CASE NO. 11-60431
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
Appellee/Plaintiff

v.

MARK J. CALHOUN
LARRY KENNEDY
KEITH KENNEDY
Appellants/Defendants

BRIEF OF APPELLANT LARRY KENNEDY

Appeal From The United States District Court
For The Southern District Of Mississippi
USDC No. 3:08-cr-DPJ-LRA

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

J. Larry Kennedy
Mark J. Calhoun
Keith M. Kennedy
Defendants/Appellants

S. Dennis Joiner
Omadare B. Jupiter
Kathy Nester
Trial and/or appellate counsel for Mark Calhoun

Willie Jones
April Calhoun
Co-defendants

William Andy Sumrall
Attorney for Willie Jones

Michael L. Knapp
Richard Rehfeldt
Trial and/or appellate counsel for Keith Kennedy

Julie Ann Epps
William B. Kirksey
Nathan Henry Elmore
Trial and/or appellate counsel for Larry Kennedy

John M. Dowdy, Jr.
Carla J. Clark

Jerry Rushing
Gaines Cleveland
Attorneys for the Plaintiff/Appellee

Hon. Daniel P. Jordan, III
United States District Court Judge

This, the 17th day of May, 2012.

/s/ Julie Ann Epps
Julie Ann Epps
Attorney for Larry Kennedy

STATEMENT REGARDING ORAL ARGUMENT

Appellant Larry Kennedy requests oral argument. Appellant believes that the facts and issues of this case are sufficiently complex that the Court would be greatly aided by oral argument. The record is more than 18 volumes long, and the exhibits comprise approximately fourteen bankers boxes.

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STATEMENT OF JURISDICTION

This is an appeal in a criminal case as a matter of right from a final decision (judgment of conviction and sentence) of the United States District Court for the Southern District of Mississippi entered on July 15, 2011. R. 581; RE 63. Appellant timely filed his notice of appeal on July 15, 2011. R. 573; RE 24.[1] The jurisdiction of the Court of Appeals is invoked pursuant to 28 U.S.C., Section 1291 and 18 U.S.C., Section 3742.

[1] Larry will cite to the record as R. followed by the page number and to the transcript as T. followed by the page number of the court reporter's transcript.

BRIEF OF APPELANT J. LARRY KENNEDY

STATEMENT OF THE ISSUES

I. The trial court committed reversible error in granting a willful blindness/deliberate ignorance instruction.

II. The trial court committed reversible error in denying Larry Kennedy's motions for new trial and for judgment of acquittal.

III. The court committed reversible error in failing to dismiss the money laundering counts because they merged with the fraud counts and because the allegations failed, as a matter of law, to constitute money laundering.

IV. The trial court erred in denying the motion to sever and/or for a mistrial.

STATEMENT OF THE CASE

(i) Course of the Proceedings:

On July 8, 2009, the government filed a Second Superseding Indictment charging Appellant J. Larry Kennedy,[2] his son, Keith M. Kennedy, Mark. J. Calhoun, April Calhoun and Willie Jones in a 38 count indictment charging conspiracy to commit wire and mail fraud, conspiracy to commit money laundering, and substantive counts of wire fraud and money laundering or aiding and abetting wire fraud and money laundering. R. 24; RE. 26. The indictment also included a notice of forfeiture.

[2] Appellant Larry Kennedy will refer to himself as Larry and his son as Keith to avoid confusion.

Count 1 of the indictment charged that from September 2004 through September 2006 Larry and Keith Kennedy conspired with Mark Calhoun, April Calhoun and Willie Jones to defraud mortgage lenders and borrowers in violation of 18 U.S.C. 1349.

Counts 2 through 16 charged all five defendants with substantive counts of wire fraud in violation of 18 U.S.C. §§1343 and 2. The government alleged that the provision of false information to lenders constituted wire fraud.

Count 17 charged Mark Calhoun, Willie Jones and the Kennedys with a conspiracy to launder money involving the proceeds and the concealment of proceeds of the wire frauds in violation of 18 U.S.C. §§1956(a)(1)(B)(9) and 1956(h).

Counts 18 through 21 charged Mark Calhoun, Willie Jones and the Kennedys with substantive counts of money laundering in violation of 18 U.S.C. §§1956(a)(1)(A)(i) and 2.

Count 22 charged a conspiracy between Mark and April Calhoun and Larry and Keith Kennedy to commit money laundering in violation of 18 U.S.C. §1956(a)(1)(B)(i) and 1956(h). After the trial, the judge dismissed Count 22 on the theory that it merged with Count 17, the other conspiracy to commit money laundering count. Tr. 3152-58.

Counts 23 through 29 charged Mark and April Calhoun and Larry and Keith Kennedy with substantive counts of money laundering in violation of 18 U.S.C. §§1956(a)(1)(A)(i) and 2.

Counts 30 through 34 charged Mark Calhoun and Larry and Keith Kennedy with substantive counts of money laundering in violation of 18 U.S.C. §§1956(a)(1)(A)(i) and 2.

Counts 35 through 38 did not charge either of the Kennedys.

Prior to trial, April Calhoun and Willie Jones entered pleas of guilty in return for their testimony and favorable recommendations by the government at sentencing. Tr. 2604; 2005.

Defendants Larry and Keith Kennedy and Mark Calhoun were tried by jury from February 24, 2010, through March 22, 2010, Hon. Daniel P. Jordan, III, presiding. Larry and Keith Kennedy were found guilty on Counts 1-34. RE 54-62; R. 317-325; Tr. 3152-3158. Mark Calhoun was found guilty of Counts 1-4, 6-20, 23-34 and 38. Tr. 3152-3158. After the trial, the trial judge sustained the defendants' motions for judgment of acquittal as to Count 22 and dismissed that count because it merged with Count 17. Tr. 3152-58. The trial judge denied the remainder of the defendants' motions for new trial and judgment of acquittal. R. 326.

On July 15, 2011, Larry was sentenced to 60 months with 3 years supervised release. RE 18-24. He was ordered to forfeit $10,244,573.57 and given a special assessment of $3,300.00. RE. 68-69. Keith was sentenced to 72 months. Sent. at 950. Mark Calhoun received 200 months. Sent. at 955.

(ii) Statement of Facts:

The defendants:

Mark Calhoun was a minister who worked as a licensed mortgage loan originator.[3] He placed people needing loans in touch with lenders who might be willing to lend money to the borrowers who wished to purchase homes in Mississippi. April Calhoun is his daughter who worked with him as a loan originator. Tr. 2543. Mark initially worked for Jason Ellis at Professional Mortgage Consultants (PMCC). Tr. 2543. Calhoun later set up Silver Cross Financial Group. Tr. 2544. At her father's direction, April set up M&C Investments. T. 2546.

Willie Jones was Mark Calhoun's cousin. Tr. 1909. He had talked to Calhoun about getting into real estate and set up a company, Metro One, for the purpose of flipping houses. Tr. 1935, 1942. He met Calhoun at the bank one day and Calhoun told him he needed to cash some checks and that he would pay Jones

[3] Loan originators work for a broker or lender. Tr. 154. Brokers are responsible for the work of their originators and brokers are required to maintain a surety bond. Tr. 171. The loan originator does not have to be bonded. Tr. 172.

to cash the checks for him. Tr. 1935. Thereafter, he and Calhoun started to extract money from the home sales they worked on as originators.

Jones and Calhoun would find buyers who would buy houses Jones and Calhoun found for them. Calhoun would submit an invoice for construction work or for property management–work that had not been done–payable to Willie Jones' companies Metro One or Unlimit Construction or later to companies owned by Mark or April. Tr. 1974-75.

Jones or Calhoun would cash the checks and keep part of the money. Some of the money would be given to the buyers, or investors, as they were called, as "advance equity" on the purchase. Calhoun would then find people whose credit was less than stellar to rent the houses. Some of the money from the liens would go to the lessees to pay the rent. The idea was that the renters would build up good credit and would then be able to purchase the house from the "investors" who would realize an additional profit beyond the "advance equity" because the value of the property would have increased. Jones and Calhoun called the filing of the false liens "pulling money out of the deal." Tr. 1974. Unfortunately the real estate market crashed, and some of the renters were unable to make their payments, which in turn meant that the "investors" were left with properties they could not afford to make payments on, and the whole scheme fell apart.

The government alleged that between 2004 and 2006 Calhoun recruited various persons, both family members and friends[4], to obtain approximately 40 mortgage loans for houses to be used as investment properties. In so doing, Calhoun supplied false information (such as false bank statements and employment verifications) to the lenders to insure that these persons qualified for the loans. These false statements constituted the wire fraud charges.

Calhoun and Jones made money off these loans over and above their originator's fees by having the lender, as part of the closing, pay various items listed on the HUD-1 such as construction liens to companies owned by Calhoun (Fast Stop Mortgage, Metro One Investments, LLC, M&C Investments, LLC, and Unlimit Construction, LLC.)[5] even though the companies never did any work on the properties. These payments constituted the money laundering charges.

