FEDERAL NARCOTICS AND MONEY LAUNDERING OFFENSES

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I. INTRODUCTION

This outline discusses federal statutes in the areas of narcotics and money laundering. The purpose of this paper is to give a general overview of the relevant statutory provisions as well as to present some of the evidentiary and procedural problems arising under these statutory provisions.

II. NARCOTICS

A. OVERVIEW

Most of the federal statutes relating to narcotics are found in Title 21 of the United States Code. ***PRACTICE TIP:*** It is imperative to determine the version of applicable statute in effect at the time of the offense because older versions may require proof of different elements for a given offense or specify different ranges of punishment as well as the use of prior editions of the Sentencing Guidelines.

While this paper will not discuss the penalties provisions found in Title 21 or the Sentencing Guidelines as they apply to narcotics cases, it is important to remember that narcotics is one of the areas where mandatory minimums can result in longer sentences than would be imposed under the Guidelines.

1. Definitions

The definitions of terms used in Title 21 are found at 21 U.S.C. § 802.

B. MANUFACTURE, DISTRIBUTION, AND POSSESSION

"[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). It is also unlawful to "create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance." 21 U.S.C. § 841(a)(2).

1. Elements

a. "knowingly or intentionally"

! The government must prove that the defendant knew that a controlled substance was the object of the transaction. *See United States v. Salmon*, 944 F.2d 1106, 1114 (3rd Cir. 1991), *cert. denied sub nom. Washington v. United States*, 502 U.S. 1110 (1992) (evidence insufficient where no evidence presented to show that defendant knew controlled substance was involved in conspiracy).

b. "manufacture"

! The definition of "manufacture" is found at 21 U.S.C. § 802(15).

! A separate statute makes it illegal to open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance. *See* 21 U.S.C. § 856.

! Another statute makes it illegal to endanger human life while illegally manufacturing a controlled substance. *See* 21 U.S.C. § 858.

c. "distribute"

! The definition of "distribute" is found at 21 U.S.C. § 802(11).

! Sharing drugs with another constitutes "distribution." *See United States v. Washington*, 41 F.3d 917 (4th Cir. 1994).

d. "dispense"

! The definition of "dispense" is found at 21 U.S.C. § 802(11).

e. "possess"

! Awareness of the existence and location of the drugs is not enough to establish possession. *See United States v. Jenkins*, 90 F.3d 814 (3rd Cir. 1996); *United States v. Vasquez-Chan*, 978 F.2d 546 (9th Cir. 1992).

! The government must prove ownership or dominion or control over either the controlled substance or the premises where they were found: the government must link the defendant to the narcotics. *See United States v. Benbrook*, 40 F.3d 88 (5th Cir. 1994); *United States v. Brown*, 3 F.3d 673 (3rd Cir.), *cert. denied*, 510 U.S. 1017 (1993) (evidence that defendant lived at house, had some control over house, and knew of presence of narcotics insufficient to support inference that defendant had dominion and control over drugs); *United States v. Glasgow*, 658 F.2d 1036 (5th Cir. 1981) (evidence that defendant's personal papers were found in residence where narcotics were found insufficient to prove ownership, dominion, or control over residence).

! Where a passenger in a vehicle is alleged to have possessed narcotics found in the vehicle, the government must prove that the passenger had the power to control either the narcotics or the vehicle. *See United States v. Rosas-Fuentes*, 970 F.2d 1379 (5th Cir. 1992); *United States v. Moreno-Hinojosa*, 804 F.2d 845 (5th Cir. 1986); *United States v. MacPherson*, 664 F.2d 69 (5th Cir. 1981).

! Where possession is alleged based on drugs found in a hidden compartment, control of the vehicle alone is insufficient to support a conviction: there must be other circumstances which show a consciousness of guilt. *See United States v. Olivier Becerril* , 861 F.2d 424 (5th Cir. 1988); *United States v. Richardson*, 848 F.2d 509 (5th Cir. 1988). ***PRACTICE TIP:*** In hidden compartment cases, the defense should request a jury instruction on the need for evidence beyond control of the vehicle.

f. "controlled substance"

! A controlled substance is any drug, substance, or "immediate precursor," *see* 21 U.S.C. § 802(23), listed on the five controlled substances schedules found in 21 U.S.C. §§ 812(a) and 812(b). *See* 21 U.S.C. § 802(6).

! Schedules I and II include opiates, cocaine, and hallucinogens. Schedule III includes amphetamines and barbiturates.

