No. 11-60431

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

FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION
3:08cr77DPJ-LRA

BRIEF OF APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not request oral argument. Although the trial was lengthy, the proof was compelling and the challenged rulings are well-grounded. The questions presented do not involve any novel or challenging legal or factual issues, but can be resolved by applying this Court's well-developed case law to the facts established by the record. As a result, the Government respectfully submits that the judgments of conviction and sentencing may be affirmed on the record and briefs alone. *See* FED. R. APP. P. 34(a)(2); FIFTH CIR. R. 28.2.3.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (*Continued*)

PAGE

TABLE OF CONTENTS (*Continued*)

PAGE

TABLE OF CONTENTS (*Continued*)

PAGE

TABLE OF CROSS REFERENCES

Defendants' Briefs	*Government's Brief*
Mark Calhoun:	
POINT VI.A	POINT V
POINT VI.B	POINT I
POINT VI.C	POINT VI
POINT VI.D	POINT V
POINT VI.E	POINT VII
POINT VI.F	POINT II
Keith Kennedy:	
POINT VI.A	POINT VI
POINT VI.B	POINT I
POINT VI.C	POINT III
POINT VI.D	POINT V
Larry Kennedy:	
POINT I	POINT VI
POINT II	POINT I
POINT III	POINT V
POINT IV	POINT IV

TABLE OF AUTHORITIES

Cases: PAGE

TABLE OF AUTHORITIES *(Continued)*

Cases *(Continued)*: PAGE

TABLE OF AUTHORITIES *(Continued)*

Cases *(Continued)*: PAGE

TABLE OF AUTHORITIES *(Continued)*

Statutes and Rules: PAGE

Other Authorities:

TABLE OF AUTHORITIES *(Continued)*

Other Authorities *(Continued)*: PAGE

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BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

Mark Calhoun, Keith Kennedy, and Larry Kennedy appeal from judgments of conviction entered by the United States District Court for the Southern District of Mississippi, following a twenty-day trial before the Honorable Daniel P. Jordan, III, United States District Judge, and a jury. C.581,

C.R.E.5; K.569, K.R.E.3; L.581, L.R.E.5.[1] All three timely filed notices of appeal. C.588, C.R.E.2; K.517, K.R.E.7; L.573, L.R.E.2. This Court's jurisdiction is properly invoked. *See* 28 U.S.C. § 1291; 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

1. Whether sufficient evidence supports the findings of guilt as to the mortgage-fraud and money-laundering charges.

2. Whether the court properly credited the explanation for the challenged peremptory strikes.

3. Whether the court responded appropriately to a juror-contact issue.

4. Whether the refusal to sever was justified.

5. Whether the court properly addressed the money-laundering issues.

6. Whether the challenged jury instructions are appropriate.

7. Whether the court properly enhanced Calhoun's sentence.

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[1] "C.581" refers to Calhoun record page 581; "C.R.E.5" to Calhoun Record Excerpt #5; "K.569" to Keith Kennedy record page number 569; "L.581" to Larry Kennedy record page number 581; "K.R.E." and "L.R.E." to Keith and Larry Kennedy's record excerpts, cited by tab; "Tr.," "Voir Dire" and "Sent." to the transcripts of the trial, voir dire, and sentencing (cited by court reporter page number); "GX" to Government Exhibit; "C.Br." to Calhoun's brief; and "K.Br." and "L.Br." to Keith and Larry Kennedy's briefs.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

All three appellants (Mark Calhoun, Keith Kennedy, and Larry Kennedy) were charged—along with two other defendants (April Calhoun and Willie Jones)—in a 38-count superseding indictment:

- Count 1 alleged that all five defendants conspired to commit mail and wire fraud, in violation of 18 U.S.C. § 1349;
- Counts 2-16 charged all five with wire fraud, in violation of 18 U.S.C. § 1343;
- Count 17 charged Calhoun, both Kennedys, and Jones with money-laundering conspiracy, in violation of 18 U.S.C. § 1956(h);
- Counts 18-21 charged the same four with promotion money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(I);
- Count 22 charged Calhoun, both Kennedys, and April Calhoun with money-laundering conspiracy, in violation of 18 U.S.C. § 1956(h);
- Counts 23-29 charged those four with promotion money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(I);
- Counts 30-34 charged Calhoun and both Kennedys with promotion money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(I); and

- Count 38 charged Calhoun with engaging in a monetary transaction in property derived from a specified unlawful activity, in violation of 18 U.S.C. § 1957.

C.110-37; C.R.E.3. The indictment also sought the forfeiture of certain property that is not at issue on appeal. *Id*.

None of the appellants was charged in Counts 35-37, which only relate to Willie Jones and April Calhoun, who both pled guilty. *See* No. 3:08cr77 (S.D. Miss.), Ct. Rec. Doc. ##185 &195, available on PACER.

Trial began on February 22, 2010, and ended on March 22, 2010. The jury found Keith and Larry Kennedy guilty of all counts (Counts 1-34) and Calhoun guilty of Counts 1-4, 6-20, 22-34, and 38. C.336-34; C.R.E.4. A table summarizing the results is set forth below. *See* Table 1 *infra*.

Calhoun was sentenced to 200 months of imprisonment for each of Counts 1-4, 6-20, and 23-34, and 120 months as to Count 38, to run concurrently, to be followed by three years of supervised release as to each count, to run concurrently. C.581-87; C.R.E.5. Calhoun was ordered to pay $10,244,574 in forfeiture in the form of a money judgment and a $3,200 special assessment. *Id.*

Table 1: **TABLE OF CHARGES AND RESULTS**

Count	Appellants	Charge	Statute	Result
1	Mark Calhoun Both Kennedys	Conspiracy to commit mail and wire fraud	18 U.S.C. § 1349	Guilty
2-4, 6-16	Mark Calhoun Both Kennedys	Wire fraud	18 U.S.C. § 1343	Guilty
5	Mark Calhoun	Wire fraud	18 U.S.C. §1343	Not guilty
	Both Kennedys	Wire fraud	18 U.S.C. §1343	Guilty
17, 22*	Mark Calhoun Both Kennedys	Money-laundering conspiracy	18 U.S.C. §1956(h)	Guilty
18-20, 23-34	Mark Calhoun Both Kennedys	Money laundering	18 USC 1956(a)(1)(A)(I)	Guilty
21	Mark Calhoun	Money laundering	18 USC 1956(a)(1)(A)(I)	Not guilty
	Both Kennedys	Money laundering	18 USC 1956(a)(1)(A)(I)	Guilty
38	Mark Calhoun	Engaging in monetary transaction	18 U.S.C. §1957	Guilty

* Count 22 was later dismissed. *See* C.110-37, 336-34; C.R.E.3 & 4; Tr. 3152-58; Sent. 904.

Keith Kennedy was sentenced to 72 months of imprisonment for each of Counts 1-21 and 23-34, to run concurrently, to be followed by three years of supervised release as to each count, to run concurrently. K.23, 535; K.R.E.3.

He also was ordered to pay a $10,244,574 forfeiture judgment and a $3,300 special assessment. *Id.*

Larry Kennedy was sentenced to 60 months of imprisonment for each of Counts 1-21 and 23-34, to run concurrently, to be followed by three years of supervised release as to each count, to run concurrently. L.581-87; L.R.E.5. He also was ordered to pay a $10,244,574 forfeiture judgment and a $3,300 special assessment. *Id.*

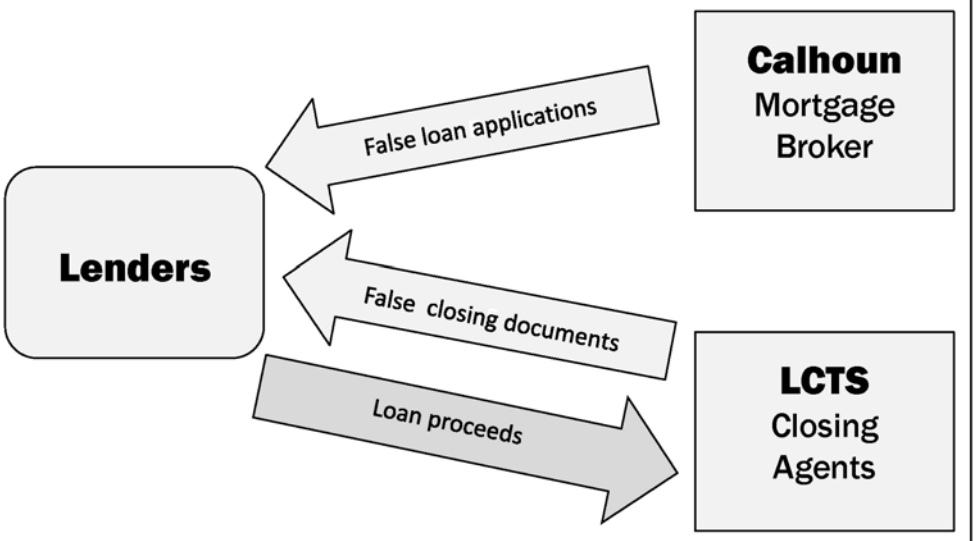
B. Statement of the Facts

1. Calhoun Collaborates with Kennedys in Defrauding Mortgage Lenders and Siphoning Loan Proceeds

The evidence showed that Calhoun—serving as a mortgage broker—committed mortgage fraud in combination with Larry and Keith Kennedy, who ran a loan closing business, Loan Closing and Title Service ("LCTS"), in Jackson, Mississippi. Tr. 199-203, 558, 1482-91, 1964. Calhoun was a preacher, teacher, and used-car salesman before becoming a mortgage broker—joining with his daughter, April Calhoun, and former student Willie Jones, who both assisted the fraud. Tr. 800-01, 1199, 1287, 1909.

Calhoun developed a mortgage-fraud scheme to lure investors into letting him use their credit standing to purchase investment properties for which the borrowers expected to receive rental income and to profit from then-appreciating property values.[2] Tr. 858, 952, 1200, 1764. Based on false representations to lenders, the scheme succeeded in generating the payment of loan proceeds to LCTS that were then available for other purposes. *See* Figure 1 *infra*. With the help of the Kennedys, Calhoun was able to siphon

Figure 1: Mortgage-Fraud Scheme



[2] Calhoun readily exploited his status as a pastor in pitching investors. Asked how Calhoun described the investment opportunity, one investor (Ulysses Cosby) recalled: "He just said that 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 his investors or his congregation being acceptable—being approved and acceptable to get a loan." Tr. 1503. *See also* Tr. 1577.

money from these deals through the payment of bogus construction liens and phony invoices.[3] Tr. 374-79, 601, 1964. *See* Facts B.2.e-B.2.f *supra*.