The Kennedys, father (Larry and son Keith), ran a business called Loan Closing & Title Services (LCTS) which operated as an escrow agent for the

[4] Most of the borrowers were related in some way to Calhoun and/or Jones. For instance, Gerald Beasley's niece Priscilla is married to Calhoun. Tr. 857. Priscilla is also the niece of Vivian Jeans. Tr. 1199. Antile Jones attended Calhoun's church and felt for him as though he was her son. Tr. 844. Borrower Timothy Turner was Willie Jones' good friend. Tr. 2056.

[5] There were several companies involved and they had connections to Calhoun, April Calhoun or Willie Jones. The companies were Metro One Investment, LLC (Tr. 133), Fast Start Mortgage Incorporated (Tr. 129); Silver Cross Financial Group, LLC (Tr. 131); Unlimit Construction (Tr. 134) and M&C Investments, LLC. Tr. 132.

closing of real estate loans. The Kennedys closed loans originated by Calhoun.[6] According to the government, the Kennedys' involvement in Calhoun's alleged scheme was to falsify notarizations and then to "knowingly getting [money for] Mr. Calhoun out of the back end of these property settlements in his shell company names." Tr. 44. For instance, the government claimed that the construction liens paid at closing were fake and that the Kennedys should have known the liens were fake because they were never filed in the land records and, thus, did not show up in the title work.

There was evidence that Calhoun was getting money from the closings for which he or his companies did nothing, e.g. April Calhoun testified that at the closing of Vivian Jeans' 4640 Coleman property, $58,194 was paid to M&C Investments and that M&C Investments did nothing to earn this money (Tr. 2560-61) nor did M&C Investments do anything to earn the management and consulting fee of $65,859.81 paid at the closing of Gordon Franklin's purchase of a house in Olive Branch (Tr. 2064-65).

However, not even the government claimed that **the Kennedys ever earned anything but the fees that would normally be earned in a typical loan closing** - $350.00 per closing. Tr. Phil Hull/110. Phil Hull, the government's case agent and

[6] Although Calhoun was one of Kennedy's customers, the Kennedys closed loans originated by others as well. Tr. 200, 207. In the two-year period at issue here, they closed hundreds of loans but maybe only 20 or so for Calhoun. Tr. 223.

summary witness testified that with some one-million-five-hundred-and-something-thousand dollars floating around as profit, LCTS received only approximately $21,990, which was the amount of their closing fees on the approximately 20 loans at issue. *Id.* at 109-110.

In each case, Mark Calhoun or someone employed directly by him would arrange for the seller to sell property to the buyer/investor, and he would fill out or assist the buyer in filling out and submitting the loan application to the lender. After reviewing the loan application, the lender would then request a title search from LCTS. Once the title search was completed, the lender would then approve the loan and submit the closing paper work to LCTS for completion. That paperwork consisted of, among other things, the HUD-1 closing statement and a loan application to be signed by the buyer at closing. Once these closing documents were submitted to the lender, the lender would authorize LCTS to disburse the checks to the appropriate parties.

Neither of the Kennedys had anything to do with submitting the initial loan applications or the supporting documents (employment verification, credit reports, etc.) to the lender. Tr. 534-535.[7] Indeed, they had no reason to even read the applications. Furthermore, neither Kennedy had any input into the approval of the loan by the lender. The sole role of the Kennedys was to do the title work and to

notarize the closing documents and to disburse the checks pursuant to the instructions of the lender once the closing documents were signed and the lender authorized disbursement. They were under no legal obligation to check the loan application for falsehoods or to check the credit worthiness of the borrower. Those duties fell on the lender. The person responsible for gathering the information for the lender is the loan originator. Tr. 588. In this case, that would be Mark Calhoun.

Over the course of the two years in question, the Kennedys operated a lucrative and busy loan closing business, closing approximately 3 or 5 loans a day and between 1200 and 2000 in the years at issue. Tr. 523-524. In all, LCTS made only $21,305.71 or $21,990.00 from the Calhoun closings. Tr. 554, 2884; DJK-11. As the government's expert Phil Hull testified, there was no suggestion that the Kennedys received any money from any of those closings other than their normal loan closing fees. Tr. 2884.

There was no direct evidence that either Kennedy knew that any of the loans in question were fraudulent. Instead, the government relied on the theory that the Kennedys were aware of a high probability of illegality and turned a blind eye in order to keep the Calhoun loan closing business. Specifically, the government pointed to several pieces of circumstantial evidence to show that the Kennedys should have known that the loans were questionable.

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[7] This is confirmed by Jason Ellis who testified that the information that goes to the lender is all

First, the government pointed to the testimony of coconspirator Willie Jones. Jones testified that he sold a house on December 16, 2004, and in signing the warranty deed, he signed his name on behalf of his investment company, Metro One Investments.[8] Tr. 1955, 1942. Larry notarized the documents at that closing. Tr. 2195. The government argued that Larry, therefore, should have known that Jones was involved with Metro One. Tr. 3012-3013. Metro One was one of the companies whose liens were paid at other closings. E.g., Tr. 2391. The government argued that because Kennedy knew Jones owned Metro One, it necessarily followed that he should have known that the liens to Metro One were false.

Second, the government claimed that because the liens listed on the HUD-1 were not recorded in the land records, the Kennedys should have known the liens were false.

Third, the government maintained that because several of the borrowers submitted more than one loan application within a short period of time claiming that they intended to use the property as their primary residences, the Kennedys should have known the applications were fraudulent. According to the government, that the applications were submitted within a month to two-month period showed

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gathered by the loan originator. Tr. 588.

[8] The Hair Street loan was not a charged loan.

Calhoun was trying to conceal from the lenders that the borrowers had more outstanding debt than was reflected on their loan applications.

The theory was that the requests for credit would not have time to show up on the borrowers' credit reports and thus the lenders would be deceived into extending credit because they would be unaware of the other loans. According to the government, the Kennedys should have known this and therefore should have been aware of fraud.

SUMMARY OF THE ARGUMENT

The trial court erred in giving the jury an instruction on "deliberate ignorance." This instruction is to be given rarely and only when there is evidence that the defendant intentionally avoided actual knowledge by closing his eyes to facts that should prompt him to investigate. *United States v. Chen*, 913 F.2d 183 (5th Cir. 1990). As a loan closer, Larry Kennedy's responsibility was to follow the lender's instructions. He did not have a duty to determine whether the documents presented to him, documents such as affidavits of primary residence and invoices for construction liens were fraudulent especially where there was nothing on the face of the documents that would indicate that they were not true and the borrowers were cautioned not to inform Larry Kennedy that the documents were false. The giving of the "deliberate ignorance" instruction under these

circumstances was reversible error because of the very real probability that Larry was convicted because the jury believed he was negligent.

The evidence was insufficient as a matter of law to convict Larry Kennedy. Essentially, the government argued that Kennedy had a duty to inquire into whether there was fraud in the loans because there were a few circumstances that might have alerted someone who was on the lookout for fraud. But Larry Kennedy, as an escrow agent, had no such duty. His duty was to follow the closing instructions.

The evidence was likewise insufficient as a matter of law to convict Larry Kennedy of conspiracy to commit wire/mail fraud and money laundering as well as substantive counts of wire/mail fraud and money laundering. Each of the circumstances which the government claimed should have alerted the Kennedy's is equally susceptible to an interpretation of innocence.

The money laundering charges of against Kennedy fail for two reasons. Under *United States v. Santos*, 553 U.S. 2020, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2008), the money laundering counts merged with the wire/mail fraud counts inasmuch as they arose from the same conduct.

They also fail because the transactions constituting the money laundering charges consisted of payments to participants in the scheme–-payments made before the underlying crime was complete. Pursuant to *United States v. Harris*,

666 F.3d 905 (5th Cir. 2012), these payments were not made from the proceeds of unlawful activity and, thus cannot constitute money laundering.

Finally, the denial of Kennedy's motion to sever was error given that the evidence against Calhoun was great--he and Willie Jones made hundreds of thousands of dollars recruiting "investors" to buy homes and by submitting fake invoices for payment at the closings; whereas, the evidence of knowledge and intent against the Kennedys was virtually non-existent and, at best, could be described as inferences drawn from inferences. The government's case against Larry (even though he only made his normal closing fees) consisted of an argument that Kennedy was liable because what Calhoun and Jones were doing should have been apparent to Larry. Trying Kennedy with Calhoun became even more problematic after Calhoun was alleged twice with having improper contact with jurors resulting in the dismissal of one juror. Under these circumstances, Kennedy can hardly be said to have had a fair trial.

ARGUMENT

I. The trial court erred in giving the jury a deliberate ignorance instruction.

a. Standard of review:

Generally, courts have broad discretion in deciding whether to grant jury instructions. However, where, as here, a defendant claims that the jury instruction

misstates the law, the court's review is de novo. *United States v. Wright*, 634 F.3d 770, 775 (5th Cir. 2011).