! The Attorney General is authorized to add substances to the schedules and to change the classification of substances already listed on the schedules. *See* 21 U.S.C. § 811(a).

g. "counterfeit substance"

! The definition of "counterfeit substance" is found at 21 U.S.C. § 802(7). Generally speaking, a "counterfeit substance" is a controlled substance which bears a trademark, trade name, or other identifying mark of a manufacturer without the permission of the manufacturer and which is thereby falsely represented to be the product of the manufacturer.

2. Other Offenses Under § 841

a. Offenses Involving Listed Chemicals

! It is illegal to possess a listed chemical with intent to manufacture a controlled substance. *See* 21 U.S.C. § 841(d)(1). It is also illegal to possess or distribute a listed chemical while knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance. *See* 21 U.S.C. § 841(d)(2).

! "Listed chemicals" are broken down into two lists. *See* 21 U.S.C. § 802(33). The "list I chemicals" are enumerated at 21 U.S.C. § 802(34). The "list II chemicals" are enumerated at 21 U.S.C. § 802(35).

! The Attorney General may add other chemicals to list I and II. *See* 21 U.S.C. §§ 802(34), 802(35).

b. Boobytraps on Federal Property

! It is illegal to assemble, maintain, place, or cause to be place a booby trap on Federal property where a controlled substance is being manufactured. *See* 21 U.S.C. § 841(e).

3. Simple Possession

! It is illegal for any person to knowingly or intentionally possess a controlled substance unless it was obtained pursuant to a valid prescription. *See* 21 U.S.C. § 844(a).

a. Civil Penalty For First Time Offenders

! If a first time offender possesses an amount of the controlled substance that is specified by the Attorney General to be a "personal use amount," the Attorney General may assess a civil penalty up to $10,000.00 on that offender as an alternative to a prison sentence. *See* 21 U.S.C. § 844a.

! There is a mechanism to expunge the record of the imposition of the civil penalty. *See* 21 U.S.C. § 844a(j).

4. Distribution to Person Under Age 21

! 21 U.S.C. § 859 provides for increased penalties for any defendant who is 18 years old or older and who distributes a controlled substance to a person who is under 21 years old.

! To prove a case under section 859, the government need not prove that the defendant knew that the recipient was under 21. *See United States v. Pruitt*, 763 F.2d 1256 (11th Cir. 1985), *cert. denied*, 474 U.S. 1084 (1986).

5. Distribution to a Pregnant Individual

! 21 U.S.C. § 861(f) provides for increased penalties for distribution to a pregnant individual.

6. Employment of Persons Under Age 18

! 21 U.S.C. §§ 861(a) and 861 (b) provide for increased penalties for any person who employs, hires, uses, persuades, induces, entices, or coerces another person under the age of 18 to violate any of the narcotics laws or to avoid detection or apprehension for any narcotics offense.

! A defendant who uses a person under age 18 to distribute to another person who is under age 18 is subject to an additional penalty. *See* 21 U.S.C. § 861(d)(1).

! A defendant who uses a person under age 14 to commit an offense is subject to an additional penalty. *See* 21 U.S.C. § 861(d)(2).

! To prove a case under section 861, the government need not prove that the defendant knew that the "employee" was under the age of 18. *See United States v. Williams*, 922 F.2d 737 (11th Cir.), *cert. denied*, 502 U.S. 892 (1991).

7. Distribution In or Near a School

! 21 U.S.C. § 860 provides for increased penalties for any violation of section 841(a)(1) (manufacture, distribute, or dispense or possession with intent) or section 856 (opening or maintaining a place for the manufacture, distribution, or use of a controlled substance) committed (1) within 1,000 feet of a public or private elementary school, vocational school, secondary school, college, junior college, or university; (2) within 1,000 feet of a play ground or housing facility owned by a public housing authority; or (3) within 100 feet of a public or private youth center, public swimming pool, or video arcade facility.

! To prove a case under section 860, the government need not prove that the defendant knew that the illicit activity was taking place within one of the listed boundaries. *See United States v. Lewin*, 900 F.2d 145 (8th Cir. 1990).

C. THE "PHONE COUNT"

"It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection." 21 U.S.C. § 843(b).

1. Elements

a. "use"

! The use may be very slight. For example, in *United States v. McIntyre*, 836 F.2d 467 (10th Cir. 1987), the court held that a telephone call which resulted in a busy signal was sufficient to establish "use" because the busy signal let the defendant know that his source was home.

! It does not matter if the defendant makes the call or receives it. *See United States v. Davis*, 929 F.2d 554 (10th Cir. 1991).

b. "communication facility"

! A "communication facility" is defined as "any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication." 21 U.S.C. § 843(b).

c. "committing, causing, or facilitating"

! For purposes of section 843, the use of the communication facility "facilitates" the offense if it makes it easier or less difficult, or if it assists or aids. *See United States v. Gonzalez-Rodriguez*, 966 F.2d 918 (5th Cir. 1992).

