NO. 11-60431

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

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

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

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ARGUMENTS

A. The district court erred by failing to dismiss the money laundering counts under the binding holdings in *Santos* and *Garland*.[1]

The prosecution concedes that under this Court's rulings in *Garland v. Roy*, 615 F.3d 391 (5th Cir. 2010), "proceeds" must be defined as "profits" if a potential "merger problem" exists in the context of the subject wire fraud group of charges on the one hand, and the money laundering group of charges on the other.[2] Appellee's Brief, p. 53. Curiously, after making this admission, the prosecution relies very little on the guidance provided by *Garland* and *Santos* in justifying its position that the funds involved in the subject money laundering charges were actually profits from the underlying wire fraud charges in this case. To understand the fallacy in the prosecution's application of *Garland* and *Santos* the subject analysis requires a review of these two cases.

As the prosecution points out, the first step the money laundering analysis requires determining whether a potential merger problem exists between the wire fraud charges and the money laundering charges. *Garland*, 615 F.3d at 402 (citing *Santos*, 128 S.Ct. at 2034 n.7 (Stevens, J., concurring in the judgment)). If a potential merger problem exists, then "proceeds" must be defined as "profits" from the underlying activity. If no potential for a merger problem exists, then

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[1]This argument is presented on pages 14 through 33 of Mr. Calhoun's initial Brief, and on pages 33 through 35 and 51 through 61 of the prosecution's Brief.

[2]*Garland* interprets the Supreme Court's rulings in *United States v. Santos*, 553 U.S. 507, 128 S.Ct. 2020 (2008). *Santos* is the seminal case that defines "proceeds" as either "gross receipts" or as "profits" in the context of money laundering charges. *Santos* also sets forth factors that must be taken into consideration to determine whether funds from an underlying crime, such as wire fraud in Mr. Calhoun's case, constitute "profits."

"proceeds" is defined as "gross receipts" from the underlying activity. *Id.* Merger occurs "when the same 'transaction' may have been used to prove both the underlying activity and the money-laundering charges[.]" *Garland*, 615 F.3d at 404.

A close review of the Indictment reveals that the exact same alleged wire transactions identified to support the wire fraud transactions are also used to support the money laundering transactions. (*Compare* Indictment, allegations in counts 2 - 16 (wire fraud counts) *with* Indictment, allegations in counts 18 - 21 and 23 - 34 (money laundering counts); *see also*, Mr. Calhoun's initial Brief on Appeal, pp. 16 - 21 (containing a count by count comparison of the conduct underlying the wire fraud charges to the conduct underlying the money laundering counts).) Because "the same 'transaction' may have been used to prove both the underlying activity and the money-laundering charges," *see Garland*, 615 F.3d at 404, merger of the two groups of charges exists in this case. Therefore, under *Garland* and *Santos*, "proceeds" must be defined as "profits" in Mr. Calhoun's case.

To get around this obvious problem, the prosecution points to conduct that was not charged or even mentioned in the lengthy 28 page Indictment. The prosecution contends that there is no merger problem because, despite what is specifically charged in the Indictment, the factual basis for money laundering was payments made from Mr. Calhoun to borrowers, so that the borrowers would continue investing in the scheme. See Appellee's Brief, p. 59 (stating the wire

fraud funds were "used to make downpayments and to induce borrowers to continue to participate" in the scheme"); *id.* at 57 (stating "[t]he 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").

The problem with the prosecution's argument is that the Indictment *specifically* charged that the money laundering conduct was the wire transfer of the funds from the lending institutions to the defendants. (*See* Indictment, allegations in counts 18 - 21 and 23 - 34 (money laundering counts).) Nowhere in the Indictment is there any mention that the basis for the money laundering counts was payments from Mr. Calhoun to potential lenders so that the alleged scheme could continue. (*See id.*)

The prosecution, through its argument, is asking this Court to allow an impermissible constructive amendment to the Indictment. "The accepted test is that a constructive amendment of the indictment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged [in the indictment.]" *United States v. Chambers*, 408 F.3d 237, 241 (5th Cir. 2005) (citation omitted). "[R]eversal is automatic" when constructive amendment occurs. *Id.* Because the prosecution's argument in Mr. Calhoun's case is based on a constructive amendment of the Indictment, the argument must be rejected.

Having established that a merger problem exists, thus "proceeds" must be defined as "profits," the next step in the analysis consists of determining what can and cannot constitute "profits" in the context of money laundering. Most important to this analysis is determining what cannot be considered profits.