Even where the Court reviews for an abuse of discretion, the trial court's discretion is not boundless. "A trial court abuses its discretion when it bases its decision on an **erroneous view of the law or a clearly erroneous assessment of the evidence** [emphasis added]." *United States v. Caldwell,* 586 F.3d 338, 341 (5th Cir. 2009). In either case, review for error is *de novo.* Moreover, even discretionary decisions in criminal cases are subject to heightened review. *United States v. Gutierrez-Farias,* 294 F.3d 657, 662 (5th Cir. 2002).

"Any omission or misstatement of an element of the offense in the jury instructions is constitutional error and, therefore, requires reversal unless [the Court] find[s] the error 'harmless beyond a reasonable doubt.'" *United States v. Kilbride,* 584 F.3d 1240, 1247 (9th Cir. 2009) [quoting *Chapman v. California,* 386 U. S. 18, 24 (1967)].

b. The merits:

Over the objections of Appellants (Tr. 2961), the trial court granted the following instruction:

> The word "knowingly" as that term has been used from time to time in these 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 in the Defendant deliberately blinded himself to the existence of a fact.

Tr. 2991-2992; Ex. C-4.

The trial judge ruled that the instruction was appropriate based on the testimony of Tom Riley that the guidelines for notaries in Mississippi require that they insure the identity of the signatory, and because several witnesses testified they did not attend closings; yet their signatures were notarized by the Kennedys. RE. 101; TR. 2945. He noted that TerriLynn Rankin testified that she mentioned her concern over the closings that took place out of the office[9] to Larry, and that Kennedy told her that he spoke to those borrowers and had their identifications faxed to him. RE. 102-103; Tr. 2945-46. Rankin also expressed her concern over the large number of and repetition of borrowers coming from Calhoun. RE. 103; Tr. 2946. The judge also noted there was evidence that Larry should have known that Willie Jones was Metro One. RE. 103; Tr. 2946. See also *United States v. Calhoun*, 2011 U.S. Dist. LEXIS 54799 *30 (S.D.Miss. May 10, 2011).

The trial court erroneously relied on testimony from Willie Jones about a double closing. Although Willie Jones did at one point say the closings took place

[9] Rankin called these "travel closings". The government used the same term to denote closings wherein the purported borrower did not sign the closing documents.

on the same day, he subsequently corrected that testimony and said the closing were on consecutive days. R. 440, Tr. 1945, 2086.

None of the evidence cited by the trial court, however, was substantive evidence of any wrongdoing. TerriLynn Rankin testified that she had known notaries to notarize documents even though the signatory was not in the notary's presence. Tr. 542. Jason Ellis, for whom Calhoun worked at one time, testified that sometime before August 2005, he had seen a HUD-1 which listed a payment to Calhoun's company Fast Start and Ellis warned Calhoun to never do that again. Tr. 602, 615. Ellis said he told Larry Kennedy the same thing twenty minutes later adding "this kind of stuff right here may be the kind of stuff I'm going to jail for". Tr. 603. The trial court struck this statement. Tr. 603. In any event, evidence as to what Ellis may have said to Larry Kennedy about Calhoun is hardly sufficient to support an inference that Larry was conspiring with Calhoun to commit mortgage fraud because there is no evidence that Larry knew the invoices were false.

As far as TerriLynn Rankin's concerns, she testified that she never questioned the Kennedys but merely commented on the repetitive business coming from Calhoun, which in fact amounted to only about $22,000 of a multi-million dollar loam business. Tr. 462.

Insofar as the Willie Jones/Metro One connection, Jones had a construction business and had even offered to redo Kennedy's office, and there was no reason

for Kennedy to be suspicious of invoices being paid to Willie Jones' company. So, none of the evidence cited by the trial court amounts to proof of knowledge of a crime, much less an intent to join or promote it, sufficient to support the giving of a deliberate ignorance instruction. There is no proof that the Kennedys consciously chose to ignore wrongdoing as opposed to mere negligence.

At trial, in objecting to the deliberate ignorance instruction, the Kennedys cited *United* States *v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990), wherein this Court held that it was error to give a deliberate ignorance instruction. Here, in denying the motion for new trial, the trial court held that *Chen* had failed to take root in the Fifth Circuit beyond cases brought under 21 USC § 856(a)(1) which criminalizes the knowing provision of property for the use of manufacturing, selling or using drugs. *United States v. Calhoun*, 2011 U.S. Dist. LEXIS 54799 at *32.

The term deliberate ignorance "denotes a conscious effort to avoid positive knowledge of a fact which is an element of an offense charged, the defendant choosing to remain ignorant so he can plead lack of positive knowledge in the event he should be caught." *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990). A person engages in "knowing" conduct when he intentionally avoids actual knowledge by closing his eyes to facts that should prompt him to investigate. Intentionally avoiding knowledge "implies something verging on

knowledge, combined with a desire to escape the consequences of knowledge." *United States v. Josefik,* 753 F.2d 585, 589 (7th Cir. 1985).

This Court in *Chen* warned against the indiscriminate use of a deliberate blindness instruction:

> As the Ninth Circuit cautioned, a "court can properly find willful blindness only where it can almost be said that the defendant actually knew." *United States v. Jewell,* 532 F.2d 697, 704 (9th Cir.), *cert. denied*, 426 U.S. 951, 96 S. Ct. 3173, 49 L. Ed. 2d 1188 (1976) (quoting G. Williams, Criminal Laws § 57 at 157 (2d ed. 1961)). The Model Penal Code provides that when "knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is **aware of a high probability** of its existence, unless he actually believes that it does not exist." § 2.02(7) (emphasis added). *See also* LaFave & Scott, *Substantive Criminal Law* § 3.5 at 307-8 (1986).

Chen, 913 F.2d 183, 1901-191. See also *Vidrine v. United States*, 2012 U.S. Dist. LEXIS 9434, 143-144 (W.D. La. Jan. 26, 2012) (citing *Chen* for the proposition that "[a] deliberate ignorance instruction should be used sparingly."); *United States v. Sanchez-Robles*, 927 F.2d 1070, 1073 (9th Cir. 1991) (same).

The evidence in this case falls short of justifying a deliberate ignorance instruction. In fact, the evidence demonstrates that Calhoun took steps to insure that Larry Kennedy did not know that Calhoun was providing fraudulent documents. For instance, Dorothy Wheat purchased several properties through the auspices of Mark Calhoun. She testified that Calhoun would meet her at the bank to give her money to purchase the cashier's checks that would provide the down

payment for each purchase. Tr. 1847, 1853, 1864. Not only did she never disclose to Kennedy that none of the money was really hers (Tr. 1881), Calhoun told Wheat **not** to tell Kennedy that the property she was purchasing would not be her primary residence despite her having submitted paperwork (a primary residence affidavit) attesting that the property was to be her primary residence. Tr. 1880-1881.

In *Chaney v.* Dreyfus *Service Corp.*, 595 F.3d 219 (5th Cir. 2010), this Court refused to impose civil liability based on a financial institution's deliberate ignorance of the fact that it was being used to launder money.

> Neither awareness of **some** probability of illegal conduct nor a showing the defendant **should** have known is enough, and so "[t]he circumstances which will support [a] deliberate indifference instruction are rare." *United States v. Lara-Velasquez, 919 F.2d 946, 951 (5th Cir. 1990)*. It requires **conscious** action in light of **known** facts amounting to a "charade of ignorance." *Id*. In short, "deliberate ignorance is reflected in a . . . defendant's actions which suggest, in effect, 'Don't tell me, I don't want to know.'" *Id*. Deliberate ignorance is the legal equivalent of knowledge.

Chaney, 595 F.3d at 240. While admitting that Dreyfus' "efforts to identify the origin, legitimacy, or ultimate destination of the funds passing through its accounts" "were non-existent", the Court nonetheless found that this failed to establish that Dreyfus should have known that it was being used to launder money. *Chaney*, 595 F.3d at 227-228.

In this case, if the case was insufficient to support deliberate ignorance in a civil case, it was even more deficient in a criminal case. Larry's only duty to the

lender as a closing agent was derived from "the closing instructions, and not generally from law and industry standards." *Freedom Mortg. Corp. v. Burnham Mortg., Inc*., 720 F. Supp. 2d 978, 992 (N.D. Ill. 2010). See also *Bescor, Inc. v. Chicago Title & Trust Co*., 446 N.E.2d 1209, 1213 (Ill. 1983) ("an escrowee . . . owes a fiduciary duty to act only according to the terms of the escrow instructions"), and other cases cited in Issue II.

The fact that he could have made inquiries into whether the construction liens were valid does not mean that he had a duty to do so. Nor did he have an obligation to determine whether the buyers' cashier's checks, presented at the closing as coming from the buyer's funds with no indication otherwise, represented the buyers' own money. The same is true for any duty he had to police the information in the loan applications.

As the escrowee, Larry Kennedy's duties did not require him to go beyond the limits of the escrow instructions to the extent of notifying any parties to the escrow of any suspicious facts or circumstances that come to the escrowee's attention. *Weldon v. First Citizens Bank of Billings*, 856 P.2d 225, 227 (Mont. 1993); 28 Am. Jur. 2d Supp. Escrow § 16 (1993). The trial court, however, in allowing the jury to convict Kennedy using a standard of deliberate ignorance, imposed on Larry a duty the law does not impose on him.