! However, "facilitate" does not include using a phone to inquire as to the status of a drug transaction. *See United States v. Rivera*, 775 F.2d 1559, 1562 (11th Cir. 1985), *cert. denied*, 475 U.S. 1051 (1986). Also, the Fifth Circuit has held that informing a co-conspirator about the arrest of another co-conspirator and the seizure of drugs is insufficient alone to establish facilitation. *See United States v. Gonzalez -Rodriguez*, 966 F.2d 918 (5th Cir. 1992).

d. "a felony"

! If the phone is used to obtain drugs for personal use, *see* 21 U.S.C. § 844(a), this statute is not violated. *See United States v. Baggett*, 890 F.2d 1095 (10th Cir. 1989).

! The underlying offense need not be separately charged and must only be proven by a preponderance of the evidence. *See United States v. Davis*, 929 F.2d 554 (10th Cir. 1991).

D. CONSPIRACY

! "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846.

! ***PRACTICE TIP:*** Conspiracy to possess is a lesser included offense of conspiracy to possess with intent to distribute. Failure to instruct the jury on the lesser included if it is supported by the evidence

is reversible error. *See United States v. Baker*, 985 F.2d 1248 (4th Cir. 1993), *cert. denied sub nom. Blackwell v. United States*, 510 U.S. 1040 (1994).

1. Elements

See United States v. Fierro, 38 F.3d 761, 768 (5th Cir.), *cert. denied*, 115 S. Ct. 1431 (1995); *United States v. Jackson*, 700 F.2d 181, 185 (5th Cir.), *cert. denied sub nom. Hicks v. United States*, 464 U.S. 842 (1983). To convict a defendant of a drug conspiracy, the government must prove:

a. "agreement"

! The government must prove that an agreement existed between two or more people to violate narcotics laws, i.e., that a conspiracy existed.

! The agreement must be between at least two non-governmental agents: a government agent or undercover informant cannot be a party to a conspiracy. *See United States v. Goff*, 847 F.2d 149 (5th Cir.), *cert. denied sub nom. Kuntze v. United States*, 488 U.S. 932 (1988).

! There must be a separate agreement for each conspiracy conviction the government seeks against an individual defendant. *See United States v. Colunga*, 786 F.2d 655 (5th Cir. 1986), *cert. denied*, 484 U.S. 857 (1987).

! An agreement may be too speculative or conditional to support a conviction. *See United States v. Jones*, 765 F.2d 996 (11th Cir. 1985).

! A mere buyer-seller relationship is insufficient to establish an agreement. *See United States v. Goines*, 988 F.2d 750 (7th Cir.), *cert. denied*, 510 U.S. 887 (1993). Likewise, helping a willing buyer locate a willing seller alone is insufficient to establish an agreement. *See United States v. Lennick*, 18 F.3d 814, 819 (9th Cir.), *cert. denied*, 513 U.S. 856 (1994). *United States v. Tyler*, 758 F.2d 66 (2nd Cir. 1985).

! ***PRACTICE TIP:*** A defendant may be entitled to a "multiple conspiracy charge" which instructs the jury to acquit if it finds that the defendant was not a member of the indicted conspiracy, but was instead a member of another conspiracy. *See United States v. Edwards*, 69 F.3d 419 (10th Cir. 1995), *cert. denied sub nom. Chaplin v. United States*, 116 S. Ct. 2497 (1996). Failure to give the "multiple conspiracy charge" will not be reversible error unless the variance is shown to affect the defendant's substantial rights. *See United States v. Guerra-Marez*, 928 F.2d 665 (5th Cir.), *cert. denied*, 502 U.S. 917 (1991).

b. "knowledge"

! The government must prove that the defendant knew of the conspiracy.

! Knowledge will not be lightly inferred. *See United States v. Rosas-Fuentes*, 970 F.2d 1379 (5th Cir. 1992). For example, in *United States v. Gardea Carrasco*, 830 F.2d 41 (5th Cir. 1987), the court reversed a conviction where the defendant loaded

suitcases of marijuana onto an airplane, but was unaware of conversations concerning the conspiracy or of the contents of the suitcase.

c. "participation"

! The government must prove that the defendant voluntarily participated in the conspiracy.

! While the government must prove that the defendant "participated," section 846 does **NOT** require proof of an overt act in furtherance of the conspiracy. *See United States v. Shabani*, 513 U.S. 10, 115 S. Ct. 382, 130 L. Ed. 2d 225 (1994); *United States v. Hernandez*, 896 F.2d 513 (11th Cir.), *cert. denied*, 498 U.S. 858 (1990).

