Pace Law Review

Volume 33
Issue 3 *Summer 2013*

Article 8

July 2013

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Matthew R. Auten
Pace University School of Law

DOI: https://doi.org/10.58948/2331-3528.1844

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Matthew R. Auten*

I. Introduction

The essence of "[m]oney laundering is the process of changing money gained from illegal operations into a manageable form while concealing its illicit origins."[1] "Money laundering" is a relatively new term,[2] as is the notion that money laundering is a crime.[3] In 1986, the United States criminalized money laundering with passage of the Money Laundering Control Act.[4] The new law reflected Congress's desire to punish individuals whose financial activities concealed the existence, size, and scope of major drug smuggling and organized crime rings.[5] When money laundering

* J.D. Candidate, Pace University School of Law (2013); B.A., McGill University (2002). The Author wishes to thank his wife Meghan, his parents Don and Judy Auten, and the entire Purvis family (including Robby and Max) for their boundless love, support, and patience, and the faculty and staff of Pace Law School for the commitment to excellence in education.

1. STAFF OF S. CAUCUS ON INT'L NARCOTICS CONTROL, 100TH CONG., LEGISLATION AIMED AT COMBATING INTERNATIONAL DRUG TRAFFICKING AND MONEY LAUNDERING 13 (Comm. Print 1987).

2. The term "money laundering" was apparently coined by United States law enforcement officials and entered the popular lexicon during the Watergate scandal in the mid-1970s. WILLIAM C. GILMORE, DIRTY MONEY: THE EVOLUTION OF INTERNATIONAL MEASURES TO COUNTER MONEY LAUNDERING AND THE FINANCING OF TERRORISM 20 (3d ed. 2004).

3. Kern Alexander, *US Anti-Money Laundering Law: Background and Overview*, *in* BUTTERWORTH'S INTERNATIONAL GUIDE TO MONEY LAUNDERING LAW AND PRACTICE 630 (Toby Graham ed., 2d ed. 2003).

4. Pub. L. No. 99-570, §§ 1351-52, 100 Stat. 3207 (1986) (codified as amended at 18 U.S.C. §§ 1956-57 (2006)).

5. *See* Scott Sultzer, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 TENN. L. REV. 143, 145-47 (1995).

was criminalized, drug trafficking was considered to be the world's most serious crime problem.[6]

However, the Money Laundering Control Act did not solely target professional money launderers.[7] Instead, Congress crafted a broad statute designed to criminalize the actions of anyone who knowingly participated in an illicit transaction, regardless of its magnitude or dollar value.[8]

Although the current money laundering statue is broad, there is widespread agreement that it does not criminalize the mere act of spending money generated by illegal criminal activity.[9] In other words, spending money by making a purchase or entering into a transaction is not necessarily a crime, even if the party spending the illegally gained money knows that the money came from illegal activities. Rather, in order to run afoul of the law, there must be direct or circumstantial evidence showing that a transaction using the illegal funds was made with an intent to "conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity,"[10] or to "avoid a transaction reporting requirement."[11]

There is often a fine line between legal transactions that amount to no more than money spending and illegal transactions designed in whole or in part to conceal or disguise; and it is difficult to distinguish between the two. The issue often boils down to how the transaction is "characterized" by a finder of fact and whether enough evidence exists to support the fact finder's characterization. Put another way, the challenge is determining whether the evidence demonstrates a transaction was entered into with the requisite mens rea. The

6. STAFF OF S. CAUCUS ON INT'L NARCOTICS CONTROL, *supra* note 1, at 1.

7. Pub. L. No. 99-570, § 1352, 100 Stat. 3207 (1986).

8. 132 CONG. REC. 3827 (1986).

9. *See, e.g.*, United States v. Dvorak, 617 F.3d 1017, 1022 (8th Cir. 2010); United States v. Law, 528 F.3d 888, 895-96 (D.C. Cir. 2008); United States v. Hall, 434 F.3d 42, 50 (1st Cir. 2006); United States v. Marshall, 248 F.3d 525, 538-39 (6th Cir. 2001); United States v. Stephenson, 183 F.3d 110, 120 (2d Cir. 1999); United States v. Willey, 57 F.3d 1374, 1385 (5th Cir. 1995); United States v. Jackson, 935 F.2d 832, 842 (7th Cir. 1991); United States v. Sanders, 928 F.2d 940, 946 (10th Cir. 1991).

10. 18 U.S.C. § 1956(a)(1)(B)(i) (2006).

11. *Id.* § 1956(a)(1)(B)(ii).

"characterization challenge" is compounded by the fact that money laundering cases typically rely on circumstantial evidence to establish that a transaction was designed with an intent to conceal. The challenge is best exemplified by cases in which money laundering charges are based on an underlying transaction whose purpose, on its face, could either be to obtain an immediate personal benefit, or to conceal some element of the criminal nature of the funds.[12]

In this Article, I will examine the history of legislative efforts to combat money laundering in the United States, including the intent and purpose of the Money Laundering Control Act 1986.[13] I will then analyze how courts have

12. I will refer to transactions that could easily serve either a legal or illegal purpose as "dual-purpose" transactions.

13. Within the anti-money laundering statutes, Congress has defined two types of money laundering that are often referred to as "promotional" and "concealment" money laundering.

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
>
> (B) knowing that the transaction is designed in whole or in part--
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> (ii) to avoid a transaction reporting requirement under State or Federal law,
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property , whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a

addressed the challenge of characterizing dual-purpose transactions by developing factors whose presence may show that a transaction was entered into with an intent to conceal. In addition to providing an analysis of several cases where courts grappled with the challenges of characterizing dual-purpose transactions, I will also examine the development of a "heightened" evidentiary standard that is often applied to scrutinize whether sufficient evidence exits to characterize a dual-purpose transaction as money laundering rather than money spending. Finally, I will make recommendations for minimizing the challenges of characterizing dual-purpose transactions.