Furthermore, Kennedy was found guilty of having conspired with Mark Calhoun, April Calhoun, Willie Jones and Keith Kennedy to commit mail wire fraud and to launder money. Both April Calhoun and Willie Jones testified and neither identified any agreement with Kennedy to carry on a mortgage fraud scheme. In fact, Jones said he had no knowledge of any communications between Calhoun and Larry Kennedy. Tr. 2085. Nor did they testify to anything either did to make Larry aware of the fraud that they should have been able to do had there been a conspiracy involving Larry Kennedy. The "deliberate ignorance" instruction allowed the jury to convict Kennedy despite there being no evidence of an agreement and no proof that Kennedy joined ay agreement.

The Second Circuit has repeatedly held that a "deliberate ignorance" instruction is never to be given in a conspiracy case. *United States v. Scotti*, 47 F.3d 1237, 1242 (2d Cir. 1995) ("[I]t is logically impossible for a defendant to intend and agree to join a conspiracy if he does not know that it exists."); United *States v. Ciambrone*, 787 F.2d 799, 810 (2d Cir. 1986) ("Conscious avoidance of participating in a conspiracy and agreeing to be a member of a conspiracy are mutually exclusive concepts."); *United States v. Mankani*, 738 F.2d 538, 546-47 (2d Cir. 1984) (concluding an agreement to conspire cannot be proved through deliberate ignorance.

One should not be able to join a conspiracy through avoidance, conscious or otherwise. The government must prove that the defendant actively and intentionally "agreed" to join and had the specific intent to commit the objects of the conspiracy. *See, e.g.*, *United States v. Salmon*, 944 F.2d 1106, 1113 (3d Cir. 1991); *United States v. Ciambrone*, 787 F.2d 799, 810 (2d Cir. 1986) ("membership in a conspiracy cannot be proven by conscious avoidance, since the requisite mental state for conspiracy is intent. Conscious avoidance and [wilfully] agreeing to be a member of a conspiracy are mutually exclusive concepts").

Moreover, "willful blindness" is not a permissible substitute for an intentional mental state. *United States v. Beech-Nut Nutrition Corp*., 871 F.2d 1181, 1196 (2nd Cir. 1989). It is not an appropriate charge in a conspiracy case, because the government must prove the defendant agreed to join (intended to join) an unlawful conspiracy. One cannot join a conspiracy through avoidance, conscious or otherwise. *United States v. Ciambrone,* 787 F.2d 799, 810 (2nd Cir. 1986) ("membership in a conspiracy cannot be proven by conscious avoidance, since the requisite mental state for conspiracy is intent. Conscious avoidance of participation in a conspiracy and agreeing to be a member of conspiracy are mutually exclusive concepts"). The instruction as used here allowed the jury to determine vital facts merely by piling inference upon inference, something this

Court has held it may not do. *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 553 (5th Cir. 2012).

This case was not one of the rare cases in which a "deliberate ignorance" instruction was justified. The instruction imposed upon Kennedy a duty he did not have under the law and allowed the jury to convict him in the complete absence of evidence that he joined a conspiracy to commit mortgage fraud spearheaded by Mark Calhoun. Kennedy's duty as an escrow agent was solely to follow the closing instructions; he made nothing more from the loans than his standard closing fee. The giving of the "deliberate ignorance" instruction in this case was reversible error especially given the insufficiency of the evidence as argued below in Issue II and incorporated herein.

II. The evidence is insufficient to support the convictions because it is insufficient to show that Larry Kennedy knowingly and intentionally committed the crimes.

a. Standard of review:

This Court reviews a challenge to the sufficiency of the evidence de novo, and considers "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Where the record supports conflicting inferences, the court must presume that the jury resolved conflicts in favor of the prosecution and must defer to that resolution. As one Court has put it, however, this

> does not mean that whenever the record supports conflicting inferences, no matter how weak, the prosecution wins, for not only would this be no more stringent than the standard of review in a civil case but also the prosecution would only fail in its proof where there was a total absence of probative evidence, which is the "no evidence" standard rejected in *Jackson [v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)]. If the *Jackson* beyond a reasonable doubt standard is to have any meaning, we must assume that when the choice between guilt and innocence from "historical" or undisputed facts reaches a certain degree of conjecture and speculation, then the defendant must be acquitted. *Ulster [County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979)] clarifies that this degree of inferential attenuation is reached **at least when the undisputed facts give equal support to inconsistent inferences** *** [I] f the evidence fails to give support to the prosecution sufficient to allow a reasonable juror to find guilt beyond a reasonable doubt, a verdict must be directed **despite the existence of conflicting inferences** [emphasis added].

Cosby v. Jones, 682 F.2d 1373, 1383, n.21 (11th Cir. 1982).

Although the Court considers the evidence in the light most favorable to the verdict, in conducting *de novo* review on sufficiency, the Court "consider[s] the countervailing evidence as well as the evidence that supports the verdict in assessing sufficiency of the evidence." *United States v. Williams,* 602 F.3d 313, 315 (5th Cir. 2010). Where, as here, the elements of knowledge and intent are circumstantial, "[t]he evidence is insufficient to support the verdict '[i]f . . . the evidence gives equal or nearly equal circumstantial support to a theory of guilt, as

well as to a theory of innocence.' *United States v. Ferguson,* 211 F.3d 878, 882 (5th Cir. 2000)." *Id.*

b. The merits:

If the Kennedys had been involved in a conspiracy with Calhoun, there would have been no reason for Calhoun to caution the buyers to hide from the Kennedys the fact that they were lying when they claimed on the primary residence affidavit that the house was to be the buyer's primary residence. But this is exactly what Calhoun did with borrower Dorothy Wheat. Calhoun warned Wheat **not** to tell Kennedy that the property she was purchasing would not be her primary residence despite her having submitted paperwork (a primary residence affidavit) attesting that the property was to be her primary residence. Moreover, he told her not to tell Kennedy that he gave her the money for the down payment. Tr. 1880-1881.

In support of their case against Larry Kennedy, the government first pointed to the testimony of coconspirator Willie Jones. Jones testified that he sold a house on December 16, 2004, and in signing the warranty deed, he signed his name on behalf of his investment company, Metro One Investments. Tr. 1955, 1942. Larry Kennedy notarized the documents at that closing. Tr. 1955. The government argued that Kennedy, then, should have known that Jones was involved with Metro One. Tr. 3012-3013. Metro One was one of the companies whose liens were paid

at other closings. See, egg. Tr. 391. Thus, the government contends, Kennedy should have known that the liens to Metro One were false. But this argument leaves a great deal to be desired. Indeed, one of Jones' companies was Unlimit Construction and there was a crew of people that he contracted with to do constriction work. Tr. 134, 2092. At one point, Jones approached Larry Kennedy about doing some construction work on Kennedy's office. Tr. 2092.

So there was every reason in the world for Larry Kennedy to think that Jones had a legitimate construction business, one that might be entitled to funds for fixing the houses before they were sold. It does not follow that merely because Kennedy may have had reason to know that Jones was involved with companies who were submitting liens that he also knew those liens were false. In the absence of any proof that Larry knew the liens were false, the link between Jones and the companies simply does not demonstrate knowledge on behalf of Larry that the liens were false or that he intended to join a conspiracy, a conspiracy that he failed to derive much benefit from. In fact, most of the borrowers received more on their individual loans than the Kennedys derived from all the loan closings.

The same can be said of any knowledge by Larry that some of the lien payments were going to the Calhouns. Again, the government asked the jury to pile inference upon inference to conclude that merely because the Kennedys knew or should have known of the Calhoun connection that they also knew the liens were

false. In the absence of proof that the Kennedys deliberate closed their eyes to the falsity of the liens, the government's proof is deficient.

Second, the government claimed that because the liens listed on the HUD-1 were not recorded in the land records, the Kennedys should have known the liens were false. But the government's own witnesses admitted that not all liens are filed. Frequently, repairs are done on a home shortly before closing, and because all the parties agree to the payment, there is no need to record the lien on the land records. Tr. 211, 214-215, 532. When this was the case, TerriLynn Rankin testified that she made sure that there was an invoice accompanying the lien. Tr. 533. More importantly, Rankin testified that so long as the invoice was in hand, the **loan closer had no duty to look behind the paperwork and determine whether the invoice was valid**. Tr. 523. So, this, too, falls far short of proving that Larry Kennedy knew that the loans he was closing were fraudulent.

Third, the government maintained that because several of the borrowers submitted loan applications within a short period of time claiming that they intended to use the property as their primary residences, the Kennedys should have known that the applications were fraudulent. According to the government, the fact that the applications were submitted within a month to two-month period showed that Calhoun was trying to conceal from the lenders that the borrowers had more outstanding debt than was reflected on their loan application. The theory was that

the requests for credit would not have time to show up on the borrowers' credit reports and thus the lenders would be deceived into extending credit because they would be unaware of the other loans. According to the government, the Kennedys should have noticed that the same borrowers were showing up at the closings and claiming the property as their primary residence.

Yet, as pointed out above, the borrowers were filling out affidavits attesting that the properties were to be their primary residences even though they knew this was false. The government, then, would place an affirmative duty on the Kennedys to verify the documentation they were being given. But this is not the loan closer's duty. The sole role of the Kennedys was to do the title work and to notarize the closing documents and to disburse the checks pursuant to the instructions of the lender once the closing documents were signed and the lender authorized disbursement. They were under no legal obligation to even read the loan application much less check the loan application for falsehoods or to check the credit worthiness of the borrower. Those duties fell on the lender.

Equally important is the fact that the lender had knowledge of and final approval of every item on the final HUD-1, including the liens. Indeed, not only did the closing instructions require the lender to approve every single change to the HUD-1, TerriLynn Rankin confirmed that this was so. Specifically, she testified that the lender gives the closing agent a funding number before any checks can be

disbursed and that the funding number is **given only after the lender has the signed final HUD-1 form listing the liens**. Not once did any of the lenders on any of the loans in question ever question the payment of the liens. Tr. 503-04. Significantly, after the final HUD-1 was approved by the lender, the Kennedys had no choice other than to disperse the checks to the people listed on the form.

The agency created by the escrow is limited to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow. *Vournas v. Fidelity Nat. Tit. Ins. Co*., 73 Cal. App. 4th 668, 674 (1999); Bandele *v. Am. Home Mortg. Servicing,* 2009 U.S. Dist. LEXIS 96744 *13 (N.D. Ga. 2009); Locks *v. North Towne Nat'l Bank*, 451 N.E.2d 19 (Ill. App. 1983); Berry *v. McLeod*, 604 P.2d 610 (Az. 1979); *Kreuer v. Union Nat'l Bank,* 119 A. 921 (Pa. 1923); *Nickell v. Reser*, 57 P.2d 101 (Kan. 1936); SMP*, Ltd. v. Syprett, Meshad, Resnick & Lieb, P.A.,* 584 So. 2d 1051, 1054 (Fla. App. 1991); *Gurley v. Bank of Huntsville*, 349 So.2d 43, 45 (Al. 1977); First *Fidelity Bank v. Matthews*, 692 P.2d 1255, 1258-59 (Mont. 1984); 28 Am. Jur. 2d. Escrow § 11 (1966 & Supp. 1990). The escrowee's fiduciary duty does not require the escrowee to go beyond the limits of the escrow instructions to the extent of notifying any parties to the escrow of any suspicious facts or circumstances that come to the escrowee's attention. *Weldon v. First Citizens Bank of Billings*, 856 P.2d 225, 227 (Mont. 1993); 28 Am. Jur. 2d Supp. Escrow § 16 (1993).

"An escrow agent has no duty to look for fraud, but, if knowledge comes to the escrow agent that there is a fraud, there is a duty to disclose such information to the parties to the escrow." *Berry,* 604 P.2d at 616; Mark *Props., Inc. v. National Title Co.,* 14 P.3d 507, 510 (Nev. 2000); *American State Bank v. Adkins*, 458 N.W.2d 807, 810 (S.D. 1990). Cf. *Coran v. Century Title Agency*, 2010 Mich. App. LEXIS 2217 (Mich. Ct. App. Nov. 18, 2010) (holding that the **only** duties of title insurers and escrow or closing agents are delineated by the contracts between the parties); *Blackburn v. McCoy*, 37 P.2d 153, 155-156 (Ca. 1934) (holding that escrow agent did not have a duty to disclose fraudulent misrepresentations made by seller to buyer even though he knew about them; the duty to disclose fraud to one principal conflicts with the duty of loyalty to the other principle).

Mississippi law is in accord. M.C.A. § 89-1-519, entitled "Agent; extent of agency" specifically provides that the scope of escrow agent's duties/powers are those set forth in the written agreement.

> Any person or entity, other than a duly licensed real estate broker or salesperson acting in the capacity of an escrow agent for the transfer of real property subject to Sections 89-1-501 through 89-1-523 shall not be deemed the agent of the transferor or transferee for purposes of the disclosure requirements of Sections 89-1-501 through 89-1-523, unless the person or entity is empowered to so act by an express written agreement to that effect. **The extent of such an agency shall be governed by the written agreement.**

Miss. Code Ann. § 89-1-519.

The escrow agent, then, "has no general duty to police the affairs of its depositors"; rather, an escrow holder's obligations are "limited to faithful compliance with [the depositors'] instructions." *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co*., 41 P. 3d 548, 552 (Cal. 2002). He certainly "has no fiduciary duty to go beyond the escrow instructions and notify parties of any suspicious facts." *Walker v. Lair*, 1984 U.S. Dist. LEXIS 15534 (D. Minn. 1984).

The district court's failure in this case to grant Larry Kennedy a judgment notwithstanding the verdict allows Larry to stand convicted based on standards that not even civil law imposes on him as an escrow agent. While Larry Kennedy, acting as an escrow agent, had no obligation to ferret out fraud, he nonetheless has been convicted for that very thing.

In denying the defendants' motion for new trial/JNOV, the trial court cited the fact that Larry Kennedy had notarized documents even though the signatory did not sign the document in his presence. The trial court ruled that this failure to require signatories to sign documents in his presence was material because the lenders testified that they relied on the presence of the borrowers at closing. R.E. 101; Tr. 2945. However, even though some of the borrowers denied signing the documents, there was ample evidence to demonstrate that these buyers did indeed purchase the subject properties and, thus, any failure by Larry Kennedy to require

the borrowers to sign in his presence was not material because the contracts were valid despite the absence of notarization.

Furthermore, while TerriLynn Rankin testified that she expressed concern to Larry Kennedy over the fact that documents were being signed outside of the office and no one had seen the documents executed (Tr. 532), he told her that he had spoken to the signatories to confirm that they had signed the documents. Tr. 460, 541. Moreover, sometimes the signatories would fax a copy of their driver's licenses to the office or the copy of the license would be brought back with the closing documents. Tr. 541.[10] When Rankin was asked whether it was true that plenty of notaries notarized documents signed outside their presence when they were given additional information such as confirming with the signatory that it was indeed his signature, she replied, "It happens." Tr. 542.

The notary's duty is to acknowledge the authenticity of the signature. *Dickey v. Royal Banks of Missouri,* 111 F.3d 580 (8th Cir. 1997) citing Herrero *v. Cummins Mid-America, Inc.,* 930 S.W.2d 18, 22 (Mo. Ct. App. 1996). In *Dickey,* the court absolved a notary of liability in a nonappearance case because the notary's misconduct did not directly cause the plaintiff's damages. In that case, a

[10] Indeed, the Kennedy's closing files included copies of the borrower's driver's license and, sometimes, the social security card as well. See, e.g.; GE 41, 59; RE. 116 (driver's license and social security card of Ulysses Crosby); G 87, 39, 30, 38; RE. 112, 118 (driver's licenses and social security cards of James and Terrica Bailey); GE 62, 63; RE. 122 (driver's licenses of Gerald and Gennette Beasley); GE-3; RE. 124 (driver's license of Rickey Jeans).

notary employed by Royal Banks did not require James M. Dickey to appear for the notarization of his authentic signature on an assignment of annuity presented to the bank by Barney Sandow.

Sandow had convinced Dickey to use the annuity as collateral for a loan from Royal Banks which Sandow would reinvest for Dickey at a higher rate of return than the annuity provided. Sandow, however, defaulted on the loan and the annuity, worth $ 110,000, was turned over to Royal Banks. Dickey sought to recover the annuity from the lender, based on the improper nonappearance notarization by Royal Banks employee Laurie Trigg-Brown. She had acted on the instruction of a bank loan officer, who first telephoned Dickey to explain that the annuity could be lost if the loan went bad; Dickey nonetheless wanted to proceed and admitted the signature to be his. After a jury found in favor of Dickey due to the notary's misconduct in not requiring his presence, an appellate court reversed:

> The jury...awarded relief in this case based on a Missouri statute that makes a notary, and his or her employer, responsible for damages that are proximately caused by professional misconduct. See *Mo. Rev. Stat. Sections 486.355-486.365*. The theory of this count would appear to rest on the premise that Mr. Sandow's fraudulent scheme would have been uncovered if only Mr. Dickey had appeared before a notary when he executed the assignment. There is more than one difficulty in the way of this theory, not least the fact that Mr. Dickey admits that the signature on the assignment is his. This admission removes the notary from any responsibility for the execution of the assignment and the harm that befell Mr. Dickey, because "the notary's duty is [merely] to acknowledged the authenticity of the signature." *Herrero v. Cummins Mid-America, Inc.,* 930 S.W.2d 18, 22 (Mo. Ct. App. 1996). The court in *Herrero,* rejecting the claim that the role of the

> notary was to make sure that the signatory knew what he was signing, said that "because the plaintiff here did not dispute the genuineness of her signature, [the defendant] did not commit official misconduct, which would subject her to liability for notarizing the form outside of [the] plaintiff's presence." *Id.*

Dickey v. Royal Banks of Missouri, 111 F.3d 580 (8th Cir. 1997).

The same is true here. Some of the borrowers acknowledged the loans. Moreover, the ones who denied that they had signed and who had sought to set aside the contracts were so thoroughly impeached that no reasonable juror could believe that they did not sign. *See,* discussion following.

That Larry did not always require the signatories to sign documents in his presence is not unusual and while not complying with the requirement to do so, it hardly indicates that he was part of a criminal conspiracy. "Notaries often do not demand the physical presence of document signers when they sign or acknowledge their signatures, do not date the documents for the day of the notarization, and most importantly, do not demand sufficient documentary evidence to identify the signers." *Comment: Notary Law And Practice For The 21st Century: Suggested Modifications For The Model Notary Act,* 30 J. Marshall L. Rev. 1063, 1069 (Summer 1997).

Here, Antile Jones was one of the borrowers who testified she did not sign any of the documents purporting to bear her signature used to purchase three

properties: 5221 Brookview Drive, Jackson, Mississippi; 107 Merlot Cove, Clinton, Mississippi.; 174 Victoria Park, Madison, Mississippi. Tr. 803-8011. Yet Jones, who admitted she had a lot of problems with her memory[11], was known to visit Calhoun's office often and knew that Roy Smith was leasing the Victoria Place property from her. T. 2619-2620.

Also, Willie Jones was living in Antile Jones' Brookwood house. He was paying the lender directly but when he fell behind Antile Jones came to the house to see about the payments. Tr. 034. When Hurricane Katrina hit at the end of August 2005, the house sustained some damage. Willie reported it to Antile who reported it to the insurer. Tr. 2035. When the check for the repairs came in it was in both Willie and Antile's names, and they cashed it and got the repairs done. Tr. 2035.

Willie later tried to get the house refinanced and out of Ms. Jones' name. Ms. Jones knew Willie was trying to do this. Tr. 2036-2037. At one point, they did work out an agreement with the lender to give them some time to pay. Both Willie and Antile signed it. Willie testified he recognized Antile's signature on the agreement. Tr. 2043-2044.

[11] Ms. Jones testified "I forget things sometime, all the time. Different times it go and it comes. Tr. 824. In fact, she could not remember from question to question what her previous answer had been.

Also, Antile Jones filed a lawsuit in Hinds County to remove Roger and Sandrei Jones from the Merlot Cove property for nonpayment of the $2500.00 a month rent asserting that she was the owner of the property.[12] Tr. 834. The government's exhibits include documents, specifically a "Patriot Act Disclosure", in which Larry Kennedy attested to having seen Ms. Jones driver's license and social security card. GE-12; RE. 109. Also in Ms. Jones' files was a letter ostensibly handwritten by her explaining why she was buying a smaller house, G-16; RE 111. She also received "advance equity" payments on the houses. All in all, Antile Jones' testimony that she knew nothing about the houses she purchased through Mark Calhoun was thoroughly impeached.

Rickey Jeans also claimed that he did not sign documents purporting to bear his signature. Tr. 1204, 1206, 1210, 1216, 1218. Yet he agreed to purchase 1540 Woodburn property, thinks he was at the closing and was under the impression that he had signed the documents concerning the purchase. Tr. 1217, 1222-1223, 1233. And while he claimed that the signature on documents concerning 132 O'Ferrell was not his, he agreed to purchase the property. Tr. 1218.

Regarding 189 Victoria Place, Jeans testified that he was 90% sure that was not his signature yet he attended the closing on the property. Tr. 1222, 1224. A moment later, he testified that it was his signature. Tr. 1227, 1235. He testified at

[12] True to form, Ms. Jones denied knowing anything about the eviction lawsuit but copies of the

one point that it was not his signature on documents connected to 1706 Hair St. (Tr. 1204, 1206, 1208, 1210) but stated several minutes later that it **was** his signature on the documents. Tr. 1226, 1233.[13]

Furthermore, when Jeans was first interviewed by the FBI, he told agent Phil Hull that he was paid $20,000 to $25,000 for purchasing the Victoria Place Property but that he really received $50,000. Tr. 1230-31. Furthermore, Larry Kennedy's file contained a copy of Rickey Jeans' driver's license. G-3; RE. 124. He, too, received "advance equity" payments on the houses.

Gerald Beasley admitting talking to Calhoun about investment properties and sending Calhoun financial information but denied having ever signed any closing documents. Tr. 859, 861. However, Kennedy's files contained a letter handwritten by one of the Beasleys (and signed by both) explaining why they were buying a house in Mississippi (they lived in Texas) and copies of the Beasley's driver's licenses. GE. 62, 63; RE. 122, 125.

Furthermore, the lender had copies of checks Gennette wrote to pay the mortgage. RE 63; RE. 126. Gerald admitted that he and Gennette received large

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court files with her signature were introduced into evidence. Tr. 835, DMC 10.

[13] That the Jeans knowingly purchased the property on Hair Street was further buttressed by the fact that he later sued the appraiser of the property for making an incorrect appraisal. Tr. 1249. In that lawsuit or another one (the record is not exactly clear), Jeans filed a verified complaint in which he stated that he never received any documentation concerning his purchase of six homes. He admitted during the trial of the instant case that that was not true. Tr. 1265. The government

sums of monies for each house they purchased ($40,000 for Brisarge) and that they made some payments on the mortgages. Tr. 888, 890. The house on Brisage was rented and Gerald collected $2600.00 rent on that property for about three months. Tr. 889, 890.[14]

All in all, the proof showed that Larry Kennedy may not have always required the actual presence of the signatories/borrowers when he notarized their documents. Yet the borrowers, in one way or another, admitted to having purchased the properties at issue. Thus, any loss to the lenders was not based on Larry Kennedy's failure to require the borrowers to sign the various documents in his presence. The losses were incurred by the borrowers' false statements on the loan application, applications which were given to the lender and which the lenders, not Kennedy, had a duty to verify.

Insofar as the other alleged conduct, the government in this case proved **only** that Larry Kennedy had information in front of him that, had he delved deeper, might have uncovered the fraud being perpetrated by Mark Calhoun and Willie Jones. But the law imposed no such duty on Larry Kennedy in his role as the loan

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immunized him with regard to his testimony in this case. Tr. 1268-1269. The Hair Street property was not charged in the indictment.

[14] Beasley testified that he also received rent and paid the mortgage on the Norwich house even though he claimed that he never received any paperwork on the house. Tr. 899. He also got $55,000 for purchasing the house. Tr. 904.

closer/escrow agent. His duty was merely to follow the closing instructions. Imposition of criminal liability based on these facts violates due process.

The proof at trial was wholly insufficient to support a finding that Larry Kennedy conspired with Mark Calhoun, April Calhoun, Willie Jones and his son Keith. Larry Kennedy's negligent notarizing of documents outside the presence of the signatories may have unwittingly aided Calhoun's objectives, but there was a complete absence of proof that Larry Kennedy knowingly aided Calhoun.

> "[C]ircumstantial evidence of knowledge and specific intent sufficient to sustain a conviction must include some indicia of the specific elements of the underlying crime," such as "proof of a defendant's knowledge or intent through evidence that the defendant participated in conversations directly related to the substance of the conspiracy," "possess[ion of] or mention[] in documents important to the conspiracy," "proof that a defendant exercised authority within the conspiracy itself," "recei[pt of] a share of the profits from the conspiracy,' or a defendant's statements 'explicitly confirming the nature of the activity in which the co-conspirators were engaged."

United States v. Friedman, 300 F.3d 111, 126 (2d Cir. 2002). Where, as here, a defendant can show that the evidence in the record, viewed in the light most favorable to the government, is not sufficient to show that he knew the specific nature of the conspiracy or underlying crime, he has met the "heavy burden" faced by defendants seeking to overturn a conviction on grounds that the evidence was insufficient. *United States v. Marji*, 158 F.3d 60, 63 (2d Cir. 1998).

While courts are reluctant to overturn a jury verdict, the Court will do so

where the jury's verdict is not supported by reasonable inferences. U.S. v. Jones 49 F.3d 628, 633 (10th Cir. 1995). As the *Jones* court put it:

> The line between a reasonable inference that may permissibly be drawn by a jury from basic facts in evidence and an impermissible speculation is not drawn by judicial idiosyncrasies. The line is drawn by the laws of logic. If there is an experience of logical probability that an ultimate fact will follow from a stated narrative or historical fact, then the jury is given the opportunity to draw a conclusion because there is a reasonable probability that the conclusion flows from the proven facts.

Id. at 631-33.

