Knowledge Inferences in Money Laundering and Structuring Prosecutions

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INTRODUCTION

Money laundering is the forgotten stepchild of organized crime control. Too often money laundering is thought of only as a charge to be tacked onto an existing prosecution. This conception is too narrow. Money laundering is not like other crimes. It is not equivalent to a murder or robbery, investigated and prosecuted after the fact. Reactive murder investigations rarely uncover a network of other criminal conduct. Money laundering, on the other hand, is a signal to law enforcement, a pattern of conduct which calls out for proactive investigation by law enforcement, should they be listening. Find money laundering, and you will find underlying criminal activity.

This Article will expand upon the utility of money laundering as an investigative tool and argues for a more robust use of this underutilized tool by federal law enforcement. In order to achieve this objective, it will be necessary to understand how money laundering and its related crime, structuring are conceptualized and prosecuted. To this end, I examine the relevant statutes and the issue of permissible inferences of defendant knowledge from circumstantial evidence. In order to pin down the tipping point at which circumstantial evidence becomes sufficient to infer criminally culpable knowledge or intent, which I refer to as the “knowledge line,” I have reviewed cases in which circumstantial evidence was found to be sufficient to support a conviction, and cases in which it has not. I conclude with a discussion of sentencing issues, and a policy argument in which I advocate a new approach designed to channel law enforcement and prosecutorial efforts toward using money laundering as a tool for investigation and targeting of high level organized crime figures.

I. THE AMERICAN ANTI-MONEY LAUNDERING REGIME

A comprehensive history of anti-money laundering (AML) efforts in the United States is both beyond the scope of this note and widely available elsewhere.¹ As such, here I will only detail those aspects of AML which are pertinent to this topic.

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To launder money is to conceal the origins of illegally acquired funds so as to make them available for use in the legitimate market. This may be accomplished in any number of ways, but most commonly involves a criminal who takes advantage of a connection to a front business which deals in a large volume of cash and thus can report more legitimate income than it actually takes in. The funds are laundered through the business in a three step process: (1) the illicit funds are invested into the legitimate business, (2) the funds are moved around via financial transactions so as to confuse pursuit, and (3) the money, now having acquired the appearance of legitimacy, may once again be used by the criminal. In the federal system, money laundering is criminalized under two statutes: 18 U.S.C. § 1956 (specific intent money laundering), and 18 U.S.C. 1957 (conducting transactions in illicit funds). These statutes will be discussed in detail infra.

The federal government imposes certain reporting requirements on financial institutions so as to facilitate the identification and prosecution of money laundering offenses. Authority to do so is founded in the AML regime established by the Bank Records and Foreign Transactions Act of 1970 (BSA or Bank Secrecy Act), and modified by the 2001 Patriot Act. The Financial Crimes Enforcement Network (FinCEN), a bureau of the Department of Treasury, is the American Financial Intelligence Unit (FIU), the agency tasked with implementing the United States’ AML regime through promulgation and enforcement of regulations on financial institutions.

The two mandated reports of import to money laundering and structuring prosecutions are Currency Transaction Reports (CTR) and Suspicious Activity Reports (SAR). The former contain information about the person conducting the transaction, the person on whose behalf the transaction is conducted, the date of the transaction, the

overview of the federal government’s overall AML approach, see Lilian B. Klein, Bank Secrecy Act Anti-Money Laundering (2008). For an examination of the BSA’s recordkeeping and reporting requirements, see California Bankers Ass’n v. Shultz, 416 U.S. 21 (1974).

2 Other methods include: the purchase of valuable possessions with criminally obtained cash, structuring cash deposits so as to avoid scrutiny, transfers through sham corporate accounts, informal money transfer schemes, laundering through attorneys or accountants, and the like. Truly, the enterprising criminal is limited only by his imagination.

3 See Driggers, supra note 1, at 930.
4 See Golde & Calvert, supra note 1, at 312.
5 I describe only a part of the American AML regime, an exploration of other aspects is beyond the scope of this note.
7 Financial Action Task Force, Summary of the Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: United States of America 3, para. 9 (June 23, 2006) [hereinafter FATF Summary]. The Financial Action Task Force (FATF) is a stand-alone intergovernmental organization which developed the Forty Recommendations, a set of policies to be implemented by national governments in order to reduce the incidence of global money laundering, and which evaluates nations on their compliance. The mechanisms of the FATF, the Forty Recommendations, and the FATF blacklist are all well beyond the scope of this note.

8 Linn, supra note 1, at 413-14.
financial institution at which the transaction took place, and the amount of the
transaction.\textsuperscript{9} CTRs must be filed for any cash transaction which exceeds $10,000,
including smaller transactions which aggregate to over $10,000, in which case the
financial institution must note on the CTR that it is being filed because of a number of
aggregated transactions.\textsuperscript{10} Evident from the name, SARs are required of financial
institutions whenever they are aware of suspicious activity taking place in an account.\textsuperscript{11}
Most often, SARs are filed when there is evidence of structuring.\textsuperscript{12}

Structuring, also referred to as smurfing, occurs when an individual breaks
down a large financial transaction into several smaller ones in order to avoid triggering
federal reporting requirements.\textsuperscript{13} Federally, structuring is criminalized at 31 U.S.C. \S
5324. Both “perfect” structuring, where the individual was successful in this attempt,
and no report was actually filed, and “imperfect” structuring, where a reporting
requirement was triggered despite efforts to avoid it, are crimes under \S 5324.\textsuperscript{14} Other
efforts to evade or frustrate reporting requirements are criminalized at 31 U.S.C. \S
5322.\textsuperscript{15}

II. INFERENCES OF KNOWLEDGE AND WILLFUL BLINDNESS

Money laundering and structuring offenses require the prosecution to prove
either a knowing or intentional \textit{mens rea}, as these crimes cannot be committed recklessly
or negligently. Therefore, I briefly discuss general criminal law standards regarding
proof of knowledge and which inferences of knowledge or intent are permissible to
draw from circumstantial evidence.

\textbf{A. Knowledge May be Proven by Circumstantial Evidence Alone}

At any criminal trial, the government must prove each element of the offense
beyond a reasonable doubt. However, a successful prosecution may be built on
circumstantial evidence, including proof of \textit{mens rea}.\textsuperscript{16} Indeed, as the defendant’s state
of mind is obviously difficult to ascertain through direct evidence in the absence of a
confession, it is fully permissible, and indeed common, for the government to prove this
element via circumstantial evidence. When the government relies upon circumstantial
evidence to prove knowledge or intent, it has no additional burden to “exclude every

\begin{itemize}
  \item \textsuperscript{9} Linn, supra note 1, at 414.
  \item \textsuperscript{10} Linn, supra note 1, at 414.
  \item \textsuperscript{11} Linn, supra note 1, at 408.
  \item \textsuperscript{12} FATF Summary, supra note 7, at 5.
  \item \textsuperscript{13} See Linn, supra note 1, at 452.
  \item \textsuperscript{14} Linn, supra note 1, at 452-53.
  \item \textsuperscript{15} These offenses include bulk cash smuggling and causing reports to be filed with material
  \item \textsuperscript{16} Holland v. United States, 348 U.S. 121, 138-39 (1954); see also Desert Palace, Inc. v. Costa, 539 U.S. 90,
100 (2003) (“[W]e have never questioned the sufficiency of circumstantial evidence in support of a
criminal conviction, even though proof beyond a reasonable doubt is required.”).
\end{itemize}
reasonable hypothesis other than that of guilt.” The jury may permissibly consider the totality of the government’s case when making a determination as to mens rea on an individual element.\footnote{\textit{Holland}, 348 U.S. at 139.}

\textbf{B. Willful Blindness is Alternative Proof of Knowledge}

Occasionally, a defendant will have a colorable argument that he did not actually know about the nature of the activity in which he was involved, yet the defendant is still culpable, as his lack of subjective knowledge is attributable to a deliberate avoidance of knowledge to shield himself from prosecution. Such a tactic demonstrates constructive knowledge, and is so recognized by the doctrine of willful blindness.\footnote{Oddly, the Supreme Court has yet to directly speak to the issue of willful blindness. However, twice in recent years the Court has impliedly endorsed the doctrine. First, the Court denied certiorari in \textit{United States v. Heredia}, a Ninth Circuit decision which revisited \textit{Jewell}, the Ninth Circuit precedent which has been so influential across the circuits that willful blindness instructions are often called \textit{Jewell} instructions. \textit{United States v. Heredia}, 483 F.3d 913 (9th Cir. 2007) (en banc) (citing \textit{United States v. Jewell}, 532 F.2d 697 (9th Cir. 1976)), cert. denied, 522 U.S. 1077 (2007). The following year, the court noted that in money laundering prosecutions, the “Government will be entitled to a willful blindness instruction if the [defendant], aware of a high probability … deliberately avoids learning the truth,” without further comment as to the willful blindness doctrine as a whole. \textit{United States v. Santos}, 553 U.S. 507, 521 (2008).} The terms willful blindness, constructive knowledge, deliberate ignorance, conscious avoidance, and the like are all used to describe such a situation. Jury instructions on the issue are commonly referred to as ostrich instructions or \textit{Jewell} instructions, for the Ninth Circuit precedent which established a nearly universally adopted rationale for the use of willful blindness instructions.\footnote{\textit{Jewell}, 532 F.2d 697; \textit{Heredia}, 483 F.3d at 919 n.6 (describing the \textit{Jewell} instruction as “an interpretation that Congress has left undisturbed for three decades and that has since been adopted by ten of our sister circuits”).}

Here, I will expand on the law surrounding willful blindness, as the doctrine arises with some regularity in money laundering prosecutions.

A \textit{Jewell} instruction allows the government to prosecute those defendants who, though they may have had the self-preservation to avoid actual knowledge, are still culpable.\footnote{\textit{Jewell}, 532 F.2d at 704 (emphasizing “that the required state of mind differs from positive knowledge only so far as necessary to encompass a calculated effort to avoid the sanctions of the statute while violating its substance”); see also § 2.02. General Requirements of Culpability, Model Penal Code § 2.02 (“When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.”).} In order to find that a defendant was deliberately ignorant, the government must show subjective appreciation of a risk of illegality, and a subsequent effort to avoid confirmation, it is not a reasonable person or a “should have known” standard.\footnote{See, e.g., \textit{United States v. Caminos}, 770 F.2d 361, 365 (3d Cir.1985) (A \textit{Jewell} instruction “must make clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability.”).}

The instructing judge must “emphasize that [d]eliberate avoidance is not a standard

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less than knowledge," rather it is an alternative way for the government to prove the defendant’s knowledge. It must also be made clear that a willfully blind defendant has not been reckless (knew of a substantial risk that his conduct was criminal) or negligent (should have known of such a risk), but “one who took deliberate actions to avoid confirming suspicions of criminality.” Deliberate action to avoid knowledge may sometimes be inferred from circumstances in which a defendant knew of a high probability of illegal activity, yet nevertheless asserts that he has no actual knowledge. Under these circumstances, a failure to investigate is not an omission, it is a deliberate action taken to avoid acquiring knowledge.

A Jewell instruction is only appropriate in limited circumstances, and appellate courts have properly cautioned trial court judges that “such a charge should not be given in every case in which a defendant claims a lack of knowledge, but only in those comparatively rare cases where ... there are facts that point in the direction of deliberate ignorance.” Additionally, though the government may put forward theories of actual knowledge and willful blindness to the jury, arguing in the alternative, a Jewell instruction is not warranted where the evidence only goes to a sharp dichotomy of actual knowledge or lack thereof, not willful blindness. Heredia, a recent case in which the Ninth Circuit revisited its Jewell precedent, explains the interaction between willful blindness and actual knowledge as follows:

When knowledge is at issue in a criminal case, the court must first determine whether the evidence of defendant’s mental state, if viewed in the light most favorable to the government, will support a finding of actual knowledge. If so, the court must instruct the jury on this theory. Actual knowledge, of course, is inconsistent with willful blindness. The deliberate ignorance instruction only comes into play, therefore, if the jury rejects the government’s case as to actual knowledge. In deciding whether to give a willful blindness instruction, in

23 Heredia, 483 F.3d at 917.
24 Heredia, 483 F.3d at 917.
25 See, e.g., United States v. Kozeny, 643 F. Supp. 2d 415, 420-21 (S.D.N.Y. 2009) (noting that the evidence was sufficient to find that defendant “knew of the high probability” of illegal activity and that this, in addition to “his lack of actual knowledge would suggest that he decided not to learn more”).
26 Judge Easterbrook stated this proposition succinctly: “When someone knows enough to put him on inquiry, he knows much. If a person with a lurking suspicion goes on as before and avoids further knowledge, this may support an inference that he has deduced the truth and is simply trying to avoid giving the appearance (and incurring the consequences) of knowledge.” United States v. Ramsey, 785 F.2d 184, 189 (7th Cir. 1986); see also United States v. Florez, 368 F.3d 1042, 1044 (8th Cir. 2004) (Willful blindness may be found when, “in light of certain obvious facts, reasonable inferences support a finding that a defendant’s failure to investigate is equivalent to ‘burying one’s head in the sand.’”); United States v. Nicholson, 677 F.2d 706, 710-11 (9th Cir. 1982) (“It is sufficient to establish that the defendant was aware of a high probability that his money would be used to further illegal activities and that he deliberately avoided finding out the facts of the situation.”); United States v. Whitehill, 532 F.3d 746, 752 (8th Cir. 2008) (stating that “a jury could reasonably conclude defendants knew something was wrong but chose not to inquire”).
27 United States v. Rivera, 944 F.2d 1563, 1570 (11th Cir. 1991) (emphasis added, internal quotation marks removed).
28 Heredia, 483 F.3d at 922.