! Mere association with a co-conspirator or presence at the scene of a crime alone are not sufficient to support a conviction for conspiracy. *See United States v. Bermea*, 30 F.3d 1539 (5th Cir. 1994), *cert. denied sub nom. Garza v. United States*, 115 S. Ct. 1825 (1995); *United States v. Jackson*, 700 F.2d 181 (5th Cir.), *cert. denied sub nom. Hicks v. United States*, 464 U.S. 842 (1983).

2. Vicarious Liability

! A conspirator is responsible for offenses committed by co-conspirators if he was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of or as a natural consequence of the conspiracy. *See United States v. Elizondo*, 920 F.2d 1308 (7th Cir. 1990).

3. Hearsay

! Statements made by a co-conspirator during the course and in furtherance of the conspiracy are not hearsay and are admissible as admissions of a party-opponent. *See* FED. R. EVID. 801(d)(2)(E). The determination of whether a particular statement fits within this rule is a preliminary question of fact for the court. *See* FED. R. EVID. 104; *Bourjaily v. United States*, 483 U.S. 171, 175, 107 S. Ct. 2775, 2778, 97 L. Ed. 2d 144, ___ (1987). The government must prove that the statement was made by a co-conspirator during the course of and in furtherance of the conspiracy by a preponderance of the evidence. *See Bourjaily*, 483 U.S. at 181.

! The defendant is entitled, if he or she so requests, to a hearing outside the presence of the jury to determine if the evidence is admissible under Rule 801(d)(2)(E). *See United States v. James*, 590 F.2d 575, 579-80 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979).

! Rule 801(d)(2)(E) applies even if a conspiracy has not been charged. *See Joyner v. United States*, 547 F.2d 1199, 1202 (4th Cir. 1977).

4. Penalties

! The Fifth Circuit and four other circuits have held that if a jury returns a general verdict of guilt to a charge that a conspiracy covered many different drugs, the defendant must be sentenced as if the conspiracy only distributed the drug carrying the lowest penalty. *See United States v. Bounds*, 985 F.2d 188, 194-95 (5th Cir.), *cert. denied*, 510 U.S. 845 (1993).

5. Entrapment

! The Fifth Circuit has recently granted rehearing *en banc* in *United States v. Knox*, 112 F.3d 802 (5th Cir. 1997), in which the court held that unless the defendant had the necessary skills to commit the offense prior to government agents becoming involved, entrapment as a matter of law is established.

E. CONTINUING CRIMINAL ENTERPRISE

In an attempt to get the "top brass" in big drug organizations, *see United States v. Markowski*, 772 F.2d 358 (7th Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986), Congress came up with the Continuing Criminal Enterprise provision found at 21 U.S.C. § 848.

PRACTICE TIP: One of the main considerations for a defense attorney in a CCE case is the draconian penalty provisions. A first offense carries a mandatory minimum sentence of 20 years. *See* 21 U.S.C. § 848(a). A defendant who is a "principal administrator, organizer, or leader" of an organization that trafficked in a large amount of drugs or made at least $10 million in one year faces a mandatory life sentence. *See* 21 U.S.C. § 848(b). Moreover, CCE has a death penalty provision for any defendant who, in furtherance of a continuing criminal enterprise, "intentionally kills or counsels, commands, indues, procures, or causes the intentional killing of an individual." 21 U.S.C. § 848(e). Finally, a defendant convicted of a CCE offense is NOT eligible for a suspended sentence and probation. *See* 21 U.S.C. § 848(d).

1. Elements

The government must prove: (a) the defendant committed a predicate offense violating a specific drug law, (b) as a part of a "continuing series" of drug violations, (c) that occurred while the defendant was acting in concert with five or more other people, (d) to whom the defendant occupied the position of an organizer or manager, and (e) from which the defendant obtained substantial income or resources. *See* 21 U.S.C. §848(c).

a. predicate offense

! The government must prove a violation of any of the drug offenses listed in Title 21. *See* 21 U.S.C. § 848(c).

! While conspiracy is a lesser included offense of CCE, *see United States v. Devine*, 934 F.2d 1325, 1342 (5th Cir.), *cert. denied sub nom. Barker v. United States*, 502 U.S. 929 (1991), it may be used as a predicate offense. *See United States v. Hicks*, 945 F.2d 107 (5th Cir. 1991); *United States v. Young*, 745 F.2d 733, 748-52 (2nd Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

! ***PRACTICE TIP:*** Try to tie the government down through the use of a motion for a bill of particulars to specific, identifiable predicate acts. Jury reliance on an infirm predicate may provide a basis for appeal.

b. "continuing series"

! Evidence of at least three or more predicate acts is required to prove that the predicate act upon which the CCE charge is based is part of a "continuing series." *See United States v. Brantley*, 733 F.2d 1429 (11th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985).

