NO.: 11-60431

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff, Appellee

v.

KEITH M. KENNEDY;
J. LARRY KENNEDY;
MARK J. CALHOUN,
Defendants, Appellants

Appeal from the United States District Court
for the Southern District of Mississippi
Cause No: 3:08cr77-DPJ-FKB

BRIEF FOR APPELLANT KEITH M. KENNEDY

MICHAEL L. KNAPP, MSB #4213
405 TOMBIGBEE STREET
JACKSON, MISSISSIPPI 39201
TELEPHONE: 601-988-5308
FACSIMILE: 601-354-5548
EMAIL: mknap56@comcast.net

Attorney for Defendant-Appellant Keith M. Kennedy

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel certifies that the persons having an interest in the outcome of this case are:

1. Honorable Daniel P. Jordan, III, United State District Judge, Jackson, Mississippi;

2. Gaines H. Cleveland, Assistant United States Attorney, Southern District of Mississippi, Gulfport, Mississippi;

3. Jerry L. Rushing, Assistant United States Attorney, Southern District of Mississippi, Jackson, Mississippi;

4. Carla J. Clark, Assistant United States Attorney, Southern District of Mississippi, Jackson, Mississippi;

5. John M. Dowdy, Jr., United States Attorney, Southern District of Mississippi, Jackson, Mississippi;

6. Richard A. Rehfeldt, Jackson, Mississippi, counsel for Keith M. Kennedy;

7. Michael L. Knapp, Jackson, Mississippi, counsel for Keith M. Kennedy;

8. Keith M. Kennedy, Defendant-Appellant;

9. Julie A. Epps, Canton, Mississippi, counsel for Mr. Larry Kennedy;

10. Nathan Henry Elmore, Jackson, Mississippi, counsel for Mr. Larry Kennedy;

11. William B. Kirksey, Jackson, Mississippi, counsel for Mr. Larry Kennedy;

12. J. Larry Kennedy, Co-defendant;

13. William Andy Sumrall, counsel for Mr. Jones;

14. Willie Jones, Co-defendant;

15. James M. Tyrone, Jackson, Mississippi, counsel for Ms. Calhoun;

16. Eileen M. Maher, Natchez, Mississippi, counsel for Ms. Calhoun;

17. April Calhoun, Co-defendant.

18. Kathryn N. Nester, Salt Lake City, Utah, counsel for Mr. Mark Calhoun;

19. Omodare B. Jupiter, Assistant Federal Public Defender, Jackson, Mississippi, counsel for Mr. Mark Calhoun;

20. S. Dennis Joiner, Federal Public Defender, Jackson, Mississippi, counsel for Mr. Mark Calhoun; and

21. Mark J. Calhoun, Co-defendant.

/s/Michael L. Knapp
MICHAEL L. KNAPP, ATTORNEY
FOR DEFENDANT-APPELLANT

STATEMENT REGARDING ORAL ARGUMENT

The Appellant submits that oral argument will not be helpful in assessing the arguments presented herein. The combined trial and sentencing hearing spanned several weeks, and the record on appeal is voluminous. The issues however are relatively narrow and will be covered by three Appellant's Briefs and one Appellee Brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes and Rules:

1. JURISDICTIONAL STATEMENT

The district court had jurisdiction over Appellant Keith M. Kennedy and the subject matter because he was indicted on May 21, 2008, by a Federal Grand Jury for the Southern District of Mississippi. (Indictment, USCA5, 26-53.) The Second Superseding Indictment (USCA5, 26) charged Mr. Keith M. Kennedy with:

count 1: conspiracy to commit wire fraud, in violation of 18 U. S. C. § 1349 (USCA5, 27-35);

count 2: wire fraud in the context of mortgage fraud, in violation of 18 U. S. C. § 1343 (ID at 35-41);

counts 17-22: conspiracy to commit money laundering in violation of 18 U. S. C. § 1956 (h) (ID at 41-44);

counts 18-21 & counts 23-34: money laundering, in violation of 18 U. S. C. § 1956(a)(1)(A)(I) (IDat 44-50);

counts 35-37: alleged against defendants other than Mr. Keith M. Kennedy; and

counts 38: engagement in a $70,000.00 transaction with money derived through unlawful wire fraud, in violation of 18 U. S. C. § 1957 (ID at 50).

The month-long trial of this case began on February 22 and ended on March

22, 2010. (*See* Docket Minute Entries, USCA5, 11-25.)

The sentencing hearing began on May 24 and ended on June 8, 2011. (*See* Docket Minute Entries, USCA5, 22-23.) The court sentenced Mr. Keith M. Kennedy to 72 months in prison on counts of 1-34 of the indictment, all sentences to run concurrent. (*Id.*) Finally, the court ordered forfeiture of money totaling $10,244,573.57. (Judgment, USCA5, 533; Final Order of Forfeiture, USCA5, 530; Sen. at 956.) A final Judgment reflecting this sentence was filed on July 5, 2011. (Judgment, USCA5, 533-535.)