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addition to an actual knowledge instruction, the district court must determine whether the jury could rationally find willful blindness even though it has rejected the government’s evidence of actual knowledge. If so, the court may also give a Jewell instruction.²⁹

C. Case Studies

The question remains, however, where the line is drawn between those defendants whose willful blindness raises their culpability to the point at which prosecution is proper, and those who were merely reckless or negligent as to the risk of involvement in illegal activity and thus are criminally innocent. That is, what quantity of circumstantial evidence will be found sufficient to support an inference of willful blindness? As this is inevitably the sort of legal question that will be left to case-by-case adjudication, below I explore cases which speak to this question to find the tipping point at which innocent conduct is transformed into criminal behavior. I will refer to this as the “knowledge line.” Later, I will use this same technique to examine knowledge lines in the money laundering and structuring contexts.

1. United States v. Gabriele³⁰

Alfred Gabriele was convicted on numerous money laundering and RICO³¹ charges for his involvement in an extensive operation run by Stephen Saccoccia to launder Colombian drug money.³² His appeal challenged rulings of the trial court relating to, among others, his knowledge that the property was criminally derived.³³ The First Circuit rejected the implication that Gabriele was not willfully blind to the nature of the money laundering operation, noting that the evidence showed “prominent ‘red flags’” including: Gabriele’s knowledge of government surveillance, his associates’ evasive tactics, and large volumes of secreted cash, as well as his statement that “someday Stephen Saccoccia is going to put us all in jail.”³⁴ As such, his “challenge to the knowledge requirement under section 1957 has the ring of desperation.”³⁵ Even though the evidence clearly could have been offered for an inference of affirmative knowledge, the court upheld Jewell instructions, as the jury could have found “that Gabriele consciously avoided the import of the conspicuous ‘red flags’ involved here.”³⁶

2. United States v. Flores³⁷

Luis Flores, an attorney with a solo practice, was convicted of money laundering for his role in assisting German Altamirano-Lean, a man who ostensibly represented

²⁹ Heredia, 483 F.3d at 922.
³⁰ United States v. Gabriele, 63 F.3d 61 (1st Cir. 1995).
³² Gabriele, 63 F.3d at 64.
³³ Gabriele, 63 F.3d at 65.
³⁴ Gabriele, 63 F.3d at 65.
³⁵ Gabriele, 63 F.3d at 65.
³⁶ Gabriele, 63 F.3d at 67.
³⁷ United States v. Flores, 454 F.3d 149 (3rd Cir. 2006).
himself to Flores as a Ecuadorean businessman seeking to expand his import/export business to the United States.\(^{38}\) For several years, Flores opened corporations for Altamirano, naming himself as the president of several of them, signed blank checks drawn on the corporate accounts, and authorized wire transfers from the accounts.\(^{39}\) At relevant points in the scheme, Flores was paid $2,000 a week in cash for his efforts.\(^{40}\) The government proceeded on a theory of willful blindness, and Flores’ defense was that he had been Altamirano’s victim, not a co-conspirator.\(^{41}\) The Court of Appeals for the Third Circuit disagreed, and based its logic in large part on Flores’ failure to investigate Altamirano’s claims in light of their inherent suspiciousness:

In response to the substantial evidence that Altamirano was involved in some sort of illegal activity, Flores willfully blinded himself to the truth. He never requested any proof of the legitimacy of the transactions from Altamirano or even any further explanation addressing either the bank manager’s or accountant’s concerns. That Flores ‘did not ask the natural follow-up question[s] to determine the source of those funds could reasonably be considered by a jury to be evidence of willful blindness.’ Indeed, when faced with the above-detailed evidence, instead of making obvious inquiries, Flores engaged in additional money laundering transactions.\(^{42}\)

3. United States v. Ebert\(^{43}\)

The sole case I unearthed in which an appellate court ruled that a trial court’s decision to employ a Jewell instruction was error was an unpublished Fourth Circuit opinion.\(^{44}\) Defendants were convicted for their roles as store owners who purchased stolen over the counter drugs and other merchandise from Donald Thomas, the head of a vast network of thieves and shoplifters.\(^{45}\) The government presented evidence going to two conclusions: 1) that “there was no legitimate market for” the sort of second-hand merchandise that the defendants purchased and 2) even if there were a legitimate market, that defendants were willfully blind to the fact that Thomas’ merchandise was stolen.\(^{46}\)

On review, the Fourth Circuit determined that the government “did not prove that Thomas’s OTC and HBA business was highly suspicious to the defendants, and thus there was no circumstantial evidence showing the defendants’ deliberate ignorance.”\(^{47}\) As such, a willful blindness instruction was improper.\(^{48}\) The court

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\(^{38}\) Flores, 454 F.3d at 152.

\(^{39}\) Flores, 454 F.3d at 152.

\(^{40}\) Flores, 454 F.3d at 152.

\(^{41}\) Flores, 454 F.3d at 152.

\(^{42}\) Flores, 454 F.3d at 155-56 (citing United States v. Wert-Ruiz, 228 F.3d 250, 257 (3d Cir. 2000)).


\(^{44}\) Ebert, 178 F.3d 1287, 1999 WL 261590.

\(^{45}\) Ebert, 178 F.3d at *1.

\(^{46}\) Ebert, 178 F.3d at *8-9.

\(^{47}\) Ebert, 178 F.3d at *13.

\(^{48}\) Ebert, 178 F.3d at *13.
identified five highly suspicious circumstances advanced by the government in favor of a willful blindness theory: 1) no legitimate secondary market in these goods exists, 2) the packaging of the goods was clearly second-hand, 3) defendants made efforts to clean the merchandise prior to sale, 4) Thomas’ prices were below wholesale, and 5) defendants refused to purchase damaged goods.\(^{49}\)

The court rejected each of these in turn. The first circumstance failed for insufficient evidence at trial.\(^{50}\) Circumstances two through four were not sufficiently suspicious to support an inference of willful blindness.\(^{51}\) Additionally, the government failed to present evidence to show that defendants actually knew about circumstances one, three, and four, and if they didn’t know about the circumstances, they could not have been and thus couldn’t have been willfully blind in the face of such suspicion.\(^{52}\) Finally, the court rejected circumstance five as only proper to show actual knowledge, not willful blindness.\(^{53}\)

**D. Lessons**

As shown, caselaw has yet to develop a coherent and easily-applied standard for what constitutes willful blindness or when a duty to investigate suspicious circumstances arises. *Gabriele* and *Flores* indicate that an assertion of ignorance in the face of suspicious circumstances may support the inference that the defendant consciously avoided learning more, particularly when he declined an opportunity to investigate.\(^{54}\) The lesson of *Ebert*, however, is that the government cannot merely rest on proof that the circumstances existed, but must also show that the defendants were aware of the circumstances, and subjectively considered them to be suspicious.\(^{55}\)

**III. MONEY LAUNDERING**

There are two federal statutes which criminalize money laundering. While they criminalize different actions, and consequently have different elements, much of the caselaw does not differentiate between the two when evaluating the probative weight of circumstantial evidence. Therefore, I will introduce each statute, but speak of money laundering offenses more generally when I discuss permissible inferences of knowledge and/or intent.


This statute criminalizes three different ways in which people can launder money: § 1956(a)(1) addresses “traditional” money laundering, that which employs

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\(^{49}\) *Ebert*, 178 F.3d at *13.

\(^{50}\) *Ebert*, 178 F.3d at *14.

\(^{51}\) *Ebert*, 178 F.3d at *21-22.

\(^{52}\) *Ebert*, 178 F.3d at *13-22.

\(^{53}\) *Ebert*, 178 F.3d at *23.

\(^{54}\) *Gabriele*, 63 F.3d at 67; *Flores*, 454 F.3d at 155-56.

\(^{55}\) *Ebert*, 178 F.3d at *13-22.
financial transactions, § 1956(a)(2) relates to funds transferred into or out of the United States, and § 1956(a)(3) ensures that defendants caught by a government sting operation can still be prosecuted by criminalizing an intent to launder funds “represented” to be ill-gotten.\(^56\) The bulk of § 1956 prosecutions proceed under the first of these.

To constitute a violation of § 1956(a)(1), the government must prove three elements: 1) that the defendant conducted a financial transaction involving proceeds actually derived from specified criminal activity,\(^57\) 2) the defendant knew the funds were unlawfully obtained, and 3) a showing of mens rea.\(^58\) This third element may be satisfied through proof either that: 1) defendant intended to either promote the underlying unlawful activity or conceal the illegal nature of the funds, or 2) defendant knew\(^59\) that the transaction was designed to either conceal an aspect of the funds or to avoid a reporting requirement.\(^60\)

For purposes of § 1956(a)(1), the government must prove that the defendant knew that the funds involved in the financial transaction “represent[,] the proceeds of some form of unlawful activity.”\(^61\) However, this is only knowledge that the funds were in some way illegally obtained, the statute “does not require that the defendant know the precise origin of the property” involved in the transaction.\(^62\)

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\(^{57}\) Defendant must, conduct “a financial transaction which in fact involves the proceeds of specified unlawful activity,” knowing that the funds involved “represent[,] the proceeds of some form of unlawful activity. 18 U.S.C.A. § 1956(a)(1). “Specified unlawful activity” is defined in another subsection of the statute, listing five categories of offenses which qualify. 18 U.S.C.A. § 1956(c)(7). The terms “specified unlawful activity” and “proceeds” have the same meaning in both § 1956 and § 1957. 18 U.S.C.A. 1957(f)(3); see also United States v. Smith, 44 F.3d 1259, 1265 (4th Cir. 1995).

\(^{58}\) As of 2009, at least seven circuits have adopted the proposition that § 1956(a)(1) “does not create separate offenses, only alternative mental states for a single offense.” United States v. Seher, 562 F.3d 1344, 1361 (11th Cir. 2009); see also United States v. Garcia-Torres, 341 F.3d 61, 65-66 (1st Cir. 2003); United States v. Bolden, 325 F.3d 471, 487 n.19 (4th Cir. 2003); United States v. Booth, 309 F.3d 566, 571-72 (9th Cir. 2002); United States v. Meshack, 225 F.3d 556, 580 n.23 (5th Cir. 2000), reh'g granted on other grounds, United States v. Meshack, 244 F.3d 367 (5th Cir. 2001); United States v. Navarro, 145 F.3d 580, 592 (3d Cir.1998); United States v. Holmes, 44 F.3d 1150, 1155-56 (2d Cir.1995).

\(^{59}\) In some circuits this is interpreted as also requiring intent, not merely knowledge. Discussed infra, see note 100.

\(^{60}\) I break the third element down into two options corresponding to either a mens rea of intent or knowledge. However, this section has also been conceptualized as consisting of three prongs, where the government may prove a violation of § 1956(a)(1) by one of three paths, showing that the defendant acted:

1) With the intent to promote the carrying on of a specific unlawful activity (the promotion prong); or
2) Knowing that the transaction was designed in whole or in part to conceal the nature, location, ownership, etc. of the proceeds (the conceal or disguise prong); or
3) Knowing that the transaction was designed to avoid a transaction reporting requirement under state or federal law (the reporting requirement prong).

\(^{61}\) Navarro, 145 F.3d at 585.

\(^{62}\) United States v. Cedeno-Perez, 579 F.3d 54, 59 (1st Cir. 2009), cert. denied, 130 S. Ct. 1091 (2010); see also United States v. Wynn, 61 F.3d 921, 924 (D.C. Cir. 1995) (noting that by “the terms of the statute, the

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issues surrounding proof of defendant’s knowledge of the “dirtiness” of the funds are discussed infra.

The two remaining sections of § 1956(a) are straightforward, and thus are less contentiously litigated. Contrasted with § 1956(a)(1), each of the other sections lightens the government’s burden on one element of the money laundering offense, while increasing it on another. The second subsection of § 1956(a) relates to international money transfers. A successful prosecution of § 1956(a)(2) must first prove that a transfer of funds (illegally derived or legitimate) was transferred into, out of, or through the United States. Once this predicate has been established, there are two mental states which will satisfy the requisite mens rea, intent: 1) to promote unlawful activity, or 2) to conceal the true nature of funds the defendant knows to be illegally derived.

Thus, though the prosecution has a lower burden in that it need not prove that the funds were of illicit origin, it has a higher mens rea bar.

The last subsection of § 1956(a) does not so much establish a separate offense as addresses a different way that § 1956(a)(1) can be committed. Whereas § 1956(a)(1) requires that the funds actually be criminally derived, a § 1956(a)(3) offender can be convicted even if he is handing clean money, if he intends to promote unlawful activity, conceal, or avoid a reporting requirement with regard to funds represented to be the proceeds of specified unlawful activity.