! The government need not identify the predicate acts which make up the "continuing series" in the indictment or in a bill of particulars. *See United States v. Simmons*, 923 F.2d 934 (2nd Cir.), *cert. denied*, 500 U.S. 919 (1991).

! ***PRACTICE TIP:*** The defendant is entitled to a jury instruction on the need for unanimous agreement on the acts that constitute the "continuing series." *See United States v. Echeverri*, 854 F.2d 638 (3rd Cir. 1988).

c. "five or more other persons"

! The government does not have to prove that the relationships with the five other people existed at the same time or that the relationships were of the same type. *See United States v. Bolts*, 558 F.2d 316, 320-21 (5th Cir.), *cert. denied*, 439 U.S. 898 (1978).

! The jury does not have to unanimously agree as to the identities of the five subordinates involved. *See United States v. Moorman*, 944 F.2d 801 (11th Cir. 1991), *cert. denied sub nom. Bowers v. United States*, 503 U.S. 1007 (1992).

d. "organizer or manager"

! The government does not have to prove that the defendant "directly" or "personally" supervised or managed the five subordinates. *See United States v. Ricks*, 882 F.2d 885, 891 (4th Cir. 1989), *cert. denied sub nom. King v. United States*, 493 U.S. 1047 (1990).

e. "substantial income or resources"

! There is no minimum required amount for the government to prove "substantial" income or resources, but, "substantial" is not intended to refer to trivial amounts derived from occasional drug sales. *See United States v. Walker*, 912 F. Supp. 646 (N.D.N.Y. 1996).

! The government may prove "substantial income or resources" by direct evidence of revenues realized and resources accumulated, or by circumstantial evidence such as defendant's position in the organization and the volume of drugs handled by the organization. *See United States v. Hahn*, 17 F.3d 502 (1st Cir. 1994).

! The government does not have to prove that the substantial income was derived from the concerted activity of the five or more other persons. *See United States v. Rogers*, 89 F.3d 1326 (7th Cir.), *cert. denied*, 117 S. Ct. 495 (1996).

2. Double Jeopardy

! Conspiracy is a lesser included offense of CCE. *See United States v. Devine*, 934 F.2d 1325, 1342 (5th Cir.), *cert. denied sub nom. Barker v. United States*, 502 U.S. 929 (1991). Therefore, double jeopardy prohibits a defendant from being convicted and sentenced for both conspiracy and CCE if the same agreement is involved. *See United States v. Neal*, 27 F.3d 1035, 1054 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1165 (1995).

! However, double jeopardy does NOT prohibit conviction for other predicate offenses, such as distribution, along with conviction for CCE. *See Garrett v. United States*, 471 U.S. 773, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985).

F. INVESTMENT OF ILLICIT DRUG PROFITS

! "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a violation of [any felony criminal provision of Title 21] to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce." 21 U.S.C. § 854(a).

! Buying or selling securities on the open market without the intention of controlling the company is not illegal under section 854. *See* 21 U.S.C. § 854(a).

! "Enterprise" means "any individual, partnership, corporation, association, or other legal entity and any union or group of individuals associated in fact though not a legal entity." 21 U.S.C. § 854(c).

! There is not much case law addressing substantive issues arising under section 854.

III. MONEY LAUNDERING

A. OVERVIEW

This outline will address money laundering provisions found at 18 U.S.C. §§ 1956 and 1957.

B. LAUNDERING OF MONETARY INSTRUMENTS (18 U.S.C. § 1956)

! 18 U.S.C. § 1956(a) enumerates three crimes: conducting domestic financial transactions, international transportation of monetary instruments or funds, and transactions involving funds "represented" to be proceeds of illicit activity.

! The definitions of terms used in section 1956 are found at 18 U.S.C. § 1956(c).

1. Conducting Domestic Financial Transactions

! 18 U.S.C. § 1956(a)(1) criminalizes conducting or attempting to conduct a financial transaction involving the proceeds of illicit activity based on the defendant's particular intent or knowledge.

a. elements

i. *"conducts or attempts to conduct"*

! The government must prove that the defendant initiated, concluded, or participated in the initiating or concluding of a transaction. *See* 18 U.S.C. § 1956(c)(2); *United States v. Fuller*, 974 F.2d 1474 (5th Cir. 1992), *cert. denied sub nom. Foster v. United States*, 510 U.S. 835 (1993).

ii. *"financial transaction"*

(a) "transaction"

! "Transaction" has a very broad definition including "purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected." 18 U.S.C. § 1956(c)(3).