As a mortgage broker, Calhoun could choose the closing agent. Tr. 1491. At LCTS, Calhoun was allowed to take extraordinary liberties, such as picking up loan files and returning them fully executed—with the Kennedys notarizing the unwitnessed signatures after-the-fact. Tr. 203, 458, 558. Calhoun "was in there a lot," one employee recalled: "When he wasn't there, he was calling." Tr. 200, 228.

2. The Mortgage-Fraud Scheme and Diversion of Proceeds

Among the means employed to accomplish the scheme were (a) misrepresenting the creditworthiness of borrowers, (b) falsifying the intended use of properties and engaging in other property-related conduct, (c) certifying forged signatures as authentic, (d) misleading lenders as to the

[3] As the court explained in a post-trial ruling: "The transactions typically began when Calhoun found homes for which the sellers would accept less than the list price. Calhoun would agree to pay the seller the lower amount, but would then arrange for unwitting purchasers to buy the property at the full list price. At closing, the difference was funneled to Calhoun or his surrogates Willie Jones and April Calhoun, Calhoun's daughter." C.505. *See, e.g.*, Tr. 1057-59, 1185, 1808-09, 1935-49, 2571-86.

source of downpayments, (e) paying false construction liens and phony invoices, and (f) encouraging investors with a share of the loan proceeds paid to the shell corporations.

a. Misrepresenting the Creditworthiness of Borrowers

A key to manipulating the mortgage-loan process was Calhoun's willingness to falsify the creditworthiness of loan applicants. For example, in a loan application Calhoun submitted for a house in Southaven, Mississippi, Calhoun represented the gross monthly income of the borrower (Dorothy Wheat) as $5,400, whereas she was actually earning "[a]bout 2,000 or a little over." Tr. 1858. *See also* Tr. 1844 (similar misrepresentation on another Wheat loan). For a property in Olive Branch, Mississippi, Calhoun submitted a loan application representing that the borrower (Gordon Franklin) had "net rental income" of $1,875 per month, but Franklin "didn't have any rental property at that time." Tr. 1764.

In addition to falsifying the income of loan applicants, Calhoun also submitted fake supporting documents. For a house on Brookview Drive in Jackson, Calhoun asked Willie Jones to manipulate the original of a bank

statement for the borrower. Tr. 2044-45. Jones used a computer to alter the document: "Mark gave me the originals, and I just changed the numbers." *Id.*

An illustration of Calhoun's willingness to enhance the apparent creditworthiness of a borrower is his falsification of his own mortgage-loan application for an investment property in Madison, Mississippi. In applying for the loan, Calhoun enlisted the help of another mortgage broker, Carla Wilson: "He couldn't process his own loan as a loan originator." Tr. 2652. Calhoun listed his employment as "pastor," inflating his church salary to qualify for the loan, but omitted his job as a mortgage broker. Tr. 2653-54, 2669-70; GX 51. Calhoun arranged for the preparation of fake tax returns based on salary amounts that Wilson told him "needed to be on the tax returns, and we were together when we went to get them prepared." Tr. 2669. Calhoun also submitted a bank statement for a business account (Mark Calhoun d/b/a Silver Cross Financial Group, LLC) but redacted the business name to give the impression it was his personal account. Tr. 2655. *Compare* GX 51 (submitted account statement) *with* GX 5 (unaltered original).

b. Falsifying the Intended Use of the Properties

Although the borrowers purchased the properties for investment, Calhoun—with the Kennedys' help—submitted false affidavits purporting that the borrowers planned to live in the homes, thereby qualifying them for more favorable loan terms. Tr. 810, 1323, 1457-58. In some instances, the Kennedys certified the signatures on occupancy affidavits that Calhoun submitted to different lenders to support that the borrowers would be living in each home, but which would have been possible only if the borrower were living in multiple homes simultaneously.[4] *Compare* GX 6 *with* GX 13 (affidavits Keith Kennedy notarized, showing Antile Jones living at two addresses) and *compare* GX 21 *with* GX 25 (affidavits Larry Kennedy notarized, showing Vivian Jeans living at two addresses).

In other instances, the borrower's purported intention to live in the home was expressed in the form of a false letter Calhoun submitted with the

[4] The district court understood the timing of these multiple purchases: "The rapid succession of closings ... masked the investment nature of the transactions—the prior purchases did not show up on credit reports, so the lenders did not know the same buyer/borrower was purchasing multiple properties as primary residences." C.506-07. *See* Tr. 461, 705; GX 6, 10, 13, 73, 77.

loan application. One such borrower (Gerald Beasley) had no plans to move to Mississippi, but agreed to buy a house there "[f]or investment purposes." Tr. 866. Another borrower, James Bailey, agreed to write a letter claiming he would live in the house even though "[t]hat was not a true statement." Tr. 977. Calhoun dictated the letter after telling Bailey "this is the only way that we could get the loan closed." *Id*.

Yet another property-related fraud involved a ruse resulting in a real-estate appraisal being performed on one house (a more-valuable property) that appeared to reflect the appraisal of an adjacent, less-valuable house. Willie Jones and Calhoun switched the numbers on the two houses so the address of the smaller blue house "1706 Hair Street" appeared on the larger green home next door: "Mark knew—from the jump, he advised me to switch the numbers." Tr. 2078. Later, the borrower, after being misled by the photograph of the wrong house on the appraisal, saw the actual home: "When I got there, I realized the one I had really bought was that blue ratty-looking house there." Tr. 1340. *Compare* GX 1 (appraisal) *with* GX 128 (photo).

c. Using Forged and Unwitnessed Signatures

The evidence showed that many of the documents associated with the mortgage-loan transactions were not signed by the purported signatory or were unwitnessed by any notary, even though both Kennedys notarized such documents. *See*, *e.g.*, Tr. 808-12, 1206-11, 1319-20, 1824-25; GX 1, 6, 10, 21, 73. As part of the scheme, Calhoun would arrange to purchase property from a home builder at one price and then finance the transaction with the seller purportedly selling the property at a higher price. *See, e.g.*, Tr. 1057-59, 1073-1074, 1181-85, 1808-09; GX 17, 29, 37, 66, 68, 83. When the sellers were shown contracts with the higher prices, they testified their signatures were forgeries. *Id*.

Borrowers also denied signing many of the mortgage documents—loan applications, signature affidavits, occupancy affidavits, and HUD-1 settlement statements—that they purportedly signed. *See, e.g.*, Tr. 802-07, 1220-23, 1320-22; GX 21, 53, 73. Despite the absence of genuine signatures, many of these documents were notarized by Larry and Keith Kennedy. *Id*.

Even though Calhoun was not employed by LCTS, he was given the exceptional privilege of conducting "travel closings" for which LCTS was the settlement agent. Tr. 203, 457, 558. Calhoun would pick up the closing documents and return them later with the signed documents ready for Larry or Keith Kennedy to notarize. *Id*. *See, e.g.*, Tr. 1506, 1604-05; GX 41.

One seller (Derek Hopson) recalled meeting Calhoun in his car in Memphis "right beside a gas station for the closing." Tr. 1604. Hopson never went to Jackson or signed in front of Larry Kennedy, who notarized the documents. *Id*. *See* GX 41. One LCTS employee (TerryLynn Rankin) became concerned about Calhoun's loans: "Because they were being taken out of the office and we were still notarizing them." Tr. 459. When she asked Larry Kennedy about this, he claimed to have "spoken to the people that were signing them." Tr. 460. But Hopson told the jury he was entirely unaware of Larry Kennedy. Tr. 1605. The same is true of others whose signatures he notarized. *See, e.g.*, Tr. 807, 872, 1321-22, 1820.

d. Misleading Lenders as to the Source of the Downpayments

None of the investors whose credit was used to qualify for the mortgage loans was required to make the mandatory downpayment for the loans. Instead, Calhoun produced certified checks purportedly obtained by the borrowers, but which they generally knew nothing about. Tr. 809, 870, 955-56, 1206. One repeat borrower (Dorothy Wheat) recalled meeting Calhoun at her bank so she could obtain the downpayment checks—"he would give me the money to purchase them with." Tr. 1847. A lender witness explained that downpayments are expected to come from the borrower and mortgage brokers are prohibited from paying the closing costs. Tr. 2146.

Willie Jones described how he and Calhoun found the money to cover the closing costs, which was to make sure there "was enough equity to cover the down payment." Tr. 1987-88. Jones and Calhoun would cash disbursement checks issued for fraudulent liens and use them to purchase cashier's checks for the downpayments. *Id.* Asked how often this occurred, Jones answered: "Plenty of times." Tr. 2004.

e. Paying False Construction Liens and Other Means of Diverting Proceeds

Based on the fraudulent loan documents that Calhoun submitted in collaboration with Larry and Keith Kennedy, mortgage lenders wired the closing funds to LCTS. Tr. 217-18, 284; GX 52 (LCTS wire log), GX 139 (summary of wire transfers). Once the Kennedys received the wired funds, Keith Kennedy authorized disbursements from the loan proceeds for false construction liens and other payments that Larry and Keith Kennedy reflected on the HUD-1 settlement statements. *See*, *e.g.*, Tr. 1188-89, 1221, 1810, 1939-40; GX 17, 53, 66. *See also* GX 140 (summary of third-party disbursements); K.366-72 (summary of mortgage loans). One LCTS employee (Rankin) recalled that Keith Kennedy distributed the majority of funds. Tr. 390. Both Kennedys signed HUD-1s calling for payments to shell companies and individuals associated with Calhoun. GX 140; K.366-72.

Before allowing the payment of construction liens, settlement agents typically look to the title abstract to identify liens that have been recorded on the property. Tr. 193, 370-74. As one title company employee explained, for

construction liens to be recognized, they had to be recorded: "It had to be on the title." Tr. 557. *Cf.* Tr. 375 ("Either on title or an invoice in the file."). The Kennedys permitted Calhoun to evade this requirement by authorizing disbursements to shell companies and individuals for work that was never performed and for bogus liens that never were recorded. *See*, *e.g.*, Tr. 1061, 1940, 1981, 2273, 2571, 2731; GX 17, 25, 53, 62, 137. *See also* K.366-72.

Even though LCTS ordinarily required a recorded lien or an invoice for disbursements, Calhoun and Jones were able to obtain payment of substantial sums for work supposedly performed by third parties simply by asking "to pull money out" of the mortgage loan proceeds.[5] Tr. 1938, 1964. According to Willie Jones: "I would discuss it with Mark or I would discuss it with Mr. Kennedy," referring to "Larry Kennedy." Tr. 1964. Jason Ellis, a mortgage loan originator who employed Calhoun when he worked for Professional Mortgage Consultants, explained that loan originators have no involvement

[5] To illustrate such a "pull out," the court referred to Jones's testimony that Larry Kennedy was aware from a closing for a property in Madison, Mississippi "that money 'pulled out' of the loan for an entity named Metro One was actually paid to Jones." C.506. *See* Tr 1945-49; GX 104. Jones in turn split the $67,600 with Calhoun, who received the bulk of the money. Tr. 1949-50.

in gathering information about construction liens or other matters relating to the property title. Tr. 592. When Ellis became aware that Calhoun had arranged for disbursements to Fast Start Mortgage (a shell entity Calhoun controlled), Ellis confronted Calhoun: "I told him that I don't want to ever see any more Fast Start disbursements on any of our HUDs ever again." Tr. 601. Ellis then called LCTS. *Id*. Ellis said he spoke "[w]ith Larry Kennedy about approximately 20 minutes after I left Mark's desk." *Id*.