II. Legislative History

Money laundering is often referred to as the "lifeblood" of organized crime, because it allows criminal enterprises to store, transport, and spend the profits of their illegal activities, while also concealing their existence, size, and scope from law enforcement agencies.[14] However, the act of money laundering itself was not criminalized until passage of the Money Laundering Control Act in 1986.[15] Before that time, law enforcement agencies still investigated money laundering,[16]

single plan or arrangement.

18 U.S.C. § 1956(a)(1) (2006). Therefore, the defining characteristic of "promotional" money laundering is an intent to facilitate the carrying on of an unlawful activity, whereas "concealment" money laundering is distinguished by an intent to hide the nature, location, source, ownership, or control of illegal proceeds. After the initial overview, I will focus exclusively on issues involving "concealment" money laundering as defined in 18 U.S.C. § 1956(a)(1)(B).

14. Letter from Irving R. Kaufman, Chairman, President's Comm'n on Organized Crime, to Honorable Ronald Reagan, President of the U.S. (1984) (introducing PRESIDENT'S COMMISSION ON ORGANIZED CRIME, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING (1984) [hereinafter THE CASH CONNECTION]).

15. Pub. L. No. 99-570, §§ 1351-52, 100 Stat. 3207 (1986) (codified as amended at 18 U.S.C. §§ 1956-57 (2006)).

16. *See, e.g.*, *Hearing Before the S. Comm. on the Judiciary on S.J. Res. 233: A Joint Resolution to Authorize the President's Commission on Organized Crime to Compel the Attendance and Testimony of Witnesses and the Production of Information*, 98th Cong. 100 (1984) (statement of Francis M.

since the strategy of "following the money" has long been an important law enforcement tactic,[17] but before money laundering was criminalized, the "follow the money" strategy was only a roadmap for discovering underlying criminal enterprises, or as evidence of tax evasion, or other regulatory crimes.[18] In fact, before money laundering itself was criminalized, the Bank Secrecy Act, which requires banks to report domestic currency transactions in excess of $10,000,[19] was the primary statute used to charge criminals with what would now be called money laundering.[20]

By the early 1980s, the size and scope of the money laundering problem made it clear that the United States needed new measures to close existing loopholes in the Bank Secrecy Act.[21] One goal in creating a new statutory regime was to enable law enforcement to disrupt the money pipeline that funded massive organized crime and drug trafficking operations.[22] Although traditional criminal activities like loan-sharking, illegal gambling, fraud, and bribery required money laundering to cleanse their illicit proceeds; it was the major drug trafficking organizations—who laundered billions of dollars in cash—that supplied the strongest impetus for the new money laundering law.[23]

As the value of the illegal drug trade grew during the 1960s and 1970s, money laundering became more lucrative and

Mullen, Jr., Administrator, Drug Enforcement Administration) [hereinafter Mullen Statement].

17. R.T. NAYLOR, FOLLOW-THE-MONEY: METHODS IN CRIME CONTROL POLICY 8-9 (1999), *available at* https://www.ncjrs.gov/nathanson/washout.html.

18. *See* Mullen Statement, *supra* note 16, at 100; Sultzer, *supra* note 5, at 152.

19. Act of Oct. 26, 1974, Pub. L. No. 91–508, 84 Stat. 1114-24 (1970); *see also* THE CASH CONNECTION, *supra* note 14, at 8-9 (explaining the shortcomings and loopholes of the Bank Secrecy Act).

20. STAFF OF S. CAUCUS ON INT'L NARCOTICS CONTROL, *supra* note 1, at 14.

21. PRESIDENT'S COMM'N ON ORGANIZED CRIME, ORGANIZED CRIME AND MONEY LAUNDERING 165 (1984) (containing statement of John M. Walker Jr. to Commission).

22. *See* Exec. Order No. 12,435, 48 Fed. Reg. 34,723 (July 28, 1983); STAFF OF S. CAUCUS ON INT'L NARCOTICS CONTROL, *supra* note 1, at 16.

23. THE CASH CONNECTION, *supra* note 14, at 7; NAYLOR, *supra* note 17, at 6.

increasingly sophisticated.[24] By the 1980s, the Western world was awash in narcotics.[25] Along with the rise of foreign cartels and increasing participation by the mafia in the illegal drug trade,[26] a new class of criminal emerged: the professional money launderer.[27] These criminals, who often had a white-collar background,[28] were detached from the underlying criminal activity that generated the operations illegal income, and instead focused solely on the means and methods of performing money laundering transactions.[29]

In response to the growing role of money laundering in financing high-profile criminal organizations, President Reagan formed an advisory commission to study the issue, to recommend reforms to close existing loopholes, and to give law enforcement new tools to cutoff the lifeblood of organized criminal organizations.[30] Through passage of the Money Laundering Control Act, Congress took aim at those whose financial expertise enabled criminal networks to operate efficiently and thereby increase their profitability.[31] Additionally, the new law enabled law enforcement to strategically attack criminal organizations by targeting their cash reserves and undermining the financing of their operations.[32] However, in approving the Money Laundering Control Act, Congress was not merely concerned with the big fish and financial whizzes who laundered millions of dollars.

24. PRESIDENT'S COMM'N ON ORGANIZED CRIME, *supra* note 21, at v; Sultzer, *supra* note 5, at 147.

25. NAYLOR, *supra* note 17, at 9.

26. *Id.*

27. Sultzer, *supra* note 5, at 158; PRESIDENT'S COMM'N ON ORGANIZED CRIME, *supra* note 21, at 8; *see also* GILMORE, *supra* note 2, at 42.