Santos involved an underlying illegal gambling operation and alleged money laundering that arose from the operation. The indictment in *Santos* alleged that illegal money laundering activities included payments made to runners and collectors that worked for the gambling operation, as well as payments made to lottery winners. *Santos*, 553 U.S. at 509. The Supreme Court in *Santos* held that "revenue generated by a gambling business that is used to pay the essential expenses of the operation is not 'proceeds' [i.e., "profits"] within the meaning of the money laundering statute." 553 U.S. at 528.

United States v. Harris, 666 F.3d 905 (5th Cir. 2012) involved an underlying illegal drug operation and alleged money laundering that arose from the operation. This Court held that mere payments for the drugs from the dealer to the supplier cannot be considered proceeds / profits in the context of a money laundering charge. *Id.* at 906-07.

As in *Santos* and *Harris*, the wire transfers to Mr. Calhoun were nothing more than payments to him for his alleged participation in the underlying wire fraud scheme. Therefore, under binding case law, the "proceeds" were not "profits," and the money laundering convictions cannot survive.

The prosecution fails to address the definitions of "profits" set forth in *Santos* and *Harris*. Rather, it argues that the funds emanating from the alleged wire fraud scheme "were pure profit since no work was done to earn those fees." Appellee's Brief, p. 56. Similarly, the prosecution makes the conclusory statement that proof at trial indicated "that the money-laundering transactions involved 'pure profits.'" *Id.* at 61. This proposition, however, simply ignores the holdings in *Santos* and *Harris*. As such, the argument should be rejected.

For all of these reasons, as well as the reasons stated in Mr. Calhoun's initial Brief, convictions on the money laundering group of charges should be reversed.

B. The district court erred by denying Mr. Calhoun's Rule 29 sufficiency of the evidence motion regarding the money laundering counts and the conspiracy to commit money laundering count.[3]

In addition to relying on the arguments presented in his initial Brief, Mr. Calhoun relies on the arguments presented in the previous subsection of this Reply Brief. The arguments presented above are also applicable to the subject Rule 29 sufficiency of the evidence argument.

C. The district court erred by failing to dismiss count 17, conspiracy to commit money laundering, because the jury was instructed on two disjunctive legal theories, one of which was legally insufficient.[4]

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

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[3]This argument is presented on pages 34 through 37 of Mr. Calhoun's initial Brief, and on pages 30 through 35 and 51 through 61 of the prosecution's Brief.

[4]This argument is presented on pages 38 through 41 of Mr. Calhoun's initial Brief., and on pages 61 through 64 of the prosecution's Brief.

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

As Mr. Calhoun argued in his initial Brief, if this court finds that the money laundering convictions must be reversed under the holdings in *Santos* and *Garland*, then *Edwards* requires dismissal of count 17, the conspiracy to commit money laundering count. Nothing argued by the prosecution affects this required outcome.

D. The case must be remanded for re-sentencing if the Court vacates the money laundering convictions.[5]

A review of Appellee's Brief indicates that the prosecution did not address this issue. A "Table of Cross References" appears on page vii of Appellee's Brief. This table indicates that Mr. Calhoun's "POINT VI.D," which encompasses the subject issue, is covered under "POINT V" of the prosecution's Brief, which is on pages 51 through 61. However, a review of those pages reveals no argument on the subject issue. Accordingly, Mr. Calhoun assumes that the prosecution concedes that remand for re-sentencing is required if the Court vacates the money laundering convictions.

[5]This issue is presented on pages 41 through 43 of Mr. Calhoun's initial Brief.

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

This argument is fully developed in Mr. Calhoun's initial Brief. No further briefing is necessary.

F. The district court erred by denying Mr. Calhoun's *Batson* challenge to the prosecution's improper use of peremptory challenges to strike two black people during jury selection, even though the court found a prima facie case of racial discrimination.[7]

1. Introduction.

Mr. Calhoun begins by noting an inadvertent error in his initial Brief. Page 49 of the initial Brief states "[p]roving that the prosecution's reason for striking Brookshire and Harris was a pretext for discrimination, defense counsel pointed out that jury members 4 (Hanson) and 9 (Smith), both of whom were white, *failed to finish high school*." (Emphasis added). The contention that neither finished high school is based on arguments presented by counsel on pages 529 through 530 of the Voir Dire transcript. However, as the prosecution points out, Mr. Smith's testimony indicates that he had a high school education. *See* Appellee's Brief, p. 39, n.1 (citing Voir Dire Transcript, p. 147). This distinction, however, makes no practical difference in the *Batson* analysis.