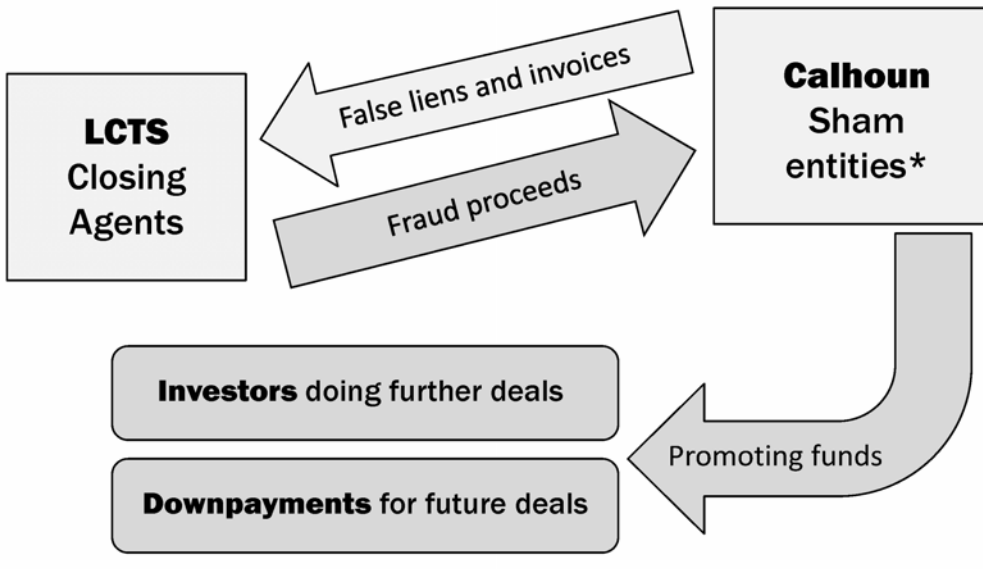
f. Encouraging Investors with a Share of the Loan Proceeds Paid to Shell Corporations

By arranging for the Kennedys to include fake construction liens and other false obligations on the HUD-1 settlement statements, Calhoun concealed his control over sizable sums of money from the loan proceeds that he was able to channel to himself and others as well as to investors whom he lured into participating in further transactions. *See* GX 140 (summary of third party disbursements); K.366-72 (summary of mortgage loans). Despite having reason to know Calhoun was behind the shell entities receiving payments from the loan proceeds, the Kennedys nonetheless permitted Calhoun to

direct payments to these entities, serving to disguise his receipt of the funds. *See, e.g.*, Tr. 374, 510, 690, 870, 966-68, 1155-57, 1986-87.

Calhoun encouraged investors to become borrowers for further mortgage loans by rewarding them with proceeds from prior transactions. *See, e.g.*, Tr. 1521-23, 1757-58, 1782, 1867-68. The conduct of such financial transactions—with the fraudulent loan proceeds paid to these shell entities—served to further the scheme by supplying a ready source of cash for

Figure 2: Promotion Money-Laundering Scheme



* Includes entities associated with Willie Jones (Metro One and Unlimit Construction) and April Calhoun (M&C Investments LLC)

borrowers willing to undertake additional loans. *Id.* And, as described above, *see* Facts 2.d, *supra*, Calhoun used a share of the loan proceeds that were

diverted to sham entities as a source of downpayments for further transactions. *See* Figure 2 *supra*.

The funds to reward continuing borrowers and to make further downpayments were derived solely from the undiluted profits from the scheme, because there were no expenses associated with providing the services reflected on the HUD-1 statements, since no such services were ever furnished. *See, e.g.*, Tr. 1935, 1940, 1964.

SUMMARY OF THE ARGUMENT

1. The proof amply supports the findings of guilt. The testimony—from coconspirators, lenders, borrowers, closing agents, and others—helped the jury understand the loan-closing files and other documents demonstrating the mortgage fraud and associated money laundering.

2. The court properly accepted the explanation for the challenged peremptory strikes. Given the focus of the case on financial transactions, the court credited the Government's expressed preference for jurors based on their job skills.

3. When a juror asked the bailiff how she should respond to a greeting by Calhoun, the bailiff told the judge, who appropriately questioned the jurors. None expressed any concern about the incident and no relief is warranted.

4. The court properly refused to grant a severance. All three appellants were thoroughly enmeshed in the conduct and were appropriately tried together.

5. Because the money-laundering transactions were distinct from the underlying mortgage fraud, there was no danger of merger, entitling the court to presume that "proceeds" in the money-laundering charges meant "gross receipts." Even so, the court cautiously chose to give a "proceeds-means-profits" definition, which the proof amply satisfied.

6. The court acted within its discretion in giving unanimity-of-theory and deliberate-ignorance instructions. In the absence of any factual or legal infirmity in the money-laundering conspiracy objects, the court did not err in permitting the jury to return an undifferentiated verdict. The court also was fully warranted in finding that the proof supported a deliberate-ignorance

instruction but, in any event, any error is harmless in light of the proof of actual knowledge.

7. The court committed no clear error in sentencing Calhoun. The Guideline enhancements turned on issues satisfactorily addressed by the trial proof.

ARGUMENT

I. Ample Evidence Supports the Jury's Guilty Verdicts

A. Standard of Review

In examining the denial of a motion for acquittal, this Court "asks only whether the jury's decision was rational, not whether it was correct." *United States v. Rodriguez*, 553 F.3d 380, 389 (5th Cir. 2008). This Court applies the same standard as the trial court, namely, "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 (1979).

Although denial of a motion for acquittal is reviewed *de novo*, this Court's "standard of review for a challenge to the sufficiency of the evidence in a criminal conviction is highly deferential to the verdict." *United States v. Redd*, 355 F.3d 866, 872 (5th Cir. 2003) (internal quotes and citation omitted). "[A] defendant seeking reversal on the basis of insufficient evidence swims upstream." *United States v. Stephens*, 571 F.3d 401, 404 (5th Cir. 2009) (internal quotes and citation omitted).

This Court evaluates the denial of a new trial motion for abuse of discretion. *United States v. Turner*, 674 F.3d 420, 429 (5th Cir. 2012). "Such motions are disfavored and reviewed with great caution." *Id.* (internal quotes and citation omitted).

B. Consideration of the Issue Below

After the Government rested, the defendants moved for a judgment of acquittal, which the court denied. Tr. 2895-2949, 2979. *See* FED. R. CRIM. P. 29. After trial, the defendants moved for acquittal or for a new trial. C.345, K.191, L.326. *See* FED. R. CRIM. P. 29 & 33. The court denied the motions. C.502; Tr. 2943-48; Sent. 798-803.

C. Discussion

1. Mortgage-Fraud Conspiracy (*Count 1*)

The proof amply satisfied the elements for conspiracy to commit mail and wire fraud. Tr. 3003. *Compare id. with* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 2.20 (Conspiracy—18 U.S.C. § 371). *But cf.* 18 U.S.C. § 1349 (no overt act required).

As this Court has said: "Direct evidence of a conspiracy is unnecessary; each element may be inferred from circumstantial evidence." *United States v. Mitchell*, 484 F.3d 762, 769 (5th Cir. 2007) (internal quotes and citation omitted). "An agreement may be inferred from a 'concert of action.'" *Id.* (citation omitted).

The proof satisfactorily showed that all three appellants collaborated in a scheme to defraud mortgage lenders that involved mailings and wirings in furtherance of the fraudulent scheme. Tr. 2943-48; C.504-09. As the trial court said, there was "a substantial amount of evidence in the record of falsified documents, forged documents, inaccurate information provided ... to lenders." Tr. 2944. *See*, *e.g.*, Tr. 419-20, 444, 455, 460, 536, 807, 860.

Both "Kennedys (1) notarized numerous forged signatures; and (2) falsely attested that signatures were signed in their presence." C.507. *See, e.g.*, Tr. 460, 807, 859-60, 935. Even though Calhoun routinely provided the downpayments that lenders expected to come from borrowers, "the closing documents Keith Kennedy prepared, and he and Larry finalized, indicated that the buyers paid cash at the closing," which was circumstantial proof of the Kennedys' "knowledge that the loans were not legitimate." C.508. *See, e.g.*, Tr. 809, 858-60, 954-56, 1019-20.

Citing Calhoun's directing his daughter to get cash from Larry Kennedy as an example, the judge said the proof "suggests a joint enterprise between the Kennedys and Calhouns." C.508. *See* Tr. 2589 (April Calhoun: "I told my daddy I needed some money. He told me to go get some money from Mr. Kennedy."). Also of significance was Calhoun's status as one of the Kennedys' largest customers and his having "had a lot of repeats" (repeat borrowers), which was uncommon for LCTS. Tr. 200, 461.

Calhoun makes no effort to challenge his conviction for conspiracy to defraud mortgage lenders. C.Br. 34-37. Keith Kennedy devotes just over a

page of his brief to the sufficiency issue, acknowledging the conduct but disputing it was done knowingly and fraudulently. K.Br. 22-23. Larry Kennedy selectively reads the record to suggest he was kept in the dark about Calhoun's conduct.[6] L.Br. 25. Larry Kennedy also assails various Government witnesses, L.Br. 34-38, disregarding that credibility choices are for the jury and that the proof is to be viewed in accord with the verdict. *Redd*, 355 F.3d at 872.

Larry Kennedy not only takes issue with the proof of his knowledge of the fraud but also disputes his having contributed to any losses. L.Br. 25-41. But both Kennedys played key roles in accomplishing the fraud by, *inter alia*—

- attesting to documents, such as owner-occupancy affidavits that lenders required to reflect the borrowers' intent to occupy the property as their primary residence, when the

[6] For example, he points to borrower Dorothy Wheat's testimony that Calhoun told her not to tell Larry Kennedy that the property would not be her primary residence despite signing an affidavit saying just that. L.Br. 25 (citing Tr. 1880-81). The record does not disclose why Calhoun took this precaution for Wheat's first closing on April 3, 2006, but nothing shows any such ruse was employed for the second closing on April 26, 2006, when Larry Kennedy attested to Wheat's having certified that another property would be her principal residence. *Compare* GX 73 (occupancy statement) *with* GX 77 (occupancy affidavit). Larry Kennedy goes on to say that Calhoun "told her not to tell Kennedy that he gave her the money for the down payment," *id*., but the cited transcript only says she did not reveal the source of the downpayment, which would have been obvious given the course of Calhoun's dealings with the Kennedys. *See* Facts 2.d *supra*.

timing of the closings meant that the borrowers would have to be living in multiple locations at the same time,[7] *see* Facts 2.b, *supra*;

- certifying signatures on loan documents that were not signed in their presence,[8] *id*. 2.c; and

- routinely accepting downpayments provided by Calhoun instead of the borrower,[9] *id.* 2.d.

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[7] Larry Kennedy says that "the borrowers were filling out affidavits attesting that the properties were to be their primary residences even though they knew this was false." L.Br. 28. But many borrowers denied ever signing such affidavits, even though both Kennedys certified their having done so in their presence. *See, e.g.*, Tr. 807, 1210-11, 1323. The Government did not seek to "place an affirmative duty on the Kennedys" to verify documents, L.Br. 28, but the Kennedys are accountable for fraud that was readily apparent, especially given their experience in handling loan closings. *See* C.507 (describing "rapid-succession closings").

[8] Seeking to minimize his admitted failure to witness the signatures of the borrowers, Larry Kennedy says that "any loss to the lenders was not based on [his] failure to require the borrowers to sign the various documents in his presence." L.Br. 38. But this overlooks the lenders' demonstrated interest in making sure that information, such as the intended use of the property, is accurate and that having the borrower sign before a notary helps assure the truthfulness of such attestations by making sure they are signed by someone with an interest in the property. *See, e.g.*, Tr. 2118-19, 2194-95, 2420. This is an obligation found in the lenders' closing instructions—not an extra duty, as Larry Kennedy argues. L.Br. 23, 29-31. *See, e.g.*, Tr. 743; GX 57 (closing instructions).

[9] A crucial responsibility regularly disregarded by the Kennedys—and largely ignored in their appellate briefs—was to make sure the borrower provided the necessary downpayment, representing the borrower's risk in the property. *See, e.g.*, Tr. 744-75, 2194, 2432; GX 57 (closing instructions). But the Kennedys routinely received the downpayment directly from Calhoun, not the borrower. *See, e.g.*, Tr. 809, 870, 955, 972, 1019.

In their capacity as closing agents, the Kennedys gave their imprimatur to a high volume of Calhoun loans that they had reason to know did not meet the lenders' closing requirements. The Kennedys' knowing involvement in the conspiracy may thus be properly inferred from their concerted action with Calhoun in defrauding the lenders. *Mitchell*, 484 F.3d at 769. The district court properly refused to acquit the defendants.

2. Wire Fraud (*Counts 2-16*)

For the wire-fraud counts, *see* Table 2, *infra*, the Government met the necessary elements to convict the defendants of wire fraud. Tr. 2933. *Compare id. with* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 2.60.

As with the mortgage-fraud conspiracy charge, Calhoun raises no sufficiency claim as to his wire-fraud conviction, and Keith Kennedy makes only a conclusory challenge not directed at any specifics of the wire-fraud counts. K.Br. 22-23. The same is true of Larry Kennedy, whose sufficiency claims as to the wire fraud are addressed in connection with the mortgage-fraud conspiracy charge. *See* Point I.A.1 *supra.* The court was properly satisfied with the evidence of wire fraud. C.505-09.

***Table 2*: Money Wired to LCTS Account for Mortgage Loans (*Wire-Fraud Counts 2-16*)**

Count	Approx. Date	Approx. Amount	Borrower	GX*	Tr.
2	10/7/2004	$46,931	Rickey Jeans	GX53	Tr.420
3	2/10/2005	$266,592	Antile Jones	GX10	Tr.395
4	2/16/2005	$368,224	Antile Jones	GX13	Tr.320-21, 2788
5	3/28/2005	$88,200	Gerald Jefferson	GX88	Tr.398
6	5/25/2005	$334,451	Ulysses Cosby	GX41	Tr.453
7	6/16/2005	$113,952	Ulysses Cosby	GX58	Tr.409
8	11/4/2005	$360,649	Gerald Beasley	GX62	Tr.1122
9	11/10/2005	$343,366	James Bailey	GX29	Tr.414
10	1/12/2006	$188,407	James Bailey	GX37	Tr.435
11	2/17/2006	$393,148	Vivian Jeans	GX21	Tr.408
12	2/28/2006	$324,000	Gordon Franklin	GX66	Tr.1760
13	3/20/2006	$231,600	Vivian Jeans	GX25	Tr.443
14	3/29/2006	$381,610	Gordon Franklin	GX70	Tr.448
15	4/3/2006	$285,811	Dorothy Wheat	GX73	Tr.421
16	4/25/2006	$269,836	Dorothy Wheat	GX77	Tr.437

* *See also* GX 52 (wire book listing wire transfers received by LCTS); Tr.217-18, 347; GX 139 (summary of wire transfers).

3. **Money-Laundering Conspiracy** (*Count 17*)

The Government offered proof that satisfies the elements for money-laundering conspiracy. Tr. 3004. *See* Sent. 798-803; 18 U.S.C. § 1956(h). The judge said "the jury heard overwhelming evidence of money laundering." Sent. 798. While the conduct involved in the money-laundering conspiracy differs from the mortgage-fraud conspiracy, the continued concerted action of the participants is a basis to infer that the defendants were acting in accordance with an agreement. *Mitchell*, 484 F.3d at 769.

The money-laundering conspiracy count charged as its objects both concealment and promotion money laundering.[10] C.126; C.R.E.3. The court said "the easiest case" was for "the concealing prong." Sent. 798. As the court said, "transfers to the third-party entities constituted an act of concealing because they hid the fact that the money transferred to third-party entities like Metro One and Fast Start were being funneled to Calhoun and others." *Id*. at 799. *See*, *e.g.*, Tr. 374-75, 378-79, 1126-29, 1188-89.

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[10] The court's instructions about the dual-object nature of this conspiracy are addressed in Point V *infra*.

As for promotion money laundering, the court was satisfied that the proof showed that money paid out by the Kennedys based on bogus liens and invoices was "put back into the scheme in various ways to promote or further its purpose." Sent. 803. *See, e.g.*, Tr. 414, 1951, 2603, 2784-86. For example, some of the cash was used to pay investors who participated in other deals. *See, e.g.*, 416-17, 1951, 2566-57.

In other instances, money siphoned from the transactions was used to fund downpayments that lenders required, which Willie Jones said he and Calhoun did "[p]lenty of times." Tr. 2004. *See, e.g.*, Tr. 1987-88, 2005, 2060, 2091. According to Jones, Larry Kennedy was well aware of their wanting "to pull money out" of deals the Kennedys were closing. Tr. 1964. As the court recognized, "the third-party payments were pure profit since no work was done to earn those fees." Sent. 803. *See, e.g.*, Tr. 1935, 1940, 1964. The jury's finding of guilt as to money-laundering conspiracy is well-founded.

All three appellants claim they were wrongly convicted of money-laundering conspiracy.[11] C.Br. 34-37; K.Br. 22-23; L.Br. 23-41. Neither Calhoun nor Keith Kennedy devote much effort to challenging the evidentiary support for the money-laundering conspiracy charge. C.Br. 34-37; K.Br. 22-23. Calhoun focuses on the "proceeds" element which is developed elsewhere. *See* Point VI *supra*. According to Keith Kennedy, "several witnesses" said "liens did not need to be recorded to be valid between the parties." K.Br. 23 (citing Tr. 210). *See also* L.Br. 27. But the customary practice was for liens to be reflected on the title, and recurring payments to third-parties not shown on the title was indicative of fraud. Tr. 371, 375, 391, 399, 557.

According to Keith Kennedy, the court struck any proof that Jason Ellis "told Larry Kennedy his concerns about Mark Calhoun" adding disbursements to his own company (Fast Start) to HUD-1 settlement statements. K.Br. 23 (citing Tr. 602). While what Ellis told Larry Kennedy was stricken, the fact that they spoke soon after his confronting Calhoun was not,

[11] The legal basis for the Government's charging decision as to promotion money laundering is the subject of a separate question presented. *See* Point VI *infra.*

with Ellis recalling that he spoke "[w]ith Larry Kennedy about approximately 20 minutes after I left Mark's desk." Tr. 601.

Larry Kennedy contends that the Government asked too much of the jury to conclude that he was aware that Willie Jones was involved in siphoning money from Calhoun's deals. L.Br. 35-36. But the payments to entities associated with Jones were not reflected on the title and were simply the product of Jones's collaborating with Calhoun "to pull money out" of closings handled by the Kennedys, which Jones said he discussed with Larry Kennedy. Tr. 1964. There is no reason the jury was not entitled to rely on Jones's testimony that Larry Kennedy was aware of this conduct which he helped facilitate.

4. Promotion Money Laundering (*Count 18-21, 23-34*)

The Government satisfied the necessary proof for promotion money laundering. Tr. 2996. *Compare id. with* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 2.76. *See* 18 U.S.C. §§ 1956(a)(1)(A)(I) & 2.

For each of the LCTS checks to entities associated with Jones charged in Counts 18-21, the funds were drawn from the proceeds of the mortgage-fraud

scheme. *See* Table 3 *infra*. Jones said none of these payments was based on his having performed any work on the properties, with the payments representing pure profit. *See, e.g.*, Tr. 1935, 1940, 1964. Jones and Calhoun would routinely use a share of the money for loan downpayments that lenders expected to come from borrowers, but which Calhoun regularly provided the Kennedys. *See, e.g.*, Tr. 1987-88, 2005, 2060, 2091.

Table 3: **Checks Drawn on LCTS Account Used as Source of Payments to Entities Associated with Willie Jones (*Promotion Money-Laundering Counts 18-21*)**

Count	Approx. Date	Check #	Approx. Amount	Borrower	GX	Tr.
18	1/7/05	#7274	$64,294	Antile Jones	GX9	Tr.2784-86
19	2/10/05	#7756	$41,580	Antile Jones	GX10	Tr.394-95
20	2/18/05	#7898	$17,500	Timothy Turner	GX18	Tr.397
21	3/28/05	#8514	$38,480	Gerald Jefferson	GX89	Tr.1988

In the transactions involving Calhoun's daughter (April) charged in Counts 23-29, repeat borrowers were awarded a share of the funds siphoned from the proceeds. *See* Table 4 *infra*. The borrowers were paid varying amounts from the proceeds that were diverted through payments to M&C

Investments, an entity controlled by Calhoun and his daughter. *See* GX 140 & 142; Tr. 2546. No appellant makes any separate challenge to this specific proof.

Table 4: **Funds Used as Source of Payments to Renewing Borrowers and Other Purposes with April Calhoun as Participant (*Promotion Money-Laundering Counts 23-29*)**

Count	Approx. Date	Wire/ Check	Approx. Amount	Borrower	GX	Tr.
23	11/11/05	Wire	$65,197	James Bailey	GX24, 29	Tr.414, 2603
24	2/17/06	Wire	$58,194	Vivian Jeans	GX21	Tr.408, 2563
25	3/03/06	Wire	$64,860	Gordon Franklin	GX66, 82	Tr.416-17, 2566-57
26	3/29/06	Wire	$46,701	Gordon Franklin	GX70, 82	Tr.447-48, 1782, 2819
27	4/4/06	Wire	$55,485	Dorothy Wheat	GX73, 82	Tr.2585, 2821-22
28	4/27/06	Wire	$41,715	Dorothy Wheat	GX24, 77	Tr.436-37, 2597-99
29	5/02/06	Check	$15,409	Dorothy Wheat	GX24	Tr.2597-99, 2824

5. Engaging in Monetary Transaction (*Count 38*)

Calhoun does not contest the adequacy of the proof for Count 38. C.Br. 34-37. The Government more than satisfied each element. Tr. 2998. *See* 18 U.S.C. § 1349; ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 74.6.

The unchallenged proof of this transaction is straightforward. *See* Tr. 2807-08; GX 49. Calhoun was the borrower for a home in Madison, Mississippi, from which $143,950 was paid to Fast Start Mortgage, which Calhoun controlled. *Id*. From this sum, approximately $70,000 was paid to Calhoun's wife. *Id*. *See also* Tr. 1229. Calhoun does not contest the sufficiency of this proof. C.Br. 34-37.

II. The Court Properly Credited the Explanation of the Challenged Peremptory Strikes

A. Applicable Legal Standards

In examining the exercise of peremptory strikes under *Batson v. Kentucky*, 476 U.S. 79 (1986), "we review the district court's determination that the prosecutor gave a race-neutral explanation for a peremptory strike of a juror for clear error." *Turner*, 674 F.3d at 436. As the Supreme Court has said, "the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (internal quotes and citation omitted). "We have recognized that these

determinations of credibility and demeanor lie peculiarly within a trial judge's province." *Id.* (internal quotes and citation omitted).

In considering whether a peremptory challenge was impermissibly based on race, the trial court undertakes a three-step analysis:

> ***First***, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; ***second***, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and ***third***, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

United States v. Williams, 610 F.3d 271, 280 (5th Cir. 2010) (internal quotes and citation omitted; emphasis added). "Where, as here, the prosecutor tenders a race-neutral explanation for his peremptory strikes, the question of Defendant's prima facie case is rendered moot and our review is limited to the second and third steps of the *Batson* analysis." *Id*. (internal quotes and citation omitted). "Our review is therefore limited to assessing the district court's determination that [appellant] failed to show purposeful discrimination." *Id.*

B. Consideration of the Issue Below

In describing this case to the jury venire, the court said "the defendants are charged with various acts of fraud, money laundering and conspiracy

related to the procurement of mortgage loans." Voir Dire 109. The prospective jurors were required to complete written questionnaires listing their employment. *Id*. at 454.

Once the panel was qualified and potential jurors were excused for cause, the court called on the parties to tender 12 jurors to the opposing side. The Government tendered seven blacks and five whites.[12] Voir Dire 512. Ultimately, the jury selected included six blacks and six whites.[13] *Id*. at 525. In choosing alternate jurors, the Government exercised two peremptories that are challenged on appeal—namely, Watasha Brookshire and James Harris. C.Br. 48.

In responding to Calhoun's *Batson* challenge, the Government said it struck Brookshire "because she's an assembly line worker" and was looking for jurors who "have a little bit more education." Voir Dire 528. As for Harris,

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[12] The description of the racial composition is based on the jury list. The parties used a challenge-and-tender system to select the jury. *See United States v. Bryant*, 671 F.2d 450, 455 (11th Cir. 1982).

[13] At the time of the verdict, the racial composition of the jury remained six blacks and six whites. One of the black jurors (Archie) was replaced by the first alternate (Forrest), who is black. Tr. 40-41; Voir Dire 525.

he "is a car-washer."[14] *Id*. Calhoun's counsel said "the fact that they may have jobs that don't require education I don't think is sufficient," saying that two white jurors (Hanson and Smith) also did not complete high school.[15] Voir Dire 529.

In ruling on the *Baston* challenge, the court said, "[f]irst, with respect to the justifications, that's obviously a race-neutral justification. I don't find that it's pretext." Voir Dire 530. Comparing the cited white jurors with the stricken black alternates, the court said Smith "is a warehouse manager which, education aside, suggests a different role than a car-washer and an assembly line worker. Mr. Hanson I believe was a landscaper." *Id.* The judge said: "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. This is going to be a complicated case." *Id*.

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[14] The court asked the prospective jurors to introduce themselves, stating their name and, if married, their spouse's employment. Voir Dire 141. Harris said: "My name is James Harris. I did not get no education. I do framing work in construction." *Id.* at 148-49.

[15] While Hanson got only as far as his junior year (Voir Dire 143), Smith has "a high school degree and one year of diesel mechanics at Hinds Junior College" (*id.* at 147).

C. Discussion

The court properly determined that the Government offered a sufficiently race-neutral explanation for its challenged peremptory strikes and that Calhoun "failed to show purposeful discrimination." *Williams*, 610 F.3d at 280. The court aptly anticipated this would "be a complicated case" and that jurors whose jobs typically require more education would be best-suited. Voir Dire 530. The trial court is entitled to wide latitude in evaluating the Government's proffered reason, and the judge was "able to consider the demeanor of the prosecutor as he made his explanation." *Turner*, 674 F.3d at 436.

In challenging the finding that the Government's reason for exercising its peremptories was race-neutral, Calhoun compares the stricken prospective alternate jurors with two white jurors (Smith and Hanson). C.Br. 49-50. Calhoun disputes the court's conclusion that Smith's job as a warehouse manager "indicated ... that he had a higher degree of intelligence than an assembly line worker or a car washer." *Id*. Apart from the managerial aspect of his position, however, Smith has a high-school degree and one year of college. *See* n.15 *supra*.

As for Hanson, Calhoun faults the court for crediting his job as a landscaper as requiring more qualifications than an assembly-line worker or car washer. C.Br. 50. While the court did not elaborate on the comparison, Calhoun has failed to show that the court clearly erred in finding the Government's reason was not a "pretext[] for purposeful discrimination." *Fields v. Thaler*, 588 F.3d 270, 274 (5th Cir. 2009). Given that landscapers typically have a degree of autonomy not ordinarily associated with assembly-line workers and car washers, the court did not clearly err in finding that the basis for the prosecution's peremptory strike was neither "implausible [n]or fantastic." *Turner*, 674 F.3d at 436 (internal quotes and citation omitted; brackets supplied).

Although an ideal juror might be one acculturated to the business world, the court committed no clear error in finding the Government did not purposefully discriminate in selecting a warehouse manager and landscaper over an assembly-line worker and car washer in fulfilling its expressed preference for jurors based on their job skills.

III. The Court Responded Appropriately to a Juror-Contact Issue

A. Standard of Review

In considering the denial of a motion for a mistrial, this Court is to "review only for abuse of discretion [the] court's handling of complaints of outside influence on the jury." *United States v. Smith*, 354 F.3d 390, 394 (5th Cir. 2003). "'In granting a broad discretion to the trial judge, we acknowledge and underscore the obvious, that the trial judge is in the best position to evaluate accurately the potential impact of the complained-of outside influence.'" *Id.* (quoting *United States v. Ramos*, 71 F.3d 1150, 1153-54 (5th Cir. 1995)).[16]

B. Consideration of the Issue Below

Keith Kennedy challenges the denial of a mistrial motion after a juror told the bailiff that Calhoun had spoken to her. K.Br. 23. At sidebar, the court announced that "one of the jurors has indicated" that Calhoun "said something to them." Tr. 2349. The judge said: "I don't know how I could be

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[16] Keith Kennedy argues the standard of review is *de novo*. K.Br. 23 (citing *United States v. Bansal*, 663 F.3d 634, 643 (5th Cir. 2011)). Kennedy may have intended to cite *Bansal* for a different proposition; the cited page addresses money laundering and includes no discussion of the standard for reviewing a juror-contact issue.

any more clear than I was last time."[17] Tr. 2350. The court then called the juror to testify about the encounter. Tr. 2351-62. She described two occasions when she was inside the courthouse doorway facing the street, waiting for her ride home, when she heard Calhoun say, "*How you doing?* and walked out the door." Tr. 2356 (court reporter's italics indicate quotations). Calhoun never made eye contact and she was uncertain if he was addressing her. Tr. 2355-57. *See also* Tr. 2361. The juror said that neither incident would prevent her from being a fair juror. Tr. 2358. Nonetheless, counsel for both Kennedys joined in moving for a mistrial. Tr. 2363-65.

In addition to the juror who reported the contact, the court called court security officer (CSO) Richard Allen, who served as bailiff, "to tell us exactly what the woman said in the presence of the jury while he was there." Tr. 2365-66. As described by CSO Allen, as he began to close the jury-room door, a

[17] This was not the first time the court dealt with a juror issue involving Calhoun. Before opening statements, Felicia Archie was stricken after she reported repeatedly seeing Calhoun at a local WalMart. Tr. 27-33. Archie told only the bailiff; no other jurors were aware of the encounter. Tr. 27, 32, 41. Larry Kennedy's counsel moved for a severance, which was denied. Tr. 37. The court was disturbed that Calhoun "would go anywhere near a juror" and received his assurance that he understood. Tr. 38.

juror said, "*What do I do about somebody speaking to me?* And I said, *Who?* She said, *Well, Mr. Calhoun spoke to me out front*. I didn't show any emotion. I simply shut the door and said, *Well, I'll tell the judge about it*, and that was it." Tr. 2371.

The judge then called each of the jurors individually to report what they had heard about the contact and its impact on their ability to be fair and impartial jurors. Tr. 2378-2405. Most reported that a juror had asked the bailiff how to respond to a greeting by one of the parties, namely, Calhoun. *Id.* For example—

- one said the juror had simply told the bailiff that Calhoun had greeted her, Tr. 2388;
- another said the juror wanted to know how to respond if a defendant "speak to them and could we speak back," referring to "Mr. Calhoun," Tr. 2390-91;
- yet another heard that "somebody had spoken to" the juror and understood it was Calhoun, Tr. 2393;
- another said "she just asked if we were not supposed to speak to anyone that spoke to us and said that Mr. Calhoun had spoken to her" in the form of a greeting, Tr. 2398;

- another said "she wanted to know if we were allowed to speak, I guess just pleasantries,"after being greeting by Calhoun, Tr. 2399-400; and

- another said: "She asked was it okay—what was the protocol if someone speak to her," referring to Calhoun, Tr. 2402.

Another juror was unaware of any conversation about this subject. Tr. 2386-87. Each of the jurors assured the court that nothing they had heard would affect their ability to be fair and impartial. *Id.*

Following the colloquy with the jurors, the court denied a motion by the Kennedys for a mistrial. Tr. 2406. The court cited "the seminal Fifth Circuit case" on this issue, *United States v. Sylvester*, 143 F.3d 923 (5th Cir. 1998), which "advises that the district court should first assess the severity of the suspected intrusion, and only when the court determines that prejudice is likely should the government be required to prove its absence." Tr. 2409. Based on "the statements that I heard," the judge said, "I don't think the situation is severe." Tr. 2409-10. "It's a pretty innocuous greeting that may or may not have been directed at her." Tr. 2410. Having examined each juror individually, the court emphasized that "all said that it would have zero impact on their

deliberations." *Id.* The judge "sense[d] no hesitation from a single juror." *Id*. No juror had "even a question about it." *Id.* "The ultimate inquiry is whether the intrusion will affect the jurors' deliberations and their verdict, and I find that it would not." *Id.* The judge saw "no risk" that any juror would hold anything against any defendant based on Calhoun's simple greeting. *Id*.

C. Discussion

The court did not abuse its discretion in refusing to declare a mistrial based on the fleeting juror contact with Calhoun. *Smith*, 354 F.3d at 394. The court responded appropriately and conducted a thorough inquiry with all parties present. Nothing about the encounter resulted in any doubt about the jury's ability to remain fair and impartial. This Court should defer to the trial judge's determination. *Ramos*, 71 F.3d at 1153-54.

According to Keith Kennedy, "the juror told the bailiff what she feared was unlawful contact in front of the other jurors who all confirmed they heard her (except one)." K.Br. 24 (citing Tr. 2361). However, neither the cited transcript nor elsewhere does the colloquy support that there was any fear

Calhoun had "unlawful contact"with the juror.[18] *See* Tr. 2351-2405. In the cited colloquy, the juror explained that she reported the contact to the bailiff in front of the other jurors "because some of them might have felt the same way" about how to respond to such a greeting, *i.e.*, "is it okay for us to speak back"—"that's what I wanted to know." Tr. 2361.

Based on this exchange, Keith Kennedy "alleges that the jury became unfairly influenced (although the juror's stated other wise [*sic*])." K.Br. 24. Not only did the jurors say they were not influenced, the court specifically found they were not—based not only on their statements but also on their demeanor and lack of hesitation in answering. Tr. 2410. There is no reason to regard the court's finding as clearly erroneous. *See United States v. Bernard*, 299 F.3d 467, 476 (5th Cir. 2002) (reviewing finding of no jury taint for clear error).

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[18] Elsewhere, Keith Kennedy asserts that the question to the bailiff "gave the jurors a indication [*sic*] that one of the defendants might be doing something improper and/or illegal." K.Br. 25. However, neither the juror's report of the incident nor the other jurors' recollection of the exchange with the bailiff offers any suggestion that Calhoun's remark involved anything "improper and/or illegal"—especially given the uncertainty that the pleasantry was even directed at the juror. Nor do the cited decisions support that "Calhoun's actions had the damage [*sic*] of tainting the Kennedys." K.Br. 25. Two of the cases—*United States v. Adams*, 799 F.2d 665, 670 (11th Cir. 1986), and *United States v. Butler*, 822 F.2d 1191, 1196 (D.C. Cir. 1987)—upheld findings of no juror taint. The third ("U.S. v. Brown, 371, F.2d 980") could not be found.

Even though the juror's inquiry of the bailiff was intended to answer her question about how to respond to an evident pleasantry on the part of Calhoun, Keith Kennedy insists "[t]he apparent prejudice is substantial" and that "[t]his involved on its face improper and perhaps illegal misconduct," which affected "[v]irtually the entire panel." K.Br. 26. Despite counsel's charged language, the court properly regarded the incident as essentially innocuous—a passing greeting by a defendant not necessarily directed at a juror. This Court has been given no reason to set aside the trial result.

IV. The Court Acted Within its Discretion in Refusing to Sever

This Court reviews the "denial of motions for severance and mistrial for abuse of discretion." *Mitchell*, 484 F.3d at 775. To demonstrate such abuse, "the defendant bears the burden of showing specific and compelling prejudice that resulted in an unfair trial, and such prejudice must be of a type against which the trial court was unable to afford protection." *Id.* (internal quotes and citation omitted). "The denial of a motion to sever is reviewed under an 'exceedingly deferential' abuse of discretion standard." *United States v. Whitfield*, 590 F.3d 325, 355 (5th Cir. 2009) (citation omitted).

B. Consideration of the Issue Below

Before trial, Calhoun moved to sever his case from his codefendants. C.173. Larry Kennedy joined Calhoun's motion, which the court declined. L.151, 173.

Larry Kennedy also moved to sever based on the allegations of Calhoun's juror contact, which the court denied. Tr. 36-37, 2364, 2406-11. Midway through the trial, Calhoun again moved for a severance, which Larry Kennedy joined. Tr. 1892-95. The court denied the motion. Tr. 1895. The court elaborated on its decision in a post-trial ruling. C.514-16.

In charging the jury, the court emphasized the need to "give separate consideration to the evidence as to each defendant." Tr. 2990-91. *Compare id. with* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 1.23.

C. Discussion

The court properly refused to sever based on an alleged disparity in the proof, which is rarely warranted. *United States v. Lewis*, 476 F.3d 369, 384 (5th Cir. 2007). "It is the rule, not the exception, that persons indicted together should be tried together, especially in conspiracy cases." *United States v.*

Thomas, 627 F.3d 146, 156 (5th Cir. 2010) (internal quotes and citation omitted). "Even when there is some risk of prejudice, limiting instructions will generally prevent actual harm to a defendant." *Id*. at 157.

Here, as in *Whitfield*, "the district court explicitly instructed the jury to consider each offense separately and each defendant individually." 590 F.3d at 356 (citation omitted). "Limiting instructions such as these are generally sufficient to prevent the threat of prejudice resulting from unsevered trials." *Id*. (citation omitted). *See* Tr. 2990 (pattern instruction). Consistent with the court having instructed the jurors to consider the defendants individually, the jury's mixed verdict demonstrates the jurors did just that. *See* C.336-44; C.R.E.4; Tr. 3152-58; Table 1 *supra*. *See also United States v. Solis*, 299 F.3d 420, 441 (5th Cir. 2002) ("the jury acquitted some of the alleged co-conspirators, supporting an inference that the jury sorted through the evidence, however complex, and considered each defendant and each count separately").

Larry Kennedy points to Calhoun's prominent role in the mortgage-fraud scheme to argue that the evidence was so overwhelmingly disproportionate as to warrant relief. L.Br. 51. But the Kennedys played a crucial

part in the conspiratorial conduct in their capacity as closing agents for Calhoun's loans. *See* Facts 2.c-2.e *supra*. Looking back on the trial, the court properly observed: "Even if prejudice did exist, public interest in judicial economy during this five-week trial was strong, and the Court provided proper limiting instructions." C.515. The claim—that the "lopsidedness of the evidence in this case was compounded by Mark Calhoun's behavior [allegedly greeting a juror] during the trial" (L.Br. 52)—disregards that no juror said the contact had any impact on their view of Calhoun—let alone the Kennedys, who were in no way implicated in the conduct. *See* Point III *supra*. The court properly refused to sever or declare a mistrial.

V. The Court Properly Addressed the Money-Laundering Issues

A. Standard of Review

This Court reviews *de novo* the denial of a motion to dismiss an indictment. *United States v. Villanueva-Diaz*, 634 F.3d 844, 848 (5th Cir. 2011). To the extent the defense sought to test the sufficiency of the proof as to the money-laundering proceeds, this Court's review is *de novo*, considering the evidence in the light most favorable to the verdict. *United States v. Harris*, 666

F.3d 905, 907 (5th Cir. 2012). "Issues of statutory interpretation are also reviewed *de novo*." *United States v. Hanafy*, 302 F.3d 485, 487 (5th Cir. 2002). "Generally, we review jury instructions for abuse of discretion and harmless error." *United States v. Betancourt*, 586 F.3d 303, 305 (5th Cir. 2009). "But when a defendant fails to object to jury instructions, our review is for plain error." *Id*. at 305-06.

B. Applicable Law

"The federal money-laundering statute, 18 U.S.C. § 1956, prohibits several activities involving criminal 'proceeds.'" *United States v. Ramos*, 427 Fed.Appx. 368, 369 (5th Cir. 2011). The meaning of the term "proceeds" was considered by the Supreme Court in its *Santos* decision (4-1-4) and has since been defined by statute. *See United States v. Santos*, 553 U.S. 507 (2008); 18 U.S.C. § 1956(c)(9).

As described by this Court, in his controlling concurrence in *Santos*, Justice Stevens stated that "the definition of 'proceeds' depends on the underlying criminal activity and must be determined via a bifurcated

analysis." *Ramos*, 427 Fed.Appx. at 369 (citing *Garland v. Roy*, 615 F.3d 391, 401 (5th Cir. 2010)). As this Court said in *Garland*:

> First, a court must determine whether ... the defendant would face the "merger problem" [which occurs when the statute criminalizing the underlying activity merges with the money-laundering statute]. If so, then ... the rule of lenity governs and "proceeds" must be defined as "profits"; and the court need not proceed to the second step of Justice Stevens' analysis. However, if, instead, there is no "merger problem," Justice Stevens' analysis ... directs that a court must look to the legislative history of the money-laundering statute to determine how to define "proceeds." A court does so with the default presumption that "proceeds" should be defined as "gross receipts," unless the legislative history affirmatively supports interpreting "proceeds" to mean "profits."

Garland, 615 F.3d at 401 (citations omitted) (bracketed definition of "merger problem" from *Ramos*, 427 Fed.Appx. at 369).

C. Consideration of the Issues Below

Before trial, Larry Kennedy moved to dismiss the money-laundering charges, which the court denied. L.162 (motion), L.12 (2/22/10 docket entry). The court also denied defense motions for acquittal. Tr. 2943-49, 2979.

Over the Government's objection, the court instructed the jury about the meaning of the term "proceeds," to which no defendant objected. Tr. 2954-64. As defined by the court:

> 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.

Tr. 2997-98.

After trial, all three defendants moved for acquittal or for a new trial. C.345, K.191, L.326. At the invitation of the court, the parties filed separate submissions regarding the money-laundering counts, which the court addressed at sentencing. C.502; Sent. 798-803.

In considering the post-trial motions, the court said the "defendants contend that the indictment is insufficient as a matter of law in the *Santos* aftermath." Sent. 800. In examining whether the money laundering merged with the mortgage-fraud conduct, the court was satisfied that "the transactions at issue were separate from the transactions related to the underlying specified unlawful activity." *Id*. at 802. "In this case the

transactions were not even direct payments to coconspirators; they were payments to shells like Metro One and Fast Start." *Id*.

For the transactions referred to in the substantive money-laundering counts, "the jury heard evidence ... and could have reasonably concluded that these transfers from LCTS to third-party entities would be used not just to pay off confederates, but to promote the scheme through payments to borrowers, renters and others." Sent. 802. "There was evidence, for example, from borrowers that payments in prior loans encouraged them to seek additional loans." *Id*. The court said:

> The jury could also find that such payments enabled borrowers to take on additional investment properties. This was not a one-time transaction where coconspirators were paid and everyone walked away. The money LCTS transferred to these entities was in most instances going to Calhoun and were being put back into the scheme in various ways to promote or further its purpose. Such conduct is distinct from the essential elements of the wire fraud counts.

Id. However, the judge "thought the issue was close enough at trial to give the proceeds-means-profits instruction." *Id*. "But if proceeds means profits, then the jury need find only a modicum of profit. And as the government

stated, the third-party payments were pure profit since no work was done to earn those fees. Those profits were then put back into the scheme." *Id*.

D. Discussion

The court appropriately addressed the money-laundering charges. The indictment, echoing the law's use of the word "proceeds," properly tracked the language of the statute. *See United States v. Franco*, 632 F.3d 880, 884 (5th Cir. 2011) ("an indictment that closely tracks the language under which it is brought is sufficient"). *See also United States v. Lyttle*, 460 Fed.Appx. 3, 5 (2d Cir. 2012) ("Nothing in the indictment ... indicates that these transactions did ***not*** involve profits; rather, the indictment uses the word 'proceeds,' which echoes the statute.") (emphasis by the court).

Given the court's cautious decision—over the prosecution's objection—to define "proceeds" as profits, appellants have no basis to complain about the jury's findings of guilt on this basis. Tr. 2954-64, 2997-98. According to the court, "as the government stated, the third-party payments were pure profit since no work was done to earn those fees." Sent. 803. *See* C.548-59 (describing

trial proof regarding "pure profit"); Tr. 2777-2884 (testimony of Agent Hull); GX 9, 44 & 89 (bank accounts into which proceeds deposited).

The court also correctly rejected appellants' post-trial challenge to their convictions. Applying *Garland*'s understanding of *Santos*, the court properly determined there was no "merger problem." Sent. 802. *See Garland*, 615 F.3d at 401. The court was satisfied that "the transactions at issue were separate from the transactions related to the underlying specified unlawful activity." Sent. 802. The transactions related to the mortgage fraud were the transfers of loan proceeds to the closing agents based on the false representations. *See* Fig. 1 *supra*. Only after the closing agents (the Kennedys) received the loan proceeds did they then make payments to sham corporations associated with Calhoun. *See* Fig. 2 *supra*. The funds received from the transfers to these sham entities were then used for purposes that promoted the mortgage-fraud scheme, such as providing cash to borrowers willing to continue to lend their creditworthiness for further loans with Calhoun and to make downpayments that lenders expected to come from the borrowers. As the court said: "The money LCTS transferred to these entities was in most instances going to

Calhoun and were being put back into the scheme in various ways to promote or further its purpose." Sent. 802. This "conduct is distinct" from the underlying mortgage fraud. *Id. Compare* Fig. 1 *with* Fig. 2. Hence, there is no merger problem.

In the absence of a merger problem, the court could rely on "the default presumption that 'proceeds' should be defined as 'gross receipts.'" *Garland*, 615 F.3d at 401. Thus, even without the court's narrower "proceeds-means-profits" definition, the Government was entitled to prevail. Sent. 802.

None of appellants' points requires any different result. Calhoun argues he was unjustly "charged, convicted and sentenced for the exact same conduct under two different statutes." C.Br. 14. Calhoun contends "the same conduct underlies both the wire fraud charges and the money laundering charges." C.Br. 15. Both Kennedys make similar arguments. *See* K.Br. 26-28; L.Br. 42-48.

While the money used to promote the mortgage-fraud scheme was derived from the fraud, the conduct involved in the money laundering was distinct, as the trial court properly recognized. Sent. 802. *Compare* Fig. 1 *with* Fig. 2 *supra*. Appellants seek to conflate the wire-fraud and money-

laundering counts, but they only succeed in pointing out that the loan proceeds from the mortgage-fraud scheme were the source of the payments used in promoting the scheme. *See* C.Br. 18-21 (bullet points). *See also* K.Br. 26-28; L.Br. 42-48. But the transactions that served to promote the scheme were made only ***after*** the closing agents (the Kennedys) received the proceeds from the lenders.[19] The transfers of these funds—used to make downpayments and to induce borrowers to continue to participate—occurred after LCTS received the loan proceeds and were not a just an ordinary "cost" of completing the loan transactions, as Larry Kennedy suggests.[20] *See* L.Br. 42.

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[19] Calhoun's reliance on a case regarding concealment of money to buy drugs, C.Br. 35 (citing *Harris*, 666 F.3d at 907), is thus unavailing because here the wiring of the fraud proceeds was complete in each instance before the funds were transferred to promote further transactions. *See*, *e.g.*, *United States v. Davis*, 226 F.3d 346, 356 (5th Cir. 2000) (fraud complete when defendant obtains money).

[20] As an example, Larry Kennedy says "[t]he money laundering in Count 23 charges a payment of $65,197 ***to*** James Bailey," which he labels as "a cost of the wire fraud perpetrated in Count 9." L.Br. 42 (emphasis added). But this disregards the multiple steps that were distinct from the wire fraud: Count 9 refers to the $343,366 wire transfer of loan proceeds to the LCTS bank account. Tr. 413-14; GX 29. Separately, the sum of $65,197 was then wired to M&C Investments based on a fraudulent invoice April Calhoun prepared for her father. Tr. 414, 2601-02. After receiving the $65,197, April Calhoun then wrote a counter check and gave $63,000 in cash to Calhoun. Tr. 2603. Bailey is one of the continuing borrowers who received cash from Calhoun—$20,000—after closing his next loan. Tr. 963. Thus, it is by no means accurate to say these multiple transactions were ordinary "costs" of the predicate crime. The same is true of the other money-laundering counts.

Despite voicing no objection to the court's "proceeds-means-profits" definition, Calhoun now insists the instruction was "wholly inadequate to apprise the jury of the parameters of what could and could not be considered 'profits' from the underlying wire fraud charges." C.Br. 26-27. Because the court's "profits" definition of "proceeds" is narrower than the default meaning of "gross proceeds," however, the court's cautious approach hardly represents plain error. *Garland*, 615 F.3d at 401.

Moreover, because the evidence "amply demonstrated that ***profitable*** transactions were supplying the funds then laundered, any error does not reach such a standard." *United States v. Achobe*, 560 F.3d 259, 271 (5th Cir. 2008) (emphasis by the Court). *See also United States v. Cooks*, 589 F.3d 173, 181 (5th Cir. 2009) ("where the evidence indicates that the specified unlawful activity was profitable and the charged transactions incurred some modicum of profit, a failure to include a 'profits' definition of proceeds in the jury instructions does not meet the plain error standard"). Neither Kennedy addresses the court's "proceeds-means- profits" definition. *See* K.Br. 26-28; L.Br. 42-48. Given the court's caution in so

instructing the jury and the proof that the money-laundering transactions involved "pure profits," no relief is warranted.

VI. The Court's Jury Instructions Were Appropriate

A. Standard of Review

"The law in this Circuit is well established that a district court has broad discretion in framing instructions to the jury, and this Court will not reverse unless the instructions taken as a whole do not correctly reflect the issues and the law." *United States v. Bieganowski*, 313 F.3d 264, 290-91 (5th Cir. 2002) (internal punctuation and citation omitted). "In reviewing whether an instruction was supported by the evidence, we view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the Government." *United States v. Wofford*, 560 F.3d 341, 352-53 (5th Cir. 2009) (internal quotes and citation omitted).

As for willful blindness, this Court has said: "We review the trial court's decision to issue a deliberate ignorance instruction for abuse of discretion." *United States v. Miller*, 588 F.3d 897, 905 (5th Cir. 2009). This Court has "consistently held that an error in giving the deliberate ignorance instruction

is ... harmless where there is substantial evidence of actual knowledge." *Id*. at 354 (internal quotes and citation omitted).

B. Consideration of the Issue Below

At the conclusion of the testimony, the court held a charge conference and, after incorporating the parties' suggested changes, allowed counsel to state their objections for the record. Tr. 2954-76. The court followed the pattern instructions on multiple-object conspiracies and deliberate ignorance. Tr. 2974, 2992, 3004-05. The court addressed defendants' concerns about these instructions in its post-trial rulings. C.519-21; Sent. 683-84, 803 ,950-51.

C. Discussion

1. Unanimity of Theory

In Count 17, the defendants were charged with conspiring to engage in promotion money laundering as well as concealment money laundering. C.125-26; C.R.E.3. In addressing the multiple objects of this conspiracy, the court properly charged the jury using the pattern unanimity-of-theory instruction. *Compare* Tr. 3004-05 *with* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 1.25. The court appropriately rejected Calhoun's

request that the jury be "charged in the conjunctive, in other words, requiring the jury to be unanimous as to both promotion and concealment." Tr. 2971.

Because the court properly found no legal infirmity with either object, there was no cause for having "alternative theories pled in the conjunctive coupled with jury instructions in the conjunctive." Sent. 803. See C.Br. 40-41 (citing *United States v. Edwards*, 303 F.3d 606, 641 (5th Cir. 2002)). Even crediting appellants' promotion money-laundering argument, there is nothing inherently infirm about the charge—only a factual claim that does not undermine its legal sufficiency.[21] *See Griffin v. United States*, 502 U.S. 43, 47 (1991)). Accordingly, given the unanimity-of-theory instruction, the "general verdict on a multi-object conspiracy may stand even if the evidence is insufficient to sustain a conviction on one of the charged objects." *United States v. Calle*, 120 F.3d 43, 45 (5th Cir. 1997) (citing *Griffin*, 502 U.S. at 47, 60)). Even if there were a shortcoming as to such evidence, the court's unanimity-of-

[21] Calhoun's argument that the promotion object of the money-laundering conspiracy was legally insufficient, requiring dismissal of Count 17 (C.Br. 38-41), is addressed in Point V *supra*.

theory instruction was appropriate and the conviction is sustainable on that basis.

2. Deliberate Ignorance

The court properly instructed the jury on the doctrine of deliberate ignorance, using the pattern instruction. Tr. 2991-92. *Compare id. with* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 1.37 ("Knowingly—To Act") (including bracketed portion). A deliberate-ignorance instruction is appropriate when "the evidence shows (1) subjective awareness of a high probability of the existence of illegal conduct and (2) purposeful contrivance to avoid learning of the illegal conduct." *United States v. Nguyen*, 493 F.3d 613, 619 (5th Cir. 2007) (internal quotes and citation omitted). The evidence satisfies both elements.