28. Alexander, *supra* note 3, at 628.

29. PRESIDENT'S COMM'N ON ORGANIZED CRIME, *supra* note 21, at 80-83 (containing statement of Special Agent Edward Gillen to Commission); Sultzer, *supra* note 5, at 147.

30. *See* Exec. Order No. 12,435, 48 Fed. Reg. 34,723 (1983); Legislation to Grant Additional Power to the President's Comm'n on Organized Crime, 7 Op. O.L.C. 128 (proposed Aug. 24, 1983).

31. Jimmy Gurule, *The Money Laundering Control Act of 1986: Creating A New Federal Offense or Merely Affording Federal Prosecutors an Alternative Means of Punishing Specified Unlawful Activity?*, 32 AM. CRIM. L. REV. 823, 825 (1995).

32. *See* PRESIDENT'S COMM'N ON ORGANIZED CRIME, *supra* note 21,at 161.

Rather, as one Congressman stated at the time, the goal was to:

> let the whole community, the whole population, know they are part of the problem and they could very well be convicted of it if they knowingly take these funds. If we can make the drug dealers' money worthless, then we have really struck a chord . . . . [Y]ou have outstanding business people who are otherwise totally moral who are accepting these funds and profiting greatly from drug trafficking . . . and this will put a stop to it.[33]

In other words, the Money Laundering Control Act created a net designed to catch both sharks and minnows.

III. Distinguishing Money Laundering from Money Spending

As a result of Congress's decision to criminalize all money laundering, regardless of the size or scope of the transaction in question, money laundering charges have arisen in a myriad of different circumstances, and courts have had ample opportunities to interpret the meaning of the statute.[34] One area of interpretation where there is widespread agreement among courts and commentators is that the Money Laundering Control Act did not criminalize the mere spending of money earned through illegal means.[35] However, there is often a

33. 132 CONG. REC. 3827 (1986).

34. *See, e.g.*, United States v. Shepard, 396 F.3d 1116 (10th Cir. 2005) (contractor fraud on gas pipeline project); United States v. Villarini, 238 F.3d 530 (4th Cir. 2001) (bank employee embezzlement); United States v. Dobbs, 63 F.3d 391 (5th Cir. 1995) (illegal sale of cattle); *see also* United States v. Hall, 434 F.3d 42 (1st Cir. 2006) (personal loans, real estate purchases, and transfers to construction company used as a front); United States v. Marshall, 248 F.3d 525 (6th Cir. 2001) (Rolex watch, fine wine, and tennis bracelet); United States v. Garcia-Emanuel, 14 F.3d 1469 (10th Cir. 1994) (land, an insurance investment, a pickup truck, and Paso Fine riding horses).

35. *See* United States v. Dvorak, 617 F.3d 1017, 1022 (8th Cir. 2010); United States v. Law, 528 F.3d 888, 895-96 (D.C. Cir. 2008); *Hall*, 434 F.3d at 50; *Marshall*, 248 F.3d at 538-39; United States v. Stephenson, 183 F.3d 110,

narrow distinction between legal financial transactions that only evince an intent to spend the proceeds of illegal activity, and financial transactions that are designed—in whole or in part—to launder the money and conceal the underlying illegal activity that generated the funds in question.

Since money laundering is not the equivalent of money spending,[36] the question for the courts was what distinguishes one from the other? Or, put another way, what kind of evidence can be relied upon to characterize a transaction as either money spending or money laundering?

The characterization challenge is best illustrated through cases where money laundering has been charged for a dual-purpose transaction. Dual-purpose transactions are especially tricky to characterize because, objectively, they often have the simultaneous effect of providing immediate personal benefits and concealing or disguising the source or nature of the funds used in the transaction.

To illustrate the characterization challenges that dual-purpose transactions pose, imagine a criminal who uses the proceeds of his criminal acts to purchase a massive diamond ring for his wife, acquire a car for his son, and open a bank account in his daughter's name. Each of these transactions provides immediate personal benefits to the criminal and his family members, but each could also have the effect of laundering the proceeds of the criminal's activities. How does a fact-finder, prosecutor, or court determine whether the purpose of these transactions was benevolent? When is the evidence sufficient to show beyond a reasonable doubt that the transactions were undertaken with the requisite mens rea for money laundering?

To determine whether sufficient evidence to support a conviction for money laundering has been produced by the prosecution, the most clear-cut cases rely on probative

120 (2d Cir. 1999); United States v. Willey, 57 F.3d 1374, 1385 (5th Cir. 1995); United States v. Jackson, 935 F.2d 832, 842 (7th Cir. 1991).

36. *Dvorak*, 617 F.3d at 1022; *Law*, 528 F.3d at 895-96; *Hall*, 434 F.3d at 50; *Marshall*, 248 F.3d at 538-39; *Stephenson*, 183 F.3d at 120; *Willey*, 57 F.3d at 1385; *Jackson*, 935 F.2d at 842; United States v. Sanders, 928 F.2d 940, 946 (10th Cir. 1991).

statements made by the defendant.[37] Direct evidence of this kind is often obtained through wiretaps,[38] or through the testimony of co-conspirators.[39] However, more often than not, the prosecution relies on circumstantial evidence—often with the interpretive help of an expert witness—to make their case that a dual-purpose transaction should be characterized as money laundering.[40] In some instances, circumstantial evidence may provide a clear inference that a particular dual-purpose transaction, or series of transactions, should be characterized as money laundering, because the intent to conceal is clear.[41] For example, in cases where there is evidence of "numerous transfers, multiple accounts, fictitious accounts, or the use of third-parties," before the dual-purpose purchase is made, there is ample evidence of a defendant's intent to conceal and thus evidentiary support to characterize the transaction as money laundering.[42]

