⁶⁵

In *United States v. Puig-Infante*,⁶⁶ the Fifth Circuit again squarely confronted the issue of whether the transportation of illicit proceeds constitutes a "financial transaction."⁶⁷ This time, however, that court reached the opposite conclusion. In *Puig-Infante*, the defendant Abigail Puig was convicted of violating section 1956(a)(1)(A)(i) for transporting \$47,000 from Florida to Texas.⁶⁸ The money was received in exchange for a load of marijuana. The Fifth Circuit reversed the money laundering conviction,⁶⁹ reasoning that the mere transportation of the proceeds of unlawful activity by the defendant did not constitute a "financial transaction" within the meaning of the statute.⁷⁰

In an attempt to reconcile its ruling in *Puig-Infante* with its earlier decisions, the court reasoned that *Gallo* and *Hamilton* involved the "disposition" of the proceeds of unlawful activity.⁷¹ The Fifth Circuit defined "disposition" as "placing elsewhere, a giving over to the care or possession of another."⁷² In *Gallo*, the proceeds of a drug sale were transferred to the defendant.⁷³ In *Hamilton*, the defendant attempted to deliver the proceeds of drug activity to Perez by placing them in the mail.⁷⁴ In both cases the court concluded that the defendants had disposed of narcotics proceeds.

In *Puig-Infante*, the court reasoned that since there was no evidence that the defendant, after returning to Texas with the money, had given the proceeds of the sale to the source of the marijuana, the transportation of the drug money did not constitute a "disposition" under the statute.⁷⁵

The attempt by the Fifth Circuit in *Puig-Infante* to distinguish *Gallo* and *Hamilton* on this basis is tenuous and unpersuasive at best. First, it is difficult to understand why Gallo's receipt of drug proceeds from the drug dealer

65. See *United States v. Arditti*, 955 F.2d 331, 338 (5th Cir.), *cert. denied*, 113 S. Ct. 597 (1992).

In *United States v. Gonzalez-Rodriguez*, 966 F.2d 918 (5th Cir. 1992), another transportation of drug proceeds case, the Fifth Circuit side-stepped the financial transaction issue and reversed the money laundering conviction on other grounds. The defendant was arrested at the Houston airport in possession of \$8,000 cash which represented the proceeds of drug activity. *Id.* at 923. While briefly discussing the meaning of the statutory term "transaction," the Fifth Circuit reversed the money laundering conviction, stressing that the government failed to introduce any evidence that the possession or transportation of the drug money was "designed to conceal or disguise the nature, the location, the course, the ownership, or the control of the proceeds of specified unlawful activity," an essential element for finding a violation of section 1956(a)(1)(B)(i). *Id.* at 925.

66. 19 F.3d 929 (5th Cir. 1994).

67. *Id.* at 937-38.

68. *Id.*

69. *Id.* at 950.

70. *Id.* at 938.

71. *Id.* at 939.

72. *Id.* at 938.

73. *Id.* at 939.

74. *Id.*

75. *Id.* at 938-39.

constitutes the “disposition” of proceeds of unlawful activity, but Abigail Puig’s receipt of drug proceeds from the drug buyers does not. Likewise, distinguishing criminal culpability based upon whether the defendant attempted to pay the drug supplier by depositing drug proceeds in the mail (affirming Hamilton’s money laundering conviction), or knowingly transported drug proceeds in an attempt to deliver them to the drug supplier (reversing Puig-Infante’s money laundering conviction) simply does not make sense. The defendants are equally culpable in both cases.

The *Samour* and *Puig-Infante* rulings are also at odds with the plain language of the statute. Section 1956(c)(3) defines the term “transaction” to include a “delivery,” “purchase,” or “sale.” A “financial transaction” includes “a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means” The transportation of funds in *Samour* and *Puig-Infante* involved the “sale” and “purchase” of drugs as well as the “delivery” of illicit proceeds.⁷⁶

This position was adopted by the Tenth Circuit in *United States v. Dimeck*.⁷⁷ In *Dimeck*, Pruneda was shipping marijuana into the Detroit area for distribution. In an effort to collect the proceeds for the distribution of the marijuana in Detroit, Pruneda asked Moore, a government informant, to pick up a package containing \$60,000 in drug proceeds and deliver the money to Pruneda in California.⁷⁸ Dimeck delivered the box containing \$60,000 to Moore, who in turn gave the money to the DEA.⁷⁹ Dimeck was subsequently convicted of conspiracy to violate section 1956(a)(1)(B)(i).⁸⁰

While agreeing with the result reached in *Samour*, the *Dimeck* court expressly rejected the Sixth Circuit’s reasoning. The Tenth Circuit found that the movement of drug proceeds constitutes a transaction as defined by section 1956(c)(3). The court declared:

Subsection 1956(c)(3) defines “transaction” to include “delivery” of the illegal proceeds. A “financial transaction” includes “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.”⁸¹

The Tenth Circuit concluded that Dimeck moved funds by “other means” when he delivered the funds to Moore.⁸²

The Tenth Circuit, however, found no evidence of a design by Dimeck to

76. See 18 U.S.C. §§ 1956(c)(3) and (4).

77. 24 F.3d 1239, 1246 (10th Cir. 1994).

78. *Id.* at 1242.

79. *Id.* at 1243.

80. *Id.* at 1241.

81. *Id.* at 1246 (quoting § 1956(c)(4)) (emphasis in original).

82. *Id.*

conceal or disguise the nature or source of the drug proceeds. The court observed that the legislative intent was to punish those drug dealers who thereafter take the additional step of attempting to legitimize their proceeds in order to make it appear that the money was derived from a lawful enterprise. Finding that additional step missing under the facts in *Dimeck*, the court accordingly reversed the money laundering conviction.⁸³

III. SECTION 1956(a)(1)(B)(i)—THE CONCEALMENT PROVISION

A. *Knowledge that the Property Represents Proceeds of Unlawful Activity*

To sustain a conviction under either section 1956(a)(1)(A)(i) or (a)(1)(B)(i), the government must prove beyond a reasonable doubt that the defendant engaged in a financial transaction knowing that the funds represented, in whole or in part, the proceeds of some form of unlawful activity.⁸⁴ The knowledge requirement may be proven by circumstantial evidence.⁸⁵ The circuits, however, disagree over whether proof that a drug dealer has no legitimate source of income to account for large purchases amounts to sufficient evidence to support a conclusion that the money constitutes drug proceeds.⁸⁶ Mere suspicion that the proceeds were derived from unlawful

83. *Id.* at 1247. Relying on its earlier decision in *United States v. Edgmon*, 952 F.2d 1206, 1214 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 3037 (1992), the Tenth Circuit stated that the money laundering violation must "follow in time" the completion of the underlying transaction. For purposes of the money laundering statute, the court concluded that "the underlying drug transaction had not yet been completed and the money laundering activity had not yet begun." *Dimeck*, 24 F.3d at 1246.