An example of the proof cited by the court is TerryLynn Rankin's asking Larry Kennedy about the travel closings. Tr. 2945. Rankin became concerned about Calhoun's taking closing files "out of the office and we were still notarizing them." Tr. 459. When challenged about this, Larry Kennedy assured her "he had spoken to the people that were signing them." Tr. 460.

But repeated witnesses were unaware of either Kennedy, despite their having attested to the witnesses' signatures on closing documents. Tr. 807, 859-60, 1210-11, 1321-22. The fact that Larry Kennedy did not speak to borrowers, while representing to Rankin that he had, is an example of his purposeful avoidance of what he had reason to suspect was illegal conduct, warranting a deliberate-ignorance instruction. *Nguyen*, 493 F.3d at 619.

A further illustration is Jason Ellis's discovery that Calhoun was arranging for the Kennedys to make payments from the loan proceeds to an entity he controlled (Fast Start). Tr. 596. *See*, *e.g.*, Tr. 374-75, 403-06, 538-39. After confronting Calhoun, Ellis called "Larry Kennedy about 20 minutes after I left Mark's desk." Tr. 601. While the actual conversation was stricken, the subject matter is readily apparent and supports an inference that Larry Kennedy was subjectively aware of wrongdoing and disregarded the implications.[22] Tr. 601-02.

[22] Although both Kennedys challenge the deliberate-ignorance instruction, it is sufficient if this Court is satisfied that it was warranted as to at least one defendant. *Bieganowski*, 313 F.3d at 290.

As the court described, Keith Kennedy wrote notes accompanying the HUD-1 settlement sheets, specifying recipients of payments he directed Larry Kennedy to make from the loan proceeds, some of which were entirely without any supporting documentation. Tr. 2946. *See*, *e.g.*, Tr. 418-19; GX 53 (note authorizing payment to "Construction lien to Willie Jones for $12,000" despite no documentation for lien).

In addition, the court cited Jones's testimony that Larry Kennedy was aware of his wanting "to pull money out of the loans." Tr. 2947. *See* Tr. 1964. The court also referred to Calhoun's directing April Calhoun to get cash from Larry Kennedy, indicating their relationship went "beyond a legitimate loan closing." Tr. 2947. *See* Tr. 2589. Calhoun's uncommonly high volume of repeat borrowers also was telling. Tr. 2949. *See* Tr. 200-01, 461-62. Despite Rankin's having alerted the Kennedys about her concerns, Calhoun remained one of their biggest sources of closings. Tr. 461-62.

Even if the facts did not fully justify a deliberate-ignorance instruction, any error in so instructing the jury should be deemed harmless. This Court has "consistently held that an error in giving the deliberate ignorance

instruction is ... harmless where there is substantial evidence of actual knowledge." *Wofford*, 560 F.3d at 354 (internal quotes and citation omitted). As in *Wofford*, the proof supporting the inference that the Kennedys were subjectively aware their conduct was unlawful also supports the inference that they had actual knowledge. *Id*.

Both Kennedys argue they are entitled to have their convictions set aside based on the decision to give a deliberate-ignorance instruction. K.Br. 12-21; L.Br. 13-23. Keith Kennedy contends a "deliberate ignorance instruction is not applicable under the facts of this particular case when a complicated 'scheme' or 'artifice' is alleged." K.Br. 19. But this Court has upheld such a charge in other mortgage-fraud and money-laundering cases. *See*, *e.g.*, *United States v. Conner*, 537 F.3d 480, 485-87 (5th Cir. 2008); *Nguyen*, 493 F.3d at 619-21; *United States v. Moncrief*, 133 Fed.Appx. 924, 936-37 (5th Cir. 2004), *vacated on other grounds*, 544 U.S. 1029 (2005). Moreover, a defendant need not know all of the details of the fraud to warrant a deliberate-ignorance instruction. Nor does the instruction depend on what a reasonable person should have known to be illegal. Here, the instruction was based on what it is fair to infer the Kennedys

"subjectively knew." *Nguyen*, 493 F.3d at 619. Both Kennedys had sufficient knowledge based on their experience in loan closings to know of the hazards of permitting a third party like Calhoun to close the loans elsewhere and of attesting to signatures they did not witness.

Larry Kennedy argues that neither of the cooperating defendants—April Calhoun and Willie Jones—testified "to anything either did to make Larry aware of the fraud that they should have been able to do had there been a conspiracy." L.Br. 21. But the court found significant that Calhoun told his daughter to get cash from Larry Kennedy, suggesting their relationship went "beyond a legitimate loan closing." Tr. 2947. *See* Tr. 2589. Jones's testimony that Larry Kennedy was aware of his wanting "to pull money out of the loans" is also indicative of his knowledge. Tr. 1964.

Neither Kennedy was held accountable solely for shortcomings in performing their "duty as escrow agent" (L.Br. 23) or for "a single suspicious incident" for which "the failure to inquire could arguably be considered mere negligence." *Nguyen*, 493 F.3d at 622. Rather, the transactions involved "repeated and routine" conduct for which both Kennedys abdicated

responsibility. As was true in *Nguyen*: "The sheer intensity and repetition in the pattern of suspicious activity coupled with [the Kennedys'] consistent failure to conduct further inquiry create a reasonable inference of purposeful contrivance." *Id*. Accordingly, the court did not abuse its discretion in including a deliberate-ignorance instruction. Nonetheless, given the Kennedys' actual knowledge based on their experience in the loan closing business, any such error is harmless.

VII. The Court Appropriately Enhanced Calhoun's Sentence

A. Standard of Review

In reviewing sentencing guideline cases, this Court reviews factual findings for clear error. *United States v. Delgado*, 668 F.3d 219, 228 (5th Cir. 2012). " The district court's finding is not clearly erroneous if it is plausible in light of the whole record." *Id.*

B. Consideration of the Issues Below

In Calhoun's pre-sentence report, the Probation Office determined that his total offense level was 45. *See* PSR ¶ 224. This includes a two-level enhancement for misrepresenting that Calhoun was acting on behalf of a

religious organization. *Id*. ¶ 214 (citing UNITED STATES SENTENCING GUIDELINES MANUAL ("U.S.S.G.") (2010) § 2B1.1(b)(8)(A)). The total also includes a two-level increase for abuse of trust. PSR ¶ 219. *See* U.S.S.G. § 3B1.3. With a total offense level of 45 and a criminal-history category of I, Calhoun faced life imprisonment. PSR ¶ 261. *See* Sent. 904. The court chose to vary from the Guidelines and sentenced Calhoun to 200 months. *Id*. at 946-50.

C. Discussion

1. Purporting to Act on Behalf of Religious Entity

In explaining the proposed enhancement, the Probation Office said:

> Pursuant to §2B1.1(b)(8)(A), the offense level is increased by 2 levels, because the offense involved a misrepresentation that the defendant was acting on behalf of a religious organization. Mark Calhoun told [a] Borrower ... he was a minister, that he had a program to help his church members in the African American community with credit problems to buy homes, and that he wanted [the borrower] to serve as a conduit to purchase the properties to be rented to church members. Calhoun did not, however, furnish renters from his church members, and misrepresented his intentions to the borrower.

PSR ¶ 214. *See* n.2 *supra*; Tr. 975, 1049-52; Sent. Tr. 787. Citing the Guidelines

commentary, the court properly found that "Calhoun represented himself as acting to obtain a benefit on behalf of his congregation, which is a religious organization, and that he intended to divert hidden proceeds to himself through the third-party payouts." Sent. 857. *See* U.S.S.G. § 2B1.1 n.7(B) (2010).

Calhoun argues "[t]here was no proof at trial to the effect that Mr. Calhoun misrepresented his intention to help congregation members obtain housing." C.Br. 44. But, even though Calhoun claimed to be helping his congregants, he ended up with a large share of the proceeds and the homes were rented to other people. *See* n.2 *supra*; PSR ¶¶ 108-18; Tr. 1406-08, 1505-10. The court's factual finding "is plausible in light of the record as a whole." *Delgado*, 668 F.3d at 228.

2. Abusing Position of Trust

In recommending an enhancement for abuse of trust, the Probation Office said:

> As a licensed mortgage loan originator, Calhoun represented to the lenders that the information contained in the loan applications and HUD-1 settlement statements was all true. Lender representatives testified at trial that they relied on the defendant, as the mortgage loan originator, to ensure that all documents

> submitted in the loan application packages, and all information contained in the HUD-1 settlement statements, were true and correct. The lender representatives also testified that they relied on the mortgage loan originators, as well as the closing agents, to be their "eyes and ears" for purposes of ferreting out any suspicious activities regarding the loans at loan closings.

PSR ¶ 219. In applying the enhancement, the court cited this Court's decision in *United States v. Wright*, 496 F.3d 371 (5th Cir. 2007). Sent. 850. "In *Wright*, the court applied the enhancement to a mortgage broker because he used his position to submit false information on loan applications to lenders with whom he had preexisting relationships. The same is true here." *Id.* *See Wright*, 496 F.3d at 375-77.

Calhoun claims he should not be held accountable for abuse of trust because "lenders employed internal audit procedures, requested borrower's IRS information and reviewed appraisals." C.Br. 45. Just because lenders employed some precautionary measures does not mean a defendant should not be held responsible for abusing his position of trust. *See*, *e.g.*, *United States v. Way*, 2012 WL 1109343 at *2 (5th Cir. 2012) ("lenders expected Way to

perform due diligence in preparing loan packages and trusted her to verify and submit accurate and truthful information in loan applications").

Here, Calhoun brazenly thwarted mortgage lenders, but did so in ways that were difficult to detect, such as handling loan closings himself and arranging for the Kennedys to notarize the often-bogus signatures after-the-fact. Tr. 743. *See* Facts 2.c *supra*. Calhoun also falsified the creditworthiness of borrowers, hid the intended use of properties, and furnished borrowers' downpayments, contrary to the lenders' loan policies. *See* Facts 2.a-2.d *supra*. The sentencing finding "is plausible in light of the record as a whole." *Delgado*, 668 F.3d at 228.

CONCLUSION

For the foregoing reasons, the judgments of conviction and sentencing should be affirmed.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 13,885 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. 32(a)(6) because this brief has been prepared using Palatino Lynotype 14-point font produced by Corel WordPerfect X3 software; the footnotes are in 12-point type.

3. Privacy redactions required by FIFTH CIR. R. 25.2.13 have been made to this brief.

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5. This brief has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

CERTIFIED, this the 18th day of June 2012.

/s/ Gaines H. Cleveland
GAINES H. CLEVELAND
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day, he caused to be electronically filed a copy of the Brief for Appellee United States of America with the Clerk of the Court using the ECF system, which caused the brief to be served on counsel of record.

CERTIFIED, this the 18th day of June 2012.

/s/ Gaines H. Cleveland
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