2. Analysis.

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[6]This argument is presented on pages 43 through 46 of Mr. Calhoun's initial Brief., and on pages 69 through 73 of the prosecution's Brief.

[7]This argument is presented on pages 46 through 51 of Mr. Calhoun's initial Brief., and on pages 36 through 41 of the prosecution's Brief.

The prosecution supports its conclusion that no *Batson* violation occurred by contending that it initially "tendered seven blacks and five whites" during the jury selection process. Appellee's Brief, p. 38. This argument should be rejected for at least two reasons.

First, the prosecution bases its contention on a purported "jury list." However, the undersigned believes that there is no "jury list" on record that describes the race of the jury panel members tendered by the prosecution. Because no such "jury list" is part of the record, any information deriving exclusively therefrom cannot be considered on appeal. *See United States v. Arreola-Ramos*, 60 F.3d 188, 192 (5th Cir. 1995) (holding that "[i]n any appeal, our factual consideration is limited to the district court record....")

Second, the prosecution's argument that it tendered some black venire members as acceptable jurors ignores the fact that each and every juror on which it exercised a peremptory challenge was black. (Voir Dire at 527.) The issue in this case is why the prosecution struck black jurors for race-based reasons, not why it accepted some black jurors. For these reasons, the prosecution's argument is without merit.

Of more importance, the prosecution had little to say about the district court's lack of explanation regarding juror Hanson. In review, Mr. Calhoun argued in his initial Brief that juror Hanson, a white juror accepted by the prosecution who worked as a landscaper, was no more qualified than black venire members Brookshire and Harris who were stricken by the prosecution. One of the stricken

venire members was an assembly line worker and the other was a car washer. In issue was whether a job as a landscaper made a potential jury member more educated or able to consider complex legal issues than a person who worked as an assembly line worker or a car washer.

The prosecution admits "the court did not elaborate on the comparison." Appellee's Brief, p. 41. In an attempt to cure this defect by the district court, the prosecution argues in a conclusory and unsupported manner that "[g]iven 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.'" *Id.*

The prosecutions argument has two fatal flaws. First, there is no record developed below regarding the level of autonomy "ordinarily associated" with any of these jobs. Further, there is no logical basis to make this determination. Who is to say that a landscaper operates with more "autonomy" than an assembly line worker or car washer? Further, who is to say whether having a job that is inherently autonomous enables one to analyze complex legal issues better than a job lacking autonomy? It is impossible to determine the level of "autonomy" that white jurors Hanson and Smith exercised on their jobs because the voir dire transcript is devoid of any information regarding the level of supervision that they worked under. (*See* Voir Dire transcript.) These unanswered questions erode away the prosecution's argument.

Second, the record is devoid of any information regarding what Mr. Hanson did as a landscaper. Did he merely cut grass? If so, the job would not require the type of "autonomy" which would render him a more educated or capable juror. Without answers to these questions, the prosecution's argument has no merit, and must be rejected.

Under *Fields v. Thaler*, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." 588 F.3d 270, 274 (5th Cir. 2009) (citation omitted). The situation described in *Fields* is exactly what happened in this case. White jurors Hanson and Smith, who were similarly situated to black venire members Brookshire and Harris, were allowed to serve on the jury. The prosecution offered no viable reason why their peremptory strikes of Brookshire and Harris were motivated by anything other than race. Under this scenario, the case must be remanded to district court for re-trial.

II. CONCLUSION

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

- If the Court agrees with his argument that the wire fraud and money laundering charges merged, then all of the money laundering convictions should be vacated.

- If the Court finds that insufficient evidence was presented at trial to support the money laundering charges, then those convictions must be vacated.
- If the Court finds that the jury improperly convicted Mr. Calhoun of conspiracy to commit money laundering because the conviction was potentially based on an improper legal theory, then the conspiracy conviction under count 17 must be vacated.
- If the Court agrees with either of the two sentencing arguments, then the case must be remanded for re-sentencing.
- If the Court finds a violation of *Batson*, then the case should be remanded to district court for re-trial.

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CERTIFICATE OF SERVICE

I, Omodare B. Jupiter, certify that today, July 2, 2012, a copy of the Reply Brief for Appellant was served upon Gaines Cleveland, Assistant United States Attorney, *via* United States Mail, postage prepaid to the Office of the U. S. Attorney, 1575 20th Avenue, Gulfport, Mississippi 39501. Also, a copy of the Reply Brief for Appellant was delivered *via* United States Mail, postage prepaid to Mark J. Calhoun, Reg. No. 02808-043, FCI Oakdale, Oakdale Correctional Facility, P.O. Box 5000, Oakdale, LA 71463.

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