

# The Constitutionality of the Proportionality Test to Prove Money Laundering

Pedro Rubén **Torres Estrada**

 <https://orcid.org/0000-0002-8516-7621>

Escuela de Gobierno y Transformación Pública del Tecnológico de Monterrey, México  
Email address: pedro.torres@tec.mx

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**Abstract:** For years, combating money laundering has been a priority for the Mexican State. Frontal attack strategies have been used against criminal groups but have not yielded the expected effectiveness, as violence continues to escalate. This work begins with an assessment of the legal punishments applied to cases of money laundering in Mexico. Subsequently, it presents the fundamental rights that might be compromised in the process of collecting evidence and explores the use of the proportionality test as a parameter and method to ask judges to accept only admissible evidence to thus avoid issues of unconstitutionality. Finally, some evidence that can be employed to substantiate money laundering offenses and secure convictions are outlined. Furthermore, recommendations for public policy are made to address and enhance the efforts of stakeholders engaged in combating this crime, since to date, effectiveness in obtaining convictions has been remarkably low.

**Keywords:** Money Laundering, Legal Proof, Illegal Evidence, Fundamental Rights, Proportionality.

**Resumen:** Por años, combatir el lavado de dinero ha sido una prioridad para el estado mexicano. Se han utilizado estrategias de combate frontal con los grupos criminales, pero no han tenido la efectividad esperada, ya que la violencia continúa aumentando. Este trabajo comienza con una evaluación de las sanciones legales aplicadas a los casos de lavado de dinero en México. Posteriormente, presenta los derechos fundamentales que podrían verse comprometidos en el proceso de recolección de prueba y explora el uso del test de proporcionalidad como parámetro y método para pedir a los jueces que acepten sólo pruebas lícitas y así evitar problemas de inconstitucionalidad. Finalmente, se describen algunas de las pruebas que pueden utilizarse para fundamentar el delito de lavado de dinero y asegurar sentencias condenatorias. Además, se hacen recomendaciones de política pública para abordar y potenciar los esfuerzos de los actores involucrados en el combate a este delito, ya que a la fecha la efectividad en la obtención de sentencias condenatorias ha sido notablemente baja.

**Palabras clave:** lavado de dinero, prueba, pruebas ilegales, derechos fundamentales, proporcionalidad.

**Summary:** I. *Diagnosis of the Legal Punishment for Transactions with Illicit Proceeds (Hereinafter Money Laundering) in Mexico.* II. *Fundamental Rights and the Test: A Theoretical Framework.* III. *The proportionality test as a control parameter to request proof from the pre-trial judge.* IV. *Some of the principal pieces of evidence used to prove money laundering in a trial.* V. *Conclusions.*

## I. Diagnosis of the Legal Punishment for Transactions with Illicit Proceeds (Hereinafter Money Laundering) in Mexico

Research has shown that there is a problem in targeting the financial, patrimonial, and economic structures of criminal activity. Only 0.26% of all federal sentences in the last five years were related to Money Laundering (ML).<sup>1</sup>

This same research puts forward two hypotheses. The first centers on law enforcement agencies' lack of clarity and effectiveness in Public Policies (hereinafter PPs) on criminal prosecution. The second hypothesis is a lack of training among prosecutors and administrative entities that work together to gather evidence for ML case convictions.

In previous studies and interviews conducted with federal judges between March and September 2021, it was observed that in ML-related cases, authorities sometimes submit illegal evidence, such as documents obtained without judicial authorization,<sup>2</sup> evidence gotten from illegal searches that did not adhere to procedure with procedural shortcomings, or interviews with the accused that were conducted without meeting the legal requirements.

With this in mind, one hypothesis explaining why judges tend not to be very effective in prosecuting ML charges is that the evidence they receive does not meet the necessary quality and legal standards to effectively punish this crime, in addition to the limited knowledge and training prosecutors have regarding money laundering.

In this context and within the scope of our article, a prosecutor or defense attorney has to verify how the evidence was obtained, as it forms the basis for an accusation and, consequently, the elements upholding it. Without legally obtained evidence, there are no convictions, so any evidence that affects a fundamental right is unconstitutional and thus taints the process.<sup>3</sup>

<sup>1</sup> Pedro Rubén Torres Estrada, *Estado Actual del Castigo Judicial del Delito de Operaciones con Recursos de Procedencia Ilícita ORPI en México*, in POLÍTICAS PÚBLICAS PARA LA PREVENCIÓN DE LAVADO DE DINERO 16-48 (Tirant lo Blanch, 2022).

<sup>2</sup> One example is when the Financial Intelligence Unit delivers bank statements directly to a pre-trial judge without the prosecutor having filed an explicit request.

<sup>3</sup> The theory known as the Fruit of the Poisonous Tree Doctrine says that any evidence obtained unlawfully must be excluded from legal proceedings as well as any evidence derived from it, since it is tainted with unlawfulness if the "tree" is tainted, so is its "fruit." Ricardo Iván Medina Rico, *La Teoría del Árbol Envenenado. Excepciones a la Regla de Exclusión*, in PRUEBA ILÍCITA Y

This work aims to provide guidelines to help investigators gather evidence by following the tenets of traceability as found in the framework established in the Código Nacional de Procedimientos Penales [National Code of Criminal Procedure, hereinafter CNPP] while also adhering to the theoretical principles that guide and regulate the collection of evidence, such as fundamental rights and others established in the Constitution and international instruments.<sup>4</sup> Additionally, we propose some tests that could help prevent or combat money laundering.

Additionally, we discuss the methods judges use to assess and weigh conflicting rights in difficult cases,<sup>5</sup> as well as to determine the legality of evidence in ML cases. One example is the proportionality test, which is a methodological tool used by judges and should not be confused with the principle of proportionality,<sup>6</sup> which is a constitutional principle in Western constitutionalism and has been applied in making judicial decisions, especially after World War II.<sup>7</sup>

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REGLA DE EXCLUSIÓN EN MATERIA PENAL. ANÁLISIS TEÓRICO PRÁCTICO EN DERECHO COMPARADO 39-53 (Editorial Universidad del Rosario, 2017) available at: <https://books.scielo.org/id/qyznm/pdf/medina-9789587388848-07.pdf> In addition to this, consult Court Opinion II.2o.P61 P (10a.), which discusses unlawful evidence and evidence with formal or procedural flaws, as part of the Fruit of the Poisonous Tree Doctrine. Available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2016747>