Such prosecutions are employed following government sting operations where, obviously, the funds at issue are not actually illegally obtained. Like § 1956(a)(2), the government has a lightened burden on proof of the nature of the funds, but must prove a heightened mens rea.

B. 18 U.S.C. § 1957. Engaging in Monetary Transactions in Property Derived from Specific Unlawful Activity

Courts have taken care to emphasize that the intentionality requirements in § 1956(a) offenses ensure that the money laundering statute is not converted into a “money spending statute.” Though this language reads as condemning such an idea,
spending illegally derived money is exactly what § 1957 criminalizes.\textsuperscript{68} However, as a counter-balance to this lowered prosecutorial burden on \textit{mens rea}, the statute requires proof that the monetary transaction be of a value exceeding $10,000, which § 1956 does not.\textsuperscript{69} Like a § 1956 prosecution, the government must prove that the defendant knew that the funds were derived from unlawful activity.\textsuperscript{70} While the government must show that the unlawful activity which produced the funds is one of a list of specified offenses, it need not prove the underlying crime in order to obtain a conviction under § 1957.\textsuperscript{71} Neither must it show that the defendant was aware “that the offense from which the criminally derived property was derived was specified unlawful activity;” the prosecution’s burden is only to show that the defendant knew that the funds were ill-gotten in some manner.\textsuperscript{72}

\textbf{C. Supreme Court Money Laundering Jurisprudence}

The Supreme Court rarely hears cases on these statutes. When the Court does speak to an issue surrounding money laundering or structuring, it is generally to define a term within the relevant statute.\textsuperscript{73} With regard to the money laundering statutes, the Court has recently addressed the definition of “proceeds,” in \textit{United States v. Santos};\textsuperscript{74}

\begin{quote}
\textsuperscript{68} The section criminalizes knowingly engaging in “a monetary transaction in criminally derived property.” 18 U.S.C.A. § 1957(a). There is no element of intent toward the transaction like that required by § 1956. \textit{Herron}, 97 F.3d at 237.
\textsuperscript{69} 18 U.S.C.A. § 1957(a).
\textsuperscript{71} \textit{Smith}, 44 F.3d at 1265; see also United States v. Huff, 641 F.3d 1228, 1230 (10th Cir. 2011).
\textsuperscript{72} United States v. Rivera-Hernandez, 497 F.3d 71, 76 (1st Cir. 2007).
\textsuperscript{73} The trio of cases representing the Supreme Court’s modern jurisprudence on money laundering and structuring each define a term in a statute. \textit{Ratzlaf}, 510 U.S. at 136-37 (imposing a willfulness requirement on 31 U.S.C.A. § 5322, at that time the pertinent anti-structuring penalty statute), superseded by statute as stated in, e.g., United States v. Pang, 362 F.3d 1187, 1193 (9th Cir. 2004) (noting that the Congressional response to \textit{Ratzlaf} was to exempt “violations of § 5324 [structuring] from the penalty provisions of § 5322, which require willfulness, and [to add] a penalty provision to § 5324 that did not require knowledge that structuring was illegal); United States v. Santos, 128 S. Ct. 2020, 2025-26 (2008) (defining “proceeds” in § 1956(a) offenses as “net profits” of unlawful activity), superseded by statute as stated in, e.g., United States v. Wilkes, 2011 WL 4953070 n.1 (9th Cir. 2011) (“Congress has since [post-\textit{Santos}] amended 18 U.S.C. § 1956 to define ‘proceeds’ as ‘any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.’” (citing 18 U.S.C. § 1956(c)(9)); \textit{Cuellar}, 553 U.S. at 567 (explaining that “conviction under [§ 1956(a)(1)(B)(i)] requires proof that the purpose—not merely the effect—of the [transaction] was to conceal or disguise [the illegality of the funds!]”).
As the focus of this note is proof of the defendant’s knowledge, an issue not addressed by the Supreme Court in these cases, my analysis of Supreme Court jurisprudence is consequently truncated. For an excellent discussion these two cases and their implications for future money laundering prosecutions, see Samuel P. Shnider, The “Design to Conceal” Requirement and the Elusive Culprits of Money Laundering, 48 Crim. L. Bull. 280 (2012).
\textsuperscript{74} \textit{Santos}, 128 S. Ct. 2020.
\end{quote}
and the definition of “designed … to conceal” in Regalado Cuellar v. United States, two opinions which it handed down on the same day.\(^7^5\)

1. United States v. Santos

In Santos, Justice Scalia’s plurality opinion determined that under §1956(a)(1) “proceeds” refers only to profits on an illegal scheme, rather than to the entire amount of money taken in by that scheme.\(^7^6\) The defendants in Santos were convicted of laundering money obtained from running an illegal lottery.\(^7^7\) Scalia agreed with the defendants that there was a merger problem under the current interpretation of the statute, as a conviction for certain underlying offenses (like gambling) would lead to an automatic conviction for money laundering as well.\(^7^8\) Consequently, he determined that, as “proceeds” could reasonably be read to mean either “receipts” or “profits,” the rule of lenity required “proceeds” to be defined as “profits.”\(^7^9\) The effect of Scalia’s restriction would be to sharply limit the ability to prosecute smaller schemes, due to the difficulty of disaggregating profits from the net revenue of the scheme.\(^8^0\)

Justice Stevens, in concurrence, read the statute more expansively than did Justice Scalia. Justice Stevens would interpret “proceeds” as having “one meaning when referring to some specified unlawful activities and a different meaning when referring to others.”\(^8^1\) By retaining such flexibility, the issue of “merger” in crimes like illegal gambling is addressed, whereas for crimes like drug trafficking, where there is no merger problem, the government would not have to meet this higher standard.\(^8^2\) Justice Stevens observed that “[a]llowing the Government to treat the mere payment of the expense of operating an illegal gambling business as a separate offense is in practical effect tantamount to double jeopardy.”\(^8^3\)

A circuit split developed almost immediately post-Santos.\(^8^4\) When the Fifth Circuit decided the Santos issue in Garland v. Roy, it noted four existing interpretations

\(^7^5\) Cuellar, 553 U.S. 550.
\(^7^6\) Santos, 553 U.S. at 514.
\(^7^7\) Because the receipts are put back into the scheme, thus furthering the criminal enterprise as necessary for money laundering prosecution. Santos, 553 U.S. at 509-10.
\(^7^8\) Santos, 553 U.S. at 515-17.
\(^7^9\) Santos, 553 U.S. at 514 (“From the face of the statute, there is no more reason to think that “proceeds” means “receipts” than there is to think that “proceeds” means “profits.” Under a long line of our decisions, the tie must go to the defendant.”).
\(^8^0\) A point he acknowledged in his opinion: “Proving the proceeds and knowledge elements of the federal money-laundering offense under the ‘profits’ interpretation will unquestionably require proof that is more difficult to obtain.” Santos, 553 U.S. at 519.
\(^8^1\) Santos, 553 U.S. at 525 (Stevens, J., concurring).
\(^8^2\) Santos, 553 U.S. at 525 (Stevens, J., concurring).
\(^8^3\) Justice Stevens was troubled by the fact that, for the instant and similarly situated defendants, the additional conviction for money laundering increased the statutory maximum prison to 20 years from the five which defendants had faced for the underlying offense alone. Santos, 553 U.S. at 525.
\(^8^4\) See Circuit Review Staff, Current Circuit Splits, 7 Seton Hall Circuit Rev. 377, 390-91 (2011)
of *Santos*, then announced a fifth.\(^85\) Before holding that the Fifth Circuit would follow Justice Stevens’ concurrence as controlling precedent, the court summarized the current confusion among the circuits:

The Fourth, Eighth and Eleventh Circuits have held that in light of Justice Stevens’ concurrence, *Santos* defines “proceeds” as “profits” only when courts are presented with the particular facts of *Santos*, where the petitioners were convicted of laundering money from the “unlawful activity” of running an illegal gambling operation. The Third and Seventh Circuits have concluded that Justice Stevens’ concurrence indicates “proceeds” must be defined as “profits” any time the legislative history of the money-laundering statute does not affirmatively indicate otherwise. Analogous to the first step of Justice Stevens’ bifurcated rule, the Ninth Circuit and, likely, the First Circuit have held that “proceeds” must be defined as “profits” any time the “merger problem” articulated in *Santos* would result if “proceeds” is defined as “gross receipts.” Finally, similar to both steps in Justice Stevens’ rule, the Sixth Circuit has held, “‘proceeds’ does not always mean profits, as Justice Scalia concluded; it means profits only when the § 1956 predicate offense creates a merger problem that leads to a radical increase in the statutory maximum sentence and only when nothing in the legislative history suggests that Congress intended such an increase.”\(^86\)

Notably, this proliferation of interpretations came into being within two years of *Santos*. Partly in response to the emerging state of confusion in the law, Congress stepped in via the 2009 Fraud Enforcement and Recovery Act (FERA) to define “proceeds” in § 1956(c)(9) as “any property derived from … unlawful activity … including the gross receipts of such activity” and, through a conforming reference, in § 1957 as well.\(^87\) Prior to FERA, § 1956 had not included a definition of “proceeds.” Recent lower court decisions have recognized this Congressional action as legislatively overruling *Santos*.\(^88\)

2. *Regalado Cuellar v. United States*

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\(^85\) *Garland v. Roy*, 615 F.3d 391, 402-04 (5th Cir. 2010) (determining that Justice Steven’s concurrence in *Santos* established a presumption of Congressional intent that “proceeds” be defined as “gross receipts,” unless legislative history indicated that “profits” was the preferred interpretation).

\(^86\) *Garland*, 615 F.3d. at 403 (citing United States v. Spencer, 592 F.3d 866, 879-80 & n.4 (8th Cir. 2010); United States v. Demarest, 570 F.3d 1232, 1242 (11th Cir. 2009); United States v. Howard, 309 Fed. Appx. 760, 771 (4th Cir. 2009) (unpublished); United States v. Lee, 558 F.3d 638, 643 (7th Cir. 2009); United States v. Yusuf, 536 F.3d 178, 186 n.12 (3d Cir. 2008); United States v. Van Alstyne, 584 F.3d 803, 814 (9th Cir. 2009); United States v. Bucci, 582 F.3d 108, 123-24 (1st Cir. 2009) (suggesting this interpretation in dicta); United States v. Kratt, 579 F.3d 558, 562 (6th Cir. 2009)).


\(^88\) See *Wilkes*, 2011 WL 4953020, at n.1 (9th Cir. 2011); see also United States v. Aslan, 644 F.3d 526, 549 (7th Cir. 2011); United States v. Richardson, 658 F.3d 333, 339 n.4 (3d Cir. 2011) (“Congress legislatively overruled Santos in 2009.”); United States v. Rubashkin, 655 F.3d 849, 864 n.3 (8th Cir. 2011); United States v. Irvin, 656 F.3d 1151, 1164 n.8 (10th Cir. 2011); United States v. Quinones, 635 F.3d 590, 599 n.4 (2d Cir. 2011).
On the same day as the *Santos* decision, the Supreme Court analyzed the term “designed ... to conceal,” as used by § 1956(a)(2)(B)(i). The defendant in this case was convicted of attempted cross-border transportation of criminally derived funds. Evidently seeking to return the proceeds of drug sales to a Mexican supplier, when the defendant was stopped he was transporting $81,000 in cash wrapped in plastic bags and duct tape, covered in animal hair, and stored in a secret compartment beneath the rear floorboards. A divided panel of the Fifth Circuit reversed defendant’s conviction, following other courts of appeals in reading an “attempt to create the Fifth Circuit reheard the appearance of legitimate wealth” element into the statute. However, when the case *en banc*, it rejected this additional element, reinstating defendant’s conviction because his efforts to conceal the cash manifested an intent to disguise the nature, location, and source, ownership, or control of the funds.

Justice Thomas, writing for a unanimous Court, determined that a middle ground was the proper reading of the statute: “[a]lthough we agree with the Government that the statute does not require proof that the defendant attempted to ‘legitimize’ tainted funds, we agree with petitioner that the Government must demonstrate that the defendant did more than merely hide the money during its transport.” He determined that, in relation to § 1956(a)(2)(B)(i) prosecutions, the government must show a purpose to conceal an aspect of the funds, not merely that the structure of the transportation did in fact conceal the funds themselves. Thus, “designed ... to conceal” means that the transaction was conducted with a purpose to conceal something about the nature of the funds, and it is not sufficient that the structure of the action had the effect of concealing some aspect of the funds, as purpose and structure are distinct, though related, and § 1956(a)(2)(B)(i) criminalizes only the former.