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because Mr. Keith M. Kennedy filed a timely Notice of Appeal and Amended Notice of Appeal on June 22, 2011 and June 23, 2011, (see July 15, 2011 Notice of Appeal respectively) (USCA5, 588), within 14 days after entry of the Judgment in a Criminal Case, as required by Rule 4(b)(1)(A) of the Federal Rules of Appellate Procedure (actual notice was filed after minute entry and before Final Judgment, therefore is treated as filed after Final Judgment). This appeal is from a Final Judgment in a Criminal Case and Order denying subsequent post-trial motions that resolved all issues before the district court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW
DELIBERATE IGNORANCE JURY INSTRUCTION

The Appellant Keith M. Kennedy contends that under the facts of this case and in reliance on U. S. v Chen, 913 F.2d 183 (5th Cir. 1990) and other cases, that the District Court erred in giving a "deliberate ignorance" instruction. This instruction is only given when there is evidence the Defendant deliberately attempted to avoid knowledge of a crime, which was not in the evidence in the present case.

SUFFICIENCY OF THE EVIDENCE

The Appellant Keith M. Kennedy contends that throughout the month long trial, his name was rarely mentioned and no knowledge of any crime was shown by the evidence. There was no showing that Keith M. Kennedy knew of any wrongdoing and no juror could have reasonably found him guilty of any counts.

DENIAL OF MOTION OF MISTRIAL WHEN JURY WAS IMPROPERLY INFLUENCED BY STATEMENTS OF ONE JUROR

The Appellant Keith M. Kennedy contends that the statement by the one juror to the bailiff that she had been talked to by a co-defendant was improper. It unfairly inputed wrong on the part of the Defendants and gave the jury the impression of misconduct. The juror made these statements in front of the entire jury (except possibly one juror).

THE MONEY LAUNDERING EVIDENCED MERGED WITH THE WIRE FRAUD ALLEGATIONS AND COULD NOT FORM THE BASIS OF A SEPARATE COUNT

The Appellant Keith M. Kennedy contends that the Government's indictment and the evidence presented contained allegations of disbursements which were a part of the underlying alleged wire fraud and the money laundering charges should have merged with the wire fraud counts.

STATEMENT OF THE CASE

This was a case charging three Defendants, (originally five) with wire fraud, conspiracy, and money laundering. The trial was lengthy as this case and involved allegations concerning mortgage fraud. The Kennedys were closing agents for the loans involved and Mark Calhoun was the "originator" of the loans. That loans were alleged to have been a scheme and artifice to pay fictitious liens and brokerage fees to Mark Calhoun and the borrowers. The jury found the Kennedy's guilty on all thirty-four (34) counts against them. The Court sentenced Keith M. Kennedy to seventy-two (72) months imprisonment. The Court overruled the Kennedy's post trial motions for Judgment of Acquittal and/or new trial. Mark Calhoun and Larry Kennedy and Keith Kennedy appealed.

STATEMENT OF FACTS

Defendant Keith Kennedy, and Mark Calhoun and Larry Kennedy were tried on a thirty-eight (38) count indictment, thirty four (34) of which pertained to the Kennedys), alleging wire fraud, conspiracy, and money laundering. The Jury found Keith Kennedy and Larry Kennedy guilty on all thirty four (34) counts. USCA5, 182-190. Mark Calhoun was also found guilty.

The Kennedys (Larry the father and Keith the son), created the Mississippi Corporation LCTS. The business terminated about 2007. The business of LCTS was loan closings, and the present charges against them stemed from their role in these closings.

The trial in this cause lasted approximately one month and the sentencing hearing lasted approximately a week.

Approximately forty (40) witnesses testified and there were nine (9) banker boxes of exhibits (documents) entered into evidence. These various loan closing files were introduced into evidence as collective exhibits instead of individual documents. USCA5, 510

Keith Kennedy was added as a defendant in the second superceding indictment. Keith Kennedy and Larry Kennedy, also a Defendant, were in the business of closing loans on residential properties. One, among others, of the loan "originators" was

Mark Calhoun, also a defendant. Mark Calhoun's involvement as a loan originator included finding home purchasers. (The borrowers thought of themselves in many instances as investors, but there was no showing either of the Kennedys knew of the investment "concept" of the borrowers, by direct knowledge.)

Mark Calhoun had created several different corporation's. These included Fast Start, Silver Cross and M&C Investments. Exhibit G-120. Another Defendant (though not tried), Willie Jones, created Metro-One Investments and Unlimited Construction (G-120).

Neither Larry Kennedy nor Keith Kennedy was involved in any way with the formation of these corporate entities. USCA5, 834, et seq. The Kennedy's operated LCTS's in 2002-2007,and there was no showing any of the other co-defendants were involved in its creation or operation. (Conclusion based on entire transcript). Additionally, the Kennedy's name appeared nowhere on the Corporate Pages of any of Defendant Mark Calhoun's or Willie Jones' corporations or business entities. G-120.

