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 MARK J. CALHOUN

S. DENNIS JOINER (MB #3176)
Federal Public Defender
N. and S. Districts of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

OMODARE B. JUPITER (MB #102054)
Assistant Federal Public Defender

Attorney for Defendant-Appellant

CERTIFICATE OF INTERESTED PARTIES

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

1. Mark J. Calhoun, Defendant-Appellant;
2. S. Dennis Joiner, Federal Public Defender, Jackson, Mississippi, counsel for Mr. Calhoun;
3. Omodare B. Jupiter, Assistant Federal Public Defender, Jackson, Mississippi, counsel for Mr. Calhoun;
4. Kathryn N. Nester, Salt Lake City, Utah, counsel for Mr. Calhoun;[1]
5. April Calhoun, Co-defendant;
6. Eileen M. Maher, Natchez, Mississippi, counsel for Ms. Calhoun;
7. James M. Tyrone, Jackson, Mississippi, counsel for Ms. Calhoun;
8. Willie Jones, Co-defendant;
9. William Andy Sumrall, counsel for Mr. Jones;
10. J. Larry Kennedy, Co-defendant;
11. William B. Kirksey, Jackson, Mississippi, counsel for Mr. Larry Kennedy;
12. Nathan Henry Elmore, Jackson, Mississippi, counsel for Mr. Larry

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[1]At the time of trial, Ms. Nester was an Assistant Federal Public Defender in Mississippi. After trial and before the filing of this Brief, Ms. Nester was appointed as the Federal Public Defender for Utah.

Kennedy;

13. Julie A. Epps, Canton, Mississippi, counsel for Mr. Larry Kennedy;
14. Keith M. Kennedy, Co-defendant;
15. Michael L. Knapp, Jackson, Mississippi, counsel for Mr. Keith Kennedy;
16. Richard A. Rehfeldt, Jackson, Mississippi, counsel for Mr. Keith Kennedy;
17. John M. Dowdy, Jr., United States Attorney, Southern District of Mississippi, Jackson, Mississippi;
18. Carla J. Clark, Assistant United States Attorney, Southern District of Mississippi, Jackson, Mississippi;
19. Jerry L. Rushing, Assistant United States Attorney, Southern District of Mississippi, Jackson, Mississippi;
20. Gaines H. Cleveland, Assistant United States Attorney, Southern District of Mississippi, Gulfport, Mississippi; and
21. Honorable Daniel P. Jordan, III, United States District Judge, Jackson, Mississippi.

This certificate is made so that the judges of this Court may evaluate possible disqualification or recusal.

/s/ Omodare B. Jupiter
OMODARE B. JUPITER
Attorney for Defendant-Appellant

STATEMENT REGARDING ORAL ARGUMENT

The Appellant submits that oral argument will be helpful in applying the law to the facts in this case.

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I. JURISDICTIONAL STATEMENT

The district court had jurisdiction over Appellant Mark Calhoun[2] and the subject matter because he was indicted on May 21, 2008, by a Federal Grand Jury for the Southern District of Mississippi. (Indictment, R. at 28-37.)[3] The prosecution filed a Superseding Indictment on January 22, 2009 (*id.* at 72-93) and a Second Superseding Indictment on July 8, 2009 (*id.* at 110-37). The Second Superseding Indictment charged Mr. Calhoun with:

count 1: conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 1349 (Indictment, R. at 111-119);

counts 2 - 16: wire fraud, in violation of 18 U.S.C. § 1343 (*id.* at 119-25);

counts 17 & 22: conspiracy to commit money laundering, in violation of 18

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[2]Of the five defendants, two sets of defendants have the same last names. Mark Calhoun is April Calhoun's father, and Larry Kennedy is Keith Kennedy's father. To distinguish these parties, Mark Calhoun is referred to as "Mr. Calhoun," April Calhoun is referred to as "Ms. Calhoun," Larry Kennedy is referred to as "L. Kennedy" and Keith Kennedy is referred to as "K. Kennedy."

[3]Abbreviations are used in parenthetical citations to the record from district court. "R. at __" is a cite to court papers filed in district court that are a part of the record on appeal. All transcripts in this case are filed under seal; thus they carry no "USCA5" page numbers that typically appear on transcripts when a case is appealed. Therefore, the page numbers assigned by the court reporter are cited. The two volumes of transcripts pertaining to motion hearings are cited as "Mtn. Hr'g at __"; the single-volume status conference transcript is cited as "Status Conf. at __"; the three volumes of transcripts pertaining to voir dire are cited as "Voir Dire at __"; the 18 volumes of trial transcripts are cited as "Trial at __"; and the six volumes of sentencing transcripts are cited as "Sen. at __". Finally, the Presentence Investigation Report, which is also filed under seal, is cited as "PSR, p. __, ¶ __".

U.S.C. § 1956(h) (*id.* at 125-28; 129-32);

counts 18 - 21
&
counts 23 - 34: money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) (*id.* at 118-29; 132-34);

counts 35 - 37: alleged against defendants other than Mr. Calhoun; and

count 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 136).

The month-long trial of this case began on February 22 and ended on March 22, 2010. (*See* Docket Minute Entries, R. at 15-18.) The jury returned not guilty verdicts against Mr. Calhoun on counts 5 and 21. (Verdict Form, R. at 337, 340.) It returned guilty verdicts on the remaining counts. (*Id.* at 336-44.) However, the court later dismissed the charge alleged against him in count 22. (Judgment, R. at 581.)

The sentencing hearing began on May 24 and ended on June 8, 2011. (*See* Docket Minute Entries, R. at 22 - 23.) The court sentenced Mr. Calhoun to 200 months in prison on each of counts 1 through 4, 6 through 20 and 23 through 34, and 120 months in prison on count 38, all to run concurrent for a total prison term of 200 months. (Judgment, R. at 583; Sen. at 955.) The court ordered three years

of supervised release on each count of conviction, all to run concurrent for a total supervised release term of three years. (*Id.*) Finally, the court ordered forfeiture of money totaling $10,244,573.57. (Judgment, R. at 587; Final Order of Forfeiture, R. at 579-80; Sen. at 956.) A Judgment reflecting this sentence was filed on July 5, 2011. (Judgment, R. at 581-87.)

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because Mr. Calhoun filed a timely Notice of Appeal on July 8, 2011 (R. at 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. This appeal is from a Final Judgment in a Criminal Case that resolves all issues before the district court.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Whether the district court erred by finding no merger of the wire and mail fraud group of charges on the one hand, and the money laundering group of charges on the other.

2) Whether the district court erred by denying Mr. Calhoun's Rule 29 sufficiency of the evidence motion regarding the money laundering counts and the conspiracy to commit money laundering count.

3) Whether the district court erred by failing to dismiss count 17, conspiracy to commit money laundering, because the jury was instructed on two disjunctive legal theories, one of which was legally insufficient.

4) Whether the case must be remanded for re-sentencing if the Court vacates the money laundering convictions.

5) Whether the district court erred by applying a number of enhancements to Mr. Calhoun's base offense level at sentencing.

6) Whether the district court erred by denying Mr. Calhoun's *Batson* challenge to the prosecution's improper use of peremptory challenges to strike two black people during jury selection, even though the court found a *prima facie* case of racial discrimination.

III. STATEMENT OF THE CASE

The Grand Jury for the Southern District of Mississippi returned a multiple count indictment against Mr. Calhoun for violation of federal statutes relating to alleged fraud. (Indictment, R. at 110-37.) The case was tried before a jury. After deliberations, the jury returned verdicts of not guilty on two counts and guilty on the remainder of the counts. (Verdict Form, R. at 336-44; Trial at 3152-58.) The court ultimately dismissed one of the counts for which the jury found Mr. Calhoun guilty. (Judgment, R. at 581; Sen. at 904.)

