

ment and its remand of the matter to the Bankruptcy Court for further proceedings leaves unaddressed the discrete issue raised by the original application—whether Penn Traffic should be permitted to reject the Project Agreement as a matter of sound business judgment. Both parties argue that the Bankruptcy Court’s further proceedings on this issue will be ministerial only. In support of this contention, both cite the Bankruptcy Court’s above-quoted observation that the proposed rejection “appears to meet the low threshold of the business judgment test”<sup>3</sup> and argue that grant of the application on remand is such a foregone conclusion that we should treat the District Court’s order as a final one and assume jurisdiction of this appeal.

While it appears that it may not be necessary for the Bankruptcy Court to entertain further evidentiary submissions or extensive argument on remand, the final determination of Penn Traffic’s rejection motion is far from a ministerial act. It is one calling for the exercise of judgment and discretion by the Bankruptcy Court. It may well be that the court’s prior assessment of the record will enable it to perform its judicial function in this regard expeditiously. Its task on remand is, nonetheless, different in kind from the sorts of computations and other mechanical functions, not requiring the exercise of judgment or discretion, that we have characterized as “ministerial” in the past. We see no reason to create any further exceptions to the final judgment rule and, accordingly, dismiss this appeal for lack of jurisdiction.



3. *Penn Traffic I*, 322 B.R. at 68.

**UNITED STATES of America,**  
**Appellee,**

v.

**Samuel NESS, Defendant–Appellant.**

**Docket No. 05–4401–cr.**

United States Court of Appeals,  
Second Circuit.

Argued: April 11, 2006.

Decided: Oct. 10, 2006.

**Background:** Defendant, convicted of conspiracy to launder and laundering drug money, moved for judgment of acquittal. The United States District Court for the Southern District of New York, Hellerstein, J., 2003 WL 21804973, denied the motion. Defendant appealed.

**Holdings:** The Court of Appeals, Calabresi, Circuit Judge, held that:

- (1) evidence established concealment element of defendant’s offenses, and
- (2) district court’s error in giving inaccurate financial institution jury charge did not amount to plain error.

Affirmed.

### 1. Conspiracy ⇨47(3.1)

#### United States ⇨34

Sufficient evidence established concealment element of defendant’s conspiracy to commit money laundering, transaction money laundering, and transportation money laundering offenses; evidence showed that defendant received narcotics proceeds and remitted them to other figures connected to different drug operations, and level of secrecy around dealings included clandestine meetings to transfer large sums of concealed cash, use of coded

language, and scrupulous avoidance of paper trail. 18 U.S.C.A. §§ 1956(a)(1)(B)(i), (a)(2)(B)(i), 1957(a).

## 2. Statutes ⇔209

The use of identical language in different provisions of a statute is a strong indication that they are to be given the same interpretation, absent clear evidence that Congress intended otherwise.

## 3. Criminal Law ⇔881(1)

When a jury issues a general verdict on a conspiracy charge naming multiple objects in the conjunctive, the lack of sufficient evidence to support one of the objects of a multi-object conspiracy does not vitiate the conspiracy conviction, where there was sufficient evidence to support another object.

## 4. Criminal Law ⇔1038.1(4)

District court's error in giving inaccurate financial institution jury charge did not amount to plain error in defendant's prosecution for conspiracy to commit money laundering and substantive money laundering, where conduct that qualified defendant or his business as a financial institution under faulty jury charge would have also satisfied definition of financial transaction in laundering of monetary instruments statute, which formed alternate basis for conviction. 18 U.S.C.A. § 1956(c)(4)(A).

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Jocelyn E. Strauber, Assistant United States Attorney (Michael J. Garcia, United States Attorney, and Karl Metzner, Assistant United States Attorney, on the brief), United States Attorney's Office for the Southern District of New York, New York, N.Y., for Appellee.

Vivian Shevitz (Jane Simkin Smith, of counsel), for Defendant–Appellant.

Before WINTER, CALABRESI, and POOLER, Circuit Judges.

CALABRESI, Circuit Judge.

Defendant–Appellant Samuel Ness was convicted, after a jury trial, of one count of conspiring to commit three money laundering offenses and one substantive count of violating 18 U.S.C. § 1956(a)(1)(B)(i) (“transaction money laundering”). The three objects of the conspiracy charged were violations of (1) 18 U.S.C. § 1957(a) (“monetary transaction in unlawful funds”), (2) 18 U.S.C. § 1956(a)(1)(B)(i), and (3) 18 U.S.C. § 1956(a)(2)(B)(i) (“transportation money laundering”). Following denial of Ness's post-verdict judgment for acquittal, *see United States of America v. Ness*, 2003 WL 21804973 (S.D.N.Y. Aug.6, 2003), he was sentenced to fifteen years' imprisonment, with three years' supervised release. On appeal, Ness raises a number of challenges to his conviction and to his sentence.