Justice Thomas determined that Congress would have written the statute with a *mens rea* of knowledge, not intent, if it had not intended this interpretation of “designed

89 *Cuellar*, 553 U.S. at 557.
90 *Cuellar*, 553 U.S. at 554.
91 *Cuellar*, 553 U.S. at 553-54.
92 *Cuellar*, 553 U.S. at 555 n.1 (2008) (noting that the Seventh, First, Sixth, and Tenth circuits had adopted an “appearance of legitimate wealth” requirement, while the Eleventh, Third, and Second had impliedly or explicitly rejected it.)
93 *Cuellar*, 553 U.S. at 556 (citing United States v. *Cuellar*, 478 F.3d 282, 289-90 (5th Cir. 2007), rev’d *sub nom.* Regalado Cuellar v. United States, 553 U.S. 550 (2008)). Judge Smith, the author of the panel decision, dissented from the en banc decision, emphasizing “‘the distinction between ‘concealing something to transport it, and transporting something to conceal it,’ and explained that whether petitioner was doing the latter depended on whether his ultimate plan upon reaching his destination was to conceal the nature, location, source, ownership, or control of the money.” *Cuellar*, 553 U.S. at 556 (citing *Cuellar*, 478 F.3d at 296-97).
94 *Cuellar*, 553 U.S. at 553.
95 *Cuellar*, 553 U.S. at 565.
96 *Cuellar*, 553 U.S. at 567 (“[C]onviction under this provision requires proof that the purpose – not merely the effect – of the [transaction] was to conceal or disguise [the nature, location, source, ownership, or control of the illegal proceeds].")
to conceal," as the alternative interpretation does not support a finding of an intentional mens rea. This assertion is bolstered by the fact that Congress did not add a definition of “purpose” to § 1956(c) when it enacted FERA to correct Santos. This leads to the inference that Congress accepted the Cuellar interpretation of “designed … to conceal,” an inference which is particularly warranted in the money laundering context, where Congress has been proactive about correcting Supreme Court interpretations with which it does not agree.

A circuit split is developing on the proper scope of the Cuellar holding. The Eleventh Circuit has declined to extend Cuellar’s intentionality requirements into § 1956(a)(1) offenses. The Seventh and Eighth Circuits have also limited the application of Cuellar to its facts. However, the Sixth Circuit has adopted Cuellar’s definition of “designed … to conceal” for prosecutions of § 1956(a)(1) offenses as well. Thus far, other circuits have not addressed the scope of Cuellar.

D. Representation of Funds

The last important definition in the federal money laundering statutes relates to § 1956(a)(3) and its reference to conducting a financial transaction with funds “represented” to be of criminal origin. Though the Supreme Court has not directly addressed the issue, it declined certiorari to an appeal from the following Fifth Circuit definition:

We do not believe that Congress intended for the term “representation” to be narrowly read as requiring an express statement by government agents. Such a reading of § 1956(a) surely would place an unreasonable burden on a government agent’s ability to enforce the statute: To hold that a government agent must recite the alleged illegal source of [the] … property at the time he attempts to transfer it in a “sting” operation would make enforcement of the statute extremely and unnecessarily difficult; “legitimate criminals,” whom undercover agents must imitate, undoubtedly would not make such recitations before each transaction.

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97 Cuellar, 553 U.S. at 565.
99 See Ratzlaf discussion, infra.
101 Aslan, 644 F.3d at 541; United States v. Williams, 605 F.3d 556, 564-65 (8th Cir. 2010).
102 United States v. Faulkenberry, 614 F.3d 573 586 (6th Cir. 2010) (incorporating “designed … to conceal” as intent to conceal into § 1956(a)(1) offenses).
103 An exploration of other contested definitions of words in these statutes is beyond the scope of this note.
105 Arditti, 955 F.2d at 339 (5th Cir.), cert. denied, 506 U.S. 998.

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Thus, for purposes of § 1956(a)(3), “[i]t is enough that the government prove that an enforcement officer or authorized person made the defendant aware of circumstances from which a reasonable person would infer that the property was drug proceeds.”

E. Knowledge Standards Generally

For purposes of those money laundering statutes which have an intentional mens rea, the requisite intent may not be inferred from the defendant’s criminally proscribed actions by themselves, without other evidence regarding the defendant’s mental state, though of course this other evidence may be circumstantial. Prior to Cuellar, the additional burden on the government was often referred to as “something more … even if that ‘something more’ is hard to articulate.” Though the central issue of Santos was not knowledge, the Court explained how the government might show knowledge in a money laundering case:

As for the knowledge element of the money-laundering offense—knowledge that the transaction involves profits of unlawful activity—that will be provable (as knowledge must almost always be proved) by circumstantial evidence. For example, someone accepting receipts from what he knows to be a long-continuing drug-dealing operation can be found to know that they include some profits. And a jury could infer from a long-running launderer-criminal relationship that the launderer knew he was hiding the criminal’s profits. Moreover, the Government will be entitled to a willful blindness instruction if the professional money launderer, aware of a high probability that the laundered funds were profits, deliberately avoids learning the truth about them—just as might be the case when he knows that the underlying crime is one that is rarely unprofitable.

Cuellar further clarified the issue, noting that even though the government must show a purpose to conceal an aspect of the funds, “purpose and structure are often related,” and “[o]ne may employ structure to achieve a purpose.” Thus, proof that a transaction was structured to conceal a listed attribute of the funds can yield an inference that concealment was a purpose of the transaction.

F. Willful Blindness

In the context of a money laundering prosecution, willful blindness is used as an alternate way to prove defendant’s knowledge that the funds were unlawfully derived. Congress intended the § 1956 to have a broad scope, and thus that it be read to include willfully blind defendants. As explained in a Sixth Circuit case, “the knowledge

106 Kaufmann, 985 F.2d at 892-93.
108 United States v. Esterman, 324 F.3d 565, 572 (7th Cir. 2003), disapproved of on other grounds by Cuellar, 553 U.S. 550.
109 Santos, 553 U.S. 507.
110 Cuellar, 553 U.S. at 565.
111 Cuellar, 553 U.S. at 565.
112 See United States v. Maher, 108 F.3d 1513, 1527 (2d Cir. 1997).
element discussed in subsections 1956(a)(1) and (c)(1) does not require that the defendant know exactly what crime generated the funds being laundered and further explains that the statute was designed to eliminate any such defense.”\textsuperscript{113} Therefore, I include cases alleging willful blindness in my analysis of permissible knowledge inferences from circumstantial evidence in the following section of this Article.

\section*{IV. MONEY LAUNDERING CASE STUDIES}

In order to develop an understanding of knowledge line in the context of money laundering prosecutions, I will detail a few representative cases in which circumstantial evidence was deemed to be sufficient to imply a defendant’s knowledge of the source of the funds, or intent in conducting the financial transaction, and a few in which it was not. Here, I do not differentiate between those cases in which knowledge is established through willful blindness and those in which it is established via evidence going toward defendant’s actual knowledge. Nor do I segregate § 1956 and § 1957 prosecutions. Of course, I do not maintain that the cases examined here are an exhaustive list of cases in which this issue was addressed, as this would be beyond the scope of this note (and sanity).\textsuperscript{114} Rather, I have taken those cases which fall near the line separating knowledge and ignorance, so far as this line may be determined.\textsuperscript{115}

\subsection*{A. Cases in which Circumstantial Evidence was Sufficient to Infer Knowledge}

\subsubsection*{1. United States v. Campbell\textsuperscript{116}}

In a prosecution under both § 1956 and § 1957, the government convicted a real estate agent on both counts based on the theory that she was willfully blind as to the


\textsuperscript{114} Cases not appearing in this note in which an appellate court found circumstantial evidence sufficient to support a defendant’s money laundering conviction include: Smith, 44 F.3d at 1265; United States v. Irvin, 656 F.3d 1151, 1165 (10th Cir. 2011); Huff, 641 F.3d at 1230; United States v. Mercedes, 283 Fed. Appx. 862, 864 (2d Cir. 2008); United States v. Blair, 2011 WL 4379370 (4th Cir. Sept. 21, 2011).

\textsuperscript{115} The Seventh Circuit has superficially addressed this issue, noting that successful money laundering prosecutions have in common the existence of more than one transaction, coupled with either direct evidence of intent to conceal or sufficiently complex transactions that such an intent could be inferred. In contrast, the cases in which money laundering charges have not succeeded are typically simple transactions that can be followed with relative ease, or transactions that involve nothing but the initial crime. Esterman, 324 F.3d at 572. However, this observation is unhelpful when attempting to unpack just what exactly “evidence of intent to conceal” means with regard to factual circumstances.

\textsuperscript{116} United States v. Campbell, 977 F.2d 854 (4th Cir. 1992).
source of her client’s money. Ellen Campbell was prosecuted following her representation of Mark Lawling, a drug dealer, in his purchase of a house in a transaction replete with red flags. At trial, Lawling, having admitted to being a drug dealer, testified to the effect that, because he could not obtain a bank mortgage, he reached an agreement with the sellers that the contract price would be lowered by $60,000, which he would pay them under the table in cash. The sellers agreed, and Campbell and the real estate agent representing the sellers executed a new contract which both lowered the sale price and increased the agents’ commission percentage correspondingly. At some point between this arraignment and the actual transfer, Campbell said to the other agent that she thought “the funds ‘may have been drug money.’” At the money transfer meeting prior to the closing, Campbell’s client arrived with $60,000 in cash “wrapped in small bundles and carried in a brown paper grocery bag,” and tipped both real estate agents “a couple of hundred dollars” each.

On appeal, the Fourth Circuit first confirmed that it was irrelevant that Campbell’s motive was to collect a commission, not to conceal drug proceeds, as “the relevant question is not Campbell’s purpose, but rather her knowledge of [her client’s] purpose.” It then established that there were really two questions of knowledge in the case: 1) whether Campbell was aware that the funds were derived from illegal activity, and 2) whether the transaction was designed for an illicit purpose. The court dismissed the latter inquiry easily, as “the fraudulent nature of the transaction itself provides a sufficient basis from which a jury could infer Campbell’s knowledge of the transaction’s purpose.” Proceeding to the other issue, whether Campbell was willfully blind as to the unlawful nature of her client’s funds, the court noted that “the evidence pointing to Campbell’s knowledge of [her client’s] illegal activities is not overwhelming.” However, it found “that the evidence of [the client’s] lifestyle, the testimony concerning Campbell’s statement that the money ‘might have been drug money,’ and the fraudulent nature of the transaction … were sufficient to create” a jury question, as a reasonable jury could have found her to be willfully blind, and thus reversed the district court’s judgment of acquittal on the money laundering charge.

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117 Campbell, 977 F.2d 854.
118 In addition to the details of the sale itself, evidence was introduced to show that Lawling drove two Porsches, had ample time to look at houses during normal business hours, and at one point showed her a briefcase full of cash to prove that he had the funds to purchase a house. Campbell, 977 F.2d at 855-56.
119 Campbell, 977 F.2d at 855-56.
120 Campbell, 977 F.2d at 856.
121 Campbell, 977 F.2d at 859.
122 Campbell, 977 F.2d at 856.
123 Campbell, 977 F.2d at 857-58.
124 Campbell, 977 F.2d at 858.
125 Campbell, 977 F.2d at 858.
126 Campbell, 977 F.2d at 858-59.
127 Campbell, 977 F.2d at 859.
2. United States v. Nickson

Michael Nickson was charged with mail fraud, tax fraud, money laundering, and structuring in connection with a scheme to defraud the City of Detroit. He pled guilty to all charges except for money laundering by way of purchasing a house in his girlfriend’s name, and was convicted by a jury on that count. On appeal he challenged the sufficiency of the evidence put forward to show his intent to conceal the illicit nature of the funds. The Sixth Circuit affirmed, noting that in addition from the inferences to be drawn from the fact that defendant kept his name out of the house purchase, “the jury could infer that, because defendant had [structured], he had a similar motive to conceal illegally obtained funds through the purchase of the property.” This inference, surprisingly, is rarely discussed in dual prosecutions of money laundering and structuring offenses.

3. United States v. Cedeño-Pérez

In 2003 and 2004, Immigration and Customs Enforcement (ICE) conducted an investigation into drug trafficking and money laundering offenses committed by a Columbian crime family, the Tolozas. As part of this investigation, an undercover ICE agent was able to pose as an associate of the Tolozas’ money launderers. In this role, the agent contacted defendant Juan Cedeño-Pérez, and offered his services as a money launderer. The agent then met defendant in a parking lot to transfer the funds, later testifying that defendant was unnerved by the presence of police nearby, but still transferred “$200,094, in twenty, ten, five, and one-dollar denominations, bound together with rubber bands and plastic straps.” After the transfer of the funds, Cedeño-Pérez called his boss to inform him that the transfer had taken place.

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129 Nickson, 127 Fed. Appx. at 771.
130 Nickson, 127 Fed. Appx. at 771.
131 Nickson, 127 Fed. Appx. at 772.
132 The court referenced circuit precedent establishing a non-exclusive list of types of evidence that could be used to demonstrate intent:

[...]

Nickson, 127 Fed. Appx. at 773-74 (quoting and adopting United States v. García–Emanuel, 14 F.3d 1469, 1475-76 (10th Cir.1994)).
133 Nickson, though six years old, has yet to be cited by any court.
134 Cedeño-Pérez, 579 F.3d at 55-56.
135 Cedeño-Pérez, 579 F.3d at 56.
136 Cedeño-Pérez, 579 F.3d at 56.
137 Cedeño-Pérez, 579 F.3d at 57.
138 So as to inform the boss that he was no longer responsible for the funds. Cedeño-Pérez, 579 F.3d at 57.
Cedeño-Pérez was convicted of conspiracy to commit money laundering, and appealed alleging insufficiency of evidence. The First Circuit rejected this argument, recognizing that the “jury could have reasoned that Cedeño’s use of code words and his concern about police detection reflected an awareness that the currency he was transferring derived from unlawful activity.” Such an inference would properly be supported by the circumstances surrounding the money transfer.