Given the diversity of crimes that may lead to money laundering charges, the endless ways criminals seek to launder money, and the importance of the context in which these actions are taken, there is no definitive list of acts that are

37. *See Stephenson*, 183 F.3d at 120 ("There was ample evidence that the money in the safe deposit box was the fruit of . . . [the] drug transactions and that Antoinette placed it there as his direction so as to conceal it. Indeed, he was recorded saying just that . . . ."); *see also Hall*, 434 F.3d at 54 ("There was testimony that Hall said that he established Fire Island Construction 'to make him look legitimate' and that he transferred construction equipment to Fire Island as part of a scheme to 'clean up some [of the] money."); United States v. Manarite, 44 F.3d 1407, 1410 (9th Cir. 1995) (confidential informant asked Defendants to participate in money laundering scheme involving casino chips that were allegedly skimmed by a casino employee); United States v. Monea, 376 F. App'x 531, 533 (6th Cir. 2010) (Defendant told undercover FBI agent "that he had a lot of money that he needed to move into legitimate businesses.") (unpublished opinion).

38. *See, e.g.*, *Stephenson*, 183 F.3d at 113.

39. *See, e.g.*, *Monea*, 376 F. App'x at 539.

40. *See generally* Thomas M. DiBiagio, *Money Laundering and Drug Trafficking: A Question of Understanding the Elements of the Crime and the Use of Circumstantial Evidence*, 28 U. RICH. L. REV. 255, 272-74 (1994).

41. *See, e.g.*, United States v. Omoruyi, 260 F.3d 291, 296 (3d Cir. 2001) ("[I]nasmuch as the money was deposited in bank accounts under false names, and Omoruyi used false identification to withdraw it, he clearly conducted the transactions charged with the intent to conceal or disguise the nature, source, ownership and control of the proceeds of the mail fraud.").

42. United States v. Johnson, 440 F.3d 1286, 1293 (11th Cir. 2006).

probative of an intent to "conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity."[43] Nevertheless, a number of courts have embraced a non-exhaustive list of actions that are probative of an intent to conceal, and thus evidence that the actions were undertaken with the necessary mens rea for criminal money laundering.[44] Perhaps the best known and widely used list of probative factors was compiled by the Court of Appeals for the Tenth Circuit in *United States v. Garcia-Emanuel*.[45]

> [The factors] include, among others, statements by a defendant probative of intent to conceal; unusual secrecy surrounding the transaction; structuring the transaction in a way to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves cumulating in the transaction; or expert testimony on practices of criminals.[46]

When courts are asked to decide whether a given set of facts are sufficient to establish or sustain a charge of money laundering, the issue is often raised by a motion made at trial,[47] although occasionally the issue is raised for the first time on appeal.[48] In either event, once the issue moves to appeal following a conviction, the evidence must be viewed in a light most favorable to the government, although because the proceedings are criminal in nature, the underlying facts must have been sufficient to establish a defendant's guilt beyond a

43. 18 U.S.C § 1956 (a)(1)(B)(i) (2006).

44. *See, e.g.*, United States v. Richardson, 658 F.3d 333, 340 (3d Cir. 2011); United States v. Johnson, 440 F.3d 1286, 1291 (11th Cir. 2006); United States v. Marshall, 248 F.3d 525, 539 (6th Cir. 2001).

45. 14 F.3d 1469 (10th Cir. 1994).

46. *Id.* at 1475-76 (internal citations omitted).

47. *See, e.g.*, *Richardson*, 658 F.3d at 337.

48. *See, e.g.*, United States v. Esterman, 324 F.3d 565, 569 (7th Cir. 2003).

reasonable doubt.[49]

IV. Approaches to Characterizing Dual-Purpose Transactions

A. *The Foundational Cases*

One of the first cases to address the challenge of characterizing dual-purpose transactions was *United States v. Sanders*.[50] Johnny Lee Sanders was indicted for his involvement in a heroin distribution ring, and of the forty-one counts against him, several were for violating federal money laundering statutes.[51] Two of the money laundering charges, which were also leveled at Sanders's wife, stemmed from the couple's purchase of an automobile using the proceeds of Johnny Lee's illegal activities.[52] The Sanders' were convicted by a jury at trial, but their money laundering convictions were nullified by a post-trial motion.[53] On appeal, the government first argued that the money laundering statute should be interpreted broadly to encompass "all transactions, however ordinary on their face, which involve the proceeds of unlawful activity."[54] However, the Tenth Circuit held that money laundering was not the same as "money spending . . . ."[55]

As an alternative to their statutory interpretation argument, the government also insisted that the "concealment" requirement had been proven because the car was titled in their daughter's name, because the Sanders signed documents in their daughter's name, and because the car was paid for in cash.[56] However, the court held that despite the car being titled in the name of a third-person,[57] the fact that the Sanders' daughter came to the car dealership after the sale, that she shared the couple's last name, and that the car was

49. *See In re* Winship, 397 U.S. 358, 363 (1970).
50. 928 F.2d 940 (10th Cir. 1991).
51. *Id.* at 942.
52. *Id.* at 944-45.
53. *Id.*
54. *Id.* at 946.
55. *Id.*
56. *Id.*
57. This was allegedly done for insurance purposes. *See id.*

conspicuously used by the couple after the purchase necessitated overturning their convictions.[58] Essentially the court found that evidence presented could not establish that the car purchase was a means of concealing the illegal proceeds of Johnny Lee's criminal activities.[59]