We assume the parties' familiarity with the facts, the procedural history, and the issues on review.

[1] Ness argues, *inter alia*, that the evidence presented at trial was insufficient to sustain his conviction with the respect to the element of “concealment,” which is applicable both to transaction money laundering and transportation money laundering. Specifically, the statutes proscribe certain “financial transaction[s]” (in the case of 18 U.S.C. § 1956(a)(1)(B)(i)) and the “transportation, transmission, or transfer” of certain funds (in the case of 18 U.S.C. § 1956(a)(2)(B)(i)) “designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.” Here, the evidence showed that Ness, who ran an armored car carrier business, received

from drug traffickers millions of dollars in narcotics proceeds, which—the government argued—Ness and his associates transported abroad and delivered at the traffickers’ behest. Ness does not dispute that such evidence was presented. Rather, he argues that the concealment element is satisfied only when the transaction or transportation at issue was designed to give unlawful proceeds the appearance of legitimate wealth. Here, he argues, the government showed only that he accepted cash from drug transactions for shipment from one place to another, *e.g.*, from drug sellers to their suppliers.

Some other circuits that have decided money laundering appeals would find this evidence legally insufficient because they have essentially adopted Ness’s reasoning. See *United States v. Cuellar*, 441 F.3d 329 (5th Cir.2006), *reh’g en banc granted*, 454 F.3d 505; *United States v. Dimeck*, 24 F.3d 1239 (10th Cir.1994); *but cf. United States v. Carr*, 25 F.3d 1194, 1206 (3d Cir.1994). But we interpret the provisions against the backdrop of Second Circuit precedent, most notably *United States v. Gotti*, 459 F.3d 296 (2d Cir.2006). In that case, a panel of this court upheld convictions under 18 U.S.C. § 1956(a)(1)(B)(i) against a sufficiency challenge with respect to concealment where the evidence showed that defendants participated in a system of “tribute” payments from lower to higher figures in an organized crime hierarchy, with the proceeds deriving from unlawful activity. *Gotti*, 459 F.3d at 308–311, 337–338. In the view of the *Gotti* panel, the

“highly complex and surreptitious” process through which the funds were transferred—involving coded language, the use of intermediaries, secretive handoffs, and cash transactions—sufficed to permit the inference that the deliveries “had been designed in a way that would conceal the source of the moneys.” *Id.* at 337; see also *id.* at 337–38 (citing approvingly to *United States v. Prince*, 214 F.3d 740, 752 (6th Cir.2000), and *United States v. Cruzado-Laureano*, 404 F.3d 470, 483 (1st Cir. 2005), for similar approaches to concealment).

[2] We conclude that *Gotti* controls here.<sup>1</sup> Ample evidence was presented to permit a jury to find that Ness received narcotics proceeds and remitted them to other figures connected to the different drug operations with which he was involved. And the level of secrecy that attended Ness’s dealings with the traffickers was comparable to that noted in *Gotti*, involving, for instance, clandestine meetings to transfer large sums of concealed cash, the use of coded language, and the scrupulous avoidance of a paper trail. See, *Ness*, 2003 WL 21804973, at \* 1–4. On such facts, we hold that a jury could find that the acts of which Ness is accused were designed, at least in part, to conceal the identity of the funds. In so holding, however, we express no view as to sufficiency issues that might arise when the remittance of unlawful funds is surrounded by less elaborate stratagems or a lesser measure of secrecy. We note also that not every disposition of unlawful funds quali-

1. Although *Gotti*’s discussion of concealment concerned only an 18 U.S.C. § 1956(a)(1)(B)(i) prosecution for transaction money laundering, we believe that it controls also with respect to Ness’s prosecution under 18 U.S.C. § 1956(a)(2)(B)(i). As indicated above, the relevant concealment language is identical for both provisions. We follow the general rule that the use of identical language

in different provisions of a statute is a strong indication that they are to be given the same interpretation, absent clear evidence that Congress intended otherwise. See *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R.*, 456 F.3d 54, 65 (2d Cir.2006). And Ness has offered no reason why the two provisions should be interpreted differently.

fies as a money laundering offense. In *United States v. Stephenson*, 183 F.3d 110 (2d Cir.1999), we held that the defendant's use of unlawful funds to purchase a car was insufficient as a matter of law to support a conviction under 18 U.S.C. § 1956(a)(1)(B)(i), and said that "[c]onceal" implies conduct entailing deception that goes beyond merely acting in a way that avoids compulsory disclosure." *Id.* at 121.

[3] In their briefs, the parties also devote considerable attention to Ness's sufficiency of the evidence challenge the regarding jury's finding that he or his business was a "financial institution". But given our rejection of Ness's sufficiency challenge on the "concealment" issue, we may resolve Ness's appeal without taking up the financial institution sufficiency question. Of the offenses charged, either in the substantive or the conspiracy count, the involvement of a financial institution is strictly necessary only to 18 U.S.C. § 1957(a), Object One of the conspiracy count.<sup>2</sup> The jury indicated by special verdict that Ness conspired to achieve all three charged objects of the conspiracy. In such a situation, as when a jury issues a general verdict on a conspiracy charge naming multiple objects in the conjunctive, "the lack of sufficient evidence to support one of the objects of a multi-object conspiracy d[oes] not vitiate the conspiracy conviction, where there was sufficient evidence to support [an]other object." *United States v. Pascarella*, 84 F.3d 61,

2. Under the disjunctive structure of 18 U.S.C. § 1956(a)(1)(B)(i), a financial institution may—but need not—be an element of transaction money laundering, and in defining transportation money laundering, 18 U.S.C. § 1956(a)(2)(B)(i) makes no reference whatsoever to financial institutions.

71 (2d Cir.1996) (citing *Griffin v. United States*, 502 U.S. 46, 60, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991)). Hence, even if Ness's armored car company did not qualify as a financial institution, and his conspiracy conviction thus could not stand with respect to Object One, the conviction could still be sustained on the basis of Objects Two and Three.<sup>3</sup> Accordingly, we may proceed without addressing this sufficiency challenge.

[4] We do, however, consider—and reject—a second, related claim: that the jury instruction with respect to the financial institution element was flawed, and caused Ness prejudice. As Ness failed to object to the charge below, our review is for plain error. *United States v. Miller*, 116 F.3d 641, 672 (2d Cir.1997). In fact, the "financial institution" jury charge proposed by the prosecution and adopted by the court was inaccurate, as the government now all but admits. But Ness is unable to demonstrate that the error caused him prejudice. As discussed above, Ness's conspiracy conviction could be sustained on the basis of its third object alone, which does not have "financial institution" as an element, so the relevant count for purposes of this challenge is the substantive count of transaction money laundering. The conduct that would qualify Ness or his business as a "financial institution" under the faulty jury charge would also satisfy the definition of a "financial transaction" in 18 U.S.C. § 1956(c)(4)(A), which forms an alternate basis for conviction. *See Gotti*, 459 F.3d at 335–36 (interpreting

3. Nor do we believe that Ness's sentence would require reconsideration even if we found the evidence insufficient with respect to the financial institution element. By our calculation, the existence *vel non* of a financial institution would not affect the applicable range under the Sentencing Guidelines, nor was it relevant to the factors mentioned by Judge Hellerstein in setting Ness's sentence.

18 U.S.C. § 1956(c)(4)(A)). Hence, even if the jury relied on the faulty jury charge, it still found facts sufficient to sustain the conviction.

We have considered each of Ness's claims, and we find them all to be without merit. Accordingly, we affirm the judgment of the district court.



Melvyn KAUFMAN, Plaintiff-  
Appellant,

v.

Judith S. KAYE, in her capacity as  
Chief Justice of the Court of Appeals  
for the State of New York, A. Gail  
Prudenti, in her capacity as presiding  
Justice of the Appellate Division of  
the Supreme Court of the State of  
New York, Appellate Division, Second  
Judicial Department, Defendants-Appellees.

Docket No. 05-5215-cv.

United States Court of Appeals,  
Second Circuit.

Argued: May 11, 2006.

Decided: Oct. 10, 2006.

**Background:** Litigant, who previously filed multiple unsuccessful lawsuits against his neighbors and others, and was sanctioned by the state appellate court for pursuing frivolous appeals, brought action seeking declaratory and injunctive relief, alleging that the procedure for assigning cases among panels of judges in the state appellate court violated the due process and equal protection clauses. The United States District Court for the Eastern Dis-

trict of New York, David G. Trager, J., 2005 WL 1923561, dismissed action. Litigant appealed.

**Holding:** The Court of Appeals, Winter, Circuit Judge, held that *Younger* abstention doctrine barred action.

Affirmed.

### 1. Federal Courts ⇌41

Federal courts may not entertain actions that seek to impose an ongoing federal audit of state proceedings.

### 2. Federal Courts ⇌51, 54

The *Younger* abstention doctrine precluded the federal District Court and Court of Appeals from deciding litigant's action, seeking declaratory and injunctive relief, alleging that state court procedure for assigning cases among panels of judges in the state appellate court violated the due process and equal protection clauses; federal courts could not interfere with state court practices, and litigant could have raised such challenges in state court. U.S.C.A. Const.Amend. 14.

### 3. Federal Courts ⇌46

*Younger* abstention by a federal court is appropriate where the plaintiff has an opportunity to raise and have timely decided by a competent state tribunal the constitutional claims at issue in the federal suit.

### 4. Federal Courts ⇌46

*Younger* abstention by the federal court is inappropriate where state law bars the effective consideration of the constitutional claims in state court.

### 5. Federal Courts ⇌46

In determining whether *Younger* abstention by the federal court is appropriate in an action alleging constitutional violations, the question is whether the state's procedural remedies could provide the re-