(b) "financial transaction"

! "Financial transaction" has a narrower definition, *see* 18 U.S.C. § 1956(c)(4), and is limited to transactions which affect interstate or foreign commerce and involve:

(1) the movement of funds by wire or other means,

! Mere "transportation" of drug proceeds does not establish a "financial transaction": some type of "disposition" of the proceeds is required. *See United States v. Puig-Infante*, 19 F.3d 929, 938 (5th Cir.), *cert. denied*, 513 U.S. 864 (1994).

! Mere possession of drug proceeds does not establish a "financial transaction." *See United States v. Ramirez*, 954 F.2d 1035, 1040 (5th Cir.), *cert. denied*, 505 U.S. 1211 (1992)..

! However, the mailing of drug proceeds has been held to constitute a "financial transaction." *See United States v. Hamilton*, 931 F.2d 1046 (5th Cir. 1991).

(2) one or more monetary instruments,

! "Monetary instrument" means coin or currency of any country, personal checks, bank checks or money orders, travelers' checks, securities, or any other negotiable instrument which in any way affects interstate or foreign commerce. *See* 18 U.S.C. § 1956(c)(5).

(3) the transfer of title to any real property, vehicle, vessel, or aircraft, or,

(4) the use of a financial institution.

! "Financial institution" includes banks, thrifts, registered brokers or dealers of securities, currency exchanges, insurance companies, credit card companies, pawnbrokers, investment bankers, precious metals dealers, loan and finance companies, casinos, the Postal Service, and any other governmental agency or business designated by the Secretary of the Treasury pursuant to 31 CFR § 103.11. *See* 18 U.S.C. § 1956(c)(6); 31 U.S.C. § 5312(a)(2).

iii. *"proceeds of specified unlawful activity"*

! The government must prove that the defendant knew that the property involved in the transaction was derived from "some form of unlawful activity" **and** that the proceeds were, in fact, derived from "specified unlawful activity." *See* 18 U.S.C. § 1956(a)(1).

! "Knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property represented the proceeds of a *felony* offense. *See* 18 U.S.C. § 1956(c)(1).

! The crimes that constitute "specified unlawful activity" are listed at 18 U.S.C. § 1956(c)(7). Section 1956(c)(7) does not include every state or federal crime, but it does include most of the crimes commonly associated with organized crime and narcotics trafficking, certain financial crimes, and all of the RICO predicate offenses listed at 18 U.S.C. § 1961(1).

! It is sufficient for the government to prove that the transaction involved disbursements from commingled sources. *See United States v. Garcia*, 37 F.3d 1359 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1699 (1995).

! The statute requires that the funds in question have already attained the status of "unlawful proceeds" at the time of the money laundering transaction. Therefore, an issue can arise as to when the specified unlawful activity ended and the property actually became "proceeds." *See United States v. Allen*, 76 F.3d 1348 (5th Cir. 1996) (focusing on the timing of the charged wire transfer).

! ***PRACTICE TIP:*** In a case involving a complex and ongoing operation, the government may need to use individuals from within the organization to prove that the funds had obtained the status of "unlawful proceeds" at the time of the transaction.

iv. *intent or knowledge*

! Section 1956(a)(1) includes four separate offenses based on the specific intent or knowledge of the defendant.

(a) with the intent to promote the carrying on of specified unlawful activity (18 U.S.C. § 1956(a)(1)(A)(i)), or,

! Evidence that the transaction lends an aura of legitimacy to criminal activities is sufficient to establish intent to promote. *See United States v. Savage*, 67 F.3d 1435 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 964 (1996).

(b) with intent to engage in tax evasion or tax fraud (18 U.S.C. § 1956(a)(1)(A)(ii), or,

(c) with knowledge that the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds (18 U.S.C. § 1956(a)(1)(B)(i)), or,

! The government need not prove that the defendant "removed all trace of his involvement with the money" by means of the charged transaction. *See United States v. Tencer*, 107 F.3d 1120, 1129 (5th Cir. 1997).

(d) with knowledge that the transaction is designed in whole or in part to avoid a reporting requirement (18 U.S.C. § 1956(a)(1)(B)(ii)).

! ***PRACTICE TIP:*** If the defendant claims that he or she did not know that the transaction was related to illicit activity as proscribed by the statute, the government will be entitled to a "willful blindness" instruction if it is supported by the evidence. *See United States v. Jensen*, 69 F.3d 906, 912 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1571 (1996).