In 1994, the Court of Appeals for the Tenth Circuit revisited *Sanders* and the challenge of characterizing dual-purpose transactions.[60] A jury convicted Mario Garcia-Emanuel on drug, tax evasion, and money laundering charges, but he was granted a judgment of acquittal pursuant to Fed. R. Crim. Pro. 29(c) on all money laundering charges.[61] Both sides appealed. [62] At the Court of Appeals, Garcia-Emanuel's conviction was reinstated on five counts of money laundering, while a judgment of acquittal was upheld on twelve others. For this article, the court's handling of counts Fourteen and Fifteen are most significant.[63] Counts Fourteen and Fifteen stemmed from two separate purchases of Paso Fino horses by Garcia-Emanuel and his wife.[64] The conviction based on one purchase was reinstated, while a judgment of acquittal was affirmed on the other.[65]

Garcia-Emanuel and his wife had a hobby of raising Paso Fino horses.[66] Therefore, "while a horse in some instances could be essentially an investment, there was a significant aspect of present personal benefit in this case."[67] The court described these counts as "borderline cases"[68] where "our requirement that the jury verdicts of guilt beyond a reasonable doubt be based on *substantial evidence*, and not mere suspicion, becomes paramount."[69]

58. *Id.*
59. *Id.*
60. *See* United States v. Garcia-Emanuel, 14 F.3d 1469, 1471-72 (10th Cir. 1994).
61. *Id.* at 1472.
62. *Id.*
63. *See id.* at 1477-78.
64. *Id.* at 1477.
65. *Id.* at 1477-78.
66. *Id.* at 1477.
67. *Id.*
68. *Id.*
69. *Id.* at 1475 (emphasis added) (citations omitted).

In Count Fourteen, a large payment on the horse was made in cash and the Garcia-Emanuel's orally represented to the seller of the horse the cash for the purchase came from their restaurant.[70] However, evidence at trial showed that the cash had come from illegal activities.[71] To counter the inference that these facts revealed the requisite mens rea, the Garcia-Emanuels' introduced evidence that exchanging cash for horses was a normal practice within the trade, that the contract for the horse was negotiated in the husband's name, that the restaurant was not used as a remitter or named party in the transaction, and that no attempt was made to leave a paper trail that would lead an investigator to believe the money came from any source other than Garcia-Emanuel.[72] Therefore, the court held that mere facts of the all-cash purchase and a single false comment about the source of the funds were insufficient evidence upon which a jury could find beyond a reasonable doubt that the transaction could be characterized as money laundering.[73] Rather, the court found that, under the circumstances, the all-cash transaction and single false comment did not amount to "substantial evidence" of an intent to conceal.[74]

Count Fifteen of Garcia-Emanuel's indictment involved nearly the same circumstances as Count Fourteen, but in this instance the money laundering conviction was reinstated.[75] Count Fifteen involved another purchase of a Paso Fino horse, but in this transaction, Ms. Garcia-Emanuel purchased the horse in her husband's name using a $20,000 check drawn on their joint checking account.[76] However, in the week prior to the purchase of the horse, three cash deposits of $7000, $8000, and $8000 were made into the joint account.[77] Although the court noted that bank deposits structured to avoid the $10,000 currency reporting requirements are criminalized under

70. *Id.* at 1477.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 1478.
76. *Id.*
77. *Id.*

another section of the money laundering statute,[78] the court nevertheless held that the temporal proximity of the transactions presented sufficient evidence upon which a jury could reasonably have concluded that the horse purchase was designed, in whole or in part, with an intent to conceal.[79] The divergent results between these two nearly identical transactions illustrates the fine line between money laundering and money spending.

B. *Concealment in the Underlying Criminal Activity*

In *United States v. Dobbs* and *United States v. Shoff*, the Courts of Appeals for the Fifth and Eighth Circuits helped to clarify the difference between money spending and money laundering.[80] Shoff was convicted of fraud for running an investment Ponzi scheme and of money laundering for using proceeds from his scam to purchase two cars.[81] The government argued that "concealment–that is, not telling the victim what is really going on–is an essential feature of all schemes to defraud. . . . [Therefore] all schemes to defraud people of money . . . include an element of money laundering."[82]

However, the court held that although

> Shoff certainly concealed [from his victims] the fact that he was converting *all* their money[;] . . . . the open manner in which he used some of the proceeds to purchase two cars was no more designed to help conceal this fraud than the fact that he spent most of the rest of the proceeds at casinos to finance his fondness for gambling.[83]

Therefore, the mere fact that committing a fraud necessarily

78. *See* 18 U.S.C. § 1956(a)(1)(B)(ii) (2006).

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

80. *See* United States v. Dobbs, 63 F.3d 391 (5th Cir. 1995); United States v. Shoff, 151 F.3d 889 (8th Cir. 1998).

81. *Shoff*, 151 F.3d at 890-91.

82. *Id.* at 891.

83. *Id.*

requires an element of concealment is not sufficient to show that a *subsequent* transaction using proceeds of the fraud to purchase personal items also evinced the same intent to conceal.

The Court of Appeals for the Fifth Circuit reached the same result in *United States v. Dobbs*.[84] Dobbs was convicted of fraud and two counts of money laundering for a scheme involving illicit sales of cattle.[85] One money laundering count showed Dobbs deposited the proceeds of an illicit cattle sale into his wife's bank account and then used the account to pay family and ranching expenses.[86] The second count found that Dobbs converted a $37,000 cattle sale check into four cashier's checks that were subsequently used to pay for family and ranching expenses.[87] Although the government argued that Dobbs's refusal to disclose these transactions to his bank and his bankruptcy attorney was evidence of intent to conceal the source of the funds, the court held that the evidence presented only demonstrated Dobbs was involved in fraudulent activity, and thereafter spent the proceeds, without the requisite attempt to conceal that is necessary for a money laundering conviction.[88] Critically, the court noted that third-parties were not used in this scheme, that Dobbs typically used his wife's bank account as the ranch's main operational account, and that the transactions themselves were "open and notorious—at least as much as typical bank transactions can be."[89] Therefore, the element of concealment from the fraud could not be "attached" to the subsequent money spending transactions.

Two years later, in *United States v. Tencer*, the Court of Appeals for the Fifth Circuit clarified that their holding in *Dobbs* did not stand for the proposition that money laundering charges could be avoided in the event of a fraud just because a criminal conducted banking transactions with the fraud proceeds in their own name.[90] Tencer was convicted of mail

84. United States v. Dobbs, 63 F.3d 391 (5th Cir. 1995).
85. *Id.* at 393-94.
86. *Id.* at 397.
87. *Id.*
88. *Id.* at 398.
89. *Id.* at 397.
90. United States v. Tencer, 107 F.3d 1120, 1130-31 (5th Cir. 1997).

fraud and money laundering for his role in a scheme to defraud several insurance companies.[91] In the three years before being indicted, Tencer opened numerous bank accounts across the country using his own name.[92] Once indicted, Tencer directed those banks to transmit his funds to an address in Louisiana at which he neither lived nor worked.[93] The cashier's checks were then used to open a new bank account in Las Vegas, where Tencer informed the bank employees that he was "moving into the area and needed cash to buy a business."[94] He also directed several banks, which had not yet mailed his deposits to Louisiana, to wire the money to his new Las Vegas account instead.[95] Tencer then sought to have the balance of his Las Vegas account, an amount exceeding $1,000,000, delivered to him, in cash, at a local airport.[96]

On appeal, Tencer argued the evidence supporting his money laundering convictions was insufficient because he never used third-parties and his actions created a clear paper trail connecting him to the bank transactions.[97] The government countered by arguing that using a false identity or third-party is not essential to a money laundering conviction, where other evidence clearly shows an intent to conceal.[98] The

91. *Id.* at 1124-25.
92. *Id.* at 1128.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 1129.
98. If a third-party or false identity is used in the course of an alleged money laundering scheme, courts have found that evidence goes to the heart of the statute's intent to criminalize concealment and have been quick to affirm convictions on those grounds. *See* United States v. Willey, 57 F.3d 1374, 1385 (5th Cir. 1995) (explaining that "simply spending money in one's own name will generally not support a money laundering conviction, using a third party, for example a business entity or relative, to purchase goods on one's behalf or from which one will benefit usually constitutes sufficient proof of a design to conceal."); *see also* United States v. Graham, 125 F. App'x 624, 631 (6th Cir. 2005) (affirming conviction for conspiracy where defendant knew drug-dealing money launderer, although physically present when a vehicle was purchased in a third-persons name, "intentionally concealed his own legal identity from any of the activities or documentation and concealed that he provided the money for the down payment, trade-in, or balance financed.") (unpublished opinion).

court agreed, finding Tencer's request that funds be sent to an address at which he neither worked nor resided, his use of a Las Vegas bank hundreds of miles away from his home and business to consolidate funds, and his false statements to bank employees about his plans to move to the area were sufficient to support his convictions.[99] In addition, although the court did not dwell on this point in its analysis, it should be noted that a distinguishing factor between *Tencer* and *Dobbs* is that Dobbs spent the fraudulently obtained funds for immediate personal benefit, while Tencer evidently did not.[100] Although the court did not speculate about whether Tencer's conviction would have been affirmed had he used the proceeds of his illegal activities for a dual-purpose transaction, it is safe to assume that the existence of such evidence would have made the decision to affirm his conviction a much closer call.

C. *Two Mischaracterized Dual-Purpose Transactions*

In contrast to *Dobbs*, the United States Court of Appeals for the Fourth Circuit found sufficient evidence to uphold a money laundering conviction in *United States v. Villarini*, on facts that were essentially analogous.[101] However, no clear split between the circuits emerged since the money laundering convictions against *Villarini* were vacated on other grounds.[102] Villarini, a former bank employee in Roanoke, Virginia, was charged with embezzling $83,000 from her employer by overstating the amount of mutilated cash she had under her control during her employment, and then cashing out that amount on her final day as a bank employee.[103] After leaving the bank, Villarini decamped for Florida so she could live near

99. *Tencer*, 107 F.3d at 1128.

100. In *Tencer* the court mentions Dobbs's use of the funds "for family and business expenses" several times but does specify its level of importance. *See Tencer*, 107 F.3d at 1128-29.

101. *Compare* United States v. Villarini, 238 F.3d 530 (4th Cir. 2001), *with* United States v. Dobbs, 63 F.3d 391, 393-94 (5th Cir. 1995).

102. *See Villarini*, 238 F.3d at 537 (concluding the government's evidence was sufficient to support money laundering convictions, but vacating those convictions because the venue was improper).

103. *Id.* at 532.

her daughter.[104] After arriving in Florida, Villarini purchased a cashier's check to cover her moving expenses and opened a new checking and savings accounts.[105] Villarini made several small deposits into the bank account over a two month period "to cover her living expenses."[106]

According to the Court:

> the fact that Villarini did not deposit the entire $83,000 in a single bank transaction, and instead made four transactions, each involving less than $3,000, at two-to-four week intervals, gives rise to a reasonable inference that the transactions were designed to avoid suspicion or to give the appearance that she had a legitimate cash income stream.[107]

As in *Garcia-Emanuel,* the court here once again noted that a separate statutory provision exists to punish bank deposits that are designed to avoid currency reporting requirements.[108] However, the court cited *Garcia-Emanuel* to support its conclusion that Villarini's actions were sufficient to support her money laundering conviction.[109] In this instance, *Garcia-Emanuel* may have been wrongly applied, and as a result, the court may have erred in its conclusion that the evidence was sufficient to characterize the transaction as money laundering as opposed to money spending.[110]

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 533.