84. 18 U.S.C. § 1956(a)(1); *see also* *United States v. Carr*, 25 F.3d 1194, 1204 (3d Cir. 1994); *United States v. McDougald*, 990 F.2d 259 (6th Cir. 1993); *United States v. Campbell*, 977 F.2d 854, 857 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1331 (1993); *United States v. Long*, 977 F.2d 1264, 1269-70 (8th Cir. 1992); *United States v. Jackson*, 935 F.2d 832, 840 (7th Cir. 1991); *United States v. Isabel*, 945 F.2d 1193, 1202 (11th Cir. 1991).

85. *See* *United States v. Brown*, 944 F.2d 1377, 1387-88 (7th Cir. 1991) (evidence that all of the transactions were structured by defendant Hollenback to avoid reporting requirements associated with transactions of \$10,000 or more, coupled with evidence that Brown was dealing in drugs, established by circumstantial evidence that defendant knew money constituted drug proceeds); *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990) (evidence that Blackman wire transferred \$11,000 by Western Union, coupled with expert testimony that drug dealers frequently use wire services in furtherance of drug activities and prefer to drive automobiles which are encumbered by a lien to avoid police seizure, held sufficient to sustain conviction). *But see* *McDougald*, 990 F.2d at 261. In *McDougald*, with Circuit Judge Boggs dissenting, the Sixth Circuit found the evidence insufficient to sustain a finding that the defendant had knowledge that \$10,000 used to purchase a Chevy Beretta for McFadden, a major drug dealer, constituted drug proceeds. The evidence relied upon by the government included: (1) McFadden and associate Watts were drug dealers; (2) McDougald spent time with McFadden and Watts; (3) McDougald acquiesced in the suspicious acquisition of the vehicle; and (4) McDougald lied about the transaction to the police.

86. *See* *United States v. Webster*, 960 F.2d 1301, 1308 (5th Cir.) ("Evidence of a differential between legitimate income and cash outflow is sufficient for a money-laundering conviction, even when the defendant claims income from additional sources."), *cert. denied*, 113 S. Ct. 355 (1992);

activity is not enough. The statute requires a "knowing" state of mind, as opposed to mere recklessness or negligence.⁸⁷ The circuits, however, have sustained money laundering convictions based on wilful blindness or conscious avoidance.

In *United States v. Antzoulatos*, the Seventh Circuit affirmed a money laundering conviction against Antzoulatos, a used car dealer who sold cars to alleged cocaine dealers.⁸⁸ While Antzoulatos denied actual knowledge and conceded only that he was guilty of negligence (*i.e.*, he "should have known" that the customers listed in the indictment were cocaine dealers), the evidence established that Antzoulatos was closely linked to the drug dealers with whom he dealt.⁸⁹ In rejecting Antzoulatos' negligence defense to the money laundering charge, the Seventh Circuit declared: "It is well settled that wilful blindness or conscious avoidance is the legal equivalent to knowledge."⁹⁰

The Fourth Circuit is in accord. In *United States v. Campbell*, the district court granted defendant's motion for judgment of acquittal after the jury returned a guilty verdict on two counts of money laundering.⁹¹ The money laundering counts involved the sale of a house by Campbell, a licensed real estate agent, to Lawing, a drug dealer. Unable to secure a loan for \$182,500, the sale price for the residence, Lawing asked Campbell to relay to the sellers whether they would accept \$60,000 in cash under the table and thereafter reduce the contract price to \$122,500. The sellers agreed and Campbell directly participated in the transaction.⁹² The Fourth Circuit reversed the judgment of acquittal.⁹³

The court in *Campbell* observed that, while the statute requires actual subjective knowledge, this requirement is "softened somewhat by the doc-

Jackson, 935 F.2d at 839-41 (one factor jury is entitled to consider is whether defendant made bank deposits exceeding amount that could reasonably be accounted for out of legitimate sources of income); *cf. Blackman*, 904 F.2d at 1257 ("[T]he government cannot rely *exclusively* on proof that a defendant charged with using proceeds from an unlawful activity has no legitimate source of income.") (emphasis in original).

87. See *United States v. Heaps*, 39 F.3d 479, 484 (4th Cir. 1994) ("Section 1956(a)(1) requires the Government to prove that the defendant had 'actual subjective knowledge' that the money used in a money laundering transaction was derived from an unlawful source."); *United States v. Antzoulatos*, 962 F.2d 720, 725 n.3 (7th Cir.), *cert. denied*, 113 S. Ct. 331 (1992); *United States v. Lora*, 895 F.2d 878, 880 n.2 (2d Cir. 1990).

88. *Antzoulatos*, 962 F.2d at 720-21.

89. *Id.* at 727. Antzoulatos mistitled cars for his drug-dealing customers and several of the customers were prepared to testify at trial that they told Antzoulatos that they were drug dealers and needed to conceal their drug profits.

90. *Id.* at 724.

91. *United States v. Campbell*, 977 F.2d 854, 856 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1331 (1993).

92. *Id.*

93. *Id.* at 859.

trine of wilful blindness."⁹⁴ After examining evidence introduced at trial of Lawing's lavish lifestyle, testimony concerning Campbell's statement that the money "might have been drug money," and the fraudulent transaction in which Campbell was asked to participate, the Fourth Circuit concluded that there was sufficient evidence for the jury to find that Campbell was wilfully blind to the fact that the \$60,000 was drug profit and "deliberately closed her eyes to what would otherwise have been obvious to her."⁹⁵

Finally, the Eighth Circuit has ruled that a wilful blindness instruction is appropriate when the defendant asserts "a lack of guilty knowledge," but the evidence "support[s] an inference of deliberate ignorance."⁹⁶

The circuits have consistently held, and the statute is sufficiently clear, that the government need not trace the proceeds to a particular drug transaction or specified unlawful activity.⁹⁷ The government need only show that "the property involved in the transaction represented proceeds from some form, though not necessarily which form, of [specified unlawful] activity."⁹⁸

B. Knowledge of the Laundering Design

To sustain a conviction for a violation of section 1956(a)(1)(B)(i), the government must prove a second scienter element. The evidence must establish that the defendant had knowledge that the transaction was "designed in whole or in part" to conceal or disguise the proceeds of specified unlawful activity.⁹⁹ The express terms of the statute provide that a design to conceal or disguise the source or nature of the proceeds is a necessary element to support a money laundering conviction.

94. *Id.* at 857. This view seems to be at odds with the Fourth Circuit's most recent pronouncement. "Section 1956(a)(1) requires the Government to prove that the defendant had 'actual subjective knowledge' that the money used in a money laundering transaction was derived from an unlawful source. The defendant may not be convicted on just what he should have known." *Heaps*, 39 F.3d at 484 (citations omitted).