Here, the government asked the jury to infer Larry's guilt from evidence which shows little more than that he may have known Jones ad Calhoun were receiving the lien money and that he closed a small number of the loans without requiring the participants to be present. As for the lien money, it simply does not follow that Larry knew that they were not entitled to the money. As for the signatures, the evidence confirms that Kennedy did require the lenders to verify their signatures as shown by the drivers' license information in the files. As for those borrowers, the Beasleys, the Jeans and Antile Jones, who claimed that they did not intend to purchase the properties, their testimony is inherently incredible because they got money from the loans, instituted lawsuits to evict the renters and signed other legal documents acknowledging their ownership.

As a matter of law, if the evidence at trial gives "equal or nearly equal circumstantial support to a theory of guilt or innocence, [the court] must reverse the conviction, as under these circumstances a reasonable jury **must necessarily entertain** a reasonable doubt." *United States v. Garcia-Flores,* 246 F.3d 451, 454 (5th Cir.2001); *United States v. Lopez,* 74 F.3d 575, 577 (5th Cir.1999). In this case, the evidence, which is wholly circumstantial, supports the conclusion that Larry Kennedy was merely doing his job as an escrow agent in closing the loans originated by Calhoun especially given the fact that he got no benefit other than what he would have gotten closing any other loan. To find otherwise requires the piling of inference upon inference.[15] For this reason, Larry Kennedy's convictions and sentences must be reversed and rendered.

III. The court committed reversible error in failing to dismiss the money laundering counts because they merged with the fraud counts because the allegations failed, as a matter of law, to constitute money laundering.

a. Standard of review:

This Court applies a *de novo* standard of review to the issue of whether wire fraud charges merge with money laundering charges. *United States v. Bansal*, 663 F.3d 634, 643 (3rd Cir. 2011).

[15] For example, the trial judge found that the fact that Larry loaned April money showed he was part of the conspiracy. While it is true that that might be one inference that could be drawn from the testimony, it is equally plausible that Larry was just lending April money because she was

b. The merits:

Kennedy was charged with conspiracy to commit money laundering in Count 17 (18 U.S.C. §§1956(a)(1)(B)(9) and 1956(h)) and 16 substantive counts of money laundering in Counts 18 through 21, 23 through 34 (18 U.S.C. §§1956(a)(1)(A)(i) and (2)).

The money laundering charges in this case were based on the same conduct as the wire and mail fraud charges. For instance, the payouts underlying the conspiracy to launder money in Count 17 consisted of payouts already listed in Count 1's conspiracy to defraud charge. Count 17 ¶ 51(c) concerns the same $20,356.76 paid to Rickey Jeans, as does Count 1 ¶ overt act 27(C). Counts 17 ¶ 51(e) (conspiracy to launder money) and Count 19 (money laundering) involve the same payment of $41,580.08 to Antile Jones, as does Count 1 ¶ 27(E). Count 17 ¶ 51(i) and Count 21 involve a payment of $38,479.95 to Gerald Jefferson (945 Branch) as does Count 1¶ overt act 27(H).

The money laundering in Count 23 charges a payment of $65,196.90 to James Bailey who purchased the property at 107 Links. That payment was a cost[16] of the alleged wire fraud perpetrated in Count 9. Count 24 was a payment to the borrower for a home purchase that made up the wire fraud alleged in Count 11;

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hard up. This is precisely the sort of impermissible inference which will not support a jury verdict because there are at least two plausible explanations.

[16] Much like the payout to the winning gamblers in the illegal lottery described in *Santos, infra.*

Count 25 was a payment to the borrower for a purchase of the wire fraud alleged in Count 12. The end result of this was that Kennedy was convicted twice for the same conduct. In short, the payouts were part of profits from the conspiracy and substantive wire frauds.

The seminal case on this issue is *United States v. Santos*, 553 U.S. 2020, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2008), wherein the Supreme Court was faced with the question of whether "proceeds" in 18 U.S.C. § 1956 should be defined as "profits" or "gross receipts" in the context of a defendant convicted of running an illegal gambling and lottery business in violation of 18 U.S.C. § 1955 and of money laundering under § 1956. *Santos,* 553 U.S. at 509 n. 1. The Court was concerned that "[i]f 'proceeds' meant 'receipts,' nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery." *Santos,* 553 U.S. at 515. The act of running a lottery and gambling enterprise not only violated the prohibition on illegal gambling businesses under 18 U.S.C. § 1955, but that act alone was also sufficient to constitute a violation of the money laundering statute, 18 U.S.C. § 1956. *Santos,* 553 U.S. at 516.

The Court found "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" by also punishing it under § 1956. *Santos,* 553 U.S. at 517. Using the same conduct, without more, to violate two statutes created a "merger problem" and was tantamount to double jeopardy. *Santos,* 553 U.S. at 516. Invoking the "profits" definition, however, solved the merger problem because "[t]ransactions that normally occur during the course of running a lottery are not identifiable uses of profits." *Santos,* 553 U.S. at 517. The Court thus found that "proceeds" meant "profits" when the predicate crime was a violation of § 1955.

Post-*Santos*, some circuits have limited its holding to gambling operations. *See, e.g*. *United States v. Demarest*, 570 F.3d 1232, 1242 (11th Cir. 2009) ("*Santos* has limited precedential value. ... [t]he narrow holding in *Santos*, at most, was that the gross receipts of an unlicensed gambling operation were not 'proceeds' under section 1956 . . . ."). *Santos,* however, specifically cautioned against doing so holding that "[t]he merger problem is not limited to lottery operations." *Santos*, 533 U.S. at 516.

> The merger problem is not limited to lottery operators. For a host of predicate crimes, merger would depend on the manner and timing of payment for the expenses associated with the commission of the crime. Few crimes are entirely free of cost, and costs are not always paid in advance. Anyone who pays for the costs of a crime with its proceeds—for example, the felon who uses the stolen money to pay for the rented getaway car—would violate the money-laundering statute. **And 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.** There are more than 250 predicate offenses for the money-laundering statute . . . .

Santos, 553 U.S. at 516-517 (emphasis added). The Fifth Circuit has not limited *Santos* to illegal gambling offenses.

In *Garland v. Roy*, 615 F.3d 391 (5th Cir. Tex. 2010), this Court considered the application of *Santos* to a case involving a pyramid schemer's payments to early investors to keep his fraud going. On collateral review, the Fifth Circuit indicated that those payments had possibly merged with the underlying mail and securities fraud charges because the same transactions gave rise to both the underlying fraud charges and those for money laundering. *Garland, 615* F.3d at 404.

On remand, the magistrate recommended vacating the money laundering convictions.

> In this case, the indictment alleged that petitioner used the mail to sell fraudulent securities and then used the proceeds to distribute money as purported returns on investments to individuals who had previously bought the securities, which encouraged continued investment in the fraudulent scheme. *Garland*, 615 F.3d at 395. Although the underlying offense is different, securities and mail fraud versus illegal gambling, the reasoning is the same because, **in both instances, proceeds were used to pay normal expenses of the underlying criminal activity**. See *Santos*, 553 U.S. at 526-27 (Stevens, J., concurring) (finding a merger problem if the government is allowed to treat the mere payment of an expense of operating an illegal gambling business as the separate offense of money laundering); see also *United*

> *States v. Moreland*, 622 F.3d 1147 (9th Cir. 2010) (reversing convictions on two counts in light of Santos where the alleged money laundering consisted of payments to investors in illegal pyramid scheme).

Garland v. Roy, 2011 U.S. Dist. LEXIS 104898, 10-11 (E.D. Tex. 2011) (emphasis added). This recommendation was adopted by the district court at *Garland v. Roy*, 2011 U.S. Dist. LEXIS 104896, 1-2 (E.D. Tex. 2011).

In this case, then, not only do the money laundering charges against Larry Kennedy fail because they merge with the mail and wire fraud charges, they also fail for another reason outlined in *Santos*: all of the payments alleged to constitute money laundering consist of amounts paid to borrowers. Those payouts were akin to the payments to the illegal lottery winners or the payment for the rental of a getaway vehicle described in *Santos*[17] or the payments to the investors in the illegal pyramid scheme outlined in *Garland*. *Garland,* 2011 U.S. Dist. LEXIS 104898 at *11. See also *United States v. Askarkhodjaev*, 2010 U.S. Dist. LEXIS 107171 at *11-12 (W.D. Mo. 2010) ("The Court finds that the payment of a salary to defendant Dougherty which is at issue in Count Ninety-Eight constitutes an expense of the specified unlawful activity, just as it did in the *Santos* case.").

Another line of cases illustrate the concept that the money laundering

[17] *Santos*, 553 U.S. at 516-517.

statutes were devised by Congress to criminalize conduct occurring **after** the underlying crime, e.g. drug sales or, as here, mortgage fraud, is completed – the conduct being the collection of large amounts of cash from, for example, drug sales and, acting with the complicity of a banker or other person in a financial institution, who then deposits the drug proceeds in a bank under the guise of conducting a legitimate business transaction.

The Act appears to be part of an effort to criminalize the conduct of those third persons--bankers, brokers, real estate agents, auto dealer and others--who have aided drug dealers by allowing them to dispose of the profits of drug activity, yet whose conduct has not been considered criminal under traditional conspiracy law. *United States v. Johnson*, 971 F.2d 562, 568-569 (10th Cir. 1992). In other words, "the money-laundering statute was intended to be a separate crime distinct from the underlying offense that generated the money." *Johnson*, 971 F.2d at 569 citing *United States v. Edgmon*, 952 F.2d 1206 (10th Cir. 1991).

The Fifth Circuit recently made this distinction clear in *United States v. Harris*, 666 F.3d 905 (5th Cir. 2012). In that case, the defendants were charged with money laundering for the purpose of concealment. The illegal activity from which these charges arose was drug trafficking. *Harris*, 666 F.3d at 906. The transactions were all payments for the drugs. This Court reversed and rendered the convictions based on the fact that the transactions were not made from proceeds of

the underlying drug trafficking. "[T]he funds transferred were not yet proceeds of specified unlawful activity because the funds themselves were payment for drugs and the unlawful act was not complete." *Harris*, 666 F.3d at 909. "Money does not becomes proceeds of illegal activity until the unlawful activity is complete." *Harris*, 666 F.3d at 910.

The same is true of the transactions at issue here. The payments were made well before the predicate activity of wire fraud was complete and did not constitute a crime distinct from the unlawful activity. For this reason, the money laundering charges against Larry Kennedy must be reversed and rendered, and Kennedy must be resentenced.

V. The trial court erred in denying the motion to sever and/or for a mistrial.

a. Standard of review

The denial of a severance motion is reviewed for an abuse of discretion. *United States v. Solis*, 299 F.3d 420, 440 (5th Cir. Tex. 2002). In order to prevail, the defendant must show that: (1) the joint trial prejudiced him to such an extent that the district court could not provide adequate protection; and (2) the prejudice outweighed the government's interest in economy of judicial administration. *Id.* The denial of a notion for mistrial is also reviewed for abuse of discretion. *United States v. Baldwin*, 644 F.2d 381, 385 (5th Cir.1981).

b. The merits:

Prior to trial, Larry Kennedy joined in Calhoun's Motion to Sever which was denied. He renewed the motion to sever and sought a mistrial after Calhoun was alleged to have had inappropriate conduct with two jurors. One of those jurors had to be excused. The trial court denied the initial motion to sever, the renewed motions to sever and the motions for mistrial occasioned by the juror contact allegations.

On the day the jury was selected, juror Felicia Archie stopped into a Wal-Mart after court recessed where she spotted Mark Calhoun. When Calhoun saw Archie, he started "praising" saying "God is good" and "He's on my side." Tr. 30. Archie was scared but Calhoun left the area Ms. Archie was in. Then Ms. Archie went to look for soup and spotted Mr. Calhoun and his wife Priscilla. She overheard Mrs. Calhoun asked her husband "who was that." Tr. 31. Ms. Archie stated that the encounter left her very scared and she did not think she could be fair. Tr. 32. Larry Kennedy asked that Ms. Archie be struck and renewed his motion for a severance inasmuch as Ms. Archie was a juror he wanted. Tr. 36. The trial court removed the juror but denied the renewed motion to sever. Tr. 36.

During the trial, juror Cynthia Bernell Caston reported to the Court that Mark Calhoun twice spoke to her as she was waiting to leave the building saying

"How you doing?" Tr. 2352, 2353. She did not discuss this with the other jurors but told the bailiff, Richard Allen, what had happened in front of the other jurors. Tr. 2352.

Larry Kennedy again renewed his motion for a severance and a mistrial. Tr. 2364. At that point, the court admonished Calhoun that he was to speak only to his lawyers and to no one else in the courtroom. Tr. 2374. The court then questioned the other jurors about Ms. Caston's encounter with Mark Calhoun as reported to the bailiff. Tr. 2379-2405. All the jurors but one indicated that they overheard Ms. Caston's comment to the bailiff. The trial court, however, denied the motion to sever and the motion for a mistrial. Tr. 2410-2411.

F.R.C.P Rule 14(a) states, "If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." This Court has long recognized that "a District Court confronted with a Rule 14 Motion for Severance is required to balance any . . . prejudice [to the defendants] against the interests of judicial economy, a consideration involving substantial discretion." *United States v. McGuire,* 608 F.2d 1028, 1031 (5th Cir. 1979).

Severance is mandated where compelling evidence that is not admissible against one or more of the co-defendants is to be introduced against another co-

defendant. This is a concern, for example, "where the . . . gruesome evidence against one defendant overwhelms the de minimus evidence against the co-defendant(s). " *United States v. Gray,* 173 F. Supp. 2d 1, 10 (D.D.C. 2001). That was certainly the case here where the government alleged that Mark Calhoun was the prime mover of a mortgage fraud scheme and the case against Larry Kennedy was based on his failure to recognize the fraud and where Kennedy's alleged participation brought him nothing but the fees normally paid to an escrow agent.

Despite the fact that two of the alleged co-conspirators, April Calhoun and Willie Jones, made deals with the government in exchange for their testimony, neither was able to provide any testimony that Larry Kennedy knew about the scheme. And not only was the evidence against Calhoun much greater than the de minimis evidence against Kennedy, there was a plethora of other bad acts evidence that the trial court allowed to be introduced against Calhoun that surely prejudiced Kennedy.

Where a defendant makes a midtrial motion for severance, he is making a motion for a mistrial for that defendant. *Depree v. Thomas,* 946 F.2d 784, 792 (11th Cir. 1991). In *United States v. Fisher*, 106 F.3d 622 (5th Cir. Tex. 1997), the defendants were charged with bank fraud, mail fraud, etc. Prior to trial, the trial court ruled that the government would be allowed to impeach defendant Carney with evidence of a state prior conviction for contempt if he took the stand. *Fisher*,

106 F.3d at 627. Carney testified and the government used the contempt conviction to paint Carney as a liar. Carney's codefendant Fisher moved for a severance after Carney's direct testimony. It was denied and both Carney and Fisher were convicted. After the trial, the Texas courts set aside the contempt conviction. *Fisher*, 106 F.3d at 628. The Fifth Circuit reversed holding that Fisher was entitled to a severance.

> Since we hold the invalid conviction should never have been introduced in this trial, we hold that even though midtrial severance is an extraordinary measure, warranted in very few cases, the damaging impeachment of Carney with an invalid conviction so poisoned the entire trial against both defendants as to render the verdict against Fisher suspect. Since Fisher's counsel announced to the jury Fisher and Carney had considered their actions to be intertwined, the destruction of Carney's credibility irreparably harmed Fisher. The instructions the jury received to consider each defendant and offense separately before returning a verdict were insufficient to protect Fisher. Midtrial severance is an extraordinary measure, but as we believe the introduction of the invalid conviction against Carney was egregiously wrong, and since it could not have been admitted against Fisher if they had been separately tried, we find that Fisher was entitled to a severance when that evidence came in against his partner and co defendant.

Fisher, 106 F.3d at 631-632.

Most of the evidence dealt with wrongdoing by Marc Calhoun and had little to do with the Kennedys. The unfairness of a joint trial resulting from the lopsidedness of the evidence in this case was compounded by Mark Calhoun's behavior during the trial when he was alleged twice to have had inappropriate

contact with jurors. The trial court erred first in refusing to grant a severance and second when it refused to allow Larry Kennedy's mistrial after Calhoun was twice alleged to have had inappropriate contact with jurors in the case.

CONCLUSION

Larry Kennedy's role as the loan closer/escrow agent for the properties brokered by Calhoun and/or Willie Jones was a limited one. His duty was to follow the lender's instructions regarding the closing. He certainly did not have a duty to go behind the documents and determine whether they were fraudulent even where the circumstances might have compelled another escrow agent to investigate further.

The only money he ever made from any of the transactions was the amount paid for a closing. There was no evidence that Kennedy conspired with Calhoun. The trial court's giving of a "deliberate ignorance" instruction on these facts was error especially here where Kennedy had no legal duty to investigate the documents he was given for the closings.

The evidence was insufficient to support the verdicts. However, assuming for the sake of argument that the mail and wire fraud charges stand, the money laundering charges merge with them and should be reversed and rendered.

Finally, given the lopsidedness of the government's case against Kennedy as compared to the evidence against Calhoun, the trial court erred when it failed to

grant Kennedy's motion to sever. At the very least, though, Kennedy's motion for a mistrial should have been granted when it became clear that Calhoun's antics were making it impossible for his codefendants to obtain a fair trial.

Respectfully submitted,
LARRY KENNEDY

/s/ Julie Ann Epps
Julie Ann Epps

CERTIFICATE OF SERVICE

I, Julie Ann Epps, hereby certify that I have this day electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

Gaines H. Cleveland
Assistant U.S. Attorney
Jackson, Mississippi

This the 17th of May, 2012.

/s/ Julie Ann Epps
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This application complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,323 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This application 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 Microsoft Word 2003 in Times New Roman typeface and font size 14 for body text and 12 for footnote text.

/s/ Julie Ann Epps
Signature of filing party
Attorney for Larry Kennedy