108. *See id.* at 532 (noting the purpose of 18 U.S.C. § 1956(a)(1)(B)(ii) is to punish transactions to avoid currency reporting requirements). *See also* United States v. Garcia-Emanuel, 14 F.3d 1469 (10th Cir. 1994).

109. *Villarini*, 238 F.3d at 533 (citing *Garcia-Emanuel*, 14 F.3d at 1478).

110. *Villarini* is thus clearly distinguishable from the bizarre case of *United States v. Dvorak*, where a money laundering conviction was affirmed solely on the basis of cash withdrawals that the defendant made from his bank account. *Compare Villarini*, 238 F.3d at 530, *with* United States v. Dvorak, 617 F.3d 1017, 1021-24 (8th Cir. 2010). In *Dvorak*, the conviction was affirmed on the grounds that several days after depositing fraudulent checks, the defendant would withdraw the entire balance of the account in cash in order to liquefy the funds so as to conceal their location. *Dvorak,* 617

For example, *Garcia-Emanuel* is distinguishable from the facts of *Villarini* because Garcia-Emanuel deposited the illegal funds into his wife's bank account, not his personal bank account. In addition, in *Garcia-Emanuel*, the deposited funds were subsequently used to purchase a single luxury item (a Paso Fino horse) that could have either been an investment and money laundering vehicle, or an item for personal use and benefit. By contrast Villarini deposited funds into her *personal* account to cover checks for her *living expenses*. The record does not indicate whether Villarini was required to write checks for her living expenses, such as rent or utility payments, but given the prosecution's burden of establishing guilt beyond a reasonable doubt, the burden should have rested with the prosecution to produce such evidence. In deciding *Villarini,* the Fourth Circuit apparently ignored *Garcia-Emanuel's* directive to search for substantial evidence of an intent to conceal.[111] Additionally the court in *Villarini* also failed to consider a major theme of money laundering jurisprudence; namely that money laundering is not the same thing as money spending. As in *Dobbs*,[112] Villarini's transactions were as open and transparent as banking transactions can be, and therefore, the court should have found the evidence to be insufficient to support a money laundering conviction.

In *United States v. Shepard*, the Tenth Circuit dramatically expanded the scope of what evidence can be sufficient to show that third-parties were used to launder money by concealing the source of the illegal funds.[113] Shepard was a construction contractor convicted for his role in a scheme to bill clients for non-existent employees and equipment.[114] Two of the money laundering counts Shepard was convicted of involved the depositing of fraudulent checks into the bank account of his daughter, Chastity Shepard.[115] According to the

F.3d at 1024. Therefore, whether he spent the funds for personal use or not was irrelevant to the court's decision. *Id.*

111. *See Garcia-Emanuel*, 14 F.3d at 1475.

112. *See* United States v. Dobbs, 63 F.3d 391, 397 (5th Cir. 1995).

113. *See* United States v. Shepard, 396 F.3d 1116, 1118-19 (10th Cir. 2005).

114. *Id.*

115. *Id.* at 1122.

court, this fact alone was sufficient to satisfy the statute's concealment requirement and characterize the transaction as money laundering.[116]

In support of this proposition, the court cited *United States v. Short* and *United States v. Stephenson*, in which deposits made by a defendant's wife into a safe deposit box were found to be probative of an intent to conceal.[117] Both cases are distinguishable. For starters, both *Short* and *Stephenson* involved the use of safe deposit boxes, which are inherently more secretive, and subject to fewer reporting requirements, than a bank account.[118] Furthermore, in *Short*, the defendant gave cash to his wife and instructed her to place the funds in a safe deposit box "under the name of one of *her relatives*."[119] Therefore, the evidence in *Short* showed that the defendant put several layers of disguise between himself and the illegal funds, including holding the funds in a safe deposit box of someone who presumably did not share his last name. In *Stephenson*, the safe deposit box was placed in the name of the defendant's wife, so there were fewer layers of deception.[120] However, all of the necessary probative evidence in *Stephenson* was provided by the defendant who was recorded on a wire-tap *telling his wife to conceal the money* by depositing it in the safe deposit box.[121]

By contrast, in *Shepard*, the deposits were made into a regular bank account, the account holder was the defendant's daughter who shared his last name, and there was no direct evidence of an intent to conceal. The issue of a common last name is important, because depositing funds into the account of a spouse or child, without more, is generally insufficient to support a conviction, while depositing funds into the account of a girlfriend has been found to be sufficient.[122] The facts of

116. *Id.*

117. *Id.* (citing United States v. Short, 181 F.3d 620, 626 (5th Cir. 1999); United States v. Stephenson, 183 F.3d 110, 120 (2d Cir. 1999)).

118. *See Short*, 181 F.3d at 626; *Stephenson*, 183 F.3d at 120.

119. *Short*, 181 F.3d at 626 (emphasis added).

120. *Stephenson*, 183 F.3d at 120.

121. *Id.*

122. *Compare* United States v. Bowman, 235 F.3d 1113, 1116 (8th Cir. 2000) ("A design or intent to conceal the nature, the source, or the ownership of unlawfully obtained proceeds may be inferred when a defendant transfers

Shepard are simply not "substantial" evidence of concealment.[123] Under the facts of *Shepard*, where a deposit was made in the bank account of an immediate family member who shares the defendant's last name, the government should have been required to produce more evidence of an intent to conceal in order to sustain the money laundering conviction.[124]

D. *Missed Opportunities to Avoid the Characterization Problem*

In *United States v. Richardson*, the defendant was convicted of money laundering for using the proceeds of her boyfriend's drug dealing operation to purchase a home in her own name.[125] According to the government, Richardson lied about her income on a mortgage application and titled the home in her name alone, even though she knew her boyfriend Coles was the home's true owner.[126] In addition, the government produced evidence that Coles laundered money through a front business and engaged in an irregular series of bank deposits in the days and hours before the closing of the home purchase.[127]

However, the court also found there was "precious little evidence" to show Richardson knew about structuring

those proceeds into the control of others with whom the defendant has a very close relationship . . . . [I]n this case, the checking account of Mr. Bowman's girlfriend."), *with* United States v. Corchado-Peralta, 318 F.3d 255, 259 (1st Cir. 2003) ("So far as we can tell, Corchado mostly did no more than make large regular deposits in an account given to her by her husband; there was no inference of concealment or disguise.").

123. It should also be noted that Shepard endorsed the check in his own name. United States v. Shepard, 396 F.3d 1116, 1122 (10th Cir. 2005).

124. For example, in *United States v. Warshak*, a number of the charged transactions involved transfers to the defendant, family members bearing his surname, and to corporations in which defendant was the sole shareholder. 631 F.3d 266, 320-21 (6th Cir. 2010). However, the government also produced evidence from an expert who found the transactions to be extremely complicated and voluminous which had the effect of commingling and concealing personal and business transactions. *Id.* at 321.

125. United States v. Richardson, 658 F.3d 333, 335 (3d Cir. 2011).

126. *Id.* at 341-42.

127. *Id.*

transactions that preceded the home purchase.[128] In fact, only one transaction–a deposit of $9200–could be connected to the defendant.[129] Further, uncontradicted evidence showed that Richardson and Coles applied to have the home jointly titled in both of their names, but were dissuaded from doing so by their mortgage company who claimed they could not issue a loan to Coles due to his poor credit, but that Richardson could qualify on her own.[130]

Notably, although the prosecution introduced evidence that five cash deposits of just less than $10,000 were made at four different banks on the day of the closing,[131] Richardson was not charged with designing transactions to avoid bank currency reporting requirements under 18 U.S.C. § 1956(a)(1)(B)(ii). Had Richardson been charged under this provision of the statute, the prosecution could have avoided the "characterization challenge" of this dual-purpose transaction, and since the government had evidence linking Richardson to a $9200 cash transaction, it is conceivable that they may have been able to produce enough evidence to sustain a conviction on this charge.

IV. Recommendations

Three recommendations stand out from the foregoing analysis of cases that explore the difference between money laundering and money spending. First, the bright light of direct evidence, such as recorded conversations obtained through a wiretap or the direct testimony of a co-conspirator, effectively turns transactions that would otherwise exist in the grey area between money spending and money laundering into clear-cut black and white cases. Although direct evidence may be difficult to obtain due to the budgetary or staff constraints, there is a clear advantage to obtaining such evidence. This is especially true for a prosecutor seeking a money laundering conviction based on a dual-purpose transaction that evinces

128. *Id.* at 341.
129. *Id.*
130. *Id.* at 341-42.
131. *Id.* at 341.

elements of both legal money spending and illegal money laundering.

Second, there appears to be a tendency on behalf of prosecutors to charge suspects with money laundering under 18 U.S.C. § 1956(a)(1)(B)(i), but not with conducting a financial transaction designed to avoid currency reporting requirements under § 1956(a)(1)(B)(ii).[132] As noted throughout this article, there have been several instances where defendants were not charged with avoiding currency reporting requirements, despite their apparently culpable conduct. Regardless of whether prosecutors decided to pursue Richardson, Villarini, and Garcia-Emanuel under § 1956(a)(1)(B)(i) for sentencing purposes, or because of erroneous assumptions about the evidence they would be allowed to present at trial, prosecutors in future cases should ensure they make full use of currency reporting requirements when charging suspects.

Third, when a money laundering charge requires characterization of a dual-purpose transaction, courts have been inclined, either explicitly or implicitly, to subject the prosecution's evidence to an exacting review. In some instances, courts have articulated a "substantial evidence" requirement for characterizing dual-purpose transactions as money laundering. Although it is not entirely clear whether the use of that term poses a distinct and additional legal burden on the prosecution, or whether it is more of a rhetorical warning that the evidence in such cases will be closely scrutinized, the heightened focus is appropriate and should continue.

V. Conclusion

Money laundering is a relatively new crime that was formerly codified for the first time in 1986. Although the impetus for the new law was driven by public outrage at large-scale money laundering operations of the mafia and foreign drug cartels, the final law approved by Congress criminalized money laundering regardless of its size or scale. As courts have grappled with the statute's language, a widespread consensus

132. *See, e.g.*, *Richardson*, 658 F.3d at 333; United States v. Garcia-Emanuel, 14 F.3d 1469 (10th Cir. 1994).

has emerged that the law does not criminalize the mere spending of the proceeds of illegal activity. However, there is often a fine line between transactions that merely represent money spending and money laundering transactions that evince intent to conceal the illegal nature of the funds being used in the transaction. The challenge is determining whether the evidence demonstrates that such transactions were undertaken with the requisite mens rea.

There are three ways this legal gray area can be brought into sharper focus. First, prosecutors should focus on developing direct evidence that demonstrates a defendant's intent to conceal. Second, prosecutors should ensure they make full use of the currency reporting provisions of 18 U.S.C. § 1956. Finally, courts should continue to carefully scrutinize money laundering charges that are based on dual-purpose transactions to ensure money laundering convictions will only stand where the defendant's culpable conduct has been proved beyond a reasonable doubt.