95. *Campbell*, 977 F.2d at 859.

96. *Long*, 977 F.2d at 1271 (quotations omitted).

97. See *Carr*, 25 F.3d at 1205; *Campbell*, 977 F.2d at 858; *United States v. Johnson*, 971 F.2d 562, 570 (10th Cir. 1992) ("Such an interpretation would allow individuals to avoid prosecution simply by commingling legitimate funds with proceeds of crime."); *Jackson*, 935 F.2d at 840; *Blackman*, 904 F.2d at 1257 ("We do not read the statute to require that the government trace the proceeds to a particular sale.") (emphasis in original); see also *United States v. Garcia*, 37 F.3d 1359 (9th Cir. 1994) (rejecting defendant's argument that the government must prove that all the money used in the transaction came specifically from drug proceeds, not from untainted funds commingled in a Swiss bank account).

98. 18 U.S.C. § 1956(c)(1); see also *Carr*, 25 F.3d at 1204 n.4 ("[T]he defendant need not know exactly what crime generated the funds involved in a transaction, only that the funds are the proceeds of some kind of crime that is a felony under Federal or State law.") (quoting S. REP. NO. 433, *supra* note 5, at 12).

99. See *United States v. Sutura*, 933 F.2d 641, 648 (8th Cir. 1991) (jury need only find that defendant intended to launder money, not that he "did a good job of laundering the proceeds").

The Tenth Circuit in *United States v. Sanders* correctly observed that "the purpose of the money laundering statute is to reach commercial transactions intended (at least in part) to disguise the relationship of the item purchased with the person providing the proceeds and that the proceeds used to make the purchase were obtained from illegal activities."¹⁰⁰ At the same time, the money laundering statute is not aimed solely at transactions intended to disguise the identity of the participants in the transaction.

In an attempt to clarify the court's earlier ruling in *Sanders*, the Tenth Circuit in *United States v. Lovett* held: "[T]he statute is aimed broadly at transactions designed in whole or in part to conceal or disguise in any manner the nature, location, source, ownership or control of the proceeds of unlawful activity."¹⁰¹ The court in *Lovett* affirmed the conviction on two money laundering counts, finding that the transactions were designed to conceal the illegal source of the proceeds (not the identity of the participants).¹⁰²

The courts, however, have rejected construing the money laundering statute so broadly as to encompass all transactions which involve the proceeds of unlawful activity. In *United States v. Sanders*, the defendant openly purchased two automobiles with proceeds from drug transactions.¹⁰³ The only evidence offered by the government to prove the design of concealment was that the title to one vehicle was placed in the name of the defendant's daughter, and a large amount of cash was used to purchase the two vehicles.¹⁰⁴ In reversing the money laundering convictions, the court emphasized that merely spending the proceeds of illegal activities does not violate the money laundering statute. The Tenth Circuit declared that "[t]o so interpret the statute would . . . turn the money laundering statute into a 'money spending statute.'"¹⁰⁵ To interpret the statute as a "money spending statute" would run contrary to Congress's expressly stated intent that the transactions being criminalized are those transactions "designed to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity."¹⁰⁶

The Tenth Circuit in *United States v. Garcia-Emanuel* elaborated on the

100. *United States v. Sanders*, 928 F.2d 940, 946 (10th Cir.), cert. denied, 112 S. Ct. 142 (1991).

101. *United States v. Lovett*, 964 F.2d 1029, 1034 n.3 (10th Cir.), cert. denied, 113 S. Ct. 169 (1992) (emphasis in original).

102. *Id.* at 1033-36; see also *Sutera*, 933 F.2d at 648 ("[T]he money laundering statute does not require the jury to find that Sutera did a good job of laundering the proceeds.").

103. 928 F.2d at 946-47.

104. *Id.* at 944-45.

105. *Id.* at 946; see also *Jackson*, 935 F.2d at 841-42 (explaining that "government must prove not just that the defendant spent ill-gotten gains, but that the expenditures were designed to hide the provenance of the funds involved").

106. *Sanders*, 928 F.2d at 946. The *Sanders* decision has been cited with approval in *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1476 (10th Cir. 1994); *Lovett*, 964 F.2d at 1034; *United States v. Edgmon*, 952 F.2d 1206, 1210 (10th Cir. 1991).

quantum of proof and type of evidence necessary to support a finding of intent to conceal or disguise.¹⁰⁷ The court emphasized that “[t]he requirement that the transaction be ‘designed’ to conceal . . . requires more than a trivial motivation to conceal,” and must be based on substantial evidence, not mere suspicion.¹⁰⁸ The court recounted a variety of types of evidence that have been cited by the circuits as supportive of evidence of intent to conceal or disguise. Convictions have been affirmed for violating section 1956(a)(1)(B)(i) based upon each of the following: statements by a defendant probative of an intent to conceal,¹⁰⁹ evidence of a defendant’s “convoluted financial dealings” with his banks and in his business,¹¹⁰ transactions shrouded in secrecy,¹¹¹ transferring funds abroad via private telex, coupled with evidence of defendant’s involvement in narcotics sales,¹¹² commingling in one account legitimate business receipts with illegitimate receipts,¹¹³ transferring title in the name of a third party to conceal the real owner,¹¹⁴ and structuring bank deposits to avoid the currency transaction reporting requirements.¹¹⁵

The Tenth Circuit, however, has not consistently applied its own “substantial evidence” test. In *United States v. Salcido*, the Tenth Circuit, in a 2-1 decision, affirmed a conviction for money laundering under section 1956(a)(1)(B)(i) on far less than substantial evidence.¹¹⁶ In *Salcido*, the defendant was convicted of money laundering for proposing that the purported drug proceeds be converted into large bills that could more easily be

107. *Garcia-Emanuel*, 14 F.3d at 1475-76.

108. *Id.* at 1474.

109. *Id.* at 1478 (defendant stated he intended to place assets in his wife’s name to defraud the IRS); *United States v. Saget*, 991 F.2d 702, 713 (11th Cir.) (unindicted co-conspirator testified that money used to renovate nightclub was from drug trafficking and defendant instructed him to say that money was gambling winnings), *cert. denied*, 114 S. Ct. 396 (1993).

110. *See United States v. Beddow*, 957 F.2d 1330, 1335 (6th Cir. 1992); *United States v. Peery*, 977 F.2d 1230, 1234 (8th Cir. 1992) (defendant’s withdrawing money from business bank account, depositing it in his personal bank account in Atlanta, and then wire transferring money to personal bank account in Lincoln, Nebraska, established requisite intent to conceal source of funds), *cert. denied*, 113 S. Ct. 1354 (1993).

111. *See United States v. Cota*, 953 F.2d 753, 760-61 (2d Cir. 1992).

112. *See United States v. Massac*, 867 F.2d 174, 178 (3d Cir. 1989).

113. *See United States v. Termini*, 992 F.2d 879, 880 (8th Cir. 1993); *United States v. Posters ‘N’ Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *cert. granted on other grounds*, 113 S. Ct. 1410 (1993); *Jackson*, 935 F.2d at 842; *Sutera*, 933 F.2d at 648.

114. *See United States v. Santos*, 20 F.3d 280 (7th Cir. 1994); *United States v. Kaufman*, 985 F.2d 884, 894 (7th Cir.), *cert. denied*, 113 S. Ct. 2350 (1993); *United States v. Turner*, 975 F.2d 490, 496-97 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1053 (1993); *Edgmon*, 952 F.2d at 1210-11; *United States v. Martin*, 933 F.2d 609, 610 (8th Cir. 1991) (\$15,000 stock purchase in cash and stock certificates issued in third party’s name, coupled with evidence that defendant was involved in discussions regarding other possible investments for drug proceeds, found sufficient to support intent to conceal).

115. *See Garcia-Emanuel*, 14 F.3d at 1478.

116. *United States v. Salcido*, 33 F.3d 1244 (10th Cir. 1994).

transported.¹¹⁷ The majority posited that based upon this evidence, the jury could reasonably infer that Salcido knew the "character" of the money he was to transport and was attempting to conceal it.¹¹⁸ Circuit Judge Kelly authored a dissenting opinion stressing that Salcido's request for large bills provided evidence only of his intention to conceal the fact that he was carrying money. However, the mere physical concealment and transportation of money is not what Congress contemplated as an offense under section 1956(a)(1)(B)(i). Absent evidence of his intent to conceal the character of the money, the government failed to prove that the defendant violated section 1956(a)(1)(B)(i).¹¹⁹

It follows from this line of cases that the exchange of money for drugs and the mere transportation of drug proceeds, without more, is insufficient to support a finding that the defendant engaged in a financial transaction with the intent to conceal or disguise the nature or source of the illicit proceeds. In enacting the MLCA, Congress was not simply concerned with criminalizing the concealment of drug proceeds. Instead, its aim was to prohibit "the conversion of cash into goods or services as a way of concealing or disguising the wellspring of the cash."¹²⁰ Absent evidence that the defendant took this additional step to create the appearance of legitimate wealth, the government should refrain from charging the defendant under section 1956(a)(1)(B)(i). Moreover, every court that has considered the issue has concluded that neither the payment of money for drugs nor the transportation of drug proceeds supports a violation of section 1956(a)(1)(B)(i).¹²¹

IV. SECTION 1956(a)(1)(A)(i)—THE PROMOTION PROVISION

A. Section 1956(a)(1)(A)(i)—Domestic Money Laundering

Section 1956(a)(1)(A)(i) makes it a federal crime to conduct a financial transaction involving the proceeds of unlawful activity "with the intent to promote the carrying on of specified unlawful activity."¹²² The statute is aimed at "the practice of plowing back proceeds of 'specified unlawful activity' to promote that activity."¹²³ It differs from section 1956(a)(1)(B)(i)

117. *Id.* at 1246.

118. *Id.*

119. *Id.* at 1247 (Kelly, J., dissenting).

120. *Jackson*, 935 F.2d at 841; see *United States v. Dimeck*, 24 F.3d 1239, 1247 (10th Cir. 1994); *Garcia-Emanuel*, 14 F.3d at 1474; *United States v. Samour*, 9 F.3d 531, 535 (6th Cir. 1993); *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 925 (5th Cir. 1992).

121. See *Dimeck*, 24 F.3d at 1246; *Samour*, 9 F.3d at 536; *Gonzalez-Rodriguez*, 966 F.2d at 925-26.

122. 18 U.S.C. § 1956(a)(1)(A)(i) (1988); see also *United States v. Paramo*, 998 F.2d 1212, 1218 (3d Cir. 1993) (act of cashing embezzled checks "promoted" the fraud of embezzlement within the meaning of the statute), *cert. denied*, 114 S. Ct. 1076 (1994).

123. *United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991).

in that intent to launder, disguise, or conceal the nature or source of the proceeds is not an element of the offense.¹²⁴ The requisite intent to promote the carrying on of unlawful activity, however, cannot be inferred from the mere use of illicit proceeds to pay personal expenses or purchase consumer goods.¹²⁵

In *United States v. Jackson*, the Seventh Circuit affirmed a conviction on one count of money laundering where drug proceeds were used to purchase telephone paging beepers. The beepers were used to contact drug couriers who were thereafter instructed on where to make drug money pickups.¹²⁶ The Seventh Circuit found that the use of the beepers was an integral part of the drug operation and that the use of the drug proceeds to purchase the beepers was intended to promote the carrying on of criminal activity.¹²⁷

The Seventh Circuit, however, reached a different conclusion with respect to the use of funds derived from drug activities to pay rental fees and purchase mobile car phones. While upholding the money laundering convictions under section 1956(a)(1)(B)(i), the court found the evidence insufficient to support a violation of section 1956(a)(1)(A)(i). The *Jackson* court opined that the government failed to prove that the cellular phones played any role in the drug operations, and while the rental payments helped maintain the defendant's personal lifestyle, the evidence failed to show how this promoted his drug activities.¹²⁸ To sustain a conviction under section 1956(a)(1)(A)(i), the Seventh Circuit reasoned that the funds must be "plowed back" to promote the carrying on of the specified unlawful activity, not simply used to benefit the defendant personally.¹²⁹

Two circuits have affirmed money laundering convictions for a violation of section 1956(a)(1)(A)(i) under the theory that payment of money in return for the receipt of illegal drugs promoted the carrying on of specified unlawful activity.¹³⁰ Although the court's analysis is minimal, in *United States v. Hamilton* the Fifth Circuit held that section 1956(a)(1)(A)(i) "clearly prohibits the mailing of drug money."¹³¹ In *United States v. Skinner*, the Second

124. See *United States v. Montoya*, 945 F.2d 1068, 1076 (9th Cir. 1991) (clarifying that subsections (A)(i) and (B)(i) are aimed at different activities); *Jackson*, 935 F.2d at 842 (same).

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

126. *Jackson*, 935 F.2d at 841.

127. *Id.*

128. *Id.*

129. *Id.* at 842.

130. See *United States v. Skinner*, 946 F.2d 176 (2d Cir. 1991) (noting that Congress intended the statute to reach a broad array of activities designed to facilitate crimes); *United States v. Hamilton*, 931 F.2d 1046, 1051 (5th Cir. 1991) (same); see also *United States v. Samour*, 9 F.3d 531, 538-39 (6th Cir. 1993) (Kennedy, J., dissenting) (following the reasoning of Second Circuit in *United States v. Skinner*, court should have affirmed Samour's conviction under § 1956(a)(1)(A)(i)).

131. *Hamilton*, 931 F.2d at 1052 (affirming defendant's conviction under § 1956(a)(1)(A)(i) for attempting to mail proceeds of drug trafficking from Mississippi to known drug trafficker in California).

Circuit upheld the defendant's conviction on four counts of conducting a financial transaction with the proceeds of unlawful activity in violation of section 1956(a)(1)(A)(i).¹³² Similar to the facts in *Hamilton*, Skinner mailed the proceeds of narcotics trafficking to her source of supply via the mail.¹³³ In affirming the money laundering convictions, the Second Circuit misconstrued the intent of Congress when it posited that, in enacting 18 U.S.C. § 1956(a)(1)(A)(i), Congress intended to make unlawful a broad array of transactions "designed to facilitate numerous federal crimes, including the distribution of cocaine."¹³⁴

The Second Circuit erroneously read the statute as prohibiting financial transactions that "facilitate" the commission of specified unlawful activity. While the *Skinner* case was rightly decided, the Second Circuit's reasoning is flawed. Skinner violated section 1956(a)(1)(A)(i) not because the payments she made to her supply source in Alaska facilitated the sale of cocaine, but rather because Skinner plowed back proceeds of specified unlawful activity to promote the carrying on of that activity.¹³⁵ Skinner took the proceeds from drug trafficking and used those monies to purchase additional quantities of cocaine, which in turn "promote[d] the carrying on" of her narcotics distribution business.

Congress was concerned with stemming the flow of illicit profits back to the criminal enterprise to be used to capitalize and expand criminal activity.¹³⁶ The chief evil to be addressed by the legislation was not conduct that facilitates specified unlawful activity. Prior to the enactment of the MLCA, aiding and abetting or conspiring to violate those offenses enumerated under the definition of "specified unlawful activity" was already punishable under federal law.¹³⁷ Congress's intent was not simply to add to the prosecutor's arsenal another federal criminal statute to cover previously prohibited conduct. Rather, its intent was to create a new federal crime to punish activity that was not previously proscribed.¹³⁸

The Tenth Circuit has construed the MLCA accordingly. In *United States v. Edgmon*, the Tenth Circuit analyzed the legislative intent of the MLCA. The court observed that in the Senate report to section 1956, Congress expressed

132. *Skinner*, 946 F.2d at 177.

133. *Id.*

134. *Id.* at 178.

135. *See Jackson*, 935 F.2d at 842.

136. *See supra* note 5 and accompanying text.

137. For example, if a person aided and abetted the commission of a narcotics felony prior to the enactment of the MLCA, the accessory could be charged as a principal for violating 21 U.S.C. § 841(a)(1) (1988). *See* 18 U.S.C. § 2 (1988) ("(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.").

138. *See supra* note 13 and accompanying text.

the need for a federal criminal offense aimed at the activity of laundering money derived from illegal activity.¹³⁹ The discussion throughout the report emphasized the need to fill a gap in the criminal law with respect to the post-crime laundering of ill-gotten gain.¹⁴⁰ The court in *Edgmon* concluded that the statute was intended to create a “new offense against money laundering.”¹⁴¹

The Tenth Circuit posited that “Congress aimed the crime of money laundering at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior ‘specified unlawful activity.’”¹⁴² In *United States v. Dimeck*, the Tenth Circuit again embraced *Edgmon*’s construction of the MLCA. The court found that absent the additional step by the drug dealer of attempting to launder the money, the delivery of drug proceeds by the middleman to the drug seller (or money courier acting on his behalf) does not violate section 1956(a)(1)(B)(i).¹⁴³

While it should be noted that both *Edgmon* and *Dimeck* were section 1956(a)(1)(B)(i) cases, the reasoning of the court is just as compelling, and the legislative history cited by the Tenth Circuit just as relevant, in construing the scope of application of section 1956(a)(1)(A)(i). The statute should not be applied to conduct that merely facilitates the commission of the underlying drug offense. Congress was aiming at the plowing back of proceeds of specified unlawful activity to capitalize and finance that activity. Congress’s intent was to criminalize the use of illegal funds “to buy more drugs for resale, and to acquire the planes, boats, and front corporations [used by drug dealers] to smuggle drugs into the United States.”¹⁴⁴ That does not mean to say that the defendant is not chargeable with a federal crime, but rather that he should be charged with something other than money laundering.

The Fourth Circuit’s reading of the legislative intent in *United States v. Heaps*¹⁴⁵ is in accord. In *Heaps*, the defendant fronted quantities of illicit drugs to two drug dealers, Beck and Boccia. Beck wired, via Western Union, two money orders to the defendant’s girlfriend, one in the amount of \$1,500 and the other for \$500.¹⁴⁶ The funds that Beck and Boccia sent to the defendant were proceeds from the sale of LSD to an undercover DEA agent.¹⁴⁷ The only evidence of what was done with the money after it was wire

139. *United States v. Edgmon*, 952 F.2d 1206, 1213 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 3037 (1992).

140. *Id.*

141. *Id.* (quoting from S. REP. NO. 433, *supra* note 5, at 4).

142. *Id.* at 1214.

143. *United States v. Dimeck*, 24 F.3d 1239, 1247 (10th Cir. 1994).

144. See *supra* note 5 (statement of Senator Alfonse D’Amato, a chief sponsor of the Senate Bill).

145. *United States v. Heaps*, 39 F.3d 479 (4th Cir. 1994).

146. *Id.* at 481.

147. *Id.* at 482.

transferred was that it was placed in a box in a drawer in Heaps's house.¹⁴⁸ Heaps was indicted and subsequently convicted of two counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i).¹⁴⁹

The government predicated its argument that the transfer of the two money orders totalling \$2,000 was intended to promote the carrying on of specified unlawful activity on two theories: first, that the transfers were made to establish goodwill for the promotion of future sales of illicit drugs by the defendant, and second, that the transfers completed the antecedent drug sales.¹⁵⁰ The court quickly dispensed with the government's first argument. The court found no evidence to support the allegation that the payment was made to create goodwill for subsequent drug transactions.¹⁵¹ The Fourth Circuit characterized the payment as being made merely to satisfy a debt from a completed drug transaction, and not to encourage future drug transactions.¹⁵² In rejecting the government's second theory of promotion, the Fourth Circuit reasoned:

Were the payment for drugs itself held to be a transaction that promoted the unlawful activity of that same transaction virtually *every* sale of drugs would be an automatic money laundering violation as soon as money changed hands. Understood this way, § 1956 would have such reach that it would criminalize the very same conduct already criminalized by the drug laws.¹⁵³

The *Heaps* court concluded that Congress intended the money laundering statute to create a separate crime, distinct from the offense that generated the money to be laundered. The Fourth Circuit followed the rationale of the Seventh Circuit in *United States v. Jackson*, holding that in the absence of any evidence that the drug proceeds were plowed back into the drug enterprise, the government failed to carry its burden of proving that the defendant intended to promote the carrying on of unlawful activity within the meaning of the statute.¹⁵⁴

A related question is whether a defendant can "promote the carrying on" of an already completed unlawful activity. Stated another way, in order to support a violation of section 1956(a)(1)(A)(i), must the evidence show that the proceeds of unlawful activity were plowed back into a continuing criminal

148. *Id.*

149. *Id.* at 480.