There was no direct evidence the Kennedy's knew of Mark Calhoun's involvement in these corporations. USCA5, 1212-1213. TerryLynn Rankin, an employee of LCTS during the time in question was not aware of this.

Keith Kennedy's duties at LCT's included preparation of the HUD-1's and

disbursement of proceeds involved in respective closings. There were other non-defendants who periodically prepared the HUD-1's USCA5, 905, 906. Barbara Allday, a former employee of LCTS and witness for the Government, never had suspicions of wrong doing by LCTS or either of the Kennedys. USCA5, 920

Keith Kennedy was a Notary Public (as was Larry Kennedy) and he did not always have the named party before him when he notarized documents. USCA5, 365. Evidence was introduced that this practice was contrary to the Secretary of State Rules, but, according to those same rules the Notary could be responsible for a civil penalty, not a criminal action. USCA5, 857-859. However, this conduct, while not appropriate, nor in compliance with Secretary of State guidelines, was not in itself criminal. It sometimes happened among loan closings in general to not have all parties present at the same time USCA5, 1827.

An employee, of LCT's, Inc., Barbara Allday, testified for the Government that construction liens can exist whether filed of record with the Chancery Clerk or not. USCA5, 918, 919. She also stated that TerryLynn Rankin and Jon Burton also prepared the HUD-1's, in addition to Keith Kennedy. Ms. Allday stated she did not remember any requests from Mark Calhoun that caused her concern.USCA5, 910. She indicated that it was common to pay bills, whether liens or not, out of the closing proceeds. USCA5, 919. She never had a suspicion that wrongdoing at LCTS by the

Kennedys. She told investigators that the Kennedy's were honest likeable people. USCA5, 920 She said that many hundreds of loans were in closed in 2007. USCA5, 931

TerryLynn Rankin was also an employee of LCT's, and she also testified. Her job was to balance LCT's books. USCA5, 970. She also indicated that it was common to pay debts at closing without there being a filed lien. USCA5, 1198, 1199. She never questioned the Kennedy's actions. USCA5, 1219. She indicated that LCT's received $21,305.71 in attorney fees, notary fees and title fees for the indicated loans. Exhibit DJK-11, (Referred to at) USCA5, 1261.

Jason Ellis, Mark Calhoun's employee during part of the time in question, had a conversation with Larry Kennedy about Mark Calhoun. However, the objection to this testimony was sustained and the jury was instructed not to consider this statement to Larry Kennedy. A motion for mistrial was made on behalf of both Kennedys because this testimony was the subject of a prior Order in Limine USCA5, 1311-1315. Other persons also testified as to closing and recording practices.

According to Danita Sheriff, a clerk at the Hinds County Chancery Clerk, there were no liens of record found on certain specified loans in question. USCA5, 1396. Patricia Hamilton, a loan officer at Flagstar, indicated that their rules allowed ten (10) loans per investor. USCA5, 1471-1472. Charlie Brook, a home builder testified that

his attorney told him it was "ok" to pay loans if disclosed on the HUD-1 USCA5, 1827. He indicated that it was common for some of the people to be absent from loan closings. USCA5, 1120. Several borrowers testified that they received large amounts from Mr. Calhoun which, they claim, was a "return on investment". USCA5, 1998, 1989, 2478. There was no evidence the Kennedys knew of this. Diane Taylor, a mortgage company employee, stated that the mortgage company had to approve the HUD-1 before it would allow disbursement USCA5, 2205.There were a few "travel closings" which, according to testimony, were closings made by the originator outside the closing agent's office. USCA5, 2517.

Agent Phil Hull, the government's representative at trial, and the lead investigator on the indicted charges provided a case summary. USCA5, 1988 et. seq., over counsel's objection, relating to loan amounts of the various closings. The Government rested. All Defendants rested without presenting any witnesses. Prior to the Government resting, however all defendants presented Rule 29 Motions for Judgment of Acquittal. These were renewed after Defendants rested and again after rebuttal of the Government.

SUMMARY OF THE ARGUMENT

Defendant Keith M. Kennedy asserts that the Court erred when it granted a "deliberate ignorance" jury instruction. There was no evidence to show that Keith M. Kennedy knew or was put on notice or attempted to avoid knowledge of any wrongdoing.

During the trial Keith M. Kennedy's name was not mentioned for days on end and there was no evidence that he was involved in any scheme or artifice to commit the charge related in the indictment. There was not enough evidence for a reasonable juror to find him guilty beyond a reasonable doubt on the charges.

Mr. Kennedy asserts that one of the jurors involved in the case spoke to the bailiff, in front of the other jurors, stating that Mark Calhoun attempted to speak to her. While she (juror) later indicated there may not have been an impropriety, the jury was questioned and heard her statements to the bailiff. This created an impression of jury contact which would be improper, on the part of the defendant Calhoun and through association, to all defendants.