2. International Transportation of Monetary Instruments or Funds

! 18 U.S.C. § 1956(a)(2) criminalizes transporting monetary instruments into the United States from another country or vice versa based on the defendant's particular knowledge or intent.

a. elements

i. *"transports, transmits, or transfers, or attempts to transport, transmit, or transfer"*

! "Transport" includes wire transfers as well as physical conveyances of money. *See United States v. Piervinanzi*, 23 F.3d 670 (2nd Cir.), *cert. denied*, 513 U.S. 904 (1994); *United States v. Monroe*, 943 F.2d 1007 (9th Cir. 1991), *cert. denied*, 503 U.S. 917 (1992).

ii. *"monetary instrument or funds"*

! "Monetary instrument" means coin or currency of any country, personal checks, bank checks or money orders, travelers' checks, securities, or any other negotiable instrument which in any way affects interstate or foreign commerce. *See* 18 U.S.C. § 1956(c)(5).

iii. *"from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States"*

! In *United States v. Harris*, 79 F.3d 223 (2nd Cir. 1996), the Defendant argued that his transactions had been domestic. The court affirmed the conviction holding the transfer of funds from New York to Connecticut and then from Connecticut to Switzerland constituted one event conducted in two stages with each stage being an integral part of the single plan.

iv. *intent or knowledge*

! Much the same as with section 1956(a)(1), section 1956(a)(2) includes three separate offenses based on the specific intent or knowledge of the defendant.

(a) with the intent to promote the carrying on of specified unlawful activity (18 U.S.C. § 1956(a)(2)(A)), or,

! Note that the government does not have to prove that the funds or monetary instrument represent the proceeds of unlawful activity for conviction under section 1956(a)(2)(A). For example, in *United States v. Hamilton*, 931 F.2d 1046, 1052 (5th Cir. 1991), the court held that the transfer of legitimate funds for purpose of expanding a drug enterprise would violate this subsection.

! Consider the following: a wire transfer of clean funds from Dallas to Mexico City for the purchase of narcotics would violate section 1956(a)(2)(A), but the transfer of the same funds from Dallas to Miami for the same purpose would not violate section 1956(a)(1)(A) because the domestic transfer would not involve criminal proceeds.

(b) knowing that the funds represent proceeds of some form of unlawful activity and knowing that such transportation is designed to:

(1) conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity (18 U.S.C. § 1956(a)(2)(B)(i)), or,

(2) avoid a transaction reporting requirement (18 U.S.C. § 1956(a)(2)(B)(ii)).

! The "knowing" requirement under this section can be satisfied even if the property is not, in fact, proceeds of unlawful activity so long as the defendant believes that the property is proceeds.

! "Knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property represented the proceeds of a *felony* offense. *See* 18 U.S.C. § 1956(c)(1).

! ***PRACTICE TIP:*** If the defendant claims that he or she did not know that the transaction was related to illicit activity as proscribed by the statute, the government will be entitled to a "willful blindness" instruction if it is supported by the evidence. *See United States v. Jensen*, 69 F.3d 906, 912 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1571 (1996).

3. Transactions Involving Funds "Represented" To Be Proceeds: Undercover "Sting" Operations

! As was mentioned earlier in this outline, subsection 1956(a)(1) requires proof that the property involved in the transaction be, in fact, the proceeds of specified unlawful activity. *See* 18 U.S.C. § 1956(a)(1). Therefore, the government would not be able to convict a defendant of a 1956(a)(1) violation if the property involved in the transaction was "sting" money provided by an undercover agent or informant during a "sting" operation.

! Subsection 1956(a)(3) was added to allow the government to prosecute defendants who agree to launder property provided to them by undercover agents and informants.

a. elements

i. *conducts or attempts to conduct a financial transaction*

! See the discussion at section III(B)(1)(a)(i) and (ii) above.

ii. *involving "property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity"*

! "Represented" means "any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official." *See* 18 U.S.C. § 1956(a)(3).

! For example, if an undercover agent gives money to the defendant and says "this is drug money," and the defendant uses the money in a transaction with one of the required intents, he is guilty of an offense under this section.

! Note, however, that it is not an offense under this section if the property is actually proceeds or facilitating property in absence of a proper representation by a law enforcement officer. This scenario would be covered by subsection 1956(a)(1).

iii. ***with intent to***

(a) "promote the carrying on of specified unlawful activity," or,

(b) "conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity," or,

(c) "avoid a transaction reporting requirement."

! Just as with subsections 1956(a)(1) and (a)(2), subsection (a)(3) includes three separate offenses based on the specific intent of the defendant.

! Note, however, that the specific intent requirement of subsection 1956(a)(3) is more stringent than the "have knowledge" requirement of subsection 1956(a)(1).

4. Conspiracy

! "Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." 18 U.S.C. § 1956(h).