150. *Id.* at 484.

151. *Id.*

152. *Id.*

153. *Id.* at 485-86 (emphasis in original).

154. *Id.* at 486; see also *Jackson*, 935 F.2d at 841.

scheme? This issue has been addressed by the Ninth,¹⁵⁵ Third,¹⁵⁶ and Fifth¹⁵⁷ Circuits. In *United States v. Montoya*, the defendant was a former California state senator who had been charged with extortion and attempted extortion under color of official right in violation of the Hobbs Act, 18 U.S.C. § 1951, and money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i).¹⁵⁸ The money laundering count alleged that Montoya deposited into his personal checking account a \$3,000 check he received from a fictitious FBI front company, which was derived from the proceeds of a “specified unlawful activity,” namely, bribery.¹⁵⁹

On appeal, Montoya argued that the check did not involve the proceeds of an ongoing criminal venture and therefore did not “promote the carrying on of specified unlawful activity.” Furthermore, he asserted that depositing the check could not have “promoted” the unlawful activity because the bribery offense had been completed upon receipt of the check from the undercover FBI agent.¹⁶⁰ The Ninth Circuit rejected this argument and affirmed the money laundering conviction, reasoning that Montoya could not have made use of the funds without depositing the check. Additionally, the court observed that depositing the check provided an opportunity for Montoya to carry out the illegal bribery by characterizing the money as a legitimate honorarium.¹⁶¹

The Ninth Circuit misconstrued the objective of the money laundering statute. While no one would disagree with the court’s reasoning that Montoya could not have made use of the funds without depositing or converting the check, this is beside the point. The subsequent use of funds to benefit the defendant personally or enhance his lifestyle is not the relevant test.¹⁶² Instead, the statute proscribes engaging in a financial transaction with monies derived from unlawful activity with the intent to promote “the carrying on” of specified unlawful activity. Had Montoya taken the check and exchanged it for \$3,000 in mobile car phones, or signed over the check to his landlord as payment for rent (such as the drug proceeds in *United States v. Jackson*), the *Montoya* court could not reasonably assert that the use of the funds derived from the bribery offense promoted the carrying on of that activity. It strains credulity to suggest that if the defendant used the \$3,000

155. *United States v. Montoya*, 945 F.2d 1068, 1075-77 (9th Cir. 1991).

156. *United States v. Paramo*, 998 F.2d 1212, 1216-18 (3d Cir. 1993).

157. *United States v. Cavalier*, 17 F.3d 90, 93 (5th Cir. 1994).

158. *Montoya*, 945 F.2d at 1070.

159. Both federal and state bribery offenses comprise “specified unlawful activity” under sections 1956(c)(7)(D) and 1956(c)(7)(A).

160. *Montoya*, 945 F.2d at 1076.

161. *Id.*

162. *Jackson*, 935 F.2d at 841.

check to acquire material goods or pay personal expenses, he would escape criminal liability (the facts in *Jackson*), but if, on the other hand, he merely deposited the check in his personal checking account, he would be guilty of federal money laundering.

In *Montoya*, the Ninth Circuit failed to explain adequately how depositing the check promoted "the carrying on" of specified unlawful activity (here, bribery) any more than using the funds to make rental payments or purchase consumer goods for personal use. In neither *Jackson* nor *Montoya* did the financial transactions contribute to the ongoing nature of the criminal activity, or for that matter to the commission of the underlying offense. Additionally, the issue of whether depositing the check assisted Montoya in disguising the funds as a legitimate honorarium, while relevant to whether he violated section 1956(a)(1)(B)(i), has no bearing on whether the defendant violated section 1956(a)(1)(A)(i). Neither intent to disguise, nor intent to conceal the nature of the illicit proceeds, is an element of section 1956(a)(1)(A)(i).

The Third Circuit confronted a similar issue in *United States v. Paramo*.¹⁶³ In *Paramo*, the defendant was convicted of mail fraud and five counts of money laundering stemming from his participation in a scheme to embezzle Internal Revenue Service tax refund checks.¹⁶⁴ Paramo challenged his money laundering convictions on grounds of insufficiency of evidence, arguing that the evidence failed to show that he plowed back any of the proceeds to further the mail fraud scheme. The Third Circuit disagreed. The court reasoned that, by definition, to "promote" something means to "contribute to [its] growth . . . or prosperity."¹⁶⁵ The court posited that the embezzled checks would have been worthless unless cashed at a bank or otherwise exchanged for negotiable currency. The court declared that "cashing each check contributed to the growth and prosperity of each preceding mail fraud by creating value out of an otherwise unremunerative enterprise."¹⁶⁶

The Third Circuit in *Paramo* acknowledged that the Seventh Circuit in *Jackson* found section 1956(a)(1)(A)(i) to be aimed at the practice of plowing back proceeds of unlawful activity to promote that activity. Yet the Third Circuit asserted that nowhere did the Seventh Circuit suggest "an intention either to delineate the universe of conduct prohibited under section 1956(a)(1)(A)(i) or to decide whether a defendant could violate that section other than by plowing back the proceeds of unlawful activity."¹⁶⁷ The Third Circuit was reluctant to read *Jackson* as requiring evidence that the defen-

163. 998 F.2d 1212, 1218 (3d Cir. 1993).

164. *Id.* at 1214-15.

165. *Id.* at 1218.

166. *Id.*

167. *Id.*

dant had plowed back or reinvested criminal proceeds to sustain a violation of the statute.

The Third Circuit placed undue emphasis on the word "promote." It apparently would read out of the statute the requirement that the financial transaction not simply promote the specified unlawful activity, but promote "the carrying on" of the specified unlawful activity. This construction of section 1956(a)(1)(A)(i) would render the statutory language to promote "the carrying on" of enumerated criminal activity superfluous and meaningless. To sustain a violation of the money laundering statute, the Third Circuit would simply require that the financial transaction promote the specified unlawful activity, i.e., "contribute to [its] growth . . . or prosperity."¹⁶⁸

Nevertheless, let us assume *arguendo* that section 1956(a)(1)(A)(i) can be violated by means other than plowing back the proceeds of unlawful activity. Thus, while depositing the tax refund checks may have served to make the unlawful scheme profitable and benefit the defendant personally by "creating value out of an otherwise unremunerative enterprise," it is difficult to see how this served in any way to "contribute to [the] growth . . . or prosperity" of the mail fraud scheme.¹⁶⁹ Moreover, cashing the tax refund checks was certainly not integral to the success of carrying on the specified unlawful activity, an element the Seventh Circuit had found necessary in *Jackson*.¹⁷⁰