Through this appeal, Mr. Calhoun seeks a number of alternative forms of relief. The relief requested ranges from remand for new trial, to reversal of numerous convictions, to remand for re-sentencing. The specific relief requested is detailed in the "Conclusion" section of this Brief.

IV. STATEMENT OF FACTS

A. The Indictment and disposition of the counts.

The specific counts in the Indictment are set forth on pages 1 and 2 of this Brief, and are not restated in this section. The charges against Mr. Calhoun and the other appellants can be grouped into three categories:

- wire fraud, counts 2 through 16 and 38;
- money laundering, counts 18 through 21 and 23 through 34; and
- conspiracy to commit wire fraud and money laundering, counts 1 (mail fraud / wire fraud), 17(money laundering) and 22 (money laundering).

(Indictment, R. at 110-37.) Counts 35 through 37 were not alleged against Mr. Calhoun, so they are not discussed in this Brief. The jury found Mr. Calhoun not guilty of counts 5 and 21, and the district court ultimately dismissed count 22. (Verdict Form, R. at 337, 340; Trial at 3152-58; Sen. at 904.) The jury found him guilty of the remaining counts. (Verdict Form, R. at 337, 340; Trial at 3152-58.)

B. Prosecution's theory of the case.

Mr. Calhoun was a loan originator, and the Kennedys, operating as Loan Closing and Title Services, Inc., were mortgage loan closers. (Indictment, R. at 110-11.) The prosecution's theory of the case against Mr. Calhoun and the Kennedys involved a two-step process.

The initial step in the prosecution's theory is the underlying wire fraud. Under the prosecution's theory, the appellants "would provide false information to potential lenders in order to obtain fraudulent mortgage loans for numerous prospective borrowers." (Indictment, R. at 112.) The prosecution claims that the appellants obtained 40 loans through this process. (Indictment, R. at 116.) These loans covered a time period from September of 2004 through September of 2006. (*Id.*)

To complete the prosecution's theory, the next integral step in the process involved the purported money laundering activities. These same money laundering activities were via wire transfer, and formed a basis for the wire fraud counts as well.

The prosecution alleges that Mr. Calhoun and Ms. Calhoun laundered money by creating fictitious creditors to whom their borrowers / clients owed money. (Indictment, R. at 115.) The creditors, which where businesses owned by Mr. Calhoun, were Fast Start Mortgage, Inc., Metro One Investments, LLC, M & C Investments, LLC and Unlimit Construction, LLC. (*Id.* at 115, 126.) These creditors and associated debts to the creditors were included on the loan settlement statements, also referenced at trial as "HUD-1 statements," resulting in purportedly ill-gotten receipts of money to the appellants via wire transfer. (*Id.* at

115.) As will be emphasized below in the “Arguments” section of this Brief, without this step in the process, no money “receipts” would have flowed to Mr. Calhoun.

C. The *voir dire* process.

During *voir dire*, defense counsel asserted a *Batson* objection alleging that the prosecution was improperly using peremptory strikes to exclude two black venire members from the jury. (Voir Dire at 523.) Mr. Calhoun is also black. (*Id.* at 529.)

The defense challenged the prosecution’s strikes of panel member 58, Brookshire, and panel member 59, Harris. (Voir Dire at 529.) The district court found a *prima facie* case of race discrimination because the prosecution admitted that it used all of its peremptory strikes on black venire members. (*Id.* at 527.)

After finding a *prima facie* case of discrimination, the court required the prosecution to provide a race neutral reason for the strikes. The prosecution’s reason for the strikes was that Brookshire and Harris had labor intense jobs that did not require a high level of education. (Voir Dire at 528.) This, opined the prosecution, rendered these black jurors unable to comprehend the complex nature of the issues to be presented at trial. (*Id.*)

To rebut this argument, defense counsel pointed out that two white people

accepted as jurors by the prosecution lacked even high school educations. (Voir Dire at 529-30.) The two white people were jury member 4, Hanson, and jury member 9, Smith. (*Id.*) The court rejected this argument and denied Mr. Calhoun's *Batson* motion. (*Id.* at 530.)

D. Sentencing.

In the end, the district court sentenced Mr. Calhoun to serve 200 months in prison, followed by three years of supervised release. (Sen. at 955.) The court also ordered him to forfeit $10,224,573.57, even though the calculated loss amount was less than 2 million dollars. (*Id.* at 956.)

Most of the arguments below focus on reversal of the money laundering convictions. Several upward adjustments to the offense level were based on the money laundering charges. The adjustments were:

- 2 level increase because Mr. Calhoun was convicted of money laundering under 18 U.S.C. § 1956. (PSR, p. 47, ¶ 215.)
- 2 level increase because the money laundering was "sophisticated." (PSR, p. 47, ¶ 216.)
- 4 level increase because Mr. Calhoun was the organizer or leader of money laundering activities involving five or more participants. (PSR, p. 47, ¶ 218.)

Other questionable adjustments applied to Mr. Calhoun's offense level were:

- 2 level increase because Mr. Calhoun purportedly misrepresented that he acted on behalf a religious organization. (Sen. at 854-55.)
- 2 level increase because Mr. Calhoun purportedly abused a position of trust. (Sen. at 850-51.)

It is important to note that the sentence ordered for Mr. Calhoun was about 2.7 times higher than the next highest sentence ordered in this case. Willie Jones, April Calhoun, Keith Kennedy and Larry Kennedy were respectively sentenced to incarceration terms of 37 months home confinement, 72 months and 60 months. (Sen. at 888, 900, 959, 963.)

V. SUMMARY OF ARGUMENTS

Mr. Calhoun's first argument is that the wire fraud group of charges and the money laundering group of charges improperly merge. Merger exists for two related but independent reasons. First, the monies involved in the alleged money laundering counts were not "profits" from the wire fraud activities. Under *Santos* and *Garland*, this scenario represents improper merger of the two groups of charges, requiring reversal of the money laundering convictions. Second, the same conduct forms the basis for both the wire fraud charges and the money laundering charges, which means that the two groups of charges merge. This also requires reversal of the money laundering convictions.

His second argument is a sufficiency of the evidence argument pertaining to the money laundering convictions. Under this Court's recent holdings in *Harris*, mere disbursement of money from a wire fraud scheme to the participants in the scheme cannot be the basis for a money laundering conviction. If that is all that proof at trial shows, then *Harris* requires reversal of any resulting convictions for insufficiency of evidence of guilt. Regarding the subject money laundering charges against Mr. Calhoun, the prosecution proved nothing more than receipt of payments for the underlying wire fraud charges. This requires reversal of the money laundering charges for insufficient proof of guilt.

The third argument focuses on count 17, conspiracy to commit money laundering. When a defendant is convicted of a crime under a disjunctive jury instruction, and one of the two theories is legally insufficient, then any resulting conviction must be reversed. The court instructed the jury on two disjunctive theories of guilt – conspiracy to commit money laundering to "promote" the wire fraud scheme, and conspiracy to commit money laundering to "conceal" the proceeds of the wire fraud scheme. This jury instruction was disjunctive in nature because proof of *either one* of these two theories would justify a guilty verdict. One of the two theories – promotion – is legally insufficient. Thus reversal of the conviction for count 17 is required.