The indictment also charged Keith M. Kennedy with money laundering which was improper since the disbursements in question were an integral part of the alleged scheme or artifice of the wire fraud and the two charges therefore merged together.

STANDARD OF REVIEW RELATIVE TO JURY INSTRUCTIONS

The Standard of Review in determining whether a jury instruction is improperly given is, after reviewing the facts de novo, whether the instructions, taken in their entirely, are a correct statement of the law and whether [the instructions] clearly instructed jurors as to the principles of law applicable to the factual issues confronting them. See Court Memorandum and Order relative to post trial motions, USCA5, 18, citing and quoting US v Lara-Velasquez, 919 F. 2d 946, 950 (5th Cir. 1990).

THE COURT ERRED IN GIVING A KNOWLEDGE INSTRUCTION CONTAINING A "DELIBERATE IGNORANCE" JURY INSTRUCTION

The Court gave the following instruction to the jury:

> The word "knowingly" as that term has been used from time to time in there instructions means that the act was done voluntarily and intentionally, not because of mistake or accident. You may find that the Defendant deliberately closed his eyes to what otherwise would have been obvious to him. While knowledge on the part of the Defendant cannot be established merely by demonstrating that the Defendant was negligent, careless or foolish, knowledge can be inferred if the Defendant deliberately blinded himself to the existence of a fact. USCA5, 3699.

The Court added later in the instructions:

> The good faith of the Defendant is a complete defense to the charge because good faith on the part of the Defendant is simply inconsistent with intent to defraud. A person who acts on a belief or opinion honestly held is not punishable under the statute merely because the belief or

> opinion turns out to be inaccurate, incorrect or wrong. USCA5, 3701, 3702. (Allowed on motion by Larry Kennedy at Trial)

Defendant Keith Calhoun objected to the deliberate ignorance instruction and the Court ruled on the objection at trial. USCA5, 3664-3670. The Court referred to objection in a chambers jury instruction conference. USCA5, 3683. (The Conference itself was not on the record.) USCA5, 3850, 385.1The objection was referenced in Keith Kennedy's Motion for New Trial, USCA5, 191., and The Courts subsequent Memorandum and Order was issued on post trial motions addressing the same issue. USCA5, 436.

At trial, counsel cited Chen vs USA, 913 F.2d 183 (5th Cir. 1990). In Chen the charges involved the "purposeful" maintaining a place for distributing and using a controlled substance (Count 1) and knowingly renting property for the purpose of starting, distributing and usage of controlled substance (Count 2). The Court in Chen held that because of the "purposeful" requirement of Section 856 (a)(1), Count 1, the deliberate ignorance instruction, should not have been given.

The Court in Chen, quoted the Ninth Circuit Case of United States vs Jewell, 532 F.2d 697 (9th Cir.), cert denied, 426 US 951 (1976), which stated: "[T] he Court can properly find wilful blindness only where it can almost be said that the defendant actually knew." Chen at 190,191. The Court held that the deliberate ignorance

instruction was improper in Count 1, 856 (a)(1). "It is not sufficient that the Defendant may have suspected or thought that the rooms were being used for such purposes". ID at 187. Defendant, Keith Kennedy equates "purposeful" (of Chen) with the "alleged scheme" and "artifice"in the context of the present case.

In addition, The Court when deciding whether to apply the same standard to 856 (a)(2) since there was no "purposeful" component, held that the following was enough for the jury to consider deliberate ignorance. The evidence cited to show the types of evidence need to show a deliberate ignorance instruction is warranted:

> That she [defendant] saw people "talking" in the parking lot and she "thought maybe they [sic] doing something" and they "look[ed] suspicious";
>
> That despite all the visits by the police with search and arrest warrants she would "never ask" why they were there even though she was curious, and that the police never answered her question concerning their need for the motel room keys and "it is not for me to ask";
>
> That she never left her office to witness what the police were doing during their visits to the Della Motel;
>
> That when the police were there, residents would call her in the office to ask the police were at the motel, but she "never ask [ed] them" whey they were concerned about the police; and
>
> That before she joined a neighborhood improvement association she did not "pay attention" to drug problems in the neighborhood. ID

The Court however applied its reasoning above in conjunction with the facts

of the case and held the second count, 856 (a) (2), warranted a proper due diligence instruction.