In *United States v. Cavalier*, the Fifth Circuit reached a similar result as that in *Montoya* and *Paramo*.¹⁷¹ In *Cavalier*, the defendant was convicted of mail fraud and aiding and abetting money laundering as part of an insurance fraud scheme in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 18 U.S.C. § 2(b).¹⁷² Cavalier shipped a van to Honduras, where he sold it for approximately \$10,000. He thereafter submitted a false theft report to Allstate Insurance Corporation ("Allstate"), reporting the van stolen.¹⁷³ Allstate subsequently mailed a check to the General Motors Acceptance Corporation ("GMAC") in the amount of over \$9,700 to satisfy the lien on the vehicle.¹⁷⁴ Cavalier challenged his money laundering conviction, arguing that Allstate's transfer of the check to GMAC did not evince an intent to promote the carrying on of mail fraud because the mail fraud offense was completed when he mailed the false insurance theft report to Allstate.¹⁷⁵ The Fifth Circuit rejected this

168. *Id.*

169. *Id.*

170. *Jackson*, 935 F.2d at 841.

171. *United States v. Cavalier*, 17 F.3d 90, 90 (5th Cir. 1994).

172. See 18 U.S.C. § 2(b) (1988) (providing that "[w]hoever 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").

173. *Cavalier*, 17 F.3d at 91.

174. *Id.*

175. *Id.*

argument, citing *Montoya* and *Paramo*.¹⁷⁶ While conceding that mailing the false theft report completed the specified unlawful activity of mail fraud, the Fifth Circuit posited that Allstate's transfer of a check to GMAC contributed to and promoted the completed mail fraud by causing GMAC to extinguish the lien on the van.¹⁷⁷

Once again, the court erred in its application of the statute. Extinguishing the lien on the van did not promote ongoing criminal activity and could not have served to promote the mail fraud scheme which the court in *Cavalier* conceded was completed by placing the false theft report in the mail.¹⁷⁸ At most, mailing the check to GMAC "promote[d]" attainment of the object of the scheme to defraud by relieving Cavalier of any financial obligation to make payments on the van. While Cavalier may have personally benefitted by GMAC extinguishing the lien, mailing the false theft report did not promote "the carrying on" of the completed mail fraud scheme.

Finally, it should be noted that in *United States v. Heaps*, the Fourth Circuit explicitly rejected the holdings of the Third and Ninth Circuits in *Paramo* and *Montoya*.¹⁷⁹ In doing so, the Fourth Circuit has aligned itself with the Seventh Circuit in *Jackson*, requiring evidence that the defendant "plow[ed] back proceeds of 'specified unlawful activity' to promote that activity."¹⁸⁰ The Fourth Circuit found *Cavalier* to be distinguishable in that the defendant in *Cavalier*, through the act of mail fraud, induced the insurance company to send a check to the credit company to cause it to extinguish its lien against the vehicle.¹⁸¹

B. Section 1956(a)(2)(A)—International Money Laundering

A similar issue arose in *United States v. Piervinanzi*, which involved a scheme to fraudulently transfer funds overseas.¹⁸² Piervinanzi was charged with attempted bank fraud in violation of 18 U.S.C. §§ 1344 and 2, and attempted money laundering in violation of 18 U.S.C. §§ 1956(a)(2)(A) and 2.¹⁸³ Section 1956(a)(2)(A) criminalizes international money laundering and prohibits transporting or transferring money outside the United States with the intent to promote the carrying on of specified unlawful activity.¹⁸⁴

176. *Id.*

177. *Id.*

178. *Id.*

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

180. *Id.* (quoting *Jackson*, 935 F.2d at 842).

181. *Id.* at 485.

182. *United States v. Piervinanzi*, 23 F.3d 670 (2d Cir. 1994).

183. *Id.* at 674.

184. 18 U.S.C. § 1956(a)(2)(A) (1988) provides in relevant part:

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or

Piervinanzi challenged his conviction for attempted money laundering arguing that section 1956(a)(2)(A) “proscribes only money ‘laundering’ activity that is analytically distinct from the underlying criminal activity that it promotes.”¹⁸⁵ The defendant maintained that because the asserted money laundering activity (the overseas transfer of the bank funds) was a component of the bank fraud scheme, there was no analytically distinct “secondary” activity.¹⁸⁶ Under this rationale, the overseas transfer of funds “merges” with the underlying bank fraud.¹⁸⁷ The Second Circuit rejected this argument.

The court initially observed that section 1956(a)(1), the domestic money laundering statute, requires that the financial transaction involve the proceeds of specified unlawful activity. By contrast, section 1956(a)(2), the international money laundering provision, contains no requirement that the funds transferred outside the United States constitute illicit proceeds.¹⁸⁸ The court found what it termed a “clearly demarcated two-step requirement” necessary to find a violation of section 1956(a)(1)(A)(i).¹⁸⁹ This requires, first, that the proceeds be derived from specified unlawful activity and, second, that the defendant, knowing the funds are tainted, conduct a financial transaction with the illicit proceeds with the intent to promote specified unlawful activity. In contrast, the court concluded, section 1956(a)(2) “contains no requirement that the ‘proceeds’ first be generated by unlawful activity, followed by a financial transaction with those proceeds, for criminal liability to attach.”¹⁹⁰ Therefore, the international laundering activity proscribed in section 1956(a)(2) need not involve separately derived criminal proceeds.

The Fifth Circuit embraced a similar construction of section 1956(a)(2) in *United States v. Hamilton*.¹⁹¹ The court asserted that a person could violate section 1956(a)(2) without participating in a financial transaction as defined by section 1956(a)(1). The *Hamilton* court explained that if a foreign drug cartel transferred proceeds from a legitimate business enterprise into a bank in the United States, the transfer would not violate the domestic money laundering statute because the funds would not represent the “proceeds of

transfer a monetary instrument or funds from a place in the United States to 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 . . . or imprisonment for not more than twenty years, or both.

See S. REP. NO. 433, *supra* note 5, at 11; see also *Piervinanzi*, 23 F.3d at 680.

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

186. *Id.*

187. *Id.*

188. *Id.* at 680.

189. *Id.*

190. *Id.*

191. *United States v. Hamilton*, 931 F.2d 1046, 1052 (5th Cir. 1991).

unlawful activities.”¹⁹² The same transfer, however, would be criminalized under section 1956(a)(2) if the proceeds were intended to provide the necessary capital to expand the drug enterprise in the United States.¹⁹³

While the Second Circuit in *Piervinanzi* correctly ruled that section 1956(a)(2) does not require that the funds attempted to be transferred overseas be derived from specified criminal activity, the funds must nevertheless be transferred with the intent to promote the carrying on of specified unlawful activity. On this point, the *Piervinanzi* court incorrectly read the statute as simply requiring that the international transfer of funds “promote” or facilitate the commission of the underlying crime. The Second Circuit declared: “Because 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 crime of bank fraud.”¹⁹⁴ Whether the transfer of the funds was integral to the perpetration of the underlying offense presents an entirely different question from whether the international transfer of funds promoted the carrying on of criminal activity. The relevant inquiry is whether the monies were intended to be invested in the specified criminal activity to sustain or expand that activity.¹⁹⁵ This certainly suggests conduct separate and distinct from the underlying specified unlawful activity.