B. Cases in which Circumstantial Evidence was Insufficient to Infer Knowledge

1. United States v. McDougald

Bobby McDougald was convicted of money laundering for purchasing a car in his name for a friend of a friend, allegedly with the latter’s drug proceeds. McDougald’s close family friend, Ronald Watts, asked McDougald if he would drive to California from Ohio to pick up Eddie McFadden, one of Watts’ associates who ran a cocaine distribution ring in California. Apparently in order to visit his granddaughter in California, McDougald agreed, and drove McFadden, a federal fugitive, back to Ohio. No evidence was introduced to show that McDougald knew of Watts and McFadden’s involvement with drugs. Soon after McDougald arrived back in Ohio, Watts asked McDougald if he would purchase a car for McFadden. McDougald agreed, and took $10,000 in cash from McFadden to buy the car, registering it in his own name. The only evidence offered to show that the cash was drug money was the fact that McFadden was a drug dealer, and that the transaction was designed to conceal the identity of the true owner of the funds. The evidence of McDougald’s knowledge of the source of the money was: “(1) McFadden and Watts were drug dealers; (2) McDougald spent time with McFadden and Watts, and was especially close to Watts; (3) McDougald acquiesced in the suspicious acquisition of the [car]” and certain inconsistent statements of McDougald.

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139 Cedeño-Pérez, 579 F.3d at 57-58.
140 Cedeño-Pérez, 579 F.3d at 59.
141 Cedeño-Pérez, 579 F.3d at 59.
142 United States v. McDougald, 990 F.2d 259 (6th Cir. 1993).
143 McDougald, 990 F.2d at 259-60.
144 Watts and his wife referred to McDougald as “Uncle Bobby,” yet testified against him at trial. McDougald, 990 F.2d at 260.
145 McDougald, 990 F.2d at 259-60.
146 Indeed, the only testimony on this point referred to an incident in which Watts started to smoke marijuana in McDougald’s car, only to have McDougald pull his car over and tell Watts to “never have drugs in his presence again.” McDougald, 990 F.2d at 259-60.
147 McDougald, 990 F.2d at 259-60.
148 McDougald, 990 F.2d at 259-60.
149 McDougald, 990 F.2d at 261.
150 McDougald inexplicably made up an incredible story which he told on the stand at trial, and which differed from the testimony of all other witnesses and the statements that he had told investigating officers. McDougald, 990 F.2d at 261-62.

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The Sixth Circuit found the evidence insufficient to prove either that the money used to purchase the car actually was drug money or that McDougald knew that the money was ill-gotten (if, indeed, it was). The Sixth Circuit rejected each of the government’s arguments in turn. First, it was immaterial if Watts and McFadden were actually drug dealers if McDougald did not know this. Second, without affirmative indication that McDougald knew of their activities, the circumstantial evidence in this case went only to the impermissible inference of “guilt by association.” Third, “the suspicious nature of the car purchase also provides little evidence of knowledge,” as McFadden could have had a variety of motives in concealing his assets in this manner. Lastly, though McDougald’s inconsistent statements may have indicated knowledge at the time he was questioned, this was not sufficient to show that his guilty knowledge was concurrent with his conduct.

2. United States v. Law

William Farrell was the leader of a cocaine distribution ring which operated out of several buildings across Washington, D.C. In connection with his narcotics business, Farrell controlled an apartment building owned in name by a co-conspirator of his, but that Farrell managed operationally, collecting rent from the tenants and paying the mortgage, but in the legal owner’s name. Farrell was convicted of numerous drug offenses, including money laundering for these mortgage payments. Farrell appealed, arguing that the government had not met its burden to show that his purpose in making the payments was to conceal the source of the funds, and the District of Columbia Circuit agreed.

The court, though finding that the money had indeed been illegally derived, held that there was insufficient evidence to infer that defendant’s intent in paying the mortgage had been to launder the money, rather than simply to maintain the building so as to continue to be able to deal drugs from it and profit from the rental income. While making payments in another’s name may be a method by which one can launder money, it is not converted into money laundering without an intent to conceal an aspect.

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151 McDougald, 990 F.2d at 262 (“Even if there were sufficient proof that the $10,000 was drug money, there is insufficient evidence that McDougald knew its source.”).
152 McDougald, 990 F.2d at 262. (noting that drug dealers do not necessarily share this aspect of their lives with their families).
153 McDougald, 990 F.2d at 262.
154 McDougald, 990 F.2d at 262.
155 McDougald was first questioned about the car purchase about one month after Watts was arrested for conspiracy to distribute cocaine. McDougald, 990 F.2d at 262-63.
156 United States v. Law, 528 F.3d 888 (D.C. Cir. 2008).
157 The court of appeals addressed arguments from Farrell’s co-defendants as well, but these do not relate to the money laundering offense. Law, 528 F.3d at 894-95.
158 Law, 528 F.3d at 895.
159 Law, 528 F.3d at 895.
160 Law, 528 F.3d at 895.
161 Law, 528 F.3d at 896.
of the funds. Here, the defendant’s legitimate benefits gained from paying the mortgage and the convenience of paying the mortgage in the name of the mortgagor negated such an inference. The court then rejected the government’s two other inferences (Farrell thought he was acquiring a property interest in the building, and Farrell refused to pay maintenance costs for the building) as not going to show an intent to conceal, and thus immaterial.

3. Cuellar

As discussed supra, the Supreme Court in Cuellar held that, in order to convict under the transportation section of § 1956, the government must show that the purpose of his transactions was to conceal, as opposed to merely showing that the transactions had the effect of concealing aspects of the funds. The Court held that the extensive evidence that the defendant had concealed the cash in order to transport it (by hiding it under the floorboards and covering it with animal hair to throw off currency-detecting dogs), was not by itself sufficient to infer the necessary mental state of intent to conceal. Justice Alito, in concurrence, explored the knowledge issue, noting that an intent to conceal could have been inferred if evidence had been introduced to show that transporting the money in this fashion would have the effect of obscuring its origins, and the people who designed the transaction knew of this effect. Such evidence would then permit the jury to infer: 1) the people who designed the transaction intended the transaction to conceal an aspect of the transactions, and 2) the defendant knew that the transaction had such a design, thus giving him the requisite mens rea for conviction.

C. Lessons

The most useful contrast between the above cases is that between Campbell and McDougald. In both, the government built its case of knowledge on two factors: the fact that the supplier of the funds was in fact a self-admitted drug dealer, and that the transaction at issue was itself fraudulent. As Campbell’s conviction was upheld, and McDougald’s was overturned, the difference between the two lies in the power of the additional circumstantial evidence tending to show knowledge. In Campbell, such an inference was justified from evidence tending to show that, simply put, Lawling acted like a drug dealer. That Lawling drove two Porsches, was available during business

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162 Law, 528 F.3d at 897.
163 Law, 528 F.3d at 897.
164 Law, 528 F.3d at 897.
165 Cuellar, 553 U.S. 550.
166 Cuellar, 553 U.S. at 565.
167 Cuellar, 553 U.S. at 553-54.
168 Cuellar, 553 U.S. at 569 (Alito, J., concurring).
169 Cuellar, 553 U.S. at 569.
170 Campbell, 977 F.2d at 855-56 (falsified closing documents); McDougald, 990 F.2d at 269 (falsified car title).
171 Campbell, 977 F.2d at 855-56.
hours, and carried the $60,000 to the exchange in a paper bag, coupled with the fraudulent nature of the transaction itself, certainly supported an inference that Campbell knew what she was getting herself into.\textsuperscript{172} In McDougald’s case, on the other hand, the evidence more rationally supported an inference that McDougald was taken advantage of by Watts than that McDougald was an active participant in Watts’ criminal enterprise.\textsuperscript{173}

When determining which inference of several rational possibilities to draw, it is essential to keep the government’s burden in mind. The government comes up short if “circumstantial evidence … is as hospitable to an interpretation consistent with [] innocence as with the government’s theory of guilt.”\textsuperscript{174} This is especially true when the defendant puts forward an innocent explanation which is sufficiently supported by the evidence.\textsuperscript{175} Though it need not disprove every inference other than guilty, when a defendant shows an alternative innocent explanation, the government must put forward enough evidence to dispel at least this particular doubt.

A last issue to mention with regard to the prosecution of money laundering offenses is the care a prosecutor should take to charge the defendant with the appropriate statutory violation to match his conduct, as the different subsections of § 1956 require proof of different elements. Post-Cuellar, depending on the circuit, this might include a shift upward in required \textit{mens rea}, requiring proof of intent to conceal, rather than mere effect of concealment. For example, the Seventh Circuit discussed this issue in \textit{United States v. Adams}, a prosecution of a cash courier:

But as the parties agree, [though evidence supported an inference that Bowline knew that the transactions involved drug proceeds] the record contains no evidence that Bowline appreciated that the purpose of the money order purchases was to promote continued marijuana trafficking, such that the jury could infer that she and Adams were conspiring to launder money with that aim. … Proof along those lines is indispensable to a [ ] conviction under the promotion prong of the statute.\textsuperscript{176}

\textbf{V. STRUCTURING}

There are two statutes which criminalize avoidance of federal reporting requirements. 31 U.S.C. § 5324 criminalizes structuring, and 31 U.S.C. § 5322 is a catch-all statute, providing a criminal penalty for all other ways in which the federal reporting requirements may be avoided or falsified.\textsuperscript{177} Like money laundering, the caselaw relating to these offenses does not stringently differentiate between the two, and so neither will I after I have introduced the statutes. Additionally, though § 5322

\begin{flushleft}
\textsuperscript{172} Campbell, 977 F.2d at 859.\\
\textsuperscript{173} McDougald, 990 F.2d at 262.\\
\textsuperscript{174} McDougald, 990 F.2d at 263.\\
\textsuperscript{175} See \textit{Law}, 528 F.3d at 895.\\
\textsuperscript{176} United States v. Adams, 625 F.3d 371, 381 (7th Cir. 2010) (emphasis added).\\
\end{flushleft}
criminalizes a wide variety of behaviors, I will use the term “structuring” loosely to refer to both smurfing and reporting requirement avoidance writ large.


Pertinent to my purposes, § 5324(a) criminalizes the practice known as structuring or smurfing, described supra. In order to successfully prosecute a § 5324(a) violation, the government must prove that, acting with the purpose to evade or falsify a federally mandated reporting requirement, the defendant 1) caused or attempted to cause an institution to fail to file the applicable report (imperfect structuring), 2) caused or attempted to cause an institution to file a report with material misstatements of fact, or 3) structure or assist in structuring or attempt to do so (perfect structuring – no reports filed).

What is required of a § 5322 prosecution is similar. The government must prove the same mens rea, that the defendant acted with the purpose to evade or falsify a federally mandated reporting requirement, and must also prove that his act had the actual effect of violating a reporting requirement issued under the subchapter.

The unit of prosecution in these violations is the entirety of the funds which would have triggered a reporting requirement, not, for example, each small transaction within the overall pattern of structuring. As the Seventh Circuit has observed, the “statute does not forbid the making of deposits. It forbids the structuring of a transaction.”

For prosecution of either § 5324 or § 5322, the government must prove that the defendant 1) engaged in structuring or other violation of the subchapter, 2) with knowledge of the applicable federally mandated reporting requirements, and 3) with the intent to evade the reporting requirement. This last element represents the willfulness mens rea embodied in the statutes, and is what is most commonly litigated in these cases.

B. Supreme Court Structuring Jurisprudence

178 Other subsections of § 5324 criminalize evasion of or causing a material misrepresentation of fact in reports required of nonfinancial businesses and reports required when exporting or importing monetary instruments. 31 U.S.C.A. §§ 5324(b)-(c). However, discussion of these subsections is beyond the scope of this note.


180 31 U.S.C.A. § 5322. Though this section may, obviously, be used to prosecute a wide variety of evasive techniques, its most common application is to bulk cash smuggling.

181 United States v. Davenport, 929 F.2d 1169, 1171 (7th Cir. 1991) (remarking that an alternative interpretation would cause the “weird result that if a defendant receives $10,000 and splits it up into 100 deposits he is ten times guiltier than a defendant who splits up the same amount into ten deposits.”).


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The Supreme Court has only ruled on the anti-structuring statutes once, in *Ratzlaf v. United States*. In *Ratzlaf*, the Court interpreted “willfulness” to require a showing not only that the defendant knew of and intended to evade reporting requirements, but also that the defendant knew that structuring was itself a crime. Justice Ginsburg, writing for the Court, predicated her interpretation in part on the premise that if Congress had wanted to predicate criminal liability on a lower *mens rea* showing, it could have done so. Within the year, Congress did just that, enacting amendments to § 5324 and § 5322 which exempted § 5324 violations from the provisions of § 5322 in favor of establishing a penalty provision within § 5324 itself without willfulness as an element of the offense.