The next two issues involve sentencing. First, if the Court vacates the money laundering convictions, then the case must be remanded for re-sentencing on the surviving convictions. Second, Mr. Calhoun argues that the district court erroneously applied two sentencing enhancements – fraudulently acting on behalf of a religious institution and abusing a position of trust. A finding in Mr. Calhoun's favor that either of these two enhancements were erroneously applied will also require remand for re-sentencing.

Mr. Calhoun's final issue is based on *Batson*. All of the prosecution's peremptory strikes during jury selection were on black venire members. The

defense challenged this as racially motivated, and the district court found a *prima facie* case of discrimination. However, the district court went on to overrule Mr. Calhoun's *Batson* objection, even though the defense made a cogent argument that the reasons given for the strikes by the prosecution were mere pretexts for discrimination. If the Court agrees with this *Batson* argument, then the case must be remanded for re-trial.

VI. ARGUMENTS

A. The district court erred by failing to dismiss the money laundering counts under the binding holdings in *Santos* and *Garland*.

1. Standard of review.

Both of the sub-arguments in this section pertain to the underlying issue of improper merger of the mail and wire fraud group of charges on the one hand, and the money laundering group of charges on the other. A *de novo* standard of review applies to the issue of merger of wire fraud charges and money laundering charges. *United States v. Bansal*, 663 F.3d 634, 643 (3d Cir. 2011) (citation omitted); *see also United States v. Pittman*, No. 95-60757, 1997 WL 73796 at *8 (5th Cir. Jan. 27, 1997) (citation omitted).

2. Analysis.

a. Introduction.

This argument focuses on the injustice that results when a defendant, such as Mr. Calhoun, is charged, convicted and sentenced for the exact same conduct under two different statutes. The prosecution charged, and ultimately achieved convictions and sentences against Mr. Calhoun for violations of the wire fraud statute, 18 U.S.C. § 1343, and for violations of the money laundering statute, 18 U.S.C. § 1956. All of the charges, convictions and sentences arose out of alleged

fraud.

The legal problem with this scenario is that the same conduct underlies both the wire fraud charges and the money laundering charges. Specifically, the alleged illegal conduct under both groups of charges was receipt of wire payments into Mr. Calhoun's bank accounts for his share of the money from the alleged scheme to defraud. Under binding case law presented below, convictions under two statutes for the same underlying conduct represent improper merger of charges.

Reversal of the money laundering convictions is the focus of this argument. The surviving money laundering counts at this point are counts 18 through 20, and counts 23 through 34. The prosecution charged Mr. Calhoun under 18 U.S.C. § 1956(a)(1)(A)(i), which states:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the *proceeds* of specified unlawful activity–
>
> > (A)(i) with the intent to *promote* the carrying on of specified unlawful activity[.]

(Emphasis added)

b. Underlying facts supporting a finding that the wire fraud and money laundering charges against Mr. Calhoun were based on the same conduct.

The legal analyses in the following subsections of this Brief are based on the fact that the conduct underlying the wire fraud charges and the money laundering charges is the same. The money laundering charges alleged in counts 19 and 23 through 33 were all based on specific wire / mail fraud charges alleged in other counts of the Indictment. This fact is supported by both the allegations in the Indictment and testimony presented at trial. The only money laundering charges that were not based on independent mail / wire fraud charges are counts 18, 20 and 34. Nevertheless, these three counts were unquestionably based on the overall wire fraud scheme, even though no specific wire fraud counts underlie them.

The language in the Indictment reveals that the prosecution bases the wire / mail fraud counts and the money laundering counts on the same conduct. This is evidenced by the following quotes from the Indictment.

- Count 1 alleges conspiracy to commit wire / mail fraud. Paragraph 21 of the Indictment, which pertains to count 1, states, "[i]t was part of the conspiracy that defendants Mr. Calhoun, Ms. Calhoun and W. Jones, and others would create fictitious creditors to which borrowers and sellers allegedly were

indebted for construction, management, marketing and consultant fees, when in fact no such debt was owed." (Indictment, R. at 115.) Paragraph 22 of the Indictment, which also pertains to count 1, goes on to state:

> Thereafter, defendants L. Kennedy and K. Kennedy, and others acting at their direction, would prepare and execute fraudulent HUD-1 Settlement Statements listing these fictitious creditors, including but not limited to Fast Start Mortgage, Inc., Willie Jones, Metro One Investment, LLC, and M & C Investments, LLC, along with legitimate creditors on the HUD-1 Settlement Statement, or an attachment thereto, *so that proceeds from the loan could be disbursed to the fictitious creditors*. These funds for fraudulently invoiced construction, management, marketing, and consultant fees were then provided by defendants L. Kennedy, and K. Kennedy, to defendants M. Calhoun, A. Calhoun, W. Jones, and others, who would convert those funds to their own use and benefit to the detriment of the borrowers, the sellers, and the lenders.

(Indictment, R. at 115 (emphasis added).)

- Counts 2 through 16 are grouped together in the Indictment. These counts allege wire fraud. Paragraphs 41 and 42 of the Indictment contain language applicable to all of counts 2 through 16. These two paragraphs contain language identical to the language quoted above regarding paragraphs 21 and 22 of the Indictment. (*Compare* Indictment, R. at 115 *with* Indictment, R. at 122-23.)

In addition to the language in the Indictment, trial testimony tied specific

instances of alleged mail / wire fraud with specific instances of alleged money laundering. The following is a summary of count 19 and counts 23 through 33 and the associated wire / mail fraud charge on which the charges are based. All of the transactions begin with obtaining money for mortgage loans via wire or mail transfer of funds from lenders, then on the same day or within a few days, portions of the loan monies were wired into accounts controlled by Mr. Calhoun. Under these transactions, it cannot be denied that the actions and transactions underlying the wire / mail fraud charges and the money laundering charges were the same actions and transactions in the context of merger of charges.

- The money laundering charge in count 19 is based on money from a loan obtained by borrower number 2. This same loan transaction is the subject of count 1, conspiracy to commit wire / mail fraud, and count 3, wire fraud. All of the alleged conduct occurred on February 10, 2005. (Indictment, R. at 117, 124, 129; Trial at 394-95 (tying together the payment made to Mr. Calhoun's company, Metro One, with the borrower's wire transferred loan funds).)
- The money laundering charge in count 23 is based on money from a loan obtained by borrower number 8. This same loan transaction is the subject of count 9, wire fraud. All of the alleged conduct occurred on November 10

and 11, 2005. (Indictment, R. at 125, 133; Trial at 414 (tying together the payment made to Mr. Calhoun's company, M & C Investments, with the borrower's wire transferred loan funds).)

- The money laundering charge in count 24 is based on money from a loan obtained by borrower number 5. This same loan transaction is the subject of count 1, conspiracy to commit wire / mail fraud, and count 11, wire fraud. All of the alleged conduct occurred on February 17, 2006. (Indictment, R. at 119, 125, 133; Trial at 408 (tying together the payment made to Mr. Calhoun's company, Fast Start, with the borrower's wire transferred loan funds).)
- The money laundering charge in count 25 is based on money from a loan obtained by borrower number 12. This same loan transaction is the subject of count 12, wire fraud. All of the alleged conduct occurred from February 28 through March 3, 2006. (Indictment, R. at 125, 133; Trial at 416-17 (tying together the payment made to Mr. Calhoun's company, M & C Investments, with the borrower's wire transferred loan funds).)
- The money laundering charge in count 26 is also based on money from a loan obtained by borrower number 12. This same loan transaction is the subject of count 14, wire fraud. All of the alleged conduct occurred on

March 29, 2006. (Indictment, R. at 125, 133; Trial at 448-49 (tying together the payment made to Mr. Calhoun's company, M&C Investments, with the borrower's wired loan funds).)

- The money laundering charge in count 27 is based on money from a loan obtained by borrower number 14. This same loan transaction is the subject of count 1, conspiracy to commit wire / mail fraud, and count 15, wire fraud. All of the alleged conduct occurred on April 3 and 4, 2006. (Indictment, R. at 119, 125, 133; Trial at 1817-22 (tying together the payment made to Mr. Calhoun's company, M & C Investments, with the borrower's wire transferred loan funds).)
- The money laundering charges in counts 28 and 29 are based on money from a loan obtained by borrower number 14. This same loan transaction is the subject of count 16, wire fraud. All of the alleged conduct occurred from April 25 through May 2, 2006. (Indictment, R. at 125, 133; Trial at 137-38, 2597-99 (tying together the payment made to Mr. Calhoun's company, M & C Investments, with the borrower's wire transferred loan funds).)
- The money laundering charges in counts 30 and 31 are based on money from a loan obtained by borrower number 9. These same loan transactions

are the subject of count 1, conspiracy to commit wire / mail fraud, and count 6, wire fraud. All of the alleged conduct occurred on May 25, 2005. (Indictment, R. at 118, 124, 134; Trial at 453-55 (tying together the payment made to Mr. Calhoun's company, Fast Start, with the borrower's wire transferred loan funds).)

- The money laundering charge in count 32 is based on money from a loan obtained by borrower number 9. This same loan transaction is the subject of count 7, wire fraud. All of the alleged conduct occurred on June 16 and 17, 2005. (Indictment, R. at 124, 134; Trial at 409-10 (tying together the payment made to Mr. Calhoun's company, Fast Start, with the borrower's wire transferred loan funds).)
- The money laundering charge in count 33 is based on money from a loan obtained by borrower number 11. This same loan transaction is the subject of count 8, wire fraud. All of the alleged conduct occurred on November 4, 2005. (Indictment, R. at 125, 134; Trial at 1106-09 (tying together the payment made to Mr. Calhoun's company, Silver Cross Financial Group, with the borrower's wire transferred loan funds).)

Applying the law presented below to the above cited trial testimony and language in the Indictment support a finding of improper merger.

c. The holdings in *Santos* and *Garland* require a finding of improper merger.

Mr. Calhoun's argument is based on the Supreme Court's holdings in *United States v. Santos*, 553 U.S. 507, 128 S.Ct. 2020 (2008) and this Court's holdings in *Garland v. Roy*, 615 F.3d 391, 402 (5th Cir. 2010). The following are brief summaries of the opinions in these two cases.

(i) *Santos* holdings.

In *Santos*, the Supreme Court addressed the merger issue in the context of money laundering. 553 U.S. at 510-11. Santos was charged with operating a lottery in violation of federal law. *Id.* He was also charged with money laundering. *Id.* In question was whether the "proceeds" involved in a money laundering charge should be narrowly defined as "profits" from the underlying gambling operation, or broadly defined as all money "receipts" from the operation. *Id.* at 511. Like Mr. Calhoun's case, this issue was decided in the context of the "promotion" prong of money laundering statute, § 1956(a)(1)(A)(i). *Id.* at 509-10.

The indictment in *Santos* alleged that illegal money laundering activities included payments made to runners and collectors that worked for the gambling operation, as well as payments made to lottery winners. *Santos*, 553 U.S. at 509. For the charge to survive under this theory, the "proceeds" from the gambling

operation had to be defined as all of the money "receipts" from the gambling operation, rather than just the "profits" of the operation.

In a plurality opinion rendered by Justice Scalia and joined by three other Justices, the Court held that "proceeds" must be narrowly defined as "profits" of the underlying illegal activity. *Santos,* 553 U.S. at 524. Supporting its conclusion, the *Santos* Court explained "[t]he Government suggests no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime." *Id.* at 517. The Court also reasoned that "[s]ince few lotteries, if any, will not pay their winners, the statute criminalizing illegal lotteries ... would "*merge*" with the money-laundering statute." *Id.* at 515-16 (emphasis added).

The *Santos* holding is very valuable to the subject analysis because the Justices provided generally applicable law, not just law applicable to a gambling scenario. The Court held "[t]he merger problem is not limited to lottery operations." *Santos*, 533 U.S. at 516. The Court went on to explain that

> any wealth-acquiring crime with multiple participants would become money laundering when the initial recipient of the wealth gives his confederates their shares. Generally speaking, any specified unlawful activity, an episode of which includes transactions which are not elements of the offense and in which a participant passes receipts on

to someone else, would merge with money laundering.

Id. In summary, this plurality holding by four Justices means that merger of wire fraud and money laundering occurs when the money laundering charge simply reflects payment of money to the participants of the wire fraud scheme.

Justice Stevens, who wrote his own concurring opinion, was the fifth Justice joining in the judgment. His concurrence was consistent with the above holdings. Addressing what he considered a "merger" problem, Justice Stevens wrote "[a]s the plurality notes, there is 'no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code, to radically increase the sentence for that crime.'" *Santos*, 553 U.S. at 527-28.

(ii) *Garland* holdings.

After the Supreme Court decided *Santos*, this Court had a chance to consider merger in the context of money laundering charges in *Garland v. Roy*, 615 F.3d 391 (5th Cir. 2010). *Garland* involved an illegal investment pyramid scheme. *Id.* at 394. The money laundering charges were based on the same activities alleged in the mail fraud charges; i.e., the defendant was mailing money to investors in the pyramid scheme. *Id.* at 394-95. Like *Santos* and the subject case, the issue was decided in the context of money laundering for the purpose of

"promotion" under § 1956(a)(1)(A)(i). *Id.* at 394.

Much of this Court's discussion in *Garland* focused on the receipts versus profits issue. The Court also analyzed merger in general, which underlies the receipts versus profits issue. Citing *Santos*, this Court explained that merger occurs "when a defendant could be punished for the same 'transaction' under the money-laundering statute as well as under another statute, namely the statute criminalizing the 'specified unlawful activity' underlying the money-laundering charge." *Garland*, 615 F.3d at 402.

This Court remanded *Garland* to the district court for further proceedings. 615 F.3d at 404. Part of the Court's rationale for remand was that "the same 'transaction' may have been used to prove both the underlying unlawful activity and the money-laundering charges[.]" *Id.* Therefore, the defendant's "convictions for mail and securities fraud potentially 'merged,' as defined by Justice Stevens and the plurality, with his money-laundering conviction."[4] *Id.*

d. Improper merger is evident by applying the law in *Santos* and *Garland* to the facts of this case.

Under *Santos* and *Garland*, the money laundering charges should be dismissed for two related but distinguishable reasons. First, <u>*all*</u> of the money

[4]Justice Stevens' opinion is important because the *Garland* Court interpreted its limiting effect on the issue.

laundering counts, including counts 18, 20 and 34, must be dismissed because the "proceeds" forming the basis of the money laundering counts were not "profits" from the underlying mail / wire fraud counts. Second, all of the money laundering counts, with the exception of counts 18, 20 and 34, must be dismissed because they merged with underlying mail / wire fraud counts. As described below, merger occurred independent from the receipts versus profits issue.

(i) Dismissal is required because the proceeds forming the basis of the money laundering counts were not "profits" of the mail / wire fraud counts.

A finding of merger is required under the receipts versus profits analyses in *Santos* and *Garland* because the monies involved in the alleged money laundering, i.e., the "proceeds," were not "profits" from the wire fraud scheme.