The Second Circuit also dismissed *Piervinanzi*’s argument that the requirement that the funds promote the “carrying on” of unlawful activity connotes continuous criminal activity. The reasoning of the court is even less persuasive on this point. The Second Circuit reasoned that the “specified unlawful activity” that must be “carried on” to support a violation of the statute is defined in section 1956(c)(7) as statutorily proscribed singular offenses including, for example, “any act or activity constituting an offense.” Thus, a violation of section 1956(a)(2) can be satisfied by the “carrying on” of a single offense of bank fraud.¹⁹⁶

The Second Circuit’s constrained reading of the statute is vulnerable on two grounds. First, the fact that the enumerated crimes which constitute “specified unlawful activity” are described in section 1956(c)(7) in singular terms begs the question. The critical inquiry is not the number of enumerated crimes violated. In order to sustain a conviction for international money laundering, the government is not required to prove that the defendant transferred funds to promote the carrying on of a “series” or “pattern” of statutorily enumerated criminal offenses. The international money launder-

192. *Id.*

193. *Id.*

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

195. *Jackson*, 935 F.2d at 842.

196. *Piervinanzi*, 23 F.3d at 680.

ing statute is violated if the defendant transfers money across U.S. borders with the intent to capitalize or expand a criminal enterprise, regardless of whether the enterprise was engaged in the commission of a single offense (e.g., narcotics trafficking) or multiple offenses (e.g., narcotics trafficking, extortion, and bank fraud) defined as "specified unlawful activity" under the statute.

Second, as previously stated, Congress's primary concern in enacting federal legislation was the spiraling growth of money laundering and the reinvestment of illicit profits to expand the operation of organized crime and narcotics trafficking in the United States.¹⁹⁷ The facts in *Piervinanzi* establish nothing more than that the attempted transfer of the funds was intended to facilitate the commission of the underlying offense. The legislative intent of the statute is clearly at odds with the Second Circuit's application of the money laundering statute. The requirement that the transfer of funds promote the "carrying on" of the specified unlawful activity, and that the money be plowed back to capitalize that activity, rather than merely contribute in some general way to the object of the completed crime, is simply not satisfied in *Piervinanzi*.

V. CONCLUSION

The Money Laundering Control Act of 1986 is a potent weapon in the war against traditional organized crime and international narcotics trafficking. The MLCA strikes at the economic base and lifeblood of organized crime, a critical component of any government strategy intended to wage a successful assault on sophisticated criminal enterprises.¹⁹⁸ At the same time, in legislating the MLCA, Congress had a very specific purpose in mind and federal prosecutors as well as the courts should be cautious not to extend its application beyond that expressed purpose. Congress intended to fill a critical gap in the criminal law with respect to the post-crime hiding and reinvesting of illicit profits to continue proscribed criminal activity.¹⁹⁹ It was Congress's intent to add a new criminal offense to punish activity not previously punished criminally.²⁰⁰ Moreover, "Congress aimed the crime of money laundering at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior 'specified unlawful

197. See *supra* note 3 and accompanying text.

198. See *supra* notes 1-5 and accompanying text.

199. See *United States v. Edgmon*, 952 F.2d 1206, 1213 (10th Cir. 1991) (stating that the Senate discussed a gap in the criminal law and intended to create a new offense), *cert. denied*, 112 S. Ct. 3037 (1992); *United States v. Dimeck*, 24 F.3d 1239, 1246-47 (10th Cir. 1994) (stating that the statute was designed to punish those who attempt to legitimize drug proceeds).

200. See *Edgmon*, 952 F.2d at 1213-14 (Congress intended to add a new offense).

activity.' ”²⁰¹ This legislative intent must be kept in mind in order to properly apply the statute.

Despite the current split of authority, paying for drugs with the proceeds of drug sales constitutes a “sale” or “purchase” under the definition of “transaction” as defined in section 1956(c)(3).²⁰² Furthermore, the sale or purchase of illicit drugs is a “financial transaction,” as defined in section 1956(c)(4), if the transaction involves the movement of funds by wire or by other means which in any way affects interstate or foreign commerce.²⁰³ Likewise, the “delivery” or “transfer” of the proceeds of narcotics trafficking is a “transaction” under the statute. It is a “financial transaction” if it involves the movement of funds by wire or by other means which in any way affects interstate or foreign commerce.²⁰⁴

Nevertheless, the payment for drugs with proceeds from narcotics trafficking violates section 1956(a)(1)(A)(i) only if the proceeds are plowed back to continue that activity (*i.e.*, to promote the carrying on of the narcotics distribution business). Section 1956(a)(1)(A)(i) does not proscribe participation in a financial transaction where the intent is simply to promote or facilitate the completion of the underlying criminal offense.

At the same time, neither the payment of money for drugs nor the receipt and transportation of currency derived from drug trafficking is prohibited conduct under section 1956(a)(1)(B)(i). Absent evidence that the defendant intended to legitimize the proceeds to make it appear that the money was derived from a legal enterprise, a conviction under this section cannot be sustained.²⁰⁵ Federal prosecutors should refrain from filing money laundering charges under this section of the MLCA.

In any event, federal courts can avoid disparate and inconsistent application of the MLCA by simply adhering to the drafters’ intent.

201. *Id.* at 1214.

202. *See* *United States v. Skinner*, 946 F.2d 176, 178 (2d Cir. 1991) (holding that MLCA conviction was proper when defendant used cocaine sale proceeds to buy money orders and mailed them to co-defendant); *United States v. Hamilton*, 931 F.2d 1046, 1051 (5th Cir. 1991) (holding that the terms of the statute prohibit mailing the proceeds of drug sales).

203. *See Hamilton*, 931 F.2d at 1051.

204. *See Dimeck*, 24 F.3d at 1246 (holding that the movement of drug proceeds can constitute a transaction); *Skinner*, 946 F.2d at 178 (same).

205. *See Dimeck*, 24 F.3d at 1247 (defendant must attempt to legitimize proceeds so that observers believe that money is derived from a legal enterprise); *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1474 (10th Cir. 1994) (it is difficult to find money laundering when defendant acquires an asset to bring him personal benefit); *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 925 (5th Cir. 1992) (in order to find a violation of MLCA, government must show that defendant tried to disguise nature, source, or ownership of funds).