Under the current iteration of the statute, the government must prove that the defendant was aware that federal law mandates the filing of certain reports, and that he acted for the purpose of evading those reporting requirements, but it does not have the additional burden of showing that the defendant knew that evading reporting requirements was itself illegal. Additionally, the government carries no burden of showing that the structuring was carried out to facilitate money laundering or another “nefarious” purpose.

However, one heightened scienter requirement does survive the congressional overruling of *Ratzlaf*, the requirement that a defendant know that the reporting requirements are federally mandated. A defendant may succeed on a defense that he believed that he was acting to avoid internal bank reports. The doctrine of willful blindness is of limited utility in the context of structuring offenses, as successful prosecution of structuring requires proof of intent, and willful blindness is only an alternative way to prove knowledge.

**VI. STRUCTURING CASE STUDIES**

As with money laundering, I will now examine a representative sample of cases in which circumstantial evidence was or was not deemed sufficient to infer criminally

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185 *Ratzlaf*, 510 U.S. at 136.
186 *Ratzlaf*, 510 U.S at 146.
187 See *MacPherson*, 424 F.3d at 188-89; see also Riegle Community Development and Regulatory Improvement Act of 1994 § 411, Pub. L. No. 103-325, 108 Stat. 2160, 2253 (codified as amended at 31 U.S.C. §§ 5322(a), (b), 5324(c)).
188 See United States v. Ismail, 91 F.3d 50, 56 (4th Cir. 1996); United States v. Wrobel, 142 F.3d 447 (9th Cir. 1998) (unpublished); United States v. Sutton, 387 Fed. Appx. 595, 599 (6th Cir. 2010); United States v. Varanese, 417 Fed. Appx. 52, 56 (2d Cir. 2011) (citing United States v. Dichne, 612 F.2d 632, 636 (2d Cir. 1979)).
189 See *MacPherson*, 424 F.3d at 185 n.2 (recognizing that “[m]otive if not an element of the crime”); see also United States v. Tipton, 56 F.3d 1009, 1012 (9th Cir. 1995).
190 See United States v. Dollar Bank Money Market Account No. 1591768456, 980 F.2d 233 (3rd Cir. 1992) (*mens rea* negated where defendant admitted to structuring behaviors, but was unaware of federal CTR filing requirements).
191 See *Dollar Bank Money Market Account No. 1591768456*, 980 F.2d 233.

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culpable knowledge and/or intent. Here, the pertinent issue will generally be an inference of intent to evade, rather than the inferences going to knowledge, the issue generally litigated in money laundering offenses. On this issue, more appellate courts have found structuring evidence to be sufficient than not.\textsuperscript{192}

\section*{A. Cases in which Circumstantial Evidence was Sufficient to Infer Knowledge}

1. \textit{United States v. Davenport}\textsuperscript{193}

In \textit{United States v. Davenport}, the defendants were a husband and wife who had been convicted under § 5324(3).\textsuperscript{194} Starting with a cash hoard of over $100,000,\textsuperscript{195} they deposited a total of $81,500 over a period of two weeks in ten transactions occurring at multiple branches of the two banks at which they had accounts.\textsuperscript{196} After being \textit{Mirandized}\textsuperscript{197} by IRS Agents, both Davenports identified the source of the funds as an inheritance from Mr. Davenport’s late father, though Ms. Davenport claimed that they had received a check, and Mr. Davenport that they had discovered the cash in a safe after his father’s death.\textsuperscript{198} At trial, however, evidence was presented to show that Mr. Davenport’s father died in poverty.\textsuperscript{199} The Seventh Circuit affirmed defendants’ convictions.\textsuperscript{200} Judge Posner, writing for the court, explained that the probable unlawful source of the funds, though not technically an element of the offense, was nevertheless relevant, as “[t]he shadier the source, the greater the Davenports’ motive to conceal the money from the authorities by taking measures to thwart the reporting requirements.”\textsuperscript{201} As it is the motive to conceal that the anti-structuring statute condemns, circumstantial evidence going toward that motive can support an inference of an intent to evade.\textsuperscript{202} Posner concluded his analysis with the following observation: “the fishiness of the inheritance story was circumstantial evidence that the structuring was done with the evasive purpose that the statute requires for liability.”\textsuperscript{203}

\textsuperscript{192} Cases in which circumstantial evidence was deemed to be sufficient for a structuring conviction, yet which do not appear in this note include: United States v. Simon, 85 F.3d 906 (2d Cir. 1996); United States v. Beidler, 110 F.3d 1064 (4th Cir. 1997); United States v. Nersesian, 824 F.2d 1294 (2d Cir. 1987); United States v. Dashney, 117 F.3d 1197 (10th Cir. 1997).

\textsuperscript{193} Davenport, 929 F.3d 1169.

\textsuperscript{194} Davenport, 929 F.3d at 1171.

\textsuperscript{195} Of unknown origin, though of course the government need not show that the cash used to structure was unlawfully obtained in order to successfully prosecute structuring violations. Davenport, 929 F.3d at 1171.

\textsuperscript{196} Davenport, 929 F.3d at 1171.


\textsuperscript{198} Davenport, 929 F.3d at 1171.

\textsuperscript{199} Trial evidence was also introduced to show that defendants had made cash deposits of $9,000 and $16,000 nineteen months before the deposits at issue in the case. Davenport, 929 F.3d at 1171.

\textsuperscript{200} Davenport, 929 F.3d at 1175.

\textsuperscript{201} Davenport, 929 F.3d at 1173-74.

\textsuperscript{202} Davenport, 929 F.3d at 1174.

\textsuperscript{203} Davenport, 929 F.3d at 1174.
2. United States v. Marder

In United States v. Marder, the defendant was convicted of structuring funds he obtained through operation of an illegal video poker gambling enterprise. The First Circuit determined that “any claim of lack of knowledge ... tends to be belied by defendant’s conduct.” Marder had instructed his wife to purchase $11,460 of cashier’s checks in three separate transactions at three separate banks. The court noted that breaking up the deposits more than the minimum necessary to avoid reporting requirements was circumstantial evidence of concealment, and that “proof of concealment tends to prove knowledge of illegality.”

Pertinently to my purposes, the court spoke to another permissible inference arising from the evidence: “it certainly would make sense for a person cognizant of the reporting requirement ... to make two separate purchases at two separate banks ... in order to obtain $11,460 without triggering a report to the IRS.” It is this last inference of intent to evade inferred from evidence of structured transactions themselves which is at the heart of most structuring prosecutions.

3. United States v. Cassano

The case against Angelo Cassano for structuring violations emerged from a complex embezzlement scheme of a large insurance company, headed by Clarence Cross, a mailroom supervisor with authority to pay vendors up to $1,000 for services rendered. Cross exploited this power, drawing checks on the company account to send to sham corporations he created. Somehow he was able to escape detection for two years, during which time he issued himself 400 checks totaling $3,800,000. These were paid directly into the accounts of the sham corporations, and Cross would then write checks to cash from the corporate accounts.

As he managed to send himself checks at such a prodigious rate, Cross soon employed associates to help him cash out the corporate accounts. When one of these associates, William White, learned he would have to go back to prison, and thus could not cash the checks, he put Cross in touch with Cassano. White had apparently

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204 United States v. Marder, 48 F.3d 564 (1st Cir. 1995).
205 Marder, 48 F.3d at 566.
206 This case was decided under a Ratzlaf standard, but its treatment of permissible inferences of an intent to evade reporting requirements has utility in the modern jurisprudence as well. Marder, 48 F.3d at 574.
207 Marder, 48 F.3d at 574.
208 Marder, 48 F.3d at 574.
209 Marder, 48 F.3d at 574 (emphasis added).
211 Cassano, 372 F.3d at 871.
212 Cassano, 372 F.3d at 871.
213 Cassano, 372 F.3d at 871.
214 Cassano, 372 F.3d at 871-72.
215 Cassano, 372 F.3d at 871-72.
informed Cassano that he [White] had been cashing the checks for a friend going through a divorce and trying to hide assets from his wife.\textsuperscript{216} Cassano agreed to take over White’s check cashing obligations, and continued to do so after White’s release from custody, around which time White agreed to pay Cassano $100-$500 per check.\textsuperscript{217} Cassano, for his part, “took great care in making sure that all the checks cashed … were in denominations less than $10,000,” and categorically refused to sign any checks cashed, though this was the standard procedure for parties presenting second-party checks.\textsuperscript{218}

Cassano appealed his structuring conviction, arguing that he lacked an intent to evade because he did not determine the denominations of the checks he cashed.\textsuperscript{219} The Seventh Circuit rejected this argument, noting that a jury could have reasonably concluded that Cassano himself filled in the check amounts while White was in prison.\textsuperscript{220} Additionally, evidence was introduced to show that Cassano, would have known of the reporting requirements because of his line of work.\textsuperscript{221} Finally, and most compellingly, “it is unlikely, to the point of absurdity, that it was pure coincidence that all fifty-one checks cashed by Cassano were in denominations under $10,000.”\textsuperscript{222} This final inference is most important, as it implies that structuring itself, at least where conducted on as grand a scale as here, may provide sufficient circumstantial evidence to demonstrate knowledge of the reporting requirements and an intent to evade them.

4. United States v. Van Allen\textsuperscript{223}

Melvin Van Allen, “erstwhile mayor of the Village of Justice, Illinois, made a living in the used auto parts business, purchasing parts from junkyards and reselling [them] to auto rebuilders.”\textsuperscript{224} In the two year time frame at issue in Van Allen’s prosecution, he and members of his family made over 1,000 cash deposits into his business account, totaling over $5.5 million, and wrote 3,000 checks drawing more than $5.8 million out of the same account.\textsuperscript{225} Only three of these transactions were in amounts over $10,000.\textsuperscript{226} Van Allen explained this behavior as an innocent byproduct of a cash business and a desire to “‘avoid the aggravation’ of filing extra paperwork.”\textsuperscript{227}

\textsuperscript{216} Cassano, 372 F.3d at 872.
\textsuperscript{217} Cassano, 372 F.3d at 872.
\textsuperscript{218} Cassano, 372 F.3d at 873.
\textsuperscript{219} Cassano, 372 F.3d at 878.
\textsuperscript{220} Cassano, 372 F.3d at 879
\textsuperscript{221} Cassano was in the restaurant business, and at trial “Frank Amanti (one of the original co-defendants and [also] a restaurant owner), testified that the $10,000 IRS reporting threshold was common knowledge in the restaurant business.” Cassano, 372 F.3d at 873.
\textsuperscript{222} Cassano, 372 F.3d at 879.
\textsuperscript{223} United States v. Van Allen, 542 F.3d 814 (7th Cir. 2008).
\textsuperscript{224} Van Allen, 542 F.3d at 817.
\textsuperscript{225} Van Allen, 542 F.3d at 817-18.
\textsuperscript{226} Van Allen, 542 F.3d at 818.
\textsuperscript{227} Van Allen, 542 F.3d at 817.
The Seventh Circuit rejected defendant’s contentions that his pattern of structured transactions was explained by the nature of his business.\textsuperscript{228} Citing Cassano, the court noted that the “sheer volume of the transactions almost compels the conclusion reached by the jury.”\textsuperscript{229} Another factor the court weighted heavily was the “irrational and inefficient nature of the transactions; Van Allen paid almost $100,000 in check-cashing fees at one of the currency exchanges.”\textsuperscript{230} It recognized that this “sacrifice [of] efficiency and convenience [including] paying the exorbitant transaction fees by going to separate banks in the same day to make almost identical deposits supports the inference that he knew of and intended to avoid the reporting requirements.”\textsuperscript{231} Again, though there was other evidence in the case pointing to Van Allen’s intent to evade the reporting requirements, the most persuasive circumstantial evidence supporting this inference was in the form of evidence of structuring itself.

5. \textit{United States v. MacPherson}\textsuperscript{232}

Perhaps the most-cited case regarding inferences of intent to evade reporting requirements from evidence of structuring is \textit{United States v. MacPherson}, a Second Circuit opinion.\textsuperscript{233} Defendant MacPherson, a New York City police officer, received supplemental income from renting out real estate holdings.\textsuperscript{234} In order to shield himself from possible damages relating to a tort suit in which he was a defendant, MacPherson liquidated many of his assets, selling several properties and withdrawing $220,000 in cash from a bank account.\textsuperscript{235} After settling the suit, MacPherson, in a series of thirty-two transactions over a four month period, each in amounts lower than $10,000, deposited $258,100 in cash into three bank accounts.\textsuperscript{236}

The Second Circuit employed the logic of \textit{United States v. Nersesian},\textsuperscript{237} a pre-Ratzlaf case in which evidence of structured transactions was used to support an inference that the defendant was aware of and acted to avoid relevant reporting requirements.\textsuperscript{238} The court extended this logic to MacPherson, who was aware of the reporting requirements, as his large cash withdrawals prior to the structuring had triggered the filing of a CTR, which was filled out in his presence by the bank employee, and who, once learning of this, chose to deposit his cash in a series of small

\begin{itemize}
\item \textsuperscript{228} Van Allen, 542 F.3d at 820.
\item \textsuperscript{229} Van Allen, 542 F.3d at 820.
\item \textsuperscript{230} Van Allen, 542 F.3d at 820.
\item \textsuperscript{231} Van Allen, 542 F.3d at 820 (citing MacPherson, 424 F.3d at 195).
\item \textsuperscript{232} MacPherson, 424 F.3d at 183.
\item \textsuperscript{233} MacPherson, 424 F.3d at 195 (holding “that a pattern of structured transactions … may, by itself, permit a rational jury to infer that a defendant had knowledge of and the intent to evade currency reporting requirements”).
\item \textsuperscript{234} MacPherson, 424 F.3d at 184-85.
\item \textsuperscript{235} MacPherson, 424 F.3d at 185.
\item \textsuperscript{236} MacPherson, 424 F.3d at 185.
\item \textsuperscript{237} Nersesian, 824 F.2d at 1314-15 (holding that the “jury could have inferred from the fact that [defendant structured his transactions], rather than [conduct] a single transaction or several larger transactions, that he knew of the reporting requirements and was attempting to avoid them”).
\item \textsuperscript{238} MacPherson, 424 F.3d at 190-91 (citing Nersesian, 824 F.2d at 1314-15).
\end{itemize}
deposits. MacPherson’s “willingness to sacrifice efficiency and convenience in depositing a quarter-million dollars through multiple small transactions ... supported a reasonable inference that MacPherson knew of and was intent on avoiding CTR reporting requirements.” It is this factor of sacrificing “efficiency and convenience” which is often relied upon to support an inference of intent in structuring prosecutions.

B. Cases in which Circumstantial Evidence was Insufficient to Infer Knowledge

1. United States v. Ismail

In *United States v. Ismail*, the government prosecuted four defendants for numerous offenses surrounding an informal currency transfer business in which funds were transferred from the United States to Pakistan. On appeal, the Fourth Circuit upheld most of the convictions, but reversed the structuring convictions of two defendants. The government’s evidence in support of its § 5324 prosecution essentially consisted of three facts: 1) the defendants engaged in a pattern of structured transactions, 2) they did so after a bank employee told them that she would have to file a report because they were attempting to deposit over $10,000, and 3) that on one occasion a defendant (without a strong command of English) told this same bank employee “no report” when she informed him that she would still have to file a report if he deposited $9,800 each into two separate accounts on the same day.

The court of appeals deemed such evidence insufficient to prove an intent to evade the reporting requirements, particularly in light of the evidence put forward by defendants offering a rationale for their behavior. The defendants had no special expertise with CTRs or American banking, and made no effort whatsoever to hide their structured transactions, usually conducting business with the same bank teller. Additionally, the bank teller had “expressly informed [defendants] that she would not have to file a report if two people made deposits under $10,000 into separate accounts,” yet for whatever reason she did not also inform them that structuring carried with it

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239 *MacPherson*, 424 F.3d at 191.

240 *MacPherson*, 424 F.3d at 191 (emphasis added).

241 See, e.g., *Van Allen*, 524 F.3d at 820, discussed supra. A similar rationale appears in money laundering cases, as seen supra in *Law*, where evidence that defendant gained “present benefits” from paying a mortgage under a different name negated an inference that his actions were taken in order to conceal the nature of the funds. *Law*, 528 F.3d at 896-97 (holding that the government’s evidence was insufficient to exclude defendant’s innocent explanations).

242 *United States v. Ismail*, 97 F.3d 50 (4th Cir. 1996).

243 The successful prosecutions were brought regarding other aspects of this transnational scheme too complex (and frankly, ingenious) to explain here. *Ismail*, 97 F.3d at 52.

244 Though this is a *Ratzlaf*-era decision, the pertinent holding relates to knowledge of the federal reporting requirements, which remains an element of § 5324 post-*Ratzlaf* fix. *Ismail*, 97 F.3d at 52.

245 *Ismail*, 97 F.3d at 53.

246 *Ismail*, 97 F.3d at 58-59.

247 *Ismail*, 97 F.3d at 59.
negative ramifications. All this was too much for the Fourth Circuit, which held that the government had fallen short of its burden to prove willfulness.

2. Gallagher’s 2000

A recent district court opinion dismissing a civil forfeiture action against the owners and operators of Gallagher’s 2000, a profitable strip club, following a bench trial “on the question of knowledge and intent” contains a similar discussion of when a defendant’s alternative explanation for his structured transactions defeats an inference of intent to evade. The government filed suit to recover nearly a million dollars it maintained were structured in order to avoid IRS attention, predating its case on 1) the transactions themselves, 2) a witness (found to be incredible) who testified as to the purported motive, and 3) a letter from the claimant’s former bank terminating his account for suspected structuring activity, which the claimant maintained he never received.

The claimant account holders explained their transactions as the result of taking in a lot of cash and maintaining an ATM on premises. Specifically, the general manager of the club “explained his $8,000 deposits as just a matter of routine, just a ‘number that he felt comfortable going to the bank with,’ partly because TD Bank had to count the cash by hand,” and additionally explained that he deposited cash in $50s and $100s because, unlike the $20s and $1s which he needed to maintain in stock at the club, he had no business use for large denominations.

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248 Ismail, 97 F.3d at 59.
249 Ismail, 97 F.3d at 59.
250 United States v. Sixty-one thousand nine hundred dollars & no cents ($61,900.00) seized from account number XXXXXXX4429 held in the name of PRP Rest., Inc., 10 CIV. 1866 BMC, 2011 WL 3583209 (E.D.N.Y. Aug. 15, 2011). For simplicity’s sake, I will refer to this case as Gallagher’s 2000, the name of the strip club targeted.
251 Gallagher’s 2000, 10 CIV. 1866 BMC, at *1.
252 The district court was vociferous in its rejection of this witness’ testimony:
      Johnson was not a convincing witness, and I do not credit his testimony and his many allegations against PRP. If he did not admit to perjury at trial, he came close; certainly, he was misleading to the Government and to the Magistrate Judge when the Government retained counsel for him. He also admitted that he had a vendetta against Potenza—indeed that he hated him; that he tried to blackmail Ms. Potenza; that he had a motive to get back at PRP, which fired him, has sued him, cancelled his insurance, and is attempting to collect on a loan; and that he has a reason to testify favorably for the Government as he has an expectation—whether or not reasonable—that the Government will be forgiving when it comes to prosecuting him. This is all to say nothing of his repeated invocation of the Fifth Amendment, which undoubtedly was meant to protect not only his credibility, but limited his testimony about PRP’s revenue. For all of these reasons, to the extent that his testimony is challenged by other witnesses, I reject it.
Gallagher’s 2000, 10 CIV. 1866 BMC, at *3.
253 Gallagher’s 2000, 10 CIV. 1866 BMC, at *1.
254 Gallagher’s 2000, 10 CIV. 1866 BMC, at *1.
255 Gallagher’s 2000, 10 CIV. 1866 BMC, at *8.
In language reflecting the *MacPherson* inquiry, the court determined that the otherwise permissible inference of intent to evade from evidence of structuring was not warranted in cases like the one before it, where the defendant had “provided a credible and logical explanation” for his transactions which was not discredited by government evidence. The court cited *MacPherson*: “[t]he permissible inference of structuring is therefore not a logical one to make in this case; there is no evidence of Potenza’s ‘willingness to sacrifice efficiency and convenience’ in making these deposits.” Specifically, the court noted that, this defendant conducted the structured transactions for efficiency and convenience, not despite a sacrifice of efficiency and convenience.

D. Lessons

In each case in which intent to evade was contested, the court weighing the circumstantial evidence employed the *MacPherson* factors of whether the pattern of transactions was conducted at the expense of efficiency and convenience to come to a decision. Though this is one step shy of finding that evidence of structured transactions equates to an intent to evade the reporting requirements, it comes close, as the process of structuring is by its very nature inefficient and inconvenient. Structuring prosecutions based on circumstantial evidence thus are functionally equivalent to a burden-shifting regime. Because undertaking a structuring process is onerous, if the government can put forward evidence of a pattern of structured transactions, this will generally satisfy the *MacPherson* inquiry, and will support an inference of intent to evade a reporting requirement. In order to rebut this, the defendant must show that the structuring behavior was actually more convenient than the alternative, or that he otherwise lacked sufficient knowledge and understanding of the federal reporting requirements to have developed an intent to evade them.

VI. SENTENCING

Sentencing for federal money laundering and structuring violations is, like other federal criminal law, subject to the Federal Sentencing Guidelines as interpreted by *Booker*. The federal system follows a “real-offense model, basing punishment decisions upon the defendant’s actual conduct as opposed to” the offense of conviction.

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256 Gallagher’s 2000, 10 CIV. 1866 BMC, at *13
257 Gallagher’s 2000, 10 CIV. 1866 BMC, at *13 (citing MacPherson, 424 F.3d at 191).
258 Gallagher’s 2000, 10 CIV. 1866 BMC, at *13.
259 Davenport, 929 F.2d at 1171-75 (defendants made ten deposits over two weeks); Marder, 48 F.3d at 574 (hypothesizing that a person attempting to avoid the reporting requirement would make two purchases at two different banks); Cassano, 372 F.3d at 879 (coincidence would be unlikely to the point of absurdity); Van Allen, 524 F.3d at 820 (“irrational and inefficient” transactions made even more onerous by the payment of almost $100,000 in check-cashing fees over the period of structuring); MacPherson, 424 F.3d at 185 (32 transactions over a four month period); Name of People, 2011 WL, at *8 (explaining the pattern of transactions as necessary to accommodate the needs of a cash-intensive business).
260 Booker, 543 U.S. 220 (rendering Guidelines advisory).
Therefore, a sentencing judge must account for all of a defendant’s conduct, charged and uncharged, convicted or not. The sentencing procedure is fairly standard across the federal system, as the circuits part ways only with regard to standards of appellate review of district court sentencing decisions. The Ninth Circuit, in Carty, thoroughly detailed a post-Booker sentencing process for the circuit which reflects modern federal sentencing procedure writ large. Among other requirements, a sentencing judge in the Ninth Circuit must:

- Begin with a correct calculation of the applicable Guidelines range. This may be from a Presentence Report properly prepared by the Probation Office.
- Allow the parties to argue for a sentence they believe to be appropriate.
- Consider the § 3553(a) factors: “the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed; the kinds of sentences available; the kinds of sentence and the sentencing range established in the Guidelines; any pertinent policy statement issued by the Sentencing Commission; the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and the need to provide restitution to any victims.”
- Not presume that a within-Guidelines range is reasonable.
- After an “individualized determination based on the facts,” and considering the justification supporting a possible departure from the Guidelines, sufficiently explain the selected sentence to allow for meaningful appellate review.

At a sentencing hearing, “no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a Court of the United States may receive and consider for the purpose of

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261 Elizabeth T. Lear, Double Jeopardy, the Federal Sentencing Guidelines, and the Subsequent-Prosecution Dilemma, 60 Brook. L. Rev. 725, 729 (1994)
262 Lear, supra note 261, at 729-30.
263 See Rita v. United States, 551 U.S. 338, 346 (2007) (noting that “the Circuits are split as to the use of a presumption of reasonableness for within-Guidelines sentences” and affirming that such a presumption is permissible); see also Gall v. United States, 552 U.S. 38, 47 (2007) (rejecting the Eighth Circuit’s appellate standard of review presuming sentences outside of the Guidelines range to be unreasonable); Kimbrough v. United States, 552 U.S. 85, 93 (2007) (rejecting the Fourth Circuit’s presumption of unreasonableness for outside-Guidelines sentences based on a disagreement with the crack/cocaine sentencing disparity).
264 United States v. Carty, 520 F.3d 984 (9th Cir. 2008).
265 Carty, 520 F.3d at 990-93.
266 Carty, 520 F.3d at 990-93 (establishing a deferential standard of appellate review setting aside only “procedurally erroneous or substantively unreasonable” sentences); 18 U.S.C.A. § 3553(a)(1)-(7).
imposing an appropriate sentence.”

When fact-finding, the judge is bound by no evidentiary rules, and may find by a preponderance of the evidence any fact except a “fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum.” To prevent violation of a defendant’s Sixth Amendment jury trial rights, a fact used to depart above the maximum statutorily prescribed sentence must be either admitted by the defendant or proved to a jury beyond a reasonable doubt.

Before any federal defendant is sentenced, the judge should perform a Guidelines calculation on the record. A Guidelines calculation consists of determining the base offense level for the offense, adding and subtracting various aggravating and mitigating factors, establishing the defendant’s criminal history category, and consulting the Guidelines sentencing table to determine the appropriate sentence range. This is in an effort to match the sentence with the defendant’s culpability as determined by his actual conduct, rather than his offense of conviction.

The Guidelines are arraigned by type of crime; both money laundering and structuring offenses are located in Part S – Money Laundering and Monetary Transaction Reporting, and each has a unique base offense level. Some aggravating and mitigating factors are offense-specific, but others apply across the board, such as those relating to the defendant’s personal role in the offense.

The base offense level for a money laundering conviction is eight or the base level for the underlying offense from which the funds were derived, if that can be determined. Upward departures are warranted in the following circumstances: 1) if the funds are derived from offenses with national security implications, or from narcotics, violence, firearms, or child pornography (six level increase); 2) if the defendant was convicted under 18 U.S.C. § 1957 (one level increase); 3) if the defendant was convicted under 18 U.S.C. § 1956 (two level increase, with an additional 2 level increase if the laundering was “sophisticated); and/or 4) if the defendant was “in the

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267 18 U.S.C.A. § 3661; see also United States v. Watts, 519 U.S. 148, 149 (1997) (holding that this freedom extends to consideration of conduct of defendants “underlying charges of which they had been acquitted”).

268 Booker, 543 U.S. at 244; see also Harris v. United States, 536 U.S. 545, 565 (2002) (noting that “the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt”).

269 Booker, 543 U.S. at 244.


271 E.g., United States v. Thompson, 515 F.3d 556, 561 (6th Cir. 2008) (“[T]he court must begin at the proper base-offense level, apply any applicable enhancements or reductions to arrive at the adjusted-offense level, and use the resulting offense level with the appropriate criminal-history category to arrive at a sentencing range.”).


273 U.S.S.G. § 2S.

274 E.g., U.S.S.G § 3B1.1 (Aggravating Role); U.S.S.G. § 3B1.2 (Mitigating Role).

275 U.S.S.G. § 2S1.1(a).
business of” laundering funds (four level increase).276 The section does not provide for offense-specific downward departures.

The base offense level for a structuring conviction is six (unless the defendant is a financial institution, in which case it is eight), plus the number of offense levels corresponding to the value of the structured funds.277 This latter instruction refers the sentencing judge to the table appearing in § 2B1.1 providing for increases in offense level corresponding to the value of funds at issue.278 Upward departures are warranted in the following circumstances: 1) if the defendant knew the funds were illegally derived (two level increase); 2) if the offense involved bulk cash smuggling (two level increase); and/or 3) if the defendant structured over $100,000 in one year (two level increase).279 Downward departure to an offense level of six is warranted if all of the following conditions are met: 1) the funds were lawfully derived, 2) the funds were to be used for a lawful purpose, and 3) the defendant did not act with reckless disregard as to the source of the funds.280

VIII. POLICY RECOMMENDATIONS

As seen from the case development outlined supra, the knowledge line seems to be lower in structuring cases than money laundering cases, despite the fact that, formally, structuring requires proof of intent, while some forms of money laundering prosecutions may proceed with the lower mens rea of knowledge. Therefore, some quantity of circumstantial evidence could support a structuring conviction, while a comparable amount of circumstantial evidence in the money laundering context would be insufficient. Counter-intuitively then, it may be preferable to pursue structuring prosecutions over money laundering prosecutions, as proving intent to structure may be more attainable in practice than proving knowledge of the origin of laundered money. This is in addition to the inherent benefit of more easily being able to prove that a “financial transaction” has occurred given the factual basis for charging structuring as opposed to money laundering.

Structuring prosecutions are also preferable because of the opportunity for a more flexible Guidelines calculation at sentencing. It is probable that the Guidelines calculation for a highly culpable defendant convicted of high-value structuring would result in a high offense level, whereas a less culpable defendant, like MacPherson, will receive the downward departure to a level six281 and receive no prison time for his offense. This not only allows for appropriately severe penalties for kingpins, but also avoids disproportionate punishment of lower-level syndicate members who conducted

276 U.S.S.G. § 2S1.1(b).
277 U.S.S.G. § 2S1.3(a).
279 U.S.S.G. § 2S1.3(b).
280 U.S.S.G. § 2S1.3(b).
281 A level six offense level with a criminal history category I calls for zero to six months of prison time according to the Sentencing Table. U.S.S.G. § 5A
structured transactions on their boss’s orders, as the Guidelines provide that a “minimal participant” gets a four-point offense level reduction.\textsuperscript{282}

\textbf{A. Next Steps}

Currently, the federal law enforcement\textsuperscript{283} approach to money laundering is to see it as an offense to be prosecuted. I argue that money laundering should additionally be used as an investigatory tool. Indeed, the tip “follow the money” launched one of the most revealing investigations in modern memory.\textsuperscript{284} If we can develop and implement a strategy to identify funds in the process of being laundered, we can develop targets for further investigation. In this way, we will be able to head straight to the top, as it were, without having to work our way up bit by bit. The prototypical use I envision for this strategy is in the context of investigation, prosecution, and dismantling drug trafficking organizations (DTO). In addition to the major Colombian and Mexican cartels, there are hundreds of smaller DTOs operating along the border, independently or in conjunction with the larger supplier cartels.

Currently, the way that federal law enforcement addresses this problem is through the familiar technique of “flipping,” as I will refer to it.\textsuperscript{285} This strategy starts with street level enforcement, usually the discovery of drug smuggling at border or interstate checkpoints. Agents arrest the offender, Mirandize him, and encourage him to talk in exchange for leniency. The information from this low-ranking member of the DTO is then used to launch an investigation against his supplier or handler, who is in turn “flipped” once sufficient evidence is gathered against him, whereupon the investigation will focus on a DTO member yet higher in the organization.

This strategy suffers from four primary vulnerabilities: 1) it is reactive, rather than proactive, 2) it relies on recently arrested criminals to provide useful, trustworthy information, and to keep quiet and report back truthfully if they are employed as confidential informants, 3) it is slow, and 4) it is hard to continue flipping all the way to the top of an organization, as the kingpins issue orders through subordinates, thus walling themselves off from government infiltration of this sort.

Conversely, an investigatory strategy which culls relevant BSA-required reports to identify suspicious behavior cures those issues. It is proactive, seeking out

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\textsuperscript{282} U.S.S.G. § 3B1.2(a).
\textsuperscript{283} Throughout this section, I will refer alternately to federal law enforcement, the Department of Justice, law enforcement, the Agencies, and the like, to refer to the wide array of actors in the federal government which have responsibility for investigating money laundering in some capacity. These include, among others, the Department of Justice and its agencies, United States Attorney’s Offices, the Department of Treasury and its agencies, and the Department of Homeland Security and its agencies.
\textsuperscript{284} Though credit for this line more properly is attributed to William Goldman, screenwriter of “All the President’s Men,” it is well-associated with the lore surrounding Deep Throat and Watergate. Frank Rich, Don’t Follow the Money, N.Y. Times, June 12, 2005, available at http://www.nytimes.com/2005/06/12/opinion/12rich.html?pagewanted=all.
\textsuperscript{285} Flipping is an extensively used tactic in domestic drug investigations to work up from a corner dealer to his supplier, but for the sake of clarity, I refer to the border context, though of course a money laundering focused strategy will be useful to all such investigations.
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suspicious activity rather than waiting for an inept drug smuggler to cross our path. It is reliant only on banks (whose effective cooperation is ensured by threat of sanction), and law enforcement. Though not rapid in the sense that it will still take a long time to amass evidence, it is certainly a more efficient method of investigation. Finally, it will be more difficult for the high-level kingpins to shield themselves from this sort of investigation. While such men may be willing to pass orders through an intermediary, they are less amenable to the idea of handing control of their assets to a subordinate as well. So the accounts that law enforcement targets as possibly containing laundered money are more likely to be under the personal control of someone worth targeting.

B. Recommendations

Federal law enforcement has recognized the utility of this approach in recent years, establishing task forces to tackle the issue. However, the sheer volume of the reports and the inapplicability of much of the reports to law enforcement objectives frustrates current efforts to use money laundering as a tool to identify potential targets. I advocate a multi-track approach to alleviate some of these pressures, so that the current task force efforts may prove to be fruitful: 1) increased bank utilization of the existing capacity to add trusted customers to a CTR exemption list, 2) deterrence of legitimate structuring, and 3) increased prosecution of structuring offenses. This approach is designed to aid law enforcement analysis of SARs, because analysis of SARs is more likely to result in a money laundering hit than CTRs. The first track will reduce pressure on law enforcement in the CTR context, thus freeing up resources for SAR review. The second will ensure that those SARs which are reviewed are more likely to be responsive than they are now. Finally, the third will take advantage of the more responsive SARs and the lower knowledge line in structuring prosecutions in order to obtain more convictions of those who structure to avoid drawing attention to money laundering.

1. CTR exemption lists

The first track is fairly simple to explain and implement. Indeed, the Government Accountability Office (GAO) made the same recommendation in a February 2008 report to Congressional Committees. Little utilized by American banks is a provision in the BSA allowing them to exempt certain trustworthy customers from CTR requirements. Should this provision be more widely utilized, it would create three main benefits: 1) fewer CTRs would be filed overall, a benefit both to the

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287 I have attached a visual representation of my proposal as an Appendix to this Article.
banks filing them and to Agencies reviewing them, 2) those CTRs filed are more likely to be pertinent if obviously non-responsive CTRs do not have to be filed, and 3) law enforcement resources may be shifted to SAR analysis if there is less to do in the CTR context.

2. Deter legitimate structuring

The second track has, to my knowledge, yet to be advocated. I propose that we make a concerted effort to deter what I refer to as “legitimate” structuring. This is when people structure with the purpose of evading federal reporting requirements, but with a motive other than to facilitate money laundering. As seen in several cases, people can structure for a variety of reasons, to hide money from a spouse, to evade taxes, to protect their assets from potential civil liability, and for a host of other purposes. Motive is immaterial to structuring prosecutions, and so this activity is still criminally culpable. This is not the conduct seen in Gallagher’s 2000, and the like. If the pattern of transactions is not designed to evade reporting requirements, but rather is for the sake of convenience or for another business purpose this is not structuring at all.

Two strategies will need to be employed concurrently in order to deter legitimate structuring. The first requires the cooperation of banks. As seen in Ismail, a defendant may succeed by presenting the defense that he was unaware that the regulations he was seeking to evade were federally mandated. An obvious fix would be a simple addition to the already numerous regulations of banks, requiring tellers and other employees who interact with customers to inform the customers that the federal regulations exist and that the customer is, on the whole, better off if a CTR is filed than he would be trying to avoid one. Such a regulation would be a minimal burden on banks to implement, yet would be of great utility to law enforcement by 1) dissuading many from structuring in the first place, and 2) establishing a potential defendant’s knowledge of the requirements in a readily verifiable manner for possible future use in a structuring prosecution.

The second strategy is wholly implemented by law enforcement. As described in detail supra, prosecution of structuring, though it requires a mens rea of intent, not knowledge, appears to have a lower knowledge line with regard to permissible inferences from circumstantial evidence. For this reason, it will not be difficult to prove an intent to structure from circumstances, particularly in the Second Circuit, or other circuits which may adopt the McFadden reasoning in the future. Unfortunately, should legitimate structuring be inadequately deterred by bank warnings, prosecution of legitimate structurers may be necessary to deter this activity. Such prosecution is likely

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290 Several of the cases discussed supra involved legitimate structuring. See Cassano, 372 F.3d at 872 (ostensibly was structuring to hide funds from an estranged wife); Gallagher’s 2000, 2011 WL, at *1 (government initiated forfeiture action on a tax evasion theory); MacPherson, 424 F.3d at 185 (structuring to shield assets from successful civil plaintiff).
292 Ismail, 97 F.3d at 59.
to be successful, however, given the permissive standard for inferring intent to evade from circumstantial evidence of structured transactions.

Though this recommendation may appear harsh, its impact can be mitigated. First, the Department of Justice and the individual United States Attorney’s Offices should implement guidelines which discourage criminal prosecution as a first intervention for legitimate structurers. Second, the Guidelines, as they premise punishment on actual underlying conduct, and, post-Booker, are no longer mandatory, will prevent legitimate structuring from being punished as harshly as structuring for the purpose of laundering money.

If legitimate structuring is deterred, the vast majority of SARs will fall into one of two categories: transactions which appear to be structuring but are really conducted for legitimate purposes, and structuring to facilitate money laundering. Obviously, this will result in a higher hit-rate for law enforcement review of SARs, and thus will facilitate the targeting of high-level offenders.

3. Pursue structuring prosecutions

Finally, I recommend that federal prosecutor’s offices consider structuring-only prosecutions of high-level offenders.293 Currently, very few structuring prosecutions are brought, especially as compared to levels of money laundering prosecutions. Though it is flashier to indict a DTO kingpin on drug trafficking, money laundering, and other media-friendly charges, structuring prosecutions have several advantages. Prosecuting for structuring allows for the following: 1) early intervention, so as to interrupt ongoing organized criminal activity, 2) an easier offense to prove, as shown supra, and 3) a flexible Guidelines approach which will most likely result in a long prison term for the offender. Prosecutors should take these factors into account when determining when to indict such criminals, and on what charges.

Putting these recommendations all into effect would produce 1) a system geared toward efficient analysis of BSA reports, 2) a lower volume of reports to review, and 3) a higher hit rate from CTR and SAR data. Together, this would result in a streamlined system designed and able to identify money launderers to target for further investigation and rapid prosecution. Structuring need not remain the underutilized tool it is today.

293 Though I’m advocating an alternative to the “flipping” path, a bottom-up investigation can work with structuring offenses too. A lower-level member structuring under orders can of course be caught and flipped just like any other type of crime.
Appendix

Proactive: money laundering as investigation

Law enforcement CTR and SAR investigation

Kingpin

Suppliers

Border crossers

Deter | legitimate

1) Banks tell customers structuring is offense

Reactive: money laundering as offense

Flippin

Flippin

Flippin

Flippin

Flippin