NO.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

XXXXXX YYYYY,
Defendant-Appellant.

_____

Appeal from the United States District Court
for the Eastern District of Texas

_____

BRIEF OF DEFENDANT-APPELLANT

_____

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XXXXXX YYYYY

CERTIFICATE OF INTERESTED PERSONS

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

Trial Judge:	Leonard Davis
Trial Counsel for Government:	Arnold Spencer Richard Moore
Appellate Counsel for Government:	Laurel Franklin Coan
Defendant:	XXXXXX YYYYY
Trial Counsel for Defendant:	Thomas Mills, Jr. Mills & Williams Gerald J. Smith, Sr. Smith & D'Antonio
Sentencing Counsel for Defendant:	F. Clinton Broden Broden & Mickelsen
Appellate Counsel for Defendant:	F. Clinton Broden Broden & Mickelsen
Co-Defendant:	Tony Harris
Trial Counsel for Co-Defendant:	Gregory Walden Holmes & Moore
Appellate Counsel for Co-Defendant:	Gregory Walden Holmes & Moore

/s/ F. Clinton Broden
F. Clinton Broden

STATEMENT REGARDING ORAL ARGUMENT

This is a unique money laundering-concealment prosecution in which the monies allegedly laundered are the monies actually exchanged by the alleged drug traffickers, often in their own names, to pay for the drugs during the course of the drug trafficking offense itself. Making it even more unique, the defendants were not charged with any of the alleged underlying drug trafficking offenses.

Given the unique nature of a prosecution in which the alleged laundering does not "follow in time" the alleged drug trafficking offense and where the alleged laundering often involves transactions in the names of the alleged drug traffickers themselves, several issues arise regarding the sufficiency of the evidence as well as issues regarding the applicability of the Supreme Court's *Santos* decision to this case. Consequently, Mr. YYYYY submits that the court should grant oral argument to resolve these unique issues.

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STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291 as an appeal from a final judgment entered by the United States District Court for the Eastern District of Texas. Furthermore, jurisdiction to review the sentence imposed in this case is invoked pursuant to 18 U.S.C. § 3742(a) as an appeal of a sentence imposed under the Sentencing Reform Act of 1984.

STATEMENT OF THE ISSUES

I. Whether the Evidence Was Sufficient to Support the Convictions.

II. Whether the Evidence Was Sufficient to Support a Forfeiture Verdict in the Amount of $1.5 Million.

III. Whether Sender and Recipient Information Contained in Moneygram Type Records Are Admissible as Business Records Where the Person Supplying the Information Has No "Business Duty to the Business.

IV. Whether a Trial Court Errs When it Refuses to Charge a Jury That "Proceeds" Means "Profits" in Accordance with *United States v. Santos* 553 U.S. 507 (2008) Where the Monies Allegedly Laundered Were the Transfers of "Proceeds" among the Alleged Drug Trafficking Confederates Themselves in Payment of the Drugs That Were Part of the Specified Unlawful Activity.

V. Whether The District Court Erred in Determining the "Value of Funds Laundered" for the Purpose of Determining the Sentencing Guidelines and Setting the Sentence.

STATEMENT OF THE CASE

I. Proceedings Below

XXXXXX YYYYY was charged by indictment with one count of Conspiracy to Launder Monetary Instruments, in violation of 18 U.S.C. § 1956(h), and two counts of Money Laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(I). *See* Excerpts at 3.[1] A trial was held on March 16-17, 2010 and March 19, 2010. On March 19, 2010, the jury found Mr. YYYYY guilty of all three counts. *See* Excerpts at 4.[2]

Mr. YYYYY was sentenced, pursuant to a judgment entered on November 23, 2010, to 252 months imprisonment and three years supervised release, and he was ordered to pay a $300 special assessment. *See* Excerpts at 5.

On November 29, 2010, Mr. YYYYY filed a timely notice of appeal. *See* Excerpts at 2.

II. Statement of the Facts

A. Trial Testimony

James Burroughs lived in California and knew co-defendant Tony Harris. *See*

[1]Citations to the Clerk's Record are to the document number ("Doc.") from the district court's docket sheet. Citations to the Record Excerpts ("Excerpts") are to the tab number. Citations to the trial transcript are to the "Trial Tr." Page Number. Citations to the sentencing transcript are to the "Sentencing Tr." at Page Number.

[2]The indictment also contained a forfeiture allegation. *See* Excerpts at 3. On March 19, 2010, after hearing evidence, the jury awarded the government a $1,500,000 money judgment on the forfeiture allegation and ordered the forfeiture of several seized vehicles and seized currency. *See* Doc. 249.

2/16/10 Trial Tr. at 127. In July 2008, Harris asked Burroughs if he could get him cough syrup containing promethazine and codeine to sell on the streets. *Id*. at 128-29. For approximately a year, Burroughs would sell Harris cough syrup at $200-$225 for a sixteen ounce bottle. Harris told Burroughs that he was reselling the syrup (also known as "drink") in Texas for approximately $400 per bottle. *Id*. at 131-32, 149-50.[3] At some point, Burroughs allowed Harris to have MoneyGram payments sent to California in his name which he would then give to Harris until he became scared because it was "too much money." *Id*. at 136-38. Later, for a three or four month period starting in approximately January 2009, Burroughs gave Harris his bank account information so that Harris could have money wired to Burroughs' account which Burroughs would then withdraw and give to Harris. *Id*. at 139-40, 156.[4] At times, Harris would give some of the money back to Burroughs to satisfy his drug debts to Burroughs. *Id*. at 162.

Steven Baker testified that he met Mr. YYYYY at a truck stop in 2007 and gambled with Mr. YYYYY on that one occasion. *See* 2/16/10 Trial Tr. at 177. Baker claimed that Mr. YYYYY originally won $3,500 and then "beat [him] out of six

[3]Harris also bought prescription medication from Burroughs such as vicodin, lortabs and lorcets. *Id*. at 132-33.

[4]Burroughs made clear that the account was originally set up to assist in administering his aunt's estate and that any monies deposited in his account prior to January 2009 were unrelated to Tony Harris. *Id*. at 156-58. Even some monies flowing through the account after January 2009 were related to the estate and unrelated to Tony Harris. *Id*. at 159, 161.

ounces of crack cocaine." *Id*. at 178-79. Mr. YYYYY allegedly then asked Baker if he could get him "pills" or "syrup." *Id*. at 180. Baker testified that he told Mr. Miler that he could not get him pills but that he did eventually give Mr. YYYYY two gallons of "syrup" a couple of weeks later. *Id*. at 180-182. Baker cooperated in the prosecution of Mr. YYYYY in hopes of receiving a downward departure. *Id*. at 183-190.

Edson Curtis testified that, beginning in 2008, he bought codeine cough syrup from Harris by mail or in person. *See* 2/16/10 Trial Tr. at 208-09. In total he believed he bought seven or eight gallons of cough syrup. *Id*. at 209-10. He would pay $300-$325 per bottle or $2,400 per gallon. *Id*. at 225. He would either pay Harris for the cough syrup by "cash in hand," send it by MoneyGram or depoit money into a Bank of America account whose number was given to him by Harris. *Id*. at 210-11. Significantly, when he sent monies to Harris by MoneyGram for the cough syrup he purchased, Curtis used his real name and Harris's real name. *Id*. at 224-25. Curtis alleged that, in one instance, he was directed to deliver a portion of the cough syrup he received in the mail from Harris to Mr. YYYYY. *Id*. at 213. That delivery also included an envelope that "sounded like pills" which he gave to Mr. YYYYY. *Id*. at 213-14.[5] Curtis admitted that he was testifying in hopes of receiving a downward

[5]Later, Mr. YYYYY expressed an interest in a car Curtis had for sale. Curtis was paid $10,000 in cash by Mr. YYYYY for the car and he was given $9,500 worth of codeine cough

departure in a pending cocaine conspiracy case. *Id*. at 216-17.

Elizabeth McCreg-King testified as the custodian of records for MoneyGram. *See* 2/17/10 Trial Tr. at 14-15. Over defense objection that Ms. McCreg-King's testimony could not qualify the records she was sponsoring as proper business records, Ms. McCreg-King was permitted to sponsor Government's Exhibit 5-A and 5-B which purported to be MoneyGram transactions "related to Mr. Tony Harris and Mr. XXXXXX YYYYY." *Id*. at 11, 15-16. Ms. McCreg-King admitted during a voir dire examination that MoneyGram had no way of knowing whether the persons *sending* monies through MoneyGram gave MoneyGram agents their correct name. *Id*. at 10.[6] During her testimony before the jury, Ms. McCreg-King also testified that the MoneyGram agents did not review identification of MoneyGram *recipients* unless the transaction was over $900. *Id*. at 16-17. Admittedly, after the exhibits in question were admitted, Ms. McCreg-King appeared to contradict herself to say that sender's were also asked for identification if the transaction was over $900. *Id*. at 23-24. In any event, Ms. McCreg-King admitted that she did not know if the individual MoneyGram agents conducting the various transactions actually did review identification in the transactions over $900. *Id*. at 21.