C. ENGAGING IN MONETARY TRANSACTIONS IN PROPERTY DERIVED FROM SPECIFIED UNLAWFUL ACTIVITY (18 U.S.C. § 1957)

! 18 U.S.C. § 1957(a) prohibits what is commonly referred to as "financial institution" or "receiving and depositing" money laundering.

! Section 1957 prohibits knowingly engaging in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity. *See* 18 U.S.C. § 1957(a).

1. Elements

a. monetary transaction exceeding $10,000

! "Monetary transaction" includes the deposit, withdrawal, transfer, or exchange of funds or a "monetary instrument" by, through, or to a "financial institution."

i. *"monetary instrument"*

! "Monetary instrument" means coin or currency of any country, personal checks, bank checks or money orders, travelers' checks, securities, or any other negotiable instrument which in any way affects interstate or foreign commerce. *See* 18 U.S.C. § 1957(f)(1); 18 U.S.C. § 1956(c)(5).

ii. *"financial institution"*

! "Financial institution" includes banks, thrifts, registered brokers or dealers of securities, currency exchanges, insurance companies, credit card companies, pawnbrokers, investment bankers, precious metals dealers, loan and finance companies, casinos, the Postal Service, and any other governmental agency or business designated by the Secretary of the Treasury pursuant to 31 CFR § 103.11. *See* 18 U.S.C. § 1957(f)(1); 18 U.S.C. § 1956(c)(6); 31 U.S.C. § 5312(a)(2).

! ***NOTE--ATTORNEY'S FEES:*** "Monetary transaction" does NOT include "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment." 18 U.S.C. § 1957(f)(1). However, in light of the Supreme Court's holding that the Sixth Amendment does not guarantee a defendant the right to use criminally derived property to obtain the attorney of his choice, *see Caplin & Drysdale v. United States*, 491 U.S., 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989) and *United States v. Monsanto*, 491 U.S. 600, 109 S. Ct. 2657, 105 L. Ed. 2d 512 (1989), the government can argue that there is no situation in which the payment of legal fees with criminally derived funds is "necessary" to preserve the defendant's Sixth Amendment rights.

b. knowledge

! Section 1957 only requires the defendant to know that the property involved in the financial transaction was derived from "a criminal offense." *See* 18 U.S.C. § 1957(c); 18 U.S.C. § 1957(f)(2). This is different from section 1956 which requires the government to prove that the defendant knew that the property involved in the financial transaction was derived from a *felony* offense. *See* 18 U.S.C. § 1956(c)(1).

! The government does not have to prove that the defendant knew that his conduct was illegal because the statute does not have a "willfulness" requirement. *See United States v. Sokolow*, 81 F.3d 397 (3rd. Cir. 1996).

c. property "derived from specified unlawful activity"

! The definition is identical to that found in subsection 1956(a)(1) because subsection 1957(f)(3) specifically states that "specified unlawful activity" has the same definition given to it in section 1956.

! The crimes that constitute "specified unlawful activity" are listed at 18 U.S.C. § 1956(c)(7). Section 1956(c)(7) does not include every state or federal crime, but it does include most of the crimes commonly associated with organized crime and narcotics trafficking, certain financial crimes, and all of the RICO predicate offenses listed at 18 U.S.C. § 1961(1).

! It is sufficient for the government to prove that the transaction involved disbursements from commingled sources. *See United States v. Garcia*, 37 F.3d 1359 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1699 (1995).

! The statute requires that the funds in question have already attained the status of "unlawful proceeds" at the time of the money laundering transaction. Therefore, an issue can arise as to when the specified unlawful activity ended and the property actually became "proceeds." *See United States v. Allen*, 76 F.3d 1348 (5th Cir. 1996) (focusing on the timing of the charged wire transfer);

! ***PRACTICE TIP:*** In a case involving a complex and ongoing operation, the government may need to use individuals from within the organization to prove that the funds had obtained the status of "unlawful proceeds" at the time of the transaction.

! With regard to the $10,000 requirement, the trial court should instruct the jury that although not all of the property at issue must be "criminally derived," at least $10,000 worth of it must be. *See United States v. Adams*, 74 F.3d 1093 (11th Cir. 1996).

d. location of offense/nationality of defendant

! Section 1957(a) only applies to offenses committed by "United States persons" and/or offenses committed within the United States or its maritime jurisdiction. *See* 18 U.S.C. § 1957(a) and 1957(d).

! "United States person" is defined at 18 U.S.C. § 3077. However, individuals described in section 3077(2)(D) are not covered by section 1957(a).

2. Conspiracy

! "Any person who conspires to commit any offense defined in . . . section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." 18 U.S.C. § 1956(h).

APPENDIX:

UNITED STATES ATTORNEY'S MANUAL

TITLE 9, CHAPTER 105

MONEY LAUNDERING