US v Lara-Velasquez, 919 F. 2d 946 (5th Cir. 1990) a case involving drugs, also involved the issue of insufficient evidence to show "deliberate ignorance". This case involved drug smuggling. In Velasquez the Defendant was warned by his parents that his father's cousin Alvarez was a "bad man" ID at 949. Marijuana was found in Defendant's pickup truck. The Defendant never examined the truck and simply drove the truck across the border with drugs in the pickup. When apprehended, the Defendant "made a sudden backward movement which the official interpreted as an attempt to escape. ID at 953. Other evidence supported strong inferences. The Court in Velasquez noted specifically that:

"The term deliberate ignorance" denotes a conscious effort to avoid positive knowledge a fact which is an element of the offense charged, the defendant choosing to remain ignorant so he can plead lack of positive knowledge in the event he should be caught." ID at 951,quoting "U.S. v Restrepo-Granda, 575 F.2d 935 (1978). The Court elaborated: " the key aspect of deliberate ignorance is the conscious action of the defendant". ID at 951. "The defendant consciously attempts to escape confirmation of conditions or events he strongly suspected to exist" ID. An example was given in US v Luna, 815 F.2d 301 (5th Cir. 1987), wherein the Court ruled "Don't

tell me, I don't want to know", was the statement by the defendant warranting the instruction. ID at 302. The risk in applying the deliberate ignorance instruction is that " a jury might convict the defendant on a lesser negligence standard. The defendant should have deem aware of the illegal conduct"., ID at 951 citing US v. Alvarado 838 F.2d 311, 314 (9th Cir. 1987) cert denied 487 U.S. 122 (1988). The mere fact of an inference that the defendant had actual knowledge is not enough, nor is it applicable when the Defendant is "more than negligent" or "stupid". ID at 951.

The Court in Velasquez cited US v Batencont, 592 F. 2d 916, 918 (5th Cir 1979) wherein the defendant was hired to transport a suit case admitting ("he had something in the suit case that he shouldn't have, but he didn't know exactly what"). The Court in Velasquez ruled the following facts to be especially probative:

1. Lara-Velasquez knew that his uncle had a poor reputation;

2. Alvarez refused to provide Lara-Velasquez the money to purchase airline tickets to the defendant's home in California, even though Alvarez had invited Lara-Velasquez to Mexico;

3. Alvarez supplied Lara-Velasquez a pickup truck and sent him on a circuitous route back to California; and

4. The inside of the truck's camper shell was inexplicably painted two different shades of white. These circumstances were so overwhelmingly suspicious that the defendant's failure to inspect the truck or question Alvarez's instructions suggests a conscious attempt to avoid incriminating knowledge, and not merely an oversight. Thus, the district court could reasonably have

> concluded that the evidence at trial satisfied the second prong of the deliberate ignorance test. Velasquez at 953.

The Court in Velasquez gave a two-prong test:

1. The Defendant was subjectively aware of a high probability of the existence of illegal conduct.

2. The Defendant purposefully contrived to avoid learning of illegal conduct. ID at 953.

In the instant case the government charged the defendants with, conspiracy, wire fraud, and money laundering.

In reference to the conspiracy counts, the indictment (Count 1) alleges all defendants, including Keith Kennedy did "knowing and willfully conspire" to:

> A. To knowingly devise a scheme and artifice to defraud and to obtain money by means of materially false and fraudulent pretenses, representations, and promises, and for the purpose of executing the scheme or artifice, and attempting to do so, did place or cause to be place in any post office or authorized depository for mail matter, documents to be sent or delivered by the Postal Service, or deposit or cause to be deposited documents to be sent or delivered by any private or commercial interstate carrier, in violation of Section 1341, Title 18 United States Code. Underlining added. USCA5, 28.
>
> B. To knowingly devise a scheme or artifice or intend to devise a scheme or artifice to defraud and to obtain money by means of materially false fraudulent pretenses, representations, or promises and, for the purpose of executing the scheme, did transmit or cause to be transmitted by means of wire or radio communications in interstate commerce, any writings, signals or sounds, in violation of Section 1343, Title 18,

United States Code.

12. It was an object of the conspiracy that the defendants, M. Calhoun, A. Calhoun, W. Jones, L. Kennedy, K. Kennedy, and others, would provide false information to potential lenders in order to obtain fraudulent mortgage loans for numerous prospective borrowers. USCA5, 28. Underlining added.

In reference to the wire fraud charges:

13. it was further an object of the conspiracy for the defendants M. Calhoun, A. Calhoun, W. Jones, L. Kennedy, K. Kennedy, and others, to enrich themselves to the detriment of the borrowers and lenders by causing and fictitious documents to be created and submitted to the lenders to ensure that mortgage loans would be funded. Thereafter, defendant L. Kennedy and K. Kennedy, operating as LCT's, Inc. Served as closing agents.... underlining added.

...

29 Beginning in or about September 2004, and continuing through a date unknown but at least through in or about September 2006, in Hinds County, in the Jackson Division of the Southern District of Mississippi and elsewhere, the defendants M. Calhoun, A. Calhoun, W. Jones, L. Kennedy, K. Kennedy aided and abetted by others known and unknown to the Grand Jury, knowingly and intentionally devised, intended to devise and carried out and attempted to carry out a scheme to defraud mortgage loan borrowers and lenders and to obtain money by materially false and fraudulent pretenses, representations, and promises. Underlining added. USCA5, 36

47 A. To conduct and attempt to conduct financial transactions affecting interstate commerce, which transactions involved the proceeds of specified unlawful activity, that is, wire fraud, with the intent to promote the carrying on of such specified unlawful activity, in violation of Section 1956a(1)(A)(i), Title 18, United States Code. ID at 17

> 47 B. To conduct and attempt to conduct financial transactions affecting interstate commerce, which transaction involved the proceeds of specified unlawful activity, that is, wire fraud, with the intent to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of such specified unlawful activity, in violation of Section 1956(a)(1)(B)(i), Tile 18, United States Code. ID at 17

The above cites to the indictment, representing the "scheme" or "artifice" alleged, show, like Chen, supra, show that, the deliberate ignorance instruction is not applicable under the facts of this particular case when a complicated "scheme" or "artifice" is alleged and substantial evidence was introduced attempting to show the nature of the scheming. The acts cannot be performed by "deliberate ignorance". The instant case is simply too complicated and detailed to allow the deliberate ignorance instruction. The charges require too much from the Defendants.

A scheme alleged in the instant case which (although it is contended the Kenendys knew nothing of this scheme) took a month trial to develop. The scheme alleged was that false fees were collected at closing and the checks from disbursements were cashed or transferred by Mark Calhoun to borrowers/investors and himself. This scheme could not be deliberately ignored and remain a scheme. It is Keith Kennedy's contention that, like Chen, this scheme or artifice equates to purposeful activity.

A case on point is U.S. v Ojebode, 957 F.2d 1218, 1219 (5th Cir 1992), which

reversed a conviction because of the allowance of the deliberate ignorance instruction. There was no evidence the defendant tried to avoid learning of the flight's scheduled landing in Houston. In Ojebode, a Nigerian was indicted for distribution of heroin. One of the assignments of error was the granting of a deliberate ignorance instruction by the trial court. The fact at issue was whether the defendant knew or deliberately avoiding knowing of a flight schedule of a plane containing drugs requiring it to land in Houston (which would give the United States jurisdiction). The flight's final stop was to be Mexico City, the Defendant's destination. Noting that the Government's case would require knowledge that the plane would stop in the United States, the Court noted that the Defendant's only defense is that he didn't know of U.S. destination and that the evidence was minimal and held the important instruction on deliberate ignorance was erroneous. Ojebode at 1229.

"Nowhere do we find that Ojebode deliberately "shut his eyes" to avoid knowing what would be obvious to view". ID at 1229. "There was no reason to believe Ojebode cared one way or the other where the plane would stop". ID at 1229

"Objebode "statements" may indicate deliberate ignorance of something, but not necessarily deliberate ignorance of the act that the flight would land in Houston". ID at 1229.

In other words, there was no purposeful contrivance to avoid learning of a

relevant fact, so there was insufficient evidence of deliberate ignorance. The instruction therefor posed too great a risk that "the jury would convict for his negligent ignorance i.e. that he should have known where the flight was headed". ID at 1229.

The use of the deliberate ignorance instruction should be rarely given. U.S. v Nguyen, 493 F.3d 613 (5th Cir 2007); Ojebode, supra. The Court should determine if (1) the subjective awareness of a high probability of the existence if illegal conduct and (2) purposeful contrivance to avoid learning of the illegal conduct. Ojebode at 1229.

In the present case there was nothing to "trigger" the Defendant Keith Kennedy to awareness of wrongdoing. Ms. Rankin testified "all" were concerned over the large loan amounts for Mark Calhoun loans, but that did not put Keith Kennedy on knowledge to the scheme or artifice that was presented at trial. It did not put him on notice of anything.

STANDARD OF REVIEW TO SUFFICIENCY OF EVIDENCE

The Standard of Review in determining the sufficiency of the evidence required to deny Keith Kennedy's Rule 29 Motion for Acquittal and to overturn a jury verdict is "whether, after reviewing the case de novo, viewing the evidence in the light most

favorable to the prosecution, any rational trial of fact could have found that the evidence established the essential elements of the crime beyond a reasonable doubt" US v Bellow, 369 F3d 450, 452 (5th Cir. 2004) quoting Jackson v. Virginia, 43 US 307, 319 (1979).

THE JURY'S VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE

LCTS, LLC was formed for the purpose of closing loans by the Kennedys. Over a period of time from 2003 to 2007 they closed over two thousand (2000) loans. USCA5,1925, G.52, USCA5, 1231.

One of the loan "originators" was co-defendant Mark Calhoun. The originator found borrowers for loans. LCTS closed the loans in questions for Mark Calhoun and Willie Jones. It's books were balanced by then employee, TerryLynn Rankin. Barbara Allday, also an employee found no evidence of the Kennedy's or LCTS wrongdoing. USCA5, 1219.

The HUD-I's, prepared by Keith Kennedy primarily and also Ms. Rankin later in the time periods, reflected several "brokerage fees" and construction liens. These payments, on at least hindsight, were to corporations and LLC's formed by Mark Calhoun and Willie Jones and April Calhoun.

The construction liens were not recorded with the Chancery clerk of their

respective counties. USCA5, 2461. However, according to several witnesses, these liens did not need to be recorded to be valid between the parties. USCA5, 918.

Additionally, Jason Ellis, another originator, told Larry Kennedy his concerns about Mark Calhoun USCA5, 1310, however, this was stricken. USCA5, 1310. Keith and Larry Kennedy did notarize the signatures of individuals not in front of them to facilitate the travel closings. However there was no showing they did this knowing the signatures were not valid or that they did it fraudulently.

The Defendant Keith Kennedy, adopts by reference his arguments relating to the deliberate ignorance instruction as these facts are of similar application here.

STANDARD OF REVIEW AS TO WHETHER THE COURT ERRED IN DENYING A MISTRIAL BECAUSE OF JURY BEING INFLUENCED

The Standard of Review of the assignment of error relative to Denial of Motion for Mistrial concerning the question of whether a jury was improperly influenced is whether the Court, reviewing the issue de novo, determines the trial court committed reversable error. United States v Bansal. 663F.3d 634, 643. (5th Cir. 2011).

THE JURY WAS UNDULY INFLUENCED BY ONE OF THE JURORS NOTIFYING THE BAILIFF THAT DEFENDANT CALHOUN TALKED TO HER

A juror told the bailiff that she thought Mark Calhoun talked with her. After examination it appears that Mr. Calhoun might not have done this. USCA5, 3070

However the juror told the bailiff what she feared was unlawful contact in front of the other jurors who all confirmed they heard her (except one), USCA5, 3069. All the jurors were examined individually and all but one remembered it. They all indicated it would not affect their ability to be fair USCA5, 3069. The Kennedy defendants both moved for a mistrial because it obviously alleged misconduct and the jurors heard it. The Defendant Keith Kennedy alleges that the jury became unfairly influenced (although the juror's stated other wise).

One of the jurors, Cynthia Bernell Laston, felt that Mr. Calhoun may have spoken to her as he was leaving the Courthouse. Mr. Calhoun said "How you doing?" USCA5, 3059-3065. The juror did not respond. While she did not address the other jurors directly, she told the bailiff about the incident in the presence of the entire jury. (except possibly one) USCA5, 3079. Mr. Calhoun may not have known she was a juror since her back was to him. USCA5, 3085. She was not even sure he was speaking to her. ID. The juror indicated this would not impact her decision. USCA5, 3066. This was the second incidence of Mr. Calhoun making alleged contact with a juror, however the second instance was "vague" at best. In the first instance the juror had to be excused. USCA5, 732 et. seq.

The jurors were questioned as to whether they heard the juror ask the bailiff and all but one heard it. This, by itself, gave the jurors a indication that one of the

defendants might be doing something improper and/or illegal. Mr. Calhoun's actions had the damage of tainting the Kennedys .U.S. v Brown, 371, F.2d 980, U.S. v Adams, 799 F.2d 665, U.S. v Bulter, 822 F.2d 1191.

The second "contact" would have been, in opinion of counsel, a violation of this Court's Orders and instructions by Mr. Calhoun. Although the juror was vague, the bailiff's testimony, Richard Allen, was not. He testified the juror said to him "What do I do about somebody speaking to me?".... "Well Mr. Calhoun spoke to me out front". USCA5, 3079 et. seq. Mr. Allen responded "Well, I'll tell the Judge about it". ID

The Court gave specific instructions to each juror at the end of each day of trial. U.S. v Adams 799 F.2d 665 (11th Cir. 1986) involved improper contact with a juror. The juror had "been contacted on the previous night by a woman (not a party emphasis added) who made a reference to the trial and to one of the defendants". The juror was excused. It was found that two of the twelve jurors did not know of the contact. The other ten (10) were aware of the contact. Five (5) of them did not know that a name had been mentioned. The Court questioned each juror and determined there was no prejudice. ID at 668.

In the instant case all but one juror knew of "contact" and all but one knew of the defendant's name was mentioned. In Adams there was a contact by a third party.

In the present case there was allegedly an attempt by one of the Defendant's (Mark Calhoun). This alleged attempted contact would create a negative opinion of all Defendants, even if they testified it would not. It must be stated that a juror was excused prior to this but the jury was not told the reason. The apparent prejudice is substantial. This involved on its face improper and perhaps illegal misconduct. Virtually the entire panel was affected.

STANDARD OF REVIEW CONCERNING MONEY LAUNDERING EVIDENCE BEING MERGED WITH WIRE FRAUD

The Standard of Review relating to whether money laundering evidence was merged with a part of the underlying offense of wire fraud is whether the Court, reviewing the issue de novo, determines the trial court committed reversable error, in its determination of the law.

THE MONEY LAUNDERING "EVIDENCE" WAS OF THE NORMAL PART OF THE UNDERLYING OFFENSE OF WIRE FRAUD

United States v. Santos, 553 U.S. 2020 (2008), involved an illegal gambling operation and "money laundering" consisting of payment to "runners". The Supreme Court, in a plurality opinion, found that the payments to runners and investors were part of the crime, but the payment could constitute money laundering but not necessarily. In examining facts, the Court held that "profits" were not proven which would justify separate conviction of money laundering. After Santos the Fifth Circuit

elaborated the issue in Garland v. Roy, 615 F.3d 391 (5th Cir. 2010). The Court in Roy found that a "return to investments" used for the basic charge of fraud were also used to support a charge of money laundering. The Court held that there was a qualitative difference between profits of the scheme and payout and when the subsequent disbursements were a "normal part of the crime". The first would allow a conviction of money laundering. The second would involve a merger with the underlying crime. Roy supra.

In the instant case the distributions of money to Calhoun's entities (of which the Kennedy's allege they were not aware) were, according to the indictment charged, a part of the scheme or artifice wherein the process kept operating. The disbursements were specifically listed as part of the scheme. See prior quotations of relevant indictment parts. USCA5, 28-36.

The Government chose to "define" the scheme of wire fraud, and these included (in addition to evidence presented at trial), the payments of construction liens and brokerage fees that the Government alleged were fraudulent. Santos and Roy apply here since the subsequent disbursements may not on a necessary element of wire fraud but definitely were a part of the actions alleged to be wire fraud. This results in the "merger problem" and therefore the allegations of disbursements to Calhouns and Jones' business entities were treated not only in the indictment but

throughout the trial to be the core of the Government's case on wire fraud. The money laundering allegations merged with the wire fraud allegations.

The normal course of a loan closing was followed. The mortgage lender (whether based on fraud or not) lent and forwarded the money. Liens, false, or not, were paid as in "common loan closings". The sellers received proceeds, first liens were paid off, auxiliary expenses such as title fees, etc. were paid and most important, the mortgage lender secured. A first lien was obtained in all cases. Disbursements are an integral and necessary part of the loan closings. The "scheme" of wire fraud alleged (although denied) would not have existed in any form without the disbursements. All closing agents use an escrow account into which the loan amount is paid. The Kennedys only received their fees and expenses. These closings are the same whether it was a legitimate crime or fraud or a legitimate transactions and the vast majority of LCTS's loans were never questioned.

CONCLUSION

The instant case involved Keith Kennedy in what he thought was a legitimate loan closing business. He prepared the HUD-1's along with others, and he disbursed the money from the mortgage lender in accordance with the HUD-1. No HUD-1 was ever questioned by the lender at or near the time in question. There was never a concern (with exception of TerryLynn Rankin who stated the large amounts of

Calhoun's loans "concerned all of them" with no description about the nature of the worry or who "they" were). She testified she never saw anything she thought was questionable otherwise. She thought the Kennedys' were likeable, honest people.

Some of the work in a closing, because of the difficulty in getting everyone together at one time and, because of the volume of the work involved, necessitated certain short cuts and irregularities, such as the notary not having the signatory before them and "travel closings". This was not enough to put them on notice to investigate a crime or what type of wrongdoing they would be investigating.

There was never an intent to defraud and this is a case wherein the "deliberate ignorance" instruction should not have been given. The standards as listed in the cases previously cited were not met. There were many days at trial when Keith Kennedy's name was not mentioned.

Because of the aforesaid mentioned assignments of error, Mr. Kennedy should not have been convicted since a reasonable juror could not have found that all the elements of the crime, alleged, were proven beyond a reasonable doubt.

CERTIFICATE OF COMPLIANCE WITH RULE 32 (a)

Certificate of Compliance with Type-Volume Limitations,
Typeface Requirements, and Type Style Recommendations

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6606 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X4, in 14 point font size and Times New Roman type style.

/s/ Michael L. Knapp
MICHAEL L. KNAPP, ATTORNEY
FOR KEITH M. KENNEDY

CERTIFICATE OF SERVICE

I, Michael L. Knapp, certify that today, I electronically filed a copy of the Brief of Appellant, Keith M. Kennedy on Honorable Gaines H. Cleveland, Assistant United States Attorney, via United States Mail, postage prepaid to the Office of the U. S. Attorney, John M. Dowdy, and a copy of the Brief of Appellant only, was delivered by electronic notification to all attorneys and judges reflected in interested parties referred to at beginning of Brief.

/s/ Michael L. Knapp

MICHAEL L. KNAPP, MSB # 4203
ATTORNEY FOR KEITH M. KENNEDY
405 TOMBIGBEE STREET
JACKSON, MISSISSIPPI 39201
TELEPHONE: 601-988-5308
FACSIMILE: 601-354-5548
EMAIL: mknap56@comcast.net