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syrup by Harris for the car. The car was titled in Harris' name. *Id*. at 214-16.

[6]Before the jury, Ms. McCreg-King confirmed that somebody could have sent a MoneyGram and "said he was Tony Harris" but she would have no way of knowing that the person was, in fact, Tony Harris. *Id*. at 20-21.

Ebony Bennet, as part of a plea agreement with the government, testified that Harris approached her while the two lived in Los Angeles, California and asked if he could have "his little brother" deposit money into her bank account. *See* 2/17/10 Trial Tr. at 55-58.[7] According to Bennett, these deposits into her Bank of America account began in or around March or April 2008. *Id*. at 59. Bennet stated that she would withdraw the money the day it was deposited and give it to Harris. *Id*. at 61. Bennett testified that "sporadic[ally]" Harris also had her pick up money for him at MoneyGram locations. *Id*. at 64-6, 765. According to Bennet, some of these monies were wired from a person claiming to be "XXXXXX YYYYY." *Id*. at 65.

Timothy Taylor also testified as part of a plea agreement and alleged that, in mid 2007 and almost all of 2008, Harris was supplying him codeine cough syrup that he would resell. *See* 2/17/10 Trial Tr. at 83-84, 87-89. The cough syrup would often be sent through UPS. *Id*. at 88. Taylor testified that he would often pay Harris by sending MoneyGrams and sometimes Harris would come to his home in Texas to pick the money up. *Id*. at 89. Taylor knew Mr. YYYYY as "Pee We." *Id*. at 90. One time, Harris sent Taylor three gallons of couch syrup by UPS and he gave two of the gallons to Mr. YYYYY at Harris's direction. *Id*. at 91-92. Taylor claimed that Mr. YYYYY paid him $2,000 for the two gallons and he (Taylor) put it with his money

[7]Bennett did not know the identity of the "little brother." *Id*. at 63.

and sent it to Harris. *Id*. at 92. Taylor testified that, another time, Harris sent him twenty pints and told him that four were for him and the other sixteen were for Mr. YYYYY. *Id*. at 93. Taylor then delivered the sixteen pints to Mr. YYYYY. *Id*. at 93-95. Still another time, when one of his shipments from Harris to Taylor had been intercepted by UPS, Harris allegedly directed Taylor to Mr. YYYYY to obtain four pints. *Id*. at 95-96.

Gina Juarez worked for Bank of America. *See* 2/17/10 Trial Tr. at 153. One time, when Ms. Juarez was working as a teller and Mr. YYYYY sought to deposit money, Mr. YYYYY did not know the account number of the account to which he sought to deposit the money and it appeared to Ms. Juarez that he had to call somebody to get the account information. *Id*. at 154. Another time, Mr. YYYYY attempted to deposit more than $10,000 total into two different accounts and did not have his identifying information for the Currency Transaction Report so the woman who Mr. YYYYY was with gave Ms. Juarez her identification instead. *Id*. at 155-56, 159-60.

Brandy Knight was a banker at Capital One. *See* 2/17/10 Trial Tr. at 171. She testified to events of August 31, 2007 as charged in Count Two of the indictment. *Id*. at 172. She testified that, on that day, Mr. YYYYY made an $8,000 and $9,000 cash deposit into his checking account at separate times and then later in the day returned

to wire the money out to an account in the name of ARPR Marketing in California. *Id*. at 173-75, 178, 188.[8] A Currency Transaction Report was prepared for the two deposits totalling $17,000 and Mr. YYYYY produced his driver's license for the report after questioning why it had to be filled out since the deposits were made on separate occasions albeit on the same day. *Id*. at 176, 182. Knight testified that when Mr. YYYYY returned to wire the money out, he had returned with other people who attempted to make their own deposits into other accounts but these other people did not want to give information for Currency Transaction Reports and they caused a commotion requiring the bank to call the police. *Id*. at 177.

Jessica Long testified that she was a long time friend of Mr. YYYYY and that on one occasion, but one occasion only, she wired $8,000 to Tony Harris in California at Mr. YYYYY's direction. *See* 2/17/10 Trial Tr. at 210-211. Mr. YYYYY allegedly gave her $8,000 in cash and asked her to wire it to Mr. YYYYY for a funeral. *Id*. at 212-13. On cross-examination, she testified that Mr. YYYYY was a very active gambler who might gamble and win "tens of thousands of dollars" at a time. *Id*. at 216-18.

The government's last witness was its case agent, Patrick Boland. Agent Boland first testified that, for the five years prior to trial, the Texas Workforce

[8]Significantly, there was no evidence of any connection between ARPR Marketing and Tony Harris. *See* 2/19/10 (AM) Tr. at 37, 61-62.

Commission had no records related to Mr. YYYYY and he was not able to find any evidence from his review of various records that Mr. YYYYY had a legitimate source of income. *Id*. at 248-51. Second, he claimed that he had reviewed evidence showing that, from 2007 until Mr. YYYYY was arrested in 2009, a person purporting to be Mr. YYYYY sent a total of ten MoneyGrams to Tony Harris, Ebony Barnett, Kendra Harris, Manuel Barrientes and Tammy Smith. *See* 2/17/10 Trial Tr. at 254-255. Third, Agent Boland testified that, from 2007 to the middle of 2009, around 100 bank wires were received by Harris or Ebony Barnett acting on behalf of Harris. *Id*. at 255. *Significantly, Agent Boland admitted that there were "several individuals," with absolutely no association to Mr. YYYYY who wired money to Harris or accounts controlled by Harris. Id*.[9] Finally, Agent Boland identified various alleged financial transactions between Mr. YYYYY and Harris including the $8,000 MoneyGram charged in Count Three which was sent from somebody identifying themselves as "XXXXXX YYYYY" to somebody identifying themselves as "Tony Harris." *Id*. at 262-64.

In addition to the above witnesses, throughout the government's case-in-chief, various law enforcement agents testified to seizures of contraband and monies from Harris and Mr. YYYYY. For example, on September 17, 2007, FBI Agent Cliff

[9] *See also* 2/19/10 (AM) Trial Tr. at 7 ("Some of these individuals were outside of Mr. YYYYY's control.").

Carruth, searched a residence in Longview, Texas belonging to Mr. YYYYY. *See* 2/17/89 Trial Tr. at 228-230. During the search he found a photograph of a person surrounded by large amounts of money and weapons, a digital scale and hundreds of "pimento jars. *Id*. at 231-234. Agent Carruth testified that, in his experience, these jars are used to sell or transport "codeine drink." Later, on March 27, 2009, FBI Agent Stewart Filmore searched a home in Longview, Texas after Mr. YYYYY was arrested at that residence. *Id*. at 193-96. He found a Western Union card in the name of Mr. YYYYY, a bill counter and approximately $13,000 in cash. *Id*. at 197-98. In a car parked at the property he also found MoneyGram receipts in the name of Shamonica Pickett. *Id*. at 198. Still later, on March 31, 2009, Longview Police Officer Paul Montoya stopped a vehicle driven by Mr. YYYYY for speeding. *Id*. at 122-23, 126-27.[10] Officer Montoya ultimately seized $14,000 in cash along with a bottle of Hydrocodone from a backpack in the trunk of the vehicle. *Id*. at 131-34. Finally, on April 10, 2009, Texas DPS Agent Roberto Rosamond stopped a vehicle being driven by Tony Harris in Sierra Blanca, Texas and ultimately discovered thirty-four small bottles, nine larger bottles, and three thirty-two ounce bottles of codeine cough syrup in the vehicle. *Id*. at 25-34. Trooper Rosamond also located various pills, including Xanax, inside the vehicle. *Id*. at 38-42.

[10]The car was not registered to Mr. YYYYY and had a female passenger. *Id*. at 141, 43.

Darrell Island testified on behalf of Mr. YYYYY. Island testified that Mr. YYYYY was a frequent gambler and gambled on horses and dice. *See* 2/19/10(AM) Trial Tr. at 76-81. At some dice events the bet would be $8,000 per roll of the dice. *Id*. at 81. One time Island witnessed Mr. YYYYY win $60,000 gambling. *Id*. at 82-83. Island admitted that Mr. YYYYY often cheated when playing dice. *Id*. at 86-87.[11]

B. Sentencing Hearing Testimony

Agent Boland testified as the lone witness at the sentencing hearing and recounted his review of the financial records.

Agent Boland testified that, from August 2005 to December 2007, Mr. YYYYY deposited over $100,000 into a business account he established in the name of "Youngest In Charge." *See* Sentencing Tr. at 12-14. Agent Boland testified that it did not appear that any of this money deposited into this account went to Tony Harris and that Harris had nothing to do with this account. *Id*. at 34. Agent Boland also admitted that Mr. YYYYY promoted concerts and concert monies were put into that account and further admitted that he had no idea how many concerts Mr. YYYYY promoted, although he claimed Mr. YYYYY only broke even on the concerts he promoted. *Id*. at 35-36, 43. Likewise, Agent Boland admitted that Mr. YYYYY made money

[11]In a brief forfeiture proceeding, Agent Boland testified that "the sum of the financial transactions that took place, both deposits, withdrawals and wires" substantially exceeded $1.5 million. *See* 2/19/10 (PM) Trial Tr. at 50. Neither defendant's counsel made an opening statement, a closing statement, put on evidence or cross-examined Agent Boland during the forfeiture proceeding.

gambling and he could not say how much of the deposits into the "Youngest In Charge" account were derived from gambling. *Id*. at 42-43.

Agent Boland next testified that, from January 2007 to January 2009, Mr. YYYYY, or others acting at his direction, sent MoneyGrams to Tony Harris in California totalling approximately $160,000. *Id*. at 16-18. The MoneyGrams were sent either to Harris or Harris's associates. *Id*. at 16. Nevertheless, upon further questioning, Agent Boland ultimately admitted that only about $80,000 of the MoneyGrams "had anything to do with Mr. YYYYY." *Id*. at 45.[12]

Agent Boland next addressed the three bank accounts in California that were allegedly controlled by Harris. Agent Boland first testified that Mr. YYYYY, or others acting at Mr. YYYYY's direction, deposited money in Texas into an account in the name of Harris that Harris would then withdraw the same day or the next day in California. *Id*. at 19-20. According to Agent Boland, deposits into Harris' account totalled approximately $370,000. *Id*. at 24, 37.[13] Agent Boland admitted that persons completely unrelated to his investigation of Mr. YYYYY made deposits into the Harris bank account but claimed it "would be speculation" to quantify the amount.

[12]The Presentence Report ("PSR") indicated that Mr. YYYYY sent $32,500 in MoneyGrams to Harris and an additional $23,633 were sent by Mr. Miler's female friends at Mr. YYYYY's direction. *See* PSR at ¶ 12. Agent Boland also claimed that another $20,000-$30,000 in MoneyGrams were sent to Harris that "had something to do with Mr. YYYYY." *See* Sentencing Tr. at 45.

[13]Over $380,000 was withdrawn from this account. *Id*. at 24.

Id. at 38. Nevertheless, Agent Boland admitted that some of the deposits into Harris' account "didn't have anything to do with XXXXXX YYYYY." *Id*. at 38, 57-58. The only thing Agent Boland could say for certain regarding which deposits into the Harris account were related to Mr. YYYYY was that Mr. YYYYY personally deposited approximately $30,000 into the account. *Id*. at 46.

Similarly, Agent Boland claimed that Mr. YYYYY, or others acting at his direction, deposited money in Texas into an account in the name of Ebony Barnett that Barnett would then withdraw in California and give to Harris. *Id*. at 25-29. Deposits into the Barnett account totalled over $380,000 but Agent Boland testified that it would be "impossible to say" how much of this amount was deposited by Mr. YYYYY or persons acting on his behalf. *Id*. at 29, 39. 59.[14] Again, like the Harris account, the only thing Agent Boland could say for certain regarding which deposits into the Barnett account were related to Mr. YYYYY was that Mr. YYYYY personally deposited approximately $30,000 into the account. *Id*. at 46.

Next, Agent Boland testified that Mr. YYYYY, or others acting at his direction, deposited money in Texas into an account in the name of James Burroughs that Burroughs would then withdraw in California and give to Harris. *Id*. at 29-30. Agent Boland testified that over $200,000 in total was deposited into Burroughs' account.

[14]Over $380,000 was withdrawn from this account. *Id*. at 29.

Id. at 30.[15] Agent Boland admitted that Burroughs had said that he only gave approximately $40,000 of monies deposited in this account to Harris. *Id*. at 41. In any event, Agent Boland could only connect approximately $30,000 of the money deposited in the Burroughs account to Mr. YYYYY. *Id*. at 47.

In the final analysis, Agent Boland admitted that, with regard to the Harris, Barnett and Burroughs bank accounts, all he knew for certain with regard to deposits related to Mr. YYYYY was that at least $90,000 or so was sent to those accounts by Mr. YYYYY or by others acting on Mr. YYYYY's behalf. *Id*. at 47.[16]

[15]Over $220,000 was withdrawn from this account. *Id*. at 30

[16]Agent Boland also admitted that, by definition, if Harris' drug customers were only paying for less than three gallons of cough syrup, at $3,100-$3,200 per gallon, they would have necessarily sent Harris less than $10,000 at a time because they would not have owed him any more money. *Id*. at 61-62. Moreover, in actuality, the testimony was that a gallon sold for $2,400. *See* 2/16/10 Trial Tr. at 225.

SUMMARY OF THE ARGUMENT

I. The Evidence Was Insufficient to Support Mr. YYYYY's Convictions.

The money laundering conspiracy charge in this case was based on monies XXXXXX YYYYY was allegedly sending to Tony Harris in California as payment for drugs provided by Harris. This court and others have made clear that transactions for the payment of drugs, even if efforts are made to conceal those payments, are not sufficient to establish a violation of 18 U.S.C. § 1956(a)(1)(B)(I) because "a transaction to pay for illegal drugs is not money laundering." Money laundering must "follow in time" the underlying criminal offense and, where the underlying drug transaction had not been completed, monetary transactions related to that drug transaction do not constitute money laundering. Consequently, the conspiracy count against Mr. YYYYY cannot stand.

The two substantive counts against Mr. YYYYY respectively involve a MoneyGram transfer in his name to Tony Harris and a deposit of monies into his own bank account where he provided the information necessarily, albeit reluctantly, to fill out a Currency Transaction Report. Contrary to the government's theory that these transactions constitute money laundering-concealment because Mr. YYYYY did not say "this is drug money" and/or say "I am a drug dealer" when conducting the transactions, there is an Eighth Circuit case directly on point that these type of open

transfers in alleged conspirators' own names do *not* constitute money laundering.

II. The Evidence Was Insufficient to Support a Forfeiture Verdict in the Amount of $1.5 Million.

For the reasons that the evidence was insufficient to support the verdicts on the counts in the indictment, so too was it insufficient to support the forfeiture verdict. Moreover, where a forfeiture verdict is based upon a conspiracy, the amount forfeited must be foreseeable to a defendant *and* part of "jointly undertaken" activity. Here, Agent Boland admitted that many of the allegedly laundered funds that were sent to Harris by MoneyGram or deposited in bank accounts Harris controlled had absolutely nothing to do with Mr. YYYYY. Therefore, given that many of the allegedly laundered funds did not involve "jointly undertaken" transactions, the evidence was insufficient to hold Mr. YYYYY responsible for the full amount of monies which Harris allegedly laundered.

III. Sender and Recipient Information Contained in MoneyGram Records Are Not Admissible as Business Records Because the Persons Supplying the Information Have No Business Duty to MoneyGram, Intl.

There are several cases directly on point which hold that *unverified* information provided to companies like MoneyGram by "outside sources" do not constitute business records because the persons providing the information have no "business duty" to the business. Moreover, Mr. YYYYY submits that, even where such "outside source" information is allegedly verified, it is in admissible where a defendant is not

able to confront the person verifying the information to determine the verification procedures that were actually followed and where there is insufficient information to determine whether the "outside source" gave the verifier legitimate identification documents. In sum, the simple act of a MoneyGram agent allegedly reviewing a person's identification documents would not, by itself, transform the even allegedly verified information into a proper business record.

IV. The Trial Court Erred When it Refused to Charge the Jury, in Accordance with *United States v. Santos* 553 U.S. 507 (2008), That "Proceeds" Means "Profits" Where the Monies Allegedly Laundered Were the Transfers of "Proceeds" among the Alleged Drug Trafficking Confederates Themselves in Payment of the Drugs That Were Part of the Specified Unlawful Activity.

This court has held that *Santos* is applicable where there is a "merger" problem. In the instant case, Mr. Miler was charged with laundering the "proceeds" of the unlawful activity of "drug trafficking." Nevertheless, this was not the typical contraband-money laundering case in which the government targeted "profits" of the drug trafficking that were used to buy luxury items. In those cases, defendants can hardly argue that these luxury items are an "expense" of drug trafficking. In contrast and in this case, the government targeted the transfer of "proceeds" among the alleged drug trafficking confederates themselves and the payments made for the drugs. Therefore, in this case, a merger problem would certainly exist and *Santos* would apply. The district court's failure to charge the jury in accordance with *Santos* despite

a request to do so by the defendants was error.

V. The District Court Erred in Determining the "Value of Funds Laundered" for the Purpose of Determining Mr. YYYYY's Sentencing Guidelines and Setting His Sentence.

The Presentence Report and the testimony of Agent Boland could only establish that, *at most*, Mr. YYYYY and those associated with Mr. YYYYY were responsible for $80,000 in money transfers to Harris or those acting on Harris's behalf. Indeed, during the trial, there was evidence that Harris had numerous drug customers that would purchase drugs from him and pay him for these drugs using MoneyGrams or wire transfers and that many of these transactions were not related to Mr. YYYYY. Nevertheless, at sentencing, the government argued that Mr. YYYYY could be responsible for over $1 million in funds transferred to Harris or Harris's associates by *any* source simply because Mr. YYYYY was convicted of a money laundering conspiracy. That is not the law. In order for monies transferred to Harris or persons acting on Harris' behalf to be attributable to Mr. YYYYY, those monies would have to have been connected to drug payments that were reasonably foreseeable to Mr. YYYYY *and* part of "jointly undertaken criminal activity" between him and Harris.

ARGUMENT[17]

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT MR. YYYYY'S CONVICTION ON COUNT 1, 2 AND 3

Mr. YYYYY moved for a directed verdict at the close of the government's evidence and again at the end of the case as to each count charged against him in the indictment and the district court denied each motion. 2/19/10 (AM) Trial Tr. at 74, 92. Therefore, on appeal, this court will review Mr. YYYYY's challenge to the sufficiency of the evidence *de novo*, but in the light most favorable to the verdict, in order to determine whether a rational trier of fact could have found that the evidence established the essential of the offense beyond a reasonable doubt. *See, e.g., United States v. Shum,* 496 F.3d 390, 391 (5th Cir.2007).

A. Count 1-Conspiracy to Commit Money Laundering

The government's essential theory in this case was that Harris was sending drugs to Mr. YYYYY in Texas and Mr. YYYYY was sending payments for these drugs to Harris in California. The government explained as much in its opening statement to the jury:

> In any drug transaction there are drugs going one way and money coming back the other way. That's the nature of a drug transaction. Now, because drug transactions are illegal, they have to be concealed by those people who are participating in them. The people who are

[17]Mr. YYYYY hereby adopts the arguments advanced on appeal by co-appellant, Tony Harris. *See* Fed. R. App. P. 28(I)

> transporting and distributing the drugs have to conceal their actions. Likewise, the people that are paying the money, transporting the money and distributing the money have to conceal their actions. That's the nature of drug transactions, that they have to be concealed from law enforcement, both the drugs and the money.

2/16/10 Trial Tr. at 107. During trial, government's witness, Edson Curtis, gave an example of how this would work. Curtis would buy codeine cough syrup from Harris by mail or in person. He would either pay Harris for the cough syrup by "cash in hand," send it by MoneyGram or depoit money into a Bank of America account whose number was given to him by Harris. *Id*. at 210-11.

This court and others have made clear that transactions for the payment of drugs, even if efforts are made to conceal those payments, are not sufficient to establish a violation of 18 U.S.C. § 1956(a)(1)(B)(I) because "a transaction to pay for illegal drugs is not money laundering." *United States v. Gaytan*, 74 F.3d 545, 555-56 (5th Cir. 1996).

> We also observed that funds do not become the proceeds of drug trafficking until a sale of drugs is completed. Hence, a transaction to pay for illegal drugs is not money laundering, because the funds involved are not proceeds of an unlawful activity when the transaction occurs, but become so only after the transaction is completed....

Id.

The United States Court of Appeals for the Tenth Circuit reached a similar conclusion in *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994). Relying on

legislative history of the money laundering statute, it first observed that "'Congress aimed the crime of money laundering at conduct that *follows in time* the underlying crimes....'" *Id*. at 1244, *quoting*, *United States v. Edgmon*, 852 F.2d 1206, 1213-14 (10th Cir. 1992), *cert. denied*, 505 U.S. 1223 (1992). The Tenth Circuit then observed:

> A drug transaction, from a business perspective, consists of the distributor (or kingpin) getting the drugs to his middlemen who in turn either sell the drugs directly or have others conduct the actual street sales. The middlemen then collect the money from either their sellers or the consumer (depending upon whether they conduct the sales themselves) and the middlemen then pay the distributor for the drugs that had been advanced to them. It is not unusual for a middleman to use a courier to deliver the money to, and pick up the drugs from, the distributor....

Id. at 1246-47 (footnote omitted). Finally, in reversing the defendant's money laundering conviction, the Tenth Circuit held that the underlying drug transaction had not been completed because the money allegedly laundered had not yet been transported from Detroit, where the drugs had been sold, to California, where the supplier would be paid. *Id*. at 1247. Consequently, "the money laundering activity had not yet begun." *Id*. at 1246.

Both *Gaytan* and *Dimeck* control this case. Here, even assuming that the money transfers related to drug trafficking, the drug transactions were not complete until Harris was paid for the drugs he sent to Texas. Just as the drug transaction in *Dimeck* was not complete until the money from Detroit arrived in California, any drug

transaction in this case would not have been completed until the money from Texas arrived in California. In other words, the money transfers alleged to form the money laundering conspiracy alleged in Count 1 of the indictment against Mr. YYYYY were themselves part of the alleged drug transactions to pay Harris for the drugs shipped to Texas and, as such, the alleged drug transactions were not *completed* at the time of the transfers. Therefore, the money transfers alleged in the indictment and described by the government at trial, even if they were payments for drugs, cannot support the jury's verdict on Count 1.

B. Count 3

Count 3 charged a substantive violation of 18 U.S.C. § 1956(a)(1)(B)(I) based on a $8,000 MoneyGram sent in the name of XXXXXX YYYYY to Tony Harris on October 10, 2008. The government described the basis for charging this transaction as money laundering violation during is closing argument:

> So we pick the October 10th, 2008 wire from Mr. YYYYY to Mr. Harris as the financial transaction, which is the final count. Now, don't think just because Mr. YYYYY is still using his own name on the wires to Mr. Harris in October, 2008 that somehow proves that they are really not trying to conceal this thing. That is just proof that every once in awhile they are desperate and need to get that money out in a hurry. He can't find a friend. He can't get someone else to do it and it's okay if he just does it every once in a while. It's still not more than $10,000. He's still not saying this is drug money and still not saying I'm a drug dealer. We're still not getting any sort of honest information. He can engage in this every once in awhile because that won't raise any red flags.

2/19/10 (PM) Trial Tr. at 7-8. Apparently, the government believed that because Mr. YYYYY did not announce that he was a "drug dealer" sending "drug money" he violated the money laundering statute by sending a MoneyGram in his name to his alleged drug supplier. Nevertheless, as set forth below, this transaction cannot support a conviction under 18 U.S.C. § 1956(a)(1)(B)(I) for several reasons.

First, as explained in relation to the conspiracy count, even assuming that this was a payment from Mr. YYYYY to Harris for drugs Harris supplied to Mr. YYYYY, this transaction would not support a money laundering conviction because is was part of the drug transaction itself and did not "follow[] [it] in time." *See Gaytan*, 74 F.3d at 555-56; *Dimeck*, 24 F.3d at 1246-47.

Second, in this particular transaction, there was no attempt to conceal. The United States Court of Appeals for the Tenth Circuit dealt with an almost identical scenario in *United States v. Herron*, 97 F.3d 234 (8th Cir. 1996), *cert. denied*, 519 U.S. 1133 (1997). There, the defendants, Herron and Jarrett sold crack cocaine in the Springfield, Illinois area and sent proceeds from the sales to Chicago via Western Union using their true names. *Id*. at 236. The court held the evidence insufficient to support a violation of money laundering concealment:

> What is lacking in this record is any evidence that the appellants' transactions were designed in whole or in part to conceal or disguise their drug proceeds. As demonstrated by the appellants' handwriting samples, they used their own names when sending the money to

> Chicago, and there is no evidence to suggest that the money was received by any persons other than those named in the Western Union records. Without any evidence of concealment, it is impossible to find that appellants *knew* of such a design.
>
> ....In other words, the mere fact that Herron and Jarrett used wire transfers to send money to Chicago cannot by itself satisfy the concealment element of the offense. Such an interpretation of the statute would render this separate element repetitive and meaningless. Because there is no evidence in the record that the appellants made any efforts to disguise the drug proceeds, we reverse their convictions for money laundering.

Id. at 237 (footnote omitted). In short, the Eighth Circuit concluded that there was no requirement, as the government suggested to the jury in this case, that the defendants in *Herron* "say[] 'this is drug money'" and/or "say[] 'I am a drug dealer'" to the Western Union officials.[18]

Finally, there is no evidence that this particular transaction involved "proceeds" of drug trafficking. While the government admittedly produced evidence that would allow a rational jury to conclude that Mr. YYYYY was involved in drug trafficking, there was also ample evidence produced that he was involved in high stakes gambling winning $60,000 at times *See* 2/19/10(AM) Trial Tr. at 82-83. In the end, there was simply no evidence produced by the government that the $8,000 MoneyGram sent on

[18]The government noted in it closing that the October 10, 2008 transaction was "not more than $10,000." 2/19/10 (PM) Trial Tr. at 8. Nevertheless, there is no evidence that this particular transaction was structured or that Mr. YYYYY "owed" Harris more money than $8,000 on this date. Indeed, even assuming that Mr. YYYYY was obtaining cough syrup from Harris at $2,400 per gallon (*see* 2/16/10 Trial Tr. at 225), a purchase of less than four gallons would not have required a payment over $10,000.

October 10, 2008 were drug "proceeds" as opposed to gambling monies.

C. Count 2

Count 2 charged a substantive violation of 18 U.S.C. § 1956(a)(1)(B)(I) based on a $17,000 deposit made by Mr. YYYYY into his Capital One Account on August 31, 2007. The evidence is insufficient to support the jury's verdict on this count for the same reasons the MoneyGram transaction in Mr. YYYYY's own name was insufficient to support the verdict on Count 3.

First, even assuming that this deposit was related to drug trafficking, this transaction would not support a money laundering conviction because is was part of the drug transaction itself and did not "follow[] [it] in time." *See Gaytan*, 74 F.3d at 555-56; *Dimeck*, 24 F.3d at 1246-47.

Second, Mr. YYYYY made the deposit in his own name and, contrary to the government's argument, he was under no requirement to announce that it was "drug money." Moreover, although Mr. YYYYY was allegedly not happy that a Currency Transaction Report ("CTR") had to be filed when he deposited $8,000 and $9,000 into his Capital One account on the same day, the fact remains that Mr. YYYYY did produce his driver's license for preparation of the CTR. *See* 2/17/10 Trial Tr. at 176, 182. Indeed, the Capital One representative testified that Mr. YYYYY did *not* try to "conceal" his driver's license information from her and she used that information to

prepare the CTR. *Id*. at 182. Moreover, the CTR was introduced into evidence at trial as Government Exhibit 8 and clearly contains the required identification information produced by Mr. YYYYY. Such a transaction would not support a conviction under 18 U.S.C. § 1956(a)(1)(B)(I). *See Herron*, 97 F.3d at 237.

Finally, similar to Count 3, the government offered no evidence at trial that the August 31, 2007 transaction involved "proceeds" of drug trafficking as opposed to gambling monies.

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE FORFEITURE VERDICT IN THIS CASE MUCH LESS TO SUPPORT A VERDICT IN THE AMOUNT OF $1.5 MILLION

This court reviews a forfeiture verdict to determine "if viewing the evidence in the light most favorable to the government, there is substantial evidence to support it." *United States v. Angiulo*, 897 F.2d 1169, 1214 (1st Cir.), *cert. denied*, 498 U.S. 845 (1990). The only testimony at the trial and/or the forfeiture hearing that would even arguably justify the $1.5 million forfeiture judgement against Mr. YYYYY was to following leading question asked by the prosecutor to the case agent, Agent Boland:

> Q. Did the sum of the financial transactions that took place, both deposits, withdrawals and wires, substantially – between these two men and their accomplices, did it substantially exceed $1.5 million?
>
> A. Yes.

2/19/10 (PM) Trial Tr. at 50. This does not constitute sufficient evidence to support

the forfeiture judgment against Mr. YYYYY, let alone one for $1.5 million.

First, as set forth above, Mr. YYYYY is not guilty of money laundering at all because the transfers alleged by the government to have constituted "money laundering" did not "follow[] [it] in time" a completed drug trafficking offense. *See Gaytan*, 74 F.3d at 555-56; *Dimeck*, 24 F.3d at 1246-47.

Second, even assuming that *some* of the transactions could be considered to be money laundering thereby supporting the forfeiture of such funds, not all of the transactions relied upon by the government to justify the $1.5 million figure constituted money laundering concealment. Indeed, as discussed above, transactions between Mr. YYYYY and Harris would *not* constitute money laundering concealment. *Herron*, 97 F.3d at 237. Thus, any forfeiture judgment that was based upon these transactions would be infirm.

Third, it is not at all clear from Agent Boland's "yes" answer at the forfeiture hearing whether Agent Boland was including transactions between Harris and his "accomplices" without any relation to Mr. YYYYY. During trial, Agent Boland, in fact, acknowledges that there were "several individuals" who wired money to Harris who had absolutely no connection to Mr. YYYYY. *See* Trial Tr. 2/17/10 at 255.[19]

[19]It became even clearer at the sentencing hearing that Agent Boland's figures included monies sent to Harris that were completely unrelated to Harris' alleged dealings with Mr. YYYYY. *See* Sentencing Tr. at 45 (Agent Boland admits that, of the $160,000 in MoneyGrams sent to Harris, only about $80,000 "had anything to do with Mr. YYYYY."); 58 (Agent Boland admits that there were monies deposited into Harris' bank account that "didn't have anything to

While it is true that a forfeiture verdict based upon a conspiracy can be joint and severable, the amount forfeited must be foreseeable to a defendant and part of "jointly undertaken" activity. *See, e.g. United States v. Bollin*, 264 F.3d 391, 419 (4th Cir. 2001). As explained by one court:

> Generally, a defendant should not be considered to have "obtained" proceeds that merely passed through his hands or proceeds received by others in which the defendant had no direct interest. However, it is well established that, for sentencing purposes, a defendant is accountable for the acts of co-conspirators that were committed in furtherance of the conspiracy and were reasonably foreseeable by the defendant. Thus, the Guidelines expressly require that both base offense levels and adjustments for specific offense characteristics be determined on the basis of "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1)(B). In the case of racketeering activity that involves money laundering offenses, one of the specific offense characteristic adjustments is a function of the amount of money involved (U.S.S.G. § 2S1.1(b)(2)); and, therefore, is calculated in accordance with the principles set forth in § 1B1.3(a)(1)(B). That is to say, it includes the reasonably foreseeable amounts laundered by co-conspirators in furtherance of the conspiracy.
>
> Since criminal forfeiture is a form of punishment, it follows that the same principles of sentencing accountability should apply

United States v. Saccoccia, 823 F.Supp. 994 (D.R.I.1993) (citations omitted), *aff'd sub. nom., United States v. Hurley*, 63 F.3d 1 (1st Cir.1995).

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do with XXXXXX YYYYY" and refuses to speculate how much money did have any relation to Mr. YYYYY); 47 (All Agent Boland could say for certain was that $90,000 or so of monies allegedly laundered by Harris through bank accounts he controlled were related to Mr. YYYYY).

Mr. YYYYY submits that, in light of his argument regarding the insufficiency of the evidence as to Count 1 the forfeiture verdict must be vacated in its entirety. In any event, the evidence was insufficient for a reasonable jury to have determined that Mr. YYYYY could foresee that Harris would launder $1.5 million. Indeed, as admitted by Agent Boland, much of the allegedly laundered funds that were sent to Harris by MoneyGram or deposited in bank accounts Harris controlled had absolutely nothing to do with Mr. YYYYY and were certainly not "jointly undertaken" transactions.

III. THE SENDER AND RECIPIENT INFORMATION CONTAINED IN THE MONEYGRAM RECORDS WERE INADMISSIBLE[20]

The government introduced as Exhibits 5A and 5B "business records" of MoneyGram, International over the defendants' objections that these records did not fully meet the requirements of business records. *See* 2/17/10 Trial Tr. at 10-11, 18-19. The exhibits purported to be MoneyGram transactions "related to Mr. Tony Harris and Mr. XXXXXX YYYYY." *Id*. at 15-16.

As noted above, the MoneyGram records custodian, Elizabeth McGregg-King, testified during a voir dire examination that MoneyGram had no way of knowing whether the persons *sending* monies through MoneyGram gave MoneyGram agents

[20]A district court's evidentiary rulings are reviewed for an abuse of discretion. *See, e.g., United States v. Jackson*, 625 F.3d 875, 879 (5th Cir.2010).

their correct name. *Id*. at 10. During her testimony before the jury, Ms. McCreg-King also testified that the MoneyGram agents did not review identification of MoneyGram *recipients* unless the transaction was over $900. *Id*. at 16-17. Moreover, Ms. McCreg-King admitted that she did not know if the individual MoneyGram agents conducting the various transactions actually did review identification in those transactions for which they were required to review identification. *Id*. at 21.

When determining the admissibility of "business records" under Fed. R. Evid. 803(6), "[i]f any person in the process is not acting in the regular course of business, then an essential link in the trustworthiness chain fails, just as it does when the person feeding the information does not have firsthand knowledge." 2 *McCormick on Evidence*, § 290, at 274 (4th ed.1992). Indeed, this court has noted that, ordinarily, business records containing information provided by a person who is not under any business duty to accurately report information to a business is *not* admissible to prove the truth of facts conveyed to the employee or agent of the business who entered the information into the business's records. *Missouri Pac. R. Co. v. Austin*, 292 F.2d 415, 421 (5th Cir. 1961). Therefore, the question becomes whether the sender and recipient information in the MoneyGram transactions in this case were admissible.

There are, in fact, several cases from various courts of appeals discussing the admissibility of MoneyGram type "business records" where portions of the records

contain information from individuals having no "business duty" to the business. For example, in *United States v. McIntyre*, 997 F.2d 687, 701 (10th Cir. 1993), *cert. denied*, 510 U.S. 1063 (1994), the government attempted to introduce the business records of Western Union "to show the means of money transfer and the involvement of certain individuals in the conspiracy." A Western Union employee testified that the records of the transfers were kept in the regular course of business and "[h]e also testified that although no identification was required to send money, identification would be required to pick up the money under the circumstances of these transfers." *Id*. The United States Court of Appeals held that, because Western Union did not have a policy of verifying the identity of senders, the Western Union records "were inadmissible to prove the identity of senders of money." *Id*.

The United States Court of Appeals for the Second Circuit also considered customer supplied sender information in Western Union records in *United States v. Vigneau*, 187 F.3d 70 (2nd Cir. 1999), *cert. denied*, 528 U.S. 1172 (2000). The court began by noting that "the business records exception does not embrace statements contained within a business record that were made by one who is not a part of the business if the embraced statements are offered for their truth." *Id*. at 75. It held that, given Western Union's practice at the time of not verifying sender information, the Western Union records purporting to reflect money transfers by

the defendant were inadmissible *Id*.at 77[21] Mr. YYYYY submits that the above precedents clearly establish that all unverified information in the MoneyGram "business records" was clearly inadmissible at his trial. Nevertheless, Mr. YYYYY also submits that, notwithstanding the *dicta* in these cases, even "outside source" information that was allegedly "verified," was inadmissible because: (1) he was denied his right to confront the individual MoneyGram agents who allegedly verified the information, and (2) the simple act of a MoneyGram agent reviewing a person's identification document did not transform the allegedly verified information into a proper business record.

First, as noted above, Ms. McCreg-King testified that she did not know if the individual MoneyGram agents conducting the various transactions did actually review a person's identification documents for transactions over $900. *See,* 2/17/10 Trial Tr. at 21. Moreover, as included in Mr. YYYYY's objections to this evidence, he was denied his Sixth Amendment right to confront the individual MoneyGram agents to determine what steps, *if any*, they actually took to verify the "outside source"

[21] *See also*, *United States v. Pendegrass*, 47 F.3d 1166, *4-5 (4th Cir.) (table) (Holding unverified sender information in Western Union transactions were inadmissible hearsay because senders were "outside sources" to Western Union), *cert. denied*, 55 U.S. 1127 (1995); *United States v. Artega*, 117 F.3d 388, (9th Cir.) (Discussing Western Union business records and noting that Fed. R. Evid. 803(6) "does not permit introduction of statements made by customers unless the employee was responsible for verifying the statements."), *cert. denied*, 522 U.S. 988 (1997).

information related to the transactions for which MoneyGram corporate policy would ordinarily have required that identification be produced. *Id*. at 17.

Second, even assuming that all individual MoneyGram agents complied with corporate policy and actually personally looked at the identifications in cases in which the identifications were required to be verified under corporate policy, this hardly qualifies the "outside sources" as having a "business duty" to MoneyGram. The Second Circuit in *Vigneau* attempted to explain the "gloss" that has allowed courts to conclude that verified information from "outside sources" serves to qualify the information given as a "business record."

> Some cases have admitted under the business records exception "outsider" statements contained in business records, like the sender's name on the Western Union form, where there is evidence that the business itself used a procedure for verifying identity (*e.g.*, by requiring a credit card or driver's license). Probably the best analytical defense of this gloss is that in such a case, the verification procedure is circumstantial evidence of identity that goes beyond the mere bootstrap use of the name to establish identity.

Vigneau, 187 F.3d at 77 (footnote omitted). Nevertheless, it is difficult to square this "gloss" with the simple fact that a person sending and receiving Moneygrams has no "business duty" to MoneyGram. Given this lack of "business duty," there would be nothing to prevent such persons from providing MoneyGram with false identification documents. In fact, the government has previously acknowledged that such false identification documents are easily obtainable.

> [18 U.S.C. § 1028(a)] was enacted in response to the findings of a special Federal Advisory Committee on False Identification ("FACFI") convened in 1974 by the Attorney General. *H.R.Rep. No. 97-802*, at 1-2, 1982 U.S.C.C.A.N. at 3520. FACFI determined that false identification documents were "facilitating drug smuggling, illegal immigration, flight from justice, fraud against business and the government, and other criminal activity, at an estimated cost of over $16 billion each year," and that "genuine government identification documents could be easily obtained from the issuing offices by means of simple misrepresentations." *Id.* at 2, 1982 U.S.C.C.A.N. at 3520. The purpose of § 1028, then, was to combat the increasing use of such documents by giving federal authorities broader power to punish the use of false or fraudulent identification documents in facilitating other crimes. *Id.* at 8.

United States v. Luke, 628 F.3d 114, 119 (8th Cir. 2010).

Although easily done, this is not a case in which the government's evidence actually verified that the identification information that was provided for a particular transaction actually traced back to the person identified as having participated in the transaction. For example, the fact that a receiver of MoneyGram transaction over $900 gave his name as "John Doe" with driver's license number TX 555555 hardly qualifies this information as a business record simply because a MoneyGram agent looked at the license presented without government evidence establishing that driver's license number TX 555555 was actually assigned to John Doe by the State of Texas.

In sum, all information provided by the MoneyGram senders and receivers that was not "verified" was clearly inadmissible under Fed. R. Evid. 803(6). In addition, the simple fact that a MoneyGram clerk *may* have followed corporate policy and

looked at a driver's license and/or other identification for particular transactions does not mean that the provider of the identification document had a "business duty" not to present a false document and the government offered no evidence that the identification information provided actually corresponded with the information of the person allegedly providing the information. Therefore, even the allegedly "verified" information provided by "outside sources" was similarly inadmissible under Fed. R. Evid. 803(6) notwithstanding any non-textual "gloss" to that rule.

IV. THE TRIAL COURT ERRED WHEN IT REFUSED TO CHARGE THE JURY THAT "PROCEEDS" MEANS "PROFITS" IN ACCORDANCE WITH *UNITED STATES V. SANTOS* 553 U.S. 507 (2008)[22]

The defendants requested that the jury be charged, pursuant to *United States v. Santos*, 553 U.S. 507 (2008), that, for purposes of money laundering, "the term 'proceeds' means the profits of the commission of the underlying specified unlawful activity...." *See* 2/19/10(AM) Trial Tr. at 93; Doc. 377. Instead, the jury was ultimately instructed that "[t]he term 'proceeds' includes *any* property or any interest in property that someone acquires or retains as a result of the commission of the underlying specified unlawful activity." *Id*. at 116 (emphasis added).

This court, unlike some other courts of appeals, has made it clear that *Santos*

[22]This court will review jury instructions to determine "whether the [district] court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them." *United States v. Mendoza-Medina*, 346 F.3d 121, 132 (5th Cir.2003) (quotations omitted), *cert. denied*., 540 U.S. 1156 (2004).

is not limited to cases in which the "proceeds" in question were produced by illegal gambling operations. *Garland v. Roy*, 615 F.3d 391 (5th Cir. 2010). Indeed, this court made clear that the term "proceeds" in 18 U.S.C. § 1956 is limited to "profits" wherever a "merger" problem may exist. This court went on to explain that a "'merger problem' result[s] any time the definition of 'proceeds' as 'receipts' enable[s] the money-laundering charge to rely upon the same 'transaction' as the 'predicate crime.' *Id*. at 400. The court, relying upon language in *Santos*, pointed out that a merger problem exists in "'[a]ny wealth-acquiring crime with multiple participants...when the initial recipient of the wealth gives his confederates their shares.'" *Id*. at 400, *citing*, *Santos*, 128 S.Ct. at 2026.27. Put another way, to avoid a merger problem "a criminal who enters into a transaction paying the expenses of his illegal activity cannot possibly violate the money-laundering statute, because by definition profits consist of what remains after expenses are paid." *Santos*, 553 U.S. at 517.

In the instant case, Mr. YYYYY was charged with laundering the "proceeds" of the unlawful activity of "drug trafficking." *See* 2/19/10 Trial Tr. (AM) at 116. Paradoxically, the government did not actually charge Mr. YYYYY with drug trafficking. Moreover, this was not the typical contraband-money laundering case in which the government targeted "profits" of the drug trafficking that were used to buy

cars, homes and "toys." In those cases, defendants can hardly argue that these luxury items are an "expense" of drug trafficking. In contrast and in this case, as set forth in the indictment and as demonstrated by Government Exhibit 20 (*see* Excerpts at Tab 6), the government targeted the transfer of "proceeds" among the alleged drug trafficking confederates themselves and the payments made for the drugs allegedly sent from Los Angeles to East Texas. In short, while a merger problem may not exist in many contraband money laundering cases where the prosecution focuses on items purchased with "profits," the prosecution in this case admittedly focused on the transfer of "proceeds" and the payments of the expenses for the purchase of drugs that were part of the specified unlawful activity.

The government suggested in relation to sentencing in the instant case that *Santos* is limited to money laundering "promotion" cases and not money laundering "concealment" cases. *See* United States' Response to Defendant YYYYY's Objections to Presentence Report at 4-5. In other words, the government suggests that Congress intended "proceeds" to mean one thing in one section of 18 U.S.C. § 1956 and another thing in another section of the same statute. Such an argument defies the rules of statutory construction "that identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

Indeed, at least two courts have rejected the argument that "proceeds" was intended to mean different things in 18 U.S.C. § 1957 compared to 18 U.S.C. § 1956. Even in those cases involving two different statutes that were part of the same Money Laundering Control Act of 1986, the courts applied the normal rules of statutory construction to apply the same meaning to the term "proceeds." *United States v. Bush*, 626 F.3d 527, 536 (9th Cir. 2010) ("Both sections make explicit use of the word 'proceeds,' and since they were enacted together in the Money Laundering Control Act, we follow the normal rule of statutory construction' that identical words used in different parts of the same act are intended to have the same meaning." (citations and quotations omitted)); *United States v. Kratt*, 579 F.3d 558, 561 (6th Cir. 2009) ("[T]here is no reason to define "proceeds" differently from one provision to the next."), *cert. denied*, 130 S.Ct. 2115 (2010).[23]

In the district court, the government based its distinction between the definition of "proceeds" in promotion cases and concealment cases on this court's decision on *United States v. Fernandez*, 559 F.3d 303 (5th Cir.), *cert. denied*, 130 S.Ct. 139 (2009).

[23]Likewise, the plurality in *Santos* clearly understood that it was addressing the definition of "proceeds" in both promotion and concealment cases. *Santos*, 553 U.S. at 515 ("The statutory purpose advanced by the Government to construe 'proceeds' is a textbook example of begging the question. To be sure, if 'proceeds' meant 'receipts,' one could say that the statute was aimed at the dangers *of concealment and promotion*. But whether 'proceeds' means 'receipts' is the very issue in the case. If 'proceeds' means 'profits,' one could say that the statute is aimed at the distinctive danger that arises from leaving in criminal hands the yield of a crime." (emphasis added)).

See United States' Response to Defendant YYYYY's Objections to Presentence Report at 4-5. Nevertheless, *Fernandez* was based upon a "plain error" review and an apparent reluctance to go beyond the four corners of Justice Steven's concurring decision in *Santos* when conducting such a "plain error" review. *Fernandez*, 559 F.3d at 316-17. The *Fernandez* court made clear that the reason it did not grant relief in that money laundering concealment case was because the defendant could not show "plain error" and not because it believed that *Santos* was inapplicable to concealment cases. Moreover, this court's recent holding in *Garland*, itself admittedly a promotion case, clearly indicates that the court will not limit *Santos* to Judge Stevens' concurring opinion in that case.

In sum, *Garland* establishes that *Santos* applies to cases such as this where the "proceeds" from the alleged illegal activity are being transferred among confederates and where the "proceeds" include the expenses of the illegal activity itself. Consequently, the district court erred in overruling the request by the defendants in this case that the jury be charged in accordance with *Santos*.

V. THE DISTRICT COURT ERRED IN DETERMINING THE VALUE OF FUNDS LAUNDERED FOR THE PURPOSE OF DETERMINING MR. YYYYY SENTENCING GUIDELINES AND SETTING HIS SENTENCE[24]

[24]This court reviews a district court's factual findings regarding the guidelines calculation for clear error and its application of the Guidelines de novo. *United States v. Ruiz*, 621 F.3d 390, 394 (5th Cir.2010)

At sentencing the district court made an "independent finding" that the "value of the funds laundered" for purposes of determining Mr. YYYYY's base offense level under U.S.S.G. § 2S1.1(2) was "in excess of one million dollars." *See* Sentencing Tr. at 83. As set forth below, this finding is in direct conflict with the facts contained in the Presentence Report and testimony of the government's case agent at the sentencing hearing.

For purposes of applying U.S.S.G. § 2S1.1(2) the "value of laundered funds" means those funds used in *unlawful* monetary transactions. *See, e.g., United States v. Barrios*, 993 F.2d 1522, 1524 (11th Cir. 1993). Moreover, this court has made clear that the burden is on the government to prove which monies were actually "laundered" and how they were laundered. *Unite States v. Rodriguez*, 278 F.3d 486, 493 (5th Cir.), *cert. denied sub. nom. United States v. Garcia-Rodriguez*, 536 U.S. 913 (2002).[25] Indeed, a district court must make specific findings in support of its factual determination as to the amount of laundered funds. *See, e.g., United States v. Orlando*, 281 F.3d 586, 600-01 (6th Cir. 2000).

Assuming, *arguendo*, that monies that are part of a drug transaction itself and which do not follow the transaction "in time" can, in fact,"laundered funds" there are

[25]*See also United States v. Rodriguez*, 278 F.3d 486, 493 (5th Cir.), *cert. denied,* 536 U.S. 913 (2002) ("[T]he government must prove by a preponderance of the evidence that the money was laundered.").

four potential categories of "laundered funds" in this case with numerous subcategories.[26]

[26] MoneyGram Transfers

MoneyGram Transfers Sent to Harris by YYYYY

MoneyGram Transfers Sent to Harris by Somebody Acting under YYYYY's Direction

MoneyGram Transfers Sent to Somebody Acting for Harris by YYYYY

MoneyGram Transfers Sent to Somebody Acting for Harris by Somebody Acting under YYYYY's Direction

MoneyGram Transfers Sent to Harris Unrelated to YYYYY

MoneyGram Transfers Sent to Somebody Acting for Harris Unrelated to YYYYY

Deposits into Harris Bank Account

Deposits by YYYYY

Deposits by Somebody Acting under YYYYY's Direction

Deposits Unrelated to YYYYY

Deposits into Ebony Bennet Bank Account

Deposits by YYYYY

Deposits by Somebody Acting under YYYYY's Direction

Deposits Unrelated to YYYYY

Deposits Unrelated to YYYYY and Harris

Deposits into James Burroughs Bank Account

Deposits by YYYYY

Deposits by Somebody Acting under YYYYY's Direction

Deposits Unrelated to YYYYY

Deposits Unrelated to YYYYY and Harris

A. Categories of Transfers Related to Mr. YYYYY

1. MoneyGram Transfers

The PSR indicated that Mr. YYYYY sent $32,500 in MoneyGrams to Harris and an additional $23,633 were sent by Mr. Miler's female friends to Harris at Mr. YYYYY's direction. *See* PSR at ¶ 12. Given that wires from Mr. YYYYY to Harris do not constitute laundered funds,[27] the "value of the funds laundered" in this category should be limited to $23,633.

In any event, Agent Boland testified that, of the $160,000, only about $80,000 "had anything to do with Mr. YYYYY." *See* Sentencing Tr. at 45. Therefore, even if transfers in Mr. YYYYY's name were included, the "value of the funds laundered" in this category should be limited to $80,000.

TOTAL= $23,633-$80,000

2. Harris Bank Account

Agent Boland admitted that persons completely unrelated to his investigation of Mr. YYYYY made deposits into the Harris bank account and further admitted that some of the deposits into Harris' account "didn't have anything to do with XXXXXX YYYYY." *See* Sentencing Tr. at 38, 57-58. The only thing Agent Boland could say for certain regarding which deposits into the Harris account were related to Mr.

[27] *See Herron*, 97 F.3d at 237.

YYYYY was that Mr. YYYYY personally deposited approximately $30,000 into the account. *Id*. at 46.

Therefore, if deposits in Mr. YYYYY's name into a bank account in Harris's name were properly excluded as not constituting "launder funds,"[28] the amount in this category would be $0. Even if such deposits were held to be "laundered funds," the amount in this category would be $30,000.

TOTAL= $0-$30,000

3. Bennet Bank Account

Deposits into the Barnett account totalled over $380,000 but Agent Boland testified that it would be "impossible to say" how much of this amount was deposited by Mr. YYYYY or persons acting on his behalf. *See* Sentencing Tr. at 29, 39. 59. Again, like the Harris account, the only thing Agent Boland could say for certain regarding which deposits into the Barnett account were related to Mr. YYYYY was that Mr. YYYYY personally deposited approximately $30,000 into the account. *Id*. at 46.

Mr. YYYYY acknowledges that, assuming that transactions that were allegedly part of the drugs transactions themselves can constitute money laundering, the $30,000 deposited into an account that was being used to conceal Harris's identity

[28]*See Herron*, 97 F.3d at 237.

would constitute "laundered funds."

TOTAL= $30,000

4. Burroughs Bank Account

Agent Boland testified that over $200,000 in total was deposited into Burroughs' account. *See* Sentencing Tr. at 30.[29] Agent Boland admitted that Burroughs had said that he only gave approximately $40,000 of monies deposited in this account to Harris. *Id*. at 41. In any event, Agent Boland could only connect approximately $30,000 of the money deposited in the Burroughs account to Mr. YYYYY or persons acting on Mr. YYYYY's behalf. *Id*. at 47.

Again Mr. YYYYY acknowledges that, assuming that transactions that were allegedly part of the drugs transactions themselves can constitute money laundering, the $30,000 deposited into an account that was being used to conceal Harris's identity would constitute "laundered funds."

TOTAL= $30,000

Grand Total= $83,633-$170,000

B. Monies Transferred to Harris Not Part of "Jointly Undertaken" Activity

During the trial, there was evidence that Harris had numerous drug customers that would purchase drugs from him and pay him for these drugs using MoneyGrams

[29]Over $220,000 was withdrawn from this account. *Id*. at 30

or wire transfers and that many of these transactions were not related to Mr. YYYYY. For example, Edson Curtis and Timothy Taylor testified to many transactions with Harris only a few of which involved Mr. YYYYY. *See* 2/16/10 Trial Tr. at 210-11, 224-25; 2/17/10 Trial Tr. at 83-84, 87-89. Nevertheless, despite the fact that Agent Boland conceded that many money transfers made to Harris were unrelated to Mr. YYYYY, the government argued at sentencing that Mr. YYYYY should be held responsible for all of these transfers because he was convicted of a money laundering conspiracy.

In order for monies transferred to Harris or persons acting on Harris' behalf to be attributable to Mr. YYYYY, those monies would have to have been connected to drug payments that were reasonably foreseeable to Mr. YYYYY *and* part of "jointly undertaken criminal activity" between him and Harris. U.S.S.G. 1B1.3(a)(1)(B). In other words, the drug transactions producing the payments would have to involve drug transactions which Mr. YYYYY agreed to jointly undertake with Harris. *See United States v. Dean*, 59 F.3d 1479, 1495 (5th Cir. 1995), *cert. denied*, 518 U.S. 1082 (1996). It is not simply enough for the government to show that Mr. YYYYY knew Harris was dealing drugs with other for those drug sales to constitute "relevant conduct" under the United States Sentencing Guidelines. *Id.*[30] At sentencing, the government

[30]*See also United States v. Evbuomwan*, 992 F.2d 70, 74 (5th Cir.1993) (holding that foreseeability of codefendants' conduct was irrelevant absent concurrent findings that defendant

made no showing that the transfers to Harris that were unrelated to Mr. YYYYY were connected to "jointly undertaken criminal activity."

At least two cases have rejected the government's argument that simply being convicted of a money laundering conspiracy is sufficient to attribute to one conspirator the entire amount of funds laundered by a second conspirator without it being shown that the this amount was foreseeable to the first conspirator and part of jointly undertaken activity. For example, in *United States v. Orlando*, 281 F.3d at 589, Orlando was convicted of a money laundering conspiracy. The United States Court of Appeals for the Sixth Circuit first explained that "[i]n applying the sentencing guidelines to particular defendants who have been convicted for their role in a conspiracy, a district court must differentiate between the co-conspirators and make individualized findings of fact for each defendant." *Id*. at 600. It then noted that the sentencing court had simply based Orlando's offense level on the total amount laundered by the conspiracy. *Id*. The Court of Appeals concluded this was error and remanded the case for resentencing because the sentencing court failed to make a determination of "'the scope of the criminal activity [Orlando] agreed to jointly undertake.'" *Id*. at 601.

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agreed to jointly undertake criminal activity with codefendants and that codefendants' conduct was in furtherance of that agreement).

Similarly, in *United States v. Andonian,* 29 F.3d 634, *11 (9th Cir. 1994) (table), *cert. denied*, 513 U.S. 1138 (1995), the respective defendants argued "that they should not have received an adjustment to their base offense levels on the ground that over $300 million were laundered, because they were not each personally responsible for laundering this entire sum." The Court of Appeals agreed and remanded the case:

> We are aware of no specific findings by the district court as to the scope of each defendant's agreement or as to the reasonable foreseeability to each defendant of the amount of money laundered. As to the Andonians, the record demonstrates that the entire $316 million was funneled through their gold exchange business. However, we cannot say that, with respect to defendants Seresi and Saini, who were not personally involved in handling all of the funds, the lack of specific findings is harmless. We therefore remand to the district court for appropriate findings and, if necessary, resentencing consistent with those findings.

Id. at *11.

C. Conclusion

In sum, at the sentencing hearing held in this case, the government only established that $170,000 in transfers were part of any alleged "jointly undertaken" activity between Harris and Mr. YYYYY. Moreover, many of these transactions were between Mr. YYYYY and Mr. Harris themselves and only $83,633 of the transfers involved actual "concealment" for purpose of determining the "value of laundered funds." *See, e.g., United States v. Barrios*, 993 at 1524 (The "value of laundered funds" means those funds used in an *unlawful* monetary transaction.). Applying the

$83, 633 figure would have resulted in only an eight point enchantment, rather than a sixteen point enchantment applied by the district court, under the Sentencing Guidelines. U.S.S.G. § 2B1.1(b)(1).

CONCLUSION

For the foregoing reasons, Mr. YYYYY's convictions should be reversed and a new trial ordered. In the alternative, his sentence should be reversed and the case remanded for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on April 8, 2011, I caused two paper copies and one electronic copy of the foregoing Brief of Defendant-Appellant to be mailed by first class mail, postage prepaid to Laurel Franklin Coan, U.S. Attorney's Office, Eastern District of Texas, 110 N. College Street, Suite 700Tyler, TX 75702 and Greg Waldron, Holmes & Moore, PLLC, 110 W. Methvin, Longview, TX 75601.

/s/ F. Clinton Broden
F. Clinton Broden

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