Mr. Calhoun acknowledges that the district court provided a brief instruction stating that "proceeds" of money laundering should be defined as "profits." The court instructed the jury as follows:

> The term "proceeds" as used in these instructions means profits from a specified unlawful activity. It is not necessary for the government to prove that all of the money included in the charged financial transaction was profit. It is enough that the charged financial transaction incurred some modicum of profit.

(Trial at 2997-98.) However, even though this instruction was given, it was woefully inadequate to apprise the jury of the parameters of what could and could

not be considered "profits" from the underlying wire fraud charges. No further jury instruction corrected this error.

In *Santos*, the Supreme Court defined what can and cannot be considered "profits" in the context of a money laundering charge. The Court held "[t]ransactions that normally occur during the course of [a crime underlying the money laundering charge] are not identifiable uses of profits and thus do not violate the money-laundering statute." 553 U.S. at 517. The Court went on to explain that there can be "no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime." *Id.*

The subject money laundering transactions – the payment of Mr. Calhoun for his alleged participation in the wire fraud scheme – were transactions that normally occurred during the course of the alleged mail / wire fraud crimes. This is a logical conclusion because without these transfers, Mr. Calhoun never would have been paid for his efforts in the underlying wire / mail fraud. That is, to receive any benefit under the alleged mail / wire fraud transactions, and to complete the wire fraud activities, Mr. Calhoun necessarily had to engage in the conduct underlying the alleged money laundering transactions.

Under *Santos*, the fact that the money transfers to Mr. Calhoun's accounts were normal progressions of the wire fraud activities requires a finding that no "profits" were involved in the charges, which is why no jury instruction would have corrected the error. This requires reversal of all money laundering convictions.

Garland sheds further light on this issue. Citing *Santos*, the *Garland* court recognized the significance of the time relationship between the conduct underlying wire fraud and the conduct underlying money laundering. *Garland*, 615 F.3d at 400. The Court analyzed this timing issue in the context of a wealth-acquiring underlying crime (mail / wire fraud in Mr. Calhoun's case) and payment of money from the crime soon thereafter (alleged money laundering). *Id.* Considering the time relationship between the underlying crime and the money laundering crime, the *Garland* Court held "the 'merger problem' result[s] any time the definition of 'proceeds' as 'receipts' enable[] the money-laundering charge to rely upon the same 'transaction' as the 'predicate crime.'" *Id.*

It cannot be denied that all of the money laundering charges were based on money derived from the alleged wire fraud activities. It is also undeniable that a very close temporal relationship existed between the two groups of crimes. *See supra*, pp. 16-21, bullet point descriptions of the alleged mail / wire fraud

transactions and money laundering transactions. Under *Garland*, these facts require a finding that the monies involved in the money laundering charges were "receipts" from the underlying mail / wire fraud activities, and not "profits" from the mail / wire fraud. All of the money laundering charges must be dismissed for this reason.

Further supporting reversal of the money laundering counts is the lack of proof of "profits" presented by the prosecution at trial. The prosecution presented no evidence at trial specifically delineating between "proceeds" from the wire / mail fraud charges and "profits" associated with the money laundering charges. In fact, at the jury charge conference the prosecution urged the court to deny the instruction defining "proceeds" as "profits." (Trial at 2954 (prosecutor stating "[y]our Honor, the government objects to the instruction defining proceeds as profits.").) This complete lack of proof of "profits" further supports reversal of the money laundering counts under *Santos* and *Garland*.

To summarize, money transfers that normally occur during the course of an underlying crime, such as wire fraud, "are not identifiable uses of profits and thus do not violate the money laundering statute" under *Santos*. 553 U.S. 517. That is, "a transaction that is a normal part of a crime" is not "profits" in the context of a money laundering charge. *Id.* Further, the timing of "proceeds" resulting from

an underlying offense must be considered. *Garland*, 615 F.3d at 400. A close temporal relationship between funds emanating from an underlying wire fraud charge and funds forming the basis of money laundering support a finding that both involve the same transaction thus no "profits" are involved. *Id.*

All of these factors support a finding that the subject "proceeds" were "receipts" rather than "profits.". The transactions forming the basis of the money laundering charges were normal transactions that emanate from the wire fraud activities. The money laundering transactions were merely disbursements of payments for the wire fraud activities. Further, the wire fraud transactions and the associated money laundering transactions transpired in a very narrow time frame, indicating that they were part of the same overall transaction.

Even the prosecution recognized the "receipts" versus "profits" issue. It failed to prove any resulting "profits" from the wire fraud scheme at trial, and it argued against instructing the jury that "proceeds" must be "profits" to return convictions for money laundering. Under these facts, the funds involved in the money laundering counts were not "profits" from the wire fraud counts, requiring reversal of all money laundering counts of conviction. Those counts are 18 through 20 and 23 through 34.

(ii) Merger exists, and dismissal is required, because the same facts underlie the wire / mail fraud counts and the money laundering counts.

Regardless of the "receipts" versus "profits" distinction, merger occurs when a defendant can be punished for the same conduct under both the mail / wire fraud statute and the money laundering statute. *Garland*, 615 F.3d at 402. This argument is related by the "receipts" versus "profits" argument. However it is somewhat distinct because the argument relies on the general underlying principle of merger, rather than the specific "receipts" versus "profits" legal principle.

As Justice Stevens explained in *Santos*, punishing a defendant for the same conduct under both the mail / wire fraud statute and the money laundering statute represents an unjust and "perverse result." *Garland*, 615 F.3d at 401-02 (citing *Santos*, 128 S.Ct. at 2033-34). This "perverse result" is exactly what Mr. Calhoun suffered in this case. Each of money laundering counts 19 and 23 through 34 charged him with receiving wired or mailed portions of loan money into accounts he controlled. *See supra*, pp. 16-21, bullet point descriptions of the alleged mail / wire fraud transactions and money laundering transactions. Likewise, count 1, conspiracy to commit wire / mail fraud, and counts 2 through 16, wire fraud, charged the exact same conduct. *Id.*

Stated another way, the mail / wire fraud charged in part that Mr. Calhoun

received money relating to the loans through mail or wire transfers into accounts of businesses that he owned. These were specific allegations in the mail / wire fraud counts. Then, the money laundering counts allege the exact same conduct. Through the money laundering counts, the prosecution alleged that Mr. Calhoun received money relating to the loans through mail or wire transfers into accounts of businesses that he owned.

Under *Garland*, this scenario represents improper merger even though the district court instructed the jury that "proceeds" in the money laundering counts had to be "profits" from the wire / mail fraud counts. *Garland* requires a finding of merger because Mr. Calhoun "could be punished for the same 'transaction' under the money-laundering statute as well as under another statute, namely the statute criminalizing the 'specified unlawful activity' underlying the money-laundering charge." 615 F.3d at 402. Merger exists in Mr. Calhoun's case because the same alleged unlawful activity – receiving funds from the subject loans – forms the basis of both the wire / mail fraud counts and the money laundering counts. *See supra*, pp. 16-21, bullet point descriptions of the alleged mail / wire fraud transactions and money laundering transactions.

Also, under *Santos*, merger exists because the money laundering transactions were normal parts of the wire / mail fraud crimes for which Mr.

Calhoun was punished under the wire / mail fraud counts. *See Santos*, 553 U.S. at 517. *Santos* involved an illegal lottery operation. The *Santos* Court held that "[s]ince few lotteries, if any, will not pay their winners, the statute criminalizing illegal lotteries ... would "merge" with the money-laundering statute." *Santos*, 553 U.S. at 515-16. Analogously, the money wired into Mr. Calhoun's accounts was his share of the purportedly ill-gotten money obtained via the underlying wire fraud accounts. That is, without this process, Mr. Calhoun never would have had access to any of the money that he obtained as a result of the underlying wire and mail fraud conduct. In a practical sense, this scenario is no different than the *Santos* defendant paying his runners and collectors that worked for the lottery operation, and paying off his lottery winners. *See Santos*, 553 U.S. at 515-16.

In summary, improper merger occurred in this case because, as this Court recognized in *Garland*, Mr. Calhoun is being punished for the same transaction under both the mail / wire fraud convictions and under most of the money laundering convictions. *See*, 615 F.3d at 402. This requires reversal of the money laundering convictions that are specifically included as conduct under a wire fraud conviction. The counts falling into this category are 19 and 23 through 34.

B. The district court erred by denying Mr. Calhoun's Rule 29 sufficiency of the evidence motion regarding the money laundering counts and the conspiracy to commit money laundering count.

1. Standard of review.

So long as a defendant asserts a Rule 29 motion for judgment of acquittal at trial, sufficiency of the evidence is reviewed *de novo* on appeal. *United States v. Harris*, 666 F.3d 905, 907 (5th Cir. 2012) (citation omitted). Mr. Calhoun's trial counsel made Rule 29 motions at all relevant times during trial. (Trial at 2895-900, 2979, 2980, 3143.)

2. Argument – the evidence presented at trial was insufficient to prove that the monies involved in the alleged money laundering counts were "proceeds" of the wire fraud scheme.

As discussed above in detail, for a money laundering count or conspiracy to commit money laundering count to survive, the prosecution must prove that the money laundering involved "proceeds" from the underlying criminal activity. *See* 18 U.S.C. § 1956(a)(1) (stating that the initial requirement for any money laundering crime is that "proceeds" from the underlying criminal activity are involved).

This "proceeds" requirement precedes the requirement that the money laundering must involve either promotion or concealment. *Id.* It also precedes the profits versus receipts analysis. Therefore, if the prosecution fails to prove

"proceeds" from the underlying crime, then the money laundering conviction fails without further analysis. Applying this principle to the subject case, if the prosecution failed to prove that the money laundering counts against Mr. Calhoun involved proceeds from the underlying wire fraud counts, then this Court must overturn his money laundering convictions.

In *United States v. Harris*, 666 F.3d 905, 907 (5th Cir. 2012), this Court dismissed money laundering and conspiracy to commit money laundering counts because the prosecution failed to prove that the charges involved proceeds from drug dealing, the alleged underlying criminal activity.[5] The defendants in *Harris* sold and distributed illegal drugs. *Id.* at 906. One of the defendants, the drug supplier, operated out of California. *Id.* He shipped the drugs to Texas to be sold by other defendants. *Id.* The Texas defendants, in turn, transferred money for the drugs back to the California defendant. *Id.* These money transactions from Texas to California were via either bank deposits at a bank with branches in both Texas and California, or via wire transfer. *Id.* at 906-07.

Quoting with approval the Tenth Circuit case *United States v. Dimeck*, 24

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[5]Unlike the subject case, the indictment in *Harris* alleged money laundering by concealment, rather than by promotion. 666 F.3d at 907. This makes no difference in the subject analysis because the "proceeds" requirement applies to both the concealment theory and the promotion theory. *See* 18 U.S.C. § 1956(a)(1).

F.3d 1239, 1244 (10th Cir. 1994), this Court held "Congress aimed the crime of money laundering at conduct that *follows in time* the underlying crime rather than to afford an alternative means of punishing the prior 'specified unlawful activity.'" *Harris*, 666 F.3d at 908 (emphasis in original). "Money does not become proceeds of illegal activity until the unlawful activity is complete. The crime of money laundering is targeted at the activities that generally follow the unlawful activity in time." *Id.* at 910.

Under these principles, the *Harris* Court finally held "mere payment of the purchase price for drugs by whatever means (even by a financial transaction as defined in § 1956) does not constitute money laundering." 666 F.3d at 909. The Court reversed the money laundering convictions. *Id.* at 910.

The alleged money laundering transactions in this case are comparable to the money laundering charges alleged in *Harris*. The alleged money laundering transactions were actually components of the alleged wire fraud transactions. *See supra*, pp. 16-21, bullet point descriptions of the alleged mail / wire fraud transactions and money laundering transactions. This is proven by a review of both the trial testimony and the allegations in the Indictment. *Id.* Thus the alleged money laundering transactions against Mr. Calhoun did not "follow the unlawful activity in time[,]" as required by *Harris*. *See* 666 F.3d at 910.

Further, the wire transfers into Mr. Calhoun's accounts were merely payment for his participation in the underlying wire fraud scheme. *See supra*, pp. 16-21, bullet point descriptions of the alleged mail / wire fraud transactions and money laundering transactions. Under *Harris*, "mere payment [for the underlying crime] by whatever means (even by a financial transaction as defined in § 1956) does not constitute money laundering." 666 F.3d at 909. That is exactly what happened in the subject case – the transactions underlying the alleged money laundering counts were payments for the underlying wire fraud crime.

Applying the binding holdings in *Harris* to the facts of Mr. Calhoun's case requires a finding that no "proceeds" were involved in the money laundering charges. This conclusion must be reached for two reasons. First, the alleged money laundering transactions were made before the wire fraud crimes were complete. Second, the money laundering transactions were payment for Mr. Calhoun's participation in the alleged wire fraud conduct. This holding requires reversal of all of the money laundering counts (counts 18 through 20 and 23 through 34, and the conspiracy to commit money laundering count (count 17).

C. The district court erred by failing to dismiss count 17, conspiracy to commit money laundering, because the jury was instructed on two disjunctive legal theories, one of which was legally insufficient.

1. Standard of review.

The subject issue is purely legal, requiring a *de novo* standard of review. *United Sates v. Bennett*, 664 F.3d 997, 1011 (5th Cir. 2011) (citation omitted).

2. Introduction to argument.

The argument in the previous section of this Brief focused on a number of money laundering counts. The money laundering counts are relevant to this conspiracy to commit money laundering argument because as analyzed below, all were specifically charged on a legal theory of "promotion." The subject argument focuses on the sole surviving conspiracy to commit money laundering count – count 17. The conspiracy to commit money laundering count was charged under both a "promotion" legal theory and a "concealment" theory.

In a post-trial Motion, defense counsel moved to dismiss count 17 because the jury's verdict could have been based on an improper legal theory. (Motion, R. at 531.) The district court erred by denying this Motion because the jury was instructed on two disjunctive legal theories, one of which, the "promotion" theory, was legally insufficient.

3. Argument - the district court erred by failing to dismiss count 17.

As a foundation for this argument, we must briefly review the argument presented above pertaining to the money laundering counts. The money laundering counts were charged and tried under 18 U.S.C. § 1956(a)(1)(A)(i), which prohibits engaging in money laundering "with the intent to *promote* the carrying on of specified unlawful activity[.]" (Emphasis added) (*See* Indictment, R. at 128, 133, 134 (stating that the money laundering charges are based on a promotion theory).) As presented under the previous argument titled "[t]he district court erred by finding no merger of the wire and mail fraud group of charges on the one hand, and the money laundering group of charges on the other[,]" the "promotional" theory of the money laundering charges fail under *Santos* and *Garland*. They fail because the proceeds involved in the money laundering were not "profits" from the underlying wire fraud scheme, and because most of the money laundering charges merged with the wire fraud charges, regardless of the profits versus receipts analysis.

Count 17, the conspiracy to commit money laundering count, charged conspiracy under both § 1956(a)(1)(A)(i) – promotion – and § 1956(a)(1)(B)(i) – concealment. (Indictment, R. at 126.) Specifically, § 1956(a)(1)(B)(i) prohibits engaging in money laundering "to *conceal* or disguise the nature, the location, the

source, the ownership, or the control of the proceeds of specified unlawful activity[.]" (Emphasis added).

The jury instruction for count 17 allowed the jury to convict Mr. Calhoun of conspiracy to commit money laundering under ***either*** the promotion theory, ***or*** the concealment theory. In other words, the district court charged the jury in the disjunctive. In relevant part, the jury instruction stated:

> Count[] 17 ... of the indictment charge[s] defendants with a violation of Title 18, United States Code, Section 1956(h), which makes it a crime for anyone to conspire with someone else to conduct a financial transaction with the proceeds of a specified unlawful activity knowing that the money represented some form of specified unlawful activity and with the intent to ***promote*** the carrying on of the unlawful activity ***or*** to ***conceal*** or disguise.

(Trial at 3003-04 (emphasis added).)

To summarize, the district court instructed the jury that it could return a guilty verdict on the conspiracy to commit money laundering count if it found an agreement to commit money laundering either with the intent to promote the wire fraud scheme, or to conceal the proceeds derived from the wire fraud scheme. This is a classic example of a "disjunctive" jury instruction because guilt can be based on either one of the two legal theories.

In *United States v. Edwards*, 303 F.3d 606 (5th Cir. 2002), this Court reiterated the remedy that must result when a defendant is convicted of a crime

under a disjunctive instruction, and one of the two theories is legally insufficient. The Court held "a conviction must be reversed when disjunctive legal theories, one of which is legally insufficient, are submitted to the jury, the jury renders a general verdict of guilty and it is impossible to tell which ground the jury selected." *Id.* at 641 (citations omitted).

The crux of Mr. Calhoun's argument on this issue is simple. If the court finds that the money laundering convictions must be reversed under the *Santos* and *Garland* argument presented above, then the conspiracy to commit money laundering count, count 17, must be dismissed as well. *Edwards* requires dismissal of count 17 under this scenario because the jury may well have returned its guilty verdict for conspiracy to commit money laundering under the legally insufficient "promotion" theory. This possibility is apparent because the jury returned a general guilty verdict on count 17, which did not inform the court of whether the verdict was based on a "promotion" theory or a "concealment" theory. (Jury Verdict, R. at 339.) Therefore, the conviction for count 17 should be vacated.

D. The case must be remanded for re-sentencing if the Court vacates the money laundering convictions.

When one or more convictions are vacated and one or more convictions

survive against a defendant, the case must be remanded for re-sentencing on the surviving counts. *See United States v. Scott*, 159 F.3d 916, 926 (5th Cir. 1998).

Three of the above arguments ask the court to vacate Mr. Calhoun's convictions on the money laundering counts. At a minimum, reversal of these convictions will affect three upward adjustments to his offense level. All three of these upward adjustments were premised on the money laundering convictions. The adjustments are:

- 2 level increase because Mr. Calhoun was convicted of money laundering under 18 U.S.C. § 1956. (PSR, p. 47, ¶ 215.)
- 2 level increase because the money laundering was "sophisticated." (PSR, p. 47, ¶ 216.)
- 4 level increase because Mr. Calhoun was the organizer or leader of money laundering activities involving five or more participants. (PSR, p. 47, ¶ 218.)

Because these upward adjustments directly affected the calculation of Mr. Calhoun's sentence, the case must be remanded for re-sentencing if the Court vacates the money laundering counts. Upon re-sentencing, he reserves the right to argue any other issues related to the reversal of the money laundering counts. That is, by focusing on these three upward adjustments in this Brief, he is not

waiving his right to argue other sentencing issues related to dismissal of the money laundering convictions.

E. The district court erred by applying a number of enhancements to Mr. Calhoun's base offense level at sentencing.[6]

1. Standard of review.

"Where, as here, the defendant objects to a sentencing enhancement in the district court, this court reviews the district court's interpretation and application of the Guidelines *de novo* and its factual findings for clear error." *United States v. Johnson*, 619 F.3d 469, 472 (5th Cir. 2010) (citation omitted).

2. The district court erred by enhancing Mr. Calhoun's offense level for purportedly misrepresenting that he acted on behalf of a religious organization.

USSG § 2B1.1(b)(8)(A) calls for a 2 level upward adjustment to a defendant's base offense level if the offense involved "misrepresentation that the defendant was acting on behalf of a ... religious ... organization[.]" The district court applied this adjustment at sentencing. (Sen. at 854-55.)

The court justified applying this Guidelines enhancement based on the testimony of Ulysses Crosby. The court summarized Mr. Crosby's testimony as follows:

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[6]The 2010 edition of the United States Sentencing Guidelines ("USSG" or "Guidelines") was used to calculate Mr. Calhoun's sentencing range. (Sen. at 15.)

> Calhoun just said he was a minister and he was in the process of having his congregation become first-time homeowners and that he was trying to form a group of people who had good credit so that he could hold houses pending these investors for his congregation being acceptable -- be approved and acceptable to get a loan.

(Sen. at 855.) It cannot be disputed that Mr. Calhoun was a pastor. Also, no evidence at trial disputed the fact that he was attempting to help congregation members purchase housing.

In *United States v. Reasor*, 541 F.3d 366, 372 (5th Cir. 2008), this Court found "that Congress, in enacting the current iteration, intended the enhancement to apply where the defendant misrepresents his intentions[.]" There was no proof at trial to the effect that Mr. Calhoun misrepresented his intention to help congregation members obtain housing. Applying *Reasor* to these facts means that the district court improperly applied the enhancement under Guidelines § 2B1.1(b)(8)(A).

3. The district court erred by enhancing Mr. Calhoun's offense level for purportedly abusing a position of trust.

The district court applied a 2 point upward adjustment to Mr. Calhoun's Guidelines offense level because he purportedly abused a "position of trust" between himself and the lenders. (Sen. at 850-51.) A "position of trust" exists when a defendant has "professional or managerial discretion" in his relationship

with the victim. USSG § 3B1.3, cmt. n.1. Stated another way, a defendant is in a position of trust with a victim when the defendant has "substantial discretionary judgment that is ordinarily given considerable deference" by the victim. *Id.*

The PSR, which the district court adopted, states that the enhancement should apply because Mr. Calhoun, acting as a mortgage loan originator, submitted false information to lending institutions. (PSR, pp. 47-48, ¶ 219.) Mr. Calhoun argued that application of the enhancement was improper because he did not occupy a position of thrust with the lending institutions.

In *United States v. Wright*, 496 F.3d 371, 377 (5th Cir. 2007), this Court found that a position of trust existed between a mortgage broker and a lender under certain circumstances. However, the Court found "that it was a close case[.]" *Id.* Under the facts of *Wright*, the "close case" leaned in favor of finding a position of trust because the lenders specifically relied on information provided by the mortgage broker. *Id.*

Mr. Calhoun's case is distinguishable from *Wright*. The trial testimony clearly indicated that the lenders employed internal audit procedures, requested borrower's IRS information and reviewed appraisals on their own. (*See eg.* Trial at 2131-32, 2155, 2205, 2230-31, 2266-67.) That is, the lenders did not rely on the information provided by Mr. Calhoun because they had internal checks and

balances to ensure that the information on the loan documentation was correct. Because Mr. Calhoun operated as an independent contractor and because the lenders employed verification procedures by which to check the veracity of loan documentation, no position of trust existed in this case.

In summary, the participants in the lending process, including Mr. Calhoun and the lenders, operated at arm's length from one another. This precludes a finding of "a position of trust" between the participants, even under the holdings in *Wright*. This, in turn, means that the district court erred by applying the subject 2 point enhancement.

4. Conclusion – sentencing enhancements.

Based on the above arguments, application of the following sentencing enhancements should be reversed: misrepresenting that Mr. Calhoun operated on behalf of a religious organization; and abusing a position of trust. Reversal of either of these enhancements requires remand for re-sentencing.

F. The district court erred by denying Mr. Calhoun's *Batson* challenge to the prosecution's improper use of peremptory challenges to strike two black people during jury selection, even though the court found a prima facie case of racial discrimination.

1. Standard of review.

On appeal, a district court's *Batson* rulings are reviewed under a clear error

standard. *United States v. Davis*, 393 F.3d 540, 544 (5th Cir. 2004) (citation omitted).

2. Argument – the principles of *Batson* were violated.

In the landmark case *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712 (1986), the Supreme Court reiterated that "the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." (Citations omitted). In short, a defendant has "the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Id.* at 85-86 (citations omitted).

Batson established a three-part test to determine whether a defendant's equal protection right is violated by racially motivated use of peremptory challenges.

> First, the defendant must make a prima facie showing that the prosecutor's use of peremptory challenges excluded members of a certain race from serving on the jury. Second, once the defendant makes that prima facie showing, the burden shifts to the state to provide a neutral explanation for the strikes related to the particular case being tried. Once the state offers an explanation for its challenges, the trial court must determine whether the defendant has established purposeful discrimination in the jury selection process. The ultimate burden of persuasion stays with the defendant throughout.

Puckett v. Epps, 641 F.3d 657, 663 (5th Cir. 2011) (internal citations omitted).

The first *Batson* step requires the defendant to make a *prima facie* case that the prosecutor exercised a peremptory challenge based on race. It is undisputed that Mr. Calhoun is black. (Voir Dire at 529.) Defense counsel asserted *Batson* with regard to the prosecution's peremptory strikes of panel members 58 (Brookshire) and 59 (Harris), both of whom were black. (*Id.* at 523, *et seq*.) The district court easily found establishment of a *prima facie* case because the prosecutor admitted that each and every peremptory strike that he exercised were on black venire members. (*Id.* at 527.)

Under the second *Batson* step, the burden shifts to the prosecution to come forward with a race-neutral reason for peremptory strikes in issue. This step presents an easy hurdle to cross because "[u]nless discriminatory intent is inherent in the prosecutor's explanation, the reason will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360, 111 S.Ct. 1859 (1991).

The prosecutor's purported race neutral reason for the strikes was limited to the following: "I struck Ms. Watasha Brookshire because she's an assembly line worker. And the government is looking for people who have, in fact – hopefully, have a little bit more education, because of education and things like that, on the jury. Mr. Harris is a car-washer." (Voir Dire at 528.) The district court found this explanation sufficient to satisfy the second *Batson* factor. (*Id.*)

The third *Batson* step is the critical step in this analysis. Under step three, the trial court is tasked with determining whether Mr. Calhoun established intentional discrimination. *Hernandez*, 500 U.S. at 363 (citation omitted). As the Supreme Court noted in *Miller-El v. Dretke*, 545 U.S. 231, 240, 125 S.Ct. 2317 (2005), some purported race-neutral reasons offered by the prosecution can be proven false on their faces. Others cannot. *Id.* Therefore, a defendant "may rely on 'all relevant circumstances'" to prove discrimination. *Id.* (citation omitted). "At this stage, implausible or fantastic justifications [by the prosecution] may (and probably will) be found to be pretexts for purposeful discrimination." *Fields v. Thaler*, 588 F.3d 270, 274 (5th Cir. 2009) (citation omitted).

Proving that the prosecution's reason for striking Brookshire and Harris was a pretext for discrimination, defense counsel pointed out that jury members 4 (Hanson) and 9 (Smith), both of whom were white, failed to finish high school. (Voir Dire at 529-30.) This reasonably proved that the prosecution's purported race-neutral rationale for the subject strikes was a pretext for discrimination, but the district court did not agree. (*Id.* at 530.)

Overruling the *Batson* challenges, the district court stated "I agree with the government that this is a case where it's legitimate to consider the educational background and the - - I guess the intelligence of the jury." (Voir Dire at 530.)

The court went on to reason that even though white jury member Smith lacked a high school education, he was a warehouse manager. (*Id.*) This apparently indicated to the court that he had a higher degree of intelligence than an assembly line worker or a car washer. (*Id.*) The defense, of course, does not agree with this unsupported finding.

More troubling is the district court's explanation, or lack thereof, concerning white jury member Hanson. As stated above, Hanson was one of the white jurors accepted by the prosecution that lacked a high school education. All that the district court stated about this juror was "Mr. Hanson I believe was a landscaper." (Voir Dire at 530.) The court provided absolutely no reason why a white landscaper would have a higher degree of intelligence than a black assembly-line worker or black car-washer. This lack of explanation by the district court is telling – there is no reasonable basis to find that a landscaper is more intelligent or able to comprehend complicated trial testimony than an assembly line worker or a car-washer.

The error in the district court's finding is apparent from this Court's holding in *Fields*. The *Fields* Court held that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination

to be considered at *Batson*'s third step." *Fields*, 588 F.3d at 274 (quoting *Miller-El*, 545 U.S. at 241). Hanson, a non-black juror accepted by the prosecution in this case, is "otherwise-similar" to black venire panel members Brookshire and Harris, who were stricken by the prosecution.

Application of binding law to the facts of this case proves intentional discrimination and a violation of *Batson* in the jury selection process. Therefore the case must be remanded to district court for re-trial. *See United States v. Huey, IV*, 76 F.3d 638, 642 (5th Cir. 1996) (remanding a case for re-trial after finding a *Batson* violation).

VII. CONCLUSION

Based on the arguments presented above, Mr. Calhoun seeks alternative forms of relief on appeal. The following requested relief is well supported by both the law and facts of this case.

- If the Court agrees with his argument that the wire fraud and money laundering charges merged, then all of the money laundering convictions should be vacated.
- If the Court finds that insufficient evidence was presented at trial to support the money laundering charges, then those convictions must be vacated.
- If the Court finds that the jury improperly convicted Mr. Calhoun of

conspiracy to commit money laundering because the conviction was potentially based on an improper legal theory, then the conspiracy conviction under count 17 must be vacated.

- If the Court agrees with either of the two sentencing arguments, then the case must be remanded for re-sentencing.
- If the Court finds a violation of *Batson*, then the case should be remanded to district court for re-trial.

S. DENNIS JOINER
Federal Public Defender

/s/ Omodare B. Jupiter
OMODARE B. JUPITER (MB #102054)
Assistant Federal Public Defender
N. and S. Districts of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I, Omodare B. Jupiter, certify that today, March 9, 2012, a copy of the Brief for Appellant, one volume of the Record, two transcripts, and the Exhibits envelope were served upon Gaines Cleveland, Assistant United States Attorney, *via* United States Mail, postage prepaid to the Office of the U. S. Attorney, 1575 20th Avenue, Gulfport, Mississippi 39501, and a copy of the Brief for Appellant only, was delivered *via* United States Mail, postage prepaid to Mark J. Calhoun, Reg. No. 02808-043, FCI Oakdale, Oakdale Correctional Facility, P.O. Box 5000, Oakdale, LA 71463.

/s/ Omodare B. Jupiter
OMODARE B. JUPITER
Assistant Federal Public Defender

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/s/ Omodare B. Jupiter
OMODARE B. JUPITER
Assistant Federal Public Defender