In the Mexican context, one case in which this theory was applied was the Florence Cassez case, where the presiding judge argued that, in addition to violating the accused's fundamental rights, her arrest had been staged, resulting in tainting the proceedings throughout the entire process. Luis Raúl González Pérez and Arturo Villarreal Palos, *Legality and Justice in the Framework Of Illegal Evidence. Some Thoughts About its Scope and Content in the Mexican Legal System*, 62(258) REVISTA DE LA FACULTAD DE DERECHO DE MÉXICO 339-353. Available at: <https://doi.org/10.22201/fder.24488933e.2012.258.60734>

PRUEBA ILÍCITA Y PRUEBA CON DEFICIENCIA FORMAL O IRREGULAR. SUS DIFERENCIAS. Segundo Tribunal Colegiado en Materia Penal del Segundo Distrito [S.C.J.N] [T.C.C], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 53, Tomo III, April 2018, Tesis II.2o.P61 P (10a.), page 2272 (Mex.) available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2016747>

<sup>4</sup> Alfonso Jaime García Figueroa, *¿Existen diferencias entre reglas y principios en el estado constitucional? Algunas notas sobre la teoría de los principios de Robert Alexy*, in DERECHOS SOCIALES Y PONDERACIÓN 333-367 (Fontamara, 2007).

<sup>5</sup> Difficult cases include those that become problematic when establishing a normative and/or factual premise. José Ramón Cossío Díaz, *Procedimientos Disciplinarios Contra Magistrados: Casos Difíciles e Independencia Judicial*, 57(248) REVISTA DE LA FACULTAD DE DERECHO DE MÉXICO. 357-369. Available at: <https://revistas.unam.mx/index.php/rfdm/article/view/61513>

Difficult cases require greater interpretative effort due to situations of doubt or controversy. FRANCISCO JAVIER EZQUIAGA GANUZAS, LA ARGUMENTACIÓN INTERPRETATIVA EN LA JUSTICIA ELECTORAL MEXICANA 59-69 (Tribunal Electoral del Poder Judicial de la Federación. Coordinación de Documentación y Apoyo Técnico, 2006) available at: <https://archivos.juridicas.unam.mx/www/bjv/libros/11/5109/8.pdf>

<sup>6</sup> Jaime Cárdenas Gracia presents the thesis that, in the Mexican context, the interpretation of the law is changing. Jaime Cárdenas Gracia, *Diez Tesis Sobre Nuestro Atraso Jurídico*, in NEOCONSTITUCIONALISMO Y ESTADO DE DERECHO 44-ff (Limusa 2006)

<sup>7</sup> The inclusion of this method for resolving difficult cases has permeated a significant segment of the legal culture in continental Europe and Latin America. Hence, it is important to study the topic of evidence in light of this method.

## II. Fundamental Rights and the Test: A Theoretical Framework

The first aspect a prosecutor or defense attorney must consider in obtaining or objecting to evidence is the rights and principles that may clash because, in a constitutional state, both elements must be in balance.<sup>8</sup> Among the rights that may enter into conflict are the presumption of innocence,<sup>9</sup> the right of defense, the right to personal and mental integrity, the right to prove innocence,<sup>10</sup> the rights of victims, and the right of access to justice,<sup>11</sup> along with other rights that might be affected indirectly, such as the right to truth.<sup>12</sup>

Although the topic addressed herein is centered on criminal law and specifically on criminal procedural law, we cannot lose sight of the central tenets of due process guarantees and rights, which delimit and shape the entire law of evidence within the framework of the Constitution and the paradigm of human rights.<sup>13</sup>

In this way, no legislation established to govern how evidence is obtained and assessed can contravene the principles of constitutional law in its national or su-

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<sup>8</sup> MIRENTXU CORCOY BIDASOLO, CRISIS DE LAS GARANTÍAS CONSTITUCIONALES A PARTIR DE LAS REFORMAS PENALES Y DE SU INTERPRETACIÓN POR LOS TRIBUNALES, IN CONSTITUCIÓN Y SISTEMA PENAL 161 (Marcial Pons 2012).

<sup>9</sup> PRESUNCIÓN DE INOCENCIA COMO REGLA DE TRATO EN SU VERTIENTE EXTRAPROCESAL. LA TRANSGRESIÓN A ESE DERECHO FUNDAMENTAL PUEDE SURGIR DE CUALQUIER AUTORIDAD PÚBLICA. Noveno Tribunal Colegiado en Materia Penal del Primer Circuito [S.C.J.N] [T.C.C], Gaceta del Semanario Judicial de la Federación, Undécima Época, Libro 14, Tomo VII, June 2022, Tesis I.9o.P.54 P (11a.), page 6355 (Mex.) available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2024811>

<sup>10</sup> DERECHO A PROBAR. CONSTITUYE UNA FORMALIDAD ESENCIAL DEL PROCEDIMIENTO INTEGRANTE DEL DERECHO DE AUDIENCIA. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 58, Tomo I, September 2018, 1a. CXII/2018 (10a.), page 839 (Mex.) available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2017887>. The right to present evidence is an essential aspect in the formality of the procedure, central to the right to a hearing, as recognized in the second paragraph of Article 14 of the Mexican Constitution. This definition has been provided by the Primera Sala de la Suprema Corte de Justicia de la Nación [First Chamber of the Supreme Court of Justice of the Nation], in Isolated Opinion e-Registration Number 2017887.

<sup>11</sup> BARUCH F. DELGADO CARBAJAL, MARÍA JOSÉ BERNAL BALLESTEROS, CATÁLOGOS PARA LA CALIFICACIÓN DE VIOLACIONES DE DERECHOS HUMANOS 127-167 (Comisión de Derechos Humanos del Estado de México 2016) available at: <https://archivos.juridicas.unam.mx/www/bjv/libros/10/4974/20.pdf>

<sup>12</sup> The right to truth, as defined in Court Opinion 1a. CCXIII/2017 (10th.), is understood as the right of victims or their family members to receive clarification from the competent State authorities regarding the events surrounding the violations and those accountable for said acts, by means of investigation and court judgment established in Articles 8 and 25 of the American Convention on Human Rights. PRUEBA GENÉTICA EN CASOS DE DESAPARICIÓN. RESULTA CONTRARIO AL DERECHO A LA VERDAD REQUERIRLA A LA VÍCTIMA INDIRECTA COMO CONDICIÓN PARA ACCEDER A LA AVERIGUACIÓN PREVIA. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 49, Tomo I, December 2017, 1a. CCXIII/2017 (10a.), page 440 (Mex.) available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2015755>

<sup>13</sup> Robert Alexy, *Los Derechos Fundamentales en el Estado Constitucional*, in ESTADO CONSTITUCIONAL, NEOCONSTITUCIONALISMO 31-48 (Trotta, 2003).

pranational<sup>14</sup> context. The first step toward ascertaining whether the evidence is illegal is to refer to what is contained in procedural or criminal procedure codes,<sup>15</sup> as they assert state that any evidence obtained by violating any fundamental right is deemed illegal.

It is also necessary to know and apply the proportionality test that constitutional courts and judges use when faced with conflicting rights or principles in given cases.<sup>16</sup> Therefore, the legal parties involved cannot disregard or fail to understand constitutional law and, much less, the methods used in its application, such as the aforementioned *test*,<sup>17</sup> whose sub-principles—necessity, suitability, and proportionality—serve as a roadmap for assessing the legality of *prima facie* evidence and complying with the standards required by judges.<sup>18</sup>

In this context, we will have to analyze whether the evidence presented does not go beyond the limits set in procedural codes.<sup>19</sup> For example, if evidence is

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<sup>14</sup> This is the case in the American Declaration of the Rights and Duties of Man (1948), the European Convention on Human Rights (1950), the Pact of San José (1969) which establishes the American Convention on Human Rights, as well as the various pacts, protocols, and conventions in which Mexico is party to and has signed. Principales Instrumentos Internacionales en Derechos Humanos [Main International Instruments on Human Rights], Comisión de Igualdad y Derechos Humanos del Tribunal Federal de Conciliación y Arbitraje (Mex.) available at: <http://www.tfca.gob.mx/es/TFCA/piiDH>

<sup>15</sup> Código Nacional de Procedimientos Penales [C.N.P.P] [National Code of Criminal Procedure], as amended, Diario Oficial de la Federación [D.O.], January 12, 2016. Title IV Test information, burden of proof and evidence, Article 264. Nullity of the evidence. Available at: [https://www.oas.org/juridico/PDFs/mesicic5\\_mex\\_ane\\_15.pdf](https://www.oas.org/juridico/PDFs/mesicic5_mex_ane_15.pdf)

<sup>16</sup> PRIMERA ETAPA DEL TEST DE PROPORCIONALIDAD. IDENTIFICACIÓN DE UNA FINALIDAD CONSTITUCIONALMENTE VÁLIDA. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 36, Tomo II, November 2016, 1a. CCLXV/2016 (10a.), page 902 (Mex.) available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2013143>

SEGUNDA ETAPA DEL TEST DE PROPORCIONALIDAD. EXAMEN DE IDONEIDAD DE LA MEDIDA LEGISLATIVA. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 36, Tomo II, November 2016, 1a. CCLXVIII/2016 (10a.), page 911 (Mex.) available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2013152>

TERCERA ETAPA DEL TEST DE PROPORCIONALIDAD. EXAMEN DE LA NECESIDAD DE LA MEDIDA LEGISLATIVA. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 36, Tomo II, November 2016, 1a. CCLXX/2016 (10a.), page 914 (Mex.) available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2013154>

CUARTA ETAPA DEL TEST DE PROPORCIONALIDAD. EXAMEN DE LA PROPORCIONALIDAD EN SENTIDO ESTRICTO DE LA MEDIDA LEGISLATIVA. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 36, Tomo II, November 2016, 1a. CCLXXII/2016 (10a.), page 984 (Mex.) available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2013136>

<sup>17</sup> Joan Queralt Jiménez, *La Detención Preventiva: Previsiones Constitucionales y Legales*, in CONSTITUCIÓN Y SISTEMA PENAL 245-ff (Marcial Pons 2012)

<sup>18</sup> We should not lose sight of the theory of probative “reasonableness,” which, in the words of Jodi Ferrer, consists of the following three steps: 1) the establishment of the elements of evidence, 2) the assessment of the evidence, and 3) the decision-making process. JORDI FERRER BELTRÁN, LA VALORACIÓN RACIONAL DE LA PRUEBA 68-150 (Marcial Pons 2007).

<sup>19</sup> PRUEBA ILÍCITA Y PRUEBA IMPERFECTA. SUS DIFERENCIAS. Primer Tribunal Colegiado en Materia Penal y Administrativa del Décimo Séptimo Circuito, Tribunales Colegiados de Circuito [T.C.C.], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 57, Tomo III,

obtained through torture or if the defendant has not been read their rights;<sup>20</sup> if the corresponding mandatory judicial authorization for gathering certain types of evidence was secured<sup>21</sup>—as in the case of search warrants, court approval for wiretapping, or authorization to intercept correspondence—; the physical examination or recognition of a person when they refuse to be examined; or lifting bank secrecy.<sup>22</sup> If these precepts are violated, evidence may be considered illegal, as will be further discussed in the following section.

### III. The Proportionality Test as a Control Parameter to Request Proof from the Pre-Trial Judge

Although it is generally thought that this method is only used in constitutional law, it should be noted that because of its empirical value, it is an extremely helpful tool for prosecutors or, as the case may be, defense lawyers and their

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August 2018, XVII.1o.P.A.68 P (10a.), page 3019 (Méx.) available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2017765>

<sup>20</sup> PRUEBA ILÍCITA. LA EXCLUSIÓN DE LA OBTENIDA CON VIOLACIÓN A LOS DERECHOS HUMANOS DEL COINCULPADO DEL QUEJOSO, NO ROMPE CON EL PRINCIPIO DE RELATIVIDAD DE LAS SENTENCIAS DE AMPARO, SIEMPRE QUE DE ELLA SE ADVIERTAN IMPUTACIONES O DATOS INCRIMINATORIOS TOMADOS EN CUENTA PARA EL DICTADO DEL FALLO RECLAMADO, EN PERJUICIO DEL PETICIONARIO. Tribunal Colegiado en Materia Penal del Décimo Primer Circuito, Tribunales Colegiados de Circuito [T.C.C.], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 39, Tomo III, February 2017, XLP.J/4 (10a.), page 1993 (Méx.) available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2013604>

<sup>21</sup> Código Nacional de Procedimientos Penales [C.N.P.P] [National Code of Criminal Procedure], as amended, Diario Oficial de la Federación [D.O.F.], January 12, 2016. Article 252. Investigation activities that require prior authorization from a pre-trial judge.

<sup>22</sup> SECRETO BANCARIO. LA SOLICITUD DE INFORMACIÓN BANCARIA —A TRAVÉS DE LA COMISIÓN NACIONAL BANCARIA Y DE VALORES— REALIZADA POR EL MINISTERIO PÚBLICO PARA LA INVESTIGACIÓN DE LOS DELITOS, DEBE ESTAR PRECEDIDA DE AUTORIZACIÓN JUDICIAL, DE LO CONTRARIO, LAS PRUEBAS OBTENIDAS SON ILEGALES Y CARENTES DE VALOR Y, POR TANTO, DEBEN EXCLUIRSE DEL CUADRO PROBATORIO. Noveno Tribunal Colegiado en Materia Penal del Primer Circuito, Tribunales Colegiados de Circuito [T.C.C.], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 70, Tomo III, September 2019, I.9o.P.251 P (10a.), page 2255 (Méx.) available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2020649>

SECRETO BANCARIO. EL ARTÍCULO 117, FRACCIÓN II, DE LA LEY DE INSTITUCIONES DE CRÉDITO, EN SU TEXTO ANTERIOR A LA REFORMA PUBLICADA EN EL DIARIO OFICIAL DE LA FEDERACIÓN EL 10 DE ENERO DE 2014, VIOLA EL DERECHO A LA VIDA PRIVADA. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 55, Tomo II, June 2018, 1a. LXXI/2018 (10a.) page 977 (Mex.) available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2017190>

ESTADOS DE CUENTA BANCARIOS PROPORCIONADOS POR LA COMISIÓN NACIONAL BANCARIA Y DE VALORES PARA COMPROBAR EL CUMPLIMIENTO DE OBLIGACIONES FISCALES, EXHIBIDOS POR LA SECRETARÍA DE HACIENDA Y CRÉDITO PÚBLICO COMO FUNDAMENTO DE LA QUERRELA POR LOS DELITOS DE DEFRAUDACIÓN FISCAL Y DEFRAUDACIÓN FISCAL EQUIPARADA. ES INNECESARIO QUE EL MINISTERIO PÚBLICO LOS SOMETA A CONTROL JUDICIAL PREVIO, TRATÁNDOSE DEL PROCESO PENAL MIXTO. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Undécima Época, Libro 13, Tomo III, May de 2022, 1a./J. 20/2022 (11a.), page 3370 (Mex.) available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2024653>

teams when initiating legal proceedings with the pre-trial judge. However, in this article, we focus on providing means to prove the crime of ML.

Prosecutors often complain that judges obstruct their investigations, but, at the same time, judges argue that many requests do not give well-founded arguments, some violate fundamental rights, and others do not clearly state the reasons for which the evidence or proof<sup>23</sup> is needed.

Hence, prosecutors must closely follow the three steps of the *proportionality test*,<sup>24</sup> which, in Robert Alexy's view, should guide them when requesting evidence. (In our country, the Supreme Court establishes four steps to this process to identify a constitutionally legitimate aim.<sup>25</sup>) *The first step* is to establish the *necessity* of the evidence, that it is relevant to the case under investigation and contributes to uncovering the truth of the facts. It must also be demonstrated that there are no other less invasive measures available and that it is necessary to protect the legal interest or fundamental right seeking to be protect.<sup>26</sup>

In summary, if the evidence has nothing to do with the facts under investigation, judges can evidently refuse authorization.<sup>27</sup> For example, it would be difficult to justify the need for wiretapping or computer data interception to investigate an act of corruption arising from complicity among government suppliers because it would affect the fundamental right to privacy and secrecy of communication. The only way would be to convince the judge that it is genuinely necessary to the case.

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<sup>23</sup> The use to be given to the evidence is a very important key, as it will direct the arguments regarding why the evidence is needed.

<sup>24</sup> Rubén Sánchez Gil, *Nuevos Apuntes Sobre el Principio de Proporcionalidad*, 1 REVISTA DEL CENTRO DE ESTUDIOS CONSTITUCIONALES. 157-164 (2015) available at: [https://www.sitios.scjn.gob.mx/cec/sites/default/files/publication/documents/2020-06/09\\_S%C3%81NCHEZ\\_REVIS-TA%20CEC\\_01.pdf](https://www.sitios.scjn.gob.mx/cec/sites/default/files/publication/documents/2020-06/09_S%C3%81NCHEZ_REVIS-TA%20CEC_01.pdf)

<sup>25</sup> PRIMERA ETAPA DEL TEST DE PROPORCIONALIDAD. IDENTIFICACIÓN DE UNA FINALIDAD CONSTITUCIONALMENTE VÁLIDA. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 36, Tomo II, November 2016, 1a. CCLXV/2016 (10a.), page 902 (Mex.) available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2013143>.

<sup>26</sup> Article 42 of the Federal Law for the Prevention and Identification of Operations with Resources of Unlawful Origin stipulates that notifications submitted to the Financial Intelligence Unit do not, in themselves, possess full probative value. Consequently, the Public Prosecutor's Office must bear out its investigation with evidence that establishes the act or transaction referred to in the notification. Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita, [L.F.P.I.O.R.P.I.] [Federal Law for the Prevention and Identification of Operations with Resources of Unlawful Origin], as amended, Diario Oficial de la Federación [D.O.], October 17, 2012 (Mex.) available at: <https://www.cnbv.gob.mx/Normatividad/Ley%20Federal%20para%20la%20Prevenci%C3%B3n%20e%20Identificaci%C3%B3n%20de%20Operaciones%20con%20Recursos%20de%20Procedencia%20Il%C3%ADcita.pdf>

ANGÉLICA ORTIZ DORANTES, EL DELITO DE LAVADO DE DINERO (Porrúa 2018).

<sup>27</sup> ANTILAVADO DE ACTIVOS Y CONTRA EL FINANCIAMIENTO DEL TERRORISMO PARA JUECES Y FISCALES [Anti-Money Laundering and Against the Financing of Terrorism for Judges and Prosecutors], F.A.T.F. June 2018 (Mex.) available at: <https://www.gafilat.org/index.php/es/biblioteca-virtual/gafi/2919-gafilat-18-i-plen-inf-02-ala-cft-para-jueces-y-fiscales/file>

This is also because public authorities have access to public and private information, *prima facie*, to prove this crime without resorting to the aforementioned measures. For example, accessing company records of bank transactions or checks issued that might prove this relationship would be less invasive and more effective.

In this particular case, the prosecutor in charge would have to weigh and justify the need for intercepting communication, as will be pointed out later. Cases of terrorism or those that might seriously affect the public interest, for instance, clearly demonstrate this aspect of a request.

Prosecutors must justify their reasons for investigating and requesting information from other individuals, by means of well-founded arguments supporting the need for such measures in the process and their relevance to the central investigation.<sup>28</sup> Therefore, in order to obtain the proper authorization to gain access to certain evidence, prosecutors must defend their need for bank statements from the accused and their spouse, for instance, to prove that the money in question comes from shell companies or accounts linked to previously convicted criminals in other proceedings. Hence, as –allegedly– funds of illicit origin, they are therefore subject to investigation.

*Second*, prosecutors have to demonstrate that the evidence requested is *suitable* for proving a crime, by focusing on whom they want to investigate and what they want to obtain from the evidence, as well as the impact achieved by the measure. This is important because if they formulate their request in general terms, it will most probably be rejected, regardless of what they might have hoped to obtain.

They also have to name the specific crime under investigation, whether to prove or prevent, such as terrorism, organized crime, kidnappings, and high-level corruption, among others. In other words, the State apparatus may be obliged to infringe upon rights like the right to privacy and secrecy of communications in the face of such necessary and suitable exceptions, if they want to demonstrate to the judge beyond a doubt exactly what they want to protect – life, freedom, public security, or national security, for example.

By the same token, prosecutors must justify the need to limit a fundamental right by arguing the suitability of the measure requested. In other words, they must bear out that this is the most appropriate measure to prove the charges being presented, emphasize the magnitude of the offense, and establish that the measure ensures foreseeable success in ensuring the prosecution of the crime. Additionally, the proportionality test means considering the possibility of alternative means of investigation and thus strengthening the case. However, they must convincingly demonstrate why this alternative is the most viable one of all.

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<sup>28</sup> By rationality we mean the quantitative and qualitative data used to justify the request for a measure before a judge. For example, this includes discrepancies in tax cases or cases of political corruption. TOMÁS FERNÁNDEZ, *DE LA ARBITRARIEDAD DE LA ADMINISTRACIÓN* 200-ff (Thomson, 2008) (1994).

The suitability of evidence<sup>29</sup> means that this type of evidence is the best one to help establish a specific fact. Furthermore, if a fundamental right needs to be infringed, said infringement must be legally authorized and done in such a way as to avoid affecting the basic core of human rights. Obtaining such evidence takes precedence over other potential evidence that may not better serve the goal of proving ML.

Finally, the *third step* is when the prosecutor and their team need to argue the *proportionality* of the measure requested; it must be reasonable considering the intended purposes. Specifically, authorization should not be disproportionately invasive compared to the facts under investigation and what needs to be proven or the legal interest to be protected.

In other words, prosecutors must weigh and demonstrate to the judge the need to limit one right in favor of optimizing or fulfilling another constitutionally valid interest. This may include not distorting the economical market and thus free competition, or safeguarding public assets in cases of high-level corruption.

For instance, requesting a search warrant to investigate money laundering offenses may be disproportionate because this information is typically found in public databases or closed sources in the hands of the National Banking and Securities Commission or the Financial Intelligence Unit. Asking for information from the latter would be more proportional than asking for a search warrant, in terms of its degree of suitability and not having to infringe the rights of domicile and personal privacy. It must be noted that the underlying logic is to optimize rights, i.e., to extend the scope of each right as far as possible up against another conflicting right while balancing both the pursued interest and the protected interest.

This is not to say that such a measure cannot be requested; it simply means that more suitable and proportionate measures to prove the crime must be exhausted before. If a search warrant is required, prosecutors need to demonstrate that the measure to obtain key evidence that may have an impact on the theory of the case aligns with the principles of the test of proportionality.<sup>30</sup>

Furthermore, prosecutors must explain their reasoning to the pre-trial judge, elaborating on how these measures contribute to obtaining and successfully re-

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<sup>29</sup> José Daniel Hidalgo Murillo, *Del Dato de Prueba en el Proceso Acusatorio Mexicano*, in DATO DE PRUEBA EN EL PROCESO ACUSATORIO Y ORAL 3-24 (Universidad Nacional Autónoma de México, 2016) available at: <http://ru.juridicas.unam.mx/xmlui/handle/123456789/12295>

<sup>30</sup> In the oral criminal system, “case theory” is defined as the argument formulated by the defense and the prosecution to demonstrate the version of the events analyzed in the criminal proceedings. Case theory, according to Dissenting Opinion 101/2015, must be framed under the following principles: a. factual b. the subsumption or not of the facts within a typified crime and c. the means of conviction that prove the factual propositions. TEORÍA DEL CASO EN LOS JUICIOS ORALES DE CORTE ACUSATORIO. DETERMINAR SI LA DEFENSA DEL INculpADO ESTÁ OBLIGADA A FORMULARLA PREVIAMENTE AL INICIO DE ÉSTOS. Primera Sala [S.C.J.N], File 101/2015, September 2019, (Mex.) available at: <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/Detalle-Pub.aspx?AsuntoID=179347>

solving the specific case. In other words, during the oral trial, they must prove the crime of money laundering, which in many cases involves organized crime or terrorism financing.

Prosecutors need to show that the information from these individuals is indispensable to their investigation. Additionally, they must limit their request to fit within the framework of the ongoing investigation. In other words, prosecutors must document which pieces of evidence they specifically seek so that the evidence, in addition to being necessary and suitable, is also *proportional*.

For example, this means citing the individuals and telephone numbers to be intercepted, specifying the timing and purpose of these interceptions, as well as the constitutional or legal objective, human right, or legal interest to be protected. More importantly, the legal team must demonstrate the proportionality of each measure and, above all, use the intended goal as a reference point, which may include identifying key financial, patrimonial, and economic networks, as well as proving the level of organization and number of individuals involved, in addition to recurring instances of ML and ML operational patterns.

In summary, evidence must pass the *proportionality test* in terms of the potential impact or infringement of a fundamental right. In such cases, the best option to prove an offense is usually to resort to the least invasive measure on a fundamental right and optimizing each one effectively.<sup>31</sup>

Before proceeding, the meaning of the *hardcore* regarding fundamental rights refers to those inseparable elements of a right that make it recognizable as such.<sup>32</sup> Laws cannot affect the hardcore or essential content of a fundamental right.<sup>33</sup> For instance, the right to defense cannot be recognized with limited le-

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<sup>31</sup> Código Nacional de Procedimientos Penales [C.N.P.P] [National Code of Criminal Procedure], as amended, Diario Oficial de la Federación [D.O.], January 12, 2016. Title IV Of evidence information, means of evidence and evidence, Articles 263,264, 265, 266. Nullity of evidence, evidentiary legality, Assessment of information and evidence, Acts of Nuisance. Available at: [https://www.oas.org/juridico/PDFs/mesicic5\\_mex\\_ane\\_15.pdf](https://www.oas.org/juridico/PDFs/mesicic5_mex_ane_15.pdf)

<sup>32</sup> The First Chamber of the Supreme Court of Justice of the Nation, in Court Opinion 1a. CXXII/2012 (10th.), mentions among the fundamental rights the right to life, nationality, the right to identity, freedom of thought and conscience, the right to health, the right to education, as well as the guarantees of criminal and procedural law. Dignidad Humana, Derecho a la Vida y Derecho a la Integridad Personal [Human Dignity, Right to Life and Right to Personal Integrity] Corte Suprema de Justicia de la Nación [C.S.J.N.] Tesis 1a. CXXII/2012 (10a.). July 2013 (Mex) available at: [https://sistemabibliotecario.scjn.gob.mx/sis-bib/CST\\_2014/000260741/000260741.pdf](https://sistemabibliotecario.scjn.gob.mx/sis-bib/CST_2014/000260741/000260741.pdf)

Likewise, in matters of the right to due process, the Supreme Court, in Court Opinion 1a./J. 11/2014 (10th.), establishes the core guarantees of due process, such as the right to a lawyer, the right not to self-incriminate oneself, and the right to know the charges against one. Additionally, it includes the right to equality before the law, the right to notification and consular assistance, the right to have a translator or interpreter, and the right of children to have their detention notified to their parents or legal guardians. DERECHO AL DEBIDO PROCESO. SU CONTENIDO. Primera Sala [S.C.J.N], Semanario Judicial de la Federación. February 28, 2014, Tesis 1a./J. 11/2014 (10a.) (Méx.) available at: <https://sjfsemanal.scjn.gob.mx/detalle/tesis/2005716>

<sup>33</sup> RONALD DWORKIN, LOS DERECHOS EN SERIO 276-303 (Ariel 2014) (1977).

gal assistance during a trial or without the offer of free public defense. Similarly, one cannot grasp the idea of personal liberty if pre-trial detention (in Mexico “*arraigo*”)<sup>34</sup> is mandated or if an individual is placed under house arrest, as it would not just restrict freedom of movement but directly have an impact on the core principle of liberty. Although it may be justified as not being imprisonment, it still affects an individual’s freedom.

In this context, criminal procedure codes often explicitly state that when evidence related to individuals’ private lives (such as wiretaps, correspondence, emails, or messages), assets (bank accounts, investments, insurance, savings, loans), health reports (medical records, blood or urine tests), administration (accounting, tax payments, partial and annual tax declarations, deductions, income, expenses, deposits either received or sent, international transactions), inviolability of their domicile (search warrants), or their location (georeferencing to determine a person’s location) is required, it must be considered, assessed, and authorized by the pre-trial judge.<sup>35</sup>

This fundamental point should guide prosecutors, but it also applies to those in charge of developing evidence-based strategies for proving crimes –namely, experts and financial or asset intelligence units included in the prosecution team. These units collaborate with the finance or treasury departments of other countries and other units connected to central banks.<sup>36</sup>

In conclusion, it must be borne in mind that the assessment parameter for authorizing these measures should be the relevance of the evidence and the proportionality of the measure compared to the offense in question. In other words, the proportionality of the measure is linked to the intended purpose

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<sup>34</sup> Pre-trial detention, in Mexico “*arraigo*” is a precautionary measure to prevent a person from leaving a given place. This measure must be issued by a judicial authority upon request of the Office of the Public Prosecutor when serious crimes are involved. Article 133 bis of the Código Penal Federal [C.P.F.][Federal Criminal Code] as amended, Diario Oficial de la Federación[D.O.], July 8, 2023 (Mex.) available at: [http://www.diputados.gob.mx/LeyesBiblio/pdf\\_mov/Codigo\\_Penal\\_Federal.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Codigo_Penal_Federal.pdf)

Alfredo Gutiérrez Ortíz Mena, *The debate about “arraigo” in the Mexican Supreme Court: Judicial review of the constitution*, in REVISTA DEL CENTRO DE ESTUDIOS CONSTITUCIONALES (3) (2016) available at: [https://www.sitios.scjn.gob.mx/cec/sites/default/files/publication/documents/2019-03/12\\_GUTIERREZ\\_REVISTA%20CEC\\_03.pdf](https://www.sitios.scjn.gob.mx/cec/sites/default/files/publication/documents/2019-03/12_GUTIERREZ_REVISTA%20CEC_03.pdf)

<sup>35</sup> CATEO EN MATERIA CIVIL. Tribunales Colegiados de Circuito [T.C.C.], Gaceta del Semanario Judicial de la Federación. November 2019, Tesis XII.C.23 C (10a.) (Mex.) available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2021094>

<sup>36</sup> The Egmont Group and the International Monetary Fund identify four models of Financial Intelligence Units, which directly depend on the specific jurisdiction of each unit: judicial, administrative, police, or hybrid units. INTERNATIONAL MONETARY FUND, UNIDADES DE INTELIGENCIA FINANCIERA. PANORAMA GENERAL 2004. Available at: <https://www.imf.org/external/pubs/ft/fiu/esl/fius.pdf>

Egmont Group, *Financial Intelligence Units*, EGMONT GROUP (March. 12, 2023) available at: <https://egmontgroup.org/about/financial-intelligence-units/#:~:text=There%20are%20four%20FIU%20models,the%20judicial%20branch%20of%20government>

and the correlation that must exist between its duration, extent, depth, and outcome.<sup>37</sup>

Furthermore, it should specify the crimes under investigation, requiring well focused inquiries found in such evidence. Failing to do so could lead to evidence that is disproportionate and violates the right to due process.

Finally, before delving into an examination of some of the evidence used to prove this particular crime, it is necessary to recall the guidelines judges follow in performing a balancing test, which can serve as a tool to point the way for prosecutors or defense attorneys in their investigative and defense strategies.

#### **IV. Some of the Principal Pieces of Evidence Used to Prove Money Laundering in a Trial**

In view of the focus of this article, we will examine how ML is typified in the Mexican context.

In Mexico, according to the Código Penal Federal (Federal Penal Code, hereinafter FPC),<sup>38</sup> the offense of money laundering is committed by whoever acquires, disposes of, manages, safeguards, possesses, exchanges, deposits, withdraws, gives as collateral, invests, transports or transfers within national territory, from national territory abroad or vice versa, resources, rights, or assets of any kind in the knowledge that said resources are or represent proceeds from an unlawful activity or seeks to conceal the nature, origin, location, destination, or ownership of said resources, rights or assets (Art. 400 bis FPC).<sup>39</sup>

A mechanism to prevent assets from being acquired with illicit proceeds is set forth in Article 22 of the Constitution:

The asset forfeiture process shall be carried out by the Office of the Public Prosecutor by means of jurisdictional civil proceedings independent of the criminal proceedings. The competent authorities from the various levels of government shall assist in fulfilling this task. The law shall establish mechanisms for authorities to administrate the assets subject to asset forfeiture, including their proceeds, yields, revenues, and related charges so that the authorities can carry out the disposal, use,

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<sup>37</sup> Alberto Montón Redondo cited by EDUARDO DE URBANO CASTRILLO ET AL., LA PRUEBA ILÍCITA PENAL 347 (2012)

<sup>38</sup> In Mexico, there is a Federal Penal Code, and each state has its own local code. Therefore, the characteristics of a criminal offense may vary from state to state or may even not exist in some states.

<sup>39</sup> Código Penal Federal [C.P.F.] [Federal Criminal Code] as amended, Diario Oficial de la Federación [D.O.], July 8, 2023 (Mex.) available at: [http://www.diputados.gob.mx/LeyesBiblio/pdf\\_mov/Codigo\\_Penal\\_Federal.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Codigo_Penal_Federal.pdf)

A sentence of five to fifteen years in prison and a fine of one thousand to five thousand days shall be imposed on whoever, by themselves or through another person, violates Article 400 bis of the Código Penal Federal [Federal Penal Code].

usufruct, transfer, and monetization, in the service of public interest, and define, in a timely manner, the destination and, where appropriate, the destruction thereof.

It shall apply to assets whose legitimate origin cannot be proven and which are related to investigations stemming from corruption, concealment, crimes committed by public officials, organized crime, vehicle theft, proceeds of unlawful activities, crimes against public health, kidnapping, extortion, human trafficking, and offenses related to hydrocarbons, petroleum, and petrochemicals.

It should be noted that in Mexico one of the basic conditions to be proven in ML-related offenses is the illegal origin of the money, which may stem from a predicate offense like drug trafficking, human trafficking, fraud, or even tax evasion.<sup>40</sup>

A predicate offense is one that generates illicit funds, while the use of that money is what constitutes the offense being analyzed herein. These are two independent offenses, and a conviction for the first is not required to initiate proceedings for the second. Starting judicial proceedings, such as the link to the trial in the first case, is sufficient for the second to be investigated separately or independently.

The Constitution broadens the range of offenses subject to asset forfeiture. In such cases, evidence is crucial for a *sui generis* civil trial to rule on stripping ownership of assets acquired with illicit resources stemming from the crimes enumerated in Article 22 of the Constitution.

Hence, the prosecutor's first challenge is to prove that the money comes from a crime, making it unlawful in itself or impossible to confirm its legitimate origin. For example, in the case of cash seized during a search or vehicle inspection, it must be demonstrated that the person does not have the means to earn such an amount of money, and therefore, it belongs to someone else.

In a situation like this, the prosecutor may request, with authorization from the pre-trial judge, financial information from the National Banking and Securities Commission to determine if the person has bank accounts and can account for their income and expenditures.

If the person has bank accounts, their income should be substantiated by electronically issued (and paid) invoices or deposits. If there are invoices, their annual and monthly tax declarations must be checked to see if there is any tax evasion or fraud.<sup>41</sup>

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<sup>40</sup> DRUG TRAFFICKING AND THE ILLEGAL DRUG TRADE ARE PRESENTED AS THE MAIN PREDICATE OFFENSES TO MONEY LAUNDERING. 1ra Evaluación Nacional de Riesgos de lavado de dinero y financiamiento al terrorismo en México [1st National Risk Assessment of Money Laundering and Terrorist Financing in Mexico], Secretaría de Hacienda y Crédito Público[S.H.C.P], October 2016 (Mex.) available at: <https://www.pld.hacienda.gob.mx/work/models/PLD/documentos/enr.pdf>

<sup>41</sup> Tax evasion consists of any activity in which a tax directed to the Tax Administration Service is wholly or partially evaded for personal benefit. On the other hand, tax fraud is a form of financial harm where taxes are partially or wholly omitted in reporting to the authorities, taking advantage of errors or using deceptive maneuvers and involving an element of fraud. Bruno

Additionally, it must be confirmed whether the individual or the company they may be associated with has employees and the necessary infrastructure to provide the service invoiced and paid for. In corruption-related offenses, companies are frequently used as fronts and in no way can provide the declared service as there are no employees enrolled in social security; none of the infrastructure, furnishings, or intellectual capital required to deliver goods and services. For example, a company specializing in information technology tools needs to have partners or employees with the professional skills to provide that service.<sup>42</sup>

Furthermore, in some cases, digital tax seals issued for individuals or legal entities may show significant irregularities, such as having been canceled and reactivated in situations related to issuing and paying invoices. In summary, demonstrating that a person does not have the transactional profile to have or handle such an amount is essential. The first phase would consist of checking whether the person may be committing a tax offense or misdemeanor in the absence of clear connection to any other offense.

If the person under investigation does not meet any of these requirements, an inquiry must be made into the individual's profession to determine if they possessed the knowledge that would enable them to exercise due diligence beforehand. A person with academic or empirical training has a higher likelihood of knowing they were engaging in an illegal activity,<sup>43</sup> a fact that becomes crucial to the case.

For example, if the person carrying the money is an accountant, a lawyer, or an economist, it will naturally lead to the assumption that they possess sufficient knowledge to understand that it was suspect to simply transport significant amounts of cash without legal justification or proper accounting records. Withdrawing money from a bank with a check that validates the cash outflow, or the cash payment would have been enough to justify the action. While handling cash may be common in livestock or agricultural businesses, they still need to establish their active engagement in such activities.

Cattle ranchers, for instance, are required to maintain records of the health tags on the animals in order to be able to transport or slaughter them. Additionally, all sales of livestock and other agricultural products must have invoic-

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Ariel Rezzoagli, *Ilícitos tributarios. Diferenciación entre evasión, defraudación y elusión fiscal*, in REVISTA JURÍDICA AMICUS CURIAE Segunda Época 2(2) (2009) available at: <https://www.revistas.unam.mx/index.php/amicus/article/view/13543>

<sup>42</sup> Software or computer tools have been widely used to generate cost overruns in government procurements.

<sup>43</sup> It is important not to confuse the principle of due diligence in evidence with due diligence in individuals. Due diligence indicates the need for not only individuals, but also financial institutions, to perform this process. On the other hand, the principles that should guide due diligence done by the State are: officiality, timeliness, competence and independence, exhaustiveness, participation of victims and their families. CFATF-GAFIC, *Recomendación 10. Debida Diligencia del Cliente* (March 01, 2023) available at: <https://www.cfatf-gafic.org/index.php/es/documentos/gafi40-recomendaciones/416-fatf-recomendacion-10-debida-diligencia-del-cliente>

es.<sup>44</sup> However, the problem lies with the informal economy, where substantial sums of money are involved, making it one of the country's major challenges in combating ML.<sup>45</sup>

If a person fails to give proof of their profession or of a legitimate occupation that could generate these resources, is not registered with the Ministry of Finance, does not have a bank account or does not file annual tax returns, ML or, at least, a tax-related offense, is a real possibility.

One common pattern of behavior in cases involving shell companies or so-called "invoices" is observed when one of their members is arrested, or the cash they were to deliver to the person who bought the invoice is stolen. If a common thief or organized crime is involved in one such incident, no criminal complaint is usually filed as they cannot prove the legitimacy of the origin of the stolen money, in addition to the potential consequences of the authorities giving it a closer inspection.

People transporting the money are typically the lowest link in the ML chain. Hence, offering them a plea bargain is often a strategic move to reach higher-level structures.<sup>46</sup> As previously mentioned, this is a little-utilized tool in hunting down the higher-level structures of a criminal organization<sup>47</sup> in Mexico.

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<sup>44</sup> In order to track individual cattle, sheep, and goats in the country, the Ministry of Agriculture and Rural Development, together with the National Certification and Livestock Services Agency (ONCESEGA), runs the National Individual Livestock Identification System (SINIIGA). This system helps to monitor the health of the country's herds, access sector assistance programs, and maintain an updated inventory of livestock and livestock production units in the country. It is also a reliable system to identify producers, as well as to track cattle purchases and sales transactions, property locations, tenure types, and the selfsame livestock in the event of a zoo-sanitary contingency. SISTEMA NACIONAL DE IDENTIFICACIÓN INDIVIDUAL DE GANADO SINIIGA, *Identificación Individual de Ganado* (March 01, 2023) available at: <https://www.siniiga.org.mx/identifica.html>.

Pedro Rubén Torres Estrada, Sylvia Camila García Mariño, Juan Pablo Martín del Campo, *Análisis de Política Pública Estatal. Riesgos de Lavado de Dinero para los Estados Mexicanos*, in POLÍTICAS PÚBLICAS PARA LA PREVENCIÓN DE LAVADO DE DINERO 80-133 (Tirant lo Blanch, 2022).

<sup>45</sup> The informal economy allows the flow of a large number of cash transactions without any oversight, control, or tax payments, thus becoming an illegal activity that evades financial system controls and anti-money laundering efforts. William Vleck, *Global Financial Governance and the Informal: Limits to the Regulation of Money*, 69(249-264) in CRIME, LAW AND SOCIAL CHANGE (2017) available at: <https://link.springer.com/article/10.1007/s10611-017-9754-7>

The 2020 National Risk Assessment identifies the informal economy as a protective barrier for money laundering that allows resources of illicit origin to be concealed. Evaluación Nacional de Riesgos 2020 [National Risk Assessment 2020], Secretaría de Hacienda y Crédito Público [S.H.C.P.], September 2020 (Mex.) available at: <https://www.pld.hacienda.gob.mx/work/models/PLD/documentos/enr2020.pdf>

<sup>46</sup> In October 2021, a request was filed at the National Institute for Transparency, Access to Information, and Personal Data Protection for information regarding the number of plea bargains for the crime of Illicit Origin of Resources had been made from 2017 to 2021. The Transparency and Government Openness Unit of the Office of the Attorney General reported that during that period, a total of five criteria for plea bargaining had been presented. Oficio No FGR/UTAG/DG/005337/2021. Folio 0001700252221

<sup>47</sup> MAYDELÍ GALLANDO ROSADO, EL NUEVO ROSTRO DE LA JUSTICIA PENAL EN MÉXICO: PRINCIPIO DE OPORTUNIDAD 23 - ff (Porrúa 2011).

Moreover, the higher-level echelons are usually better protected, so it is a good approach to explore alternatives to get closer to their operations. This point is particularly important for entrepreneurs who become partners in crime with perpetrators of illegal activities with the greatest impact on society, such as human trafficking.

Another challenge is to identify the predicate offense of the activity. At the very least, the prosecution will get an opportunity to seize this money and declare it abandoned, and thus see if anyone comes forward to prove its legitimate origin. If no one shows up, it becomes part of the national or state treasury after a hearing before the pre-trial judge.

The above describes how ML cases are typically initiated in Mexico. It can therefore be said that, according to the data, a significant amount of the money seized by the police is caught *in flagrante*.<sup>48</sup> However, not all ML cases originate in this way. Some are the result of investigations into predicate offenses like organized crime, fuel theft, drug trafficking, corruption, human trafficking, arms trafficking, undocumented immigration, and organ trafficking, among others.

For example, the National Asset Forfeiture Law requires prosecutors to notify the Asset Forfeiture Unit when they suspect potential ML. Most cases of ML are discovered by prosecutors through a predicate offense. For instance, investigations into fuel theft inevitably entail an economic component, as is the case with most offenses.

The important and interesting aspect is how a prosecutor or investigator can discover a money laundering offense based on evidence from the predicate offense or vice versa by identifying the predicate offense based on the money trail. The latter has been a weakness in public policies and criminal prosecution strategies, both at government and prosecution office levels.

As previously stated, in the past five years, only 0.26% of federal sentences correspond to money laundering, which amounts to 654 sentences in federal courts out of the 245,502 sentences nationwide for other offenses.<sup>49</sup> This leads to the conclusion that there is a lack of decisiveness and effectiveness in punishing the offense in itself, as most penalties pertain to the predicate offense, thus failing to undermine criminal economic structures.<sup>50</sup>

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<sup>48</sup> *In flagrante* is defined as an event in which the person is arrested at the time of or immediately after committing a crime.

Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], as amended, Diario Oficial de la Federación [D.O.], 12 de January 2016. Section II. *In flagrante* and urgent cases, Article 146. *In flagrante*.

<sup>49</sup> In response to a request for information, it was found that a total of 654 convictions were obtained for Money Laundering in courts and tribunals between 2016 and 2021. Official Information Request UT/STSAI/2399/2021-0320000209321-GR contained information obtained from Official Document CJF/CAP/DGGJ/STG/1650/2021, and the numbers used were taken from the National Census of State Justice Administration of the INEGI 2021.

<sup>50</sup> Pedro Rubén Torres Estrada, *Estado Actual del Castigo Judicial del Delito de Operaciones con Recursos de Procedencia Ilícita ORPI en México*, in POLÍTICAS PÚBLICAS PARA LA PREVENCIÓN DE LAVADO DE DINERO 16-48 (Tirant lo Blanch, 2022).

However, for the purposes of this article, it is essential not to lose sight of what happens after a prosecutor receives a criminal report of a potential money laundering offense. The question is, “What to do?” It should also be clear that evidence must be evaluated freely and logically.<sup>51</sup> Therefore, innovation and the use of other disciplines will be beneficial within this paradigm.

The first step is to take apart the individual, group of individuals or companies involved in the money laundering process. It should be noted that anyone who disposes of, acquires, manages, possesses, changes, converts, or deposits can be held liable for ML, in addition to the transportation of money.<sup>52</sup>

Therefore, prosecutors must examine the familial, patrimonial, commercial, and social networks of the person who committed the predicate offense. In this context, civil registry data are crucial for identifying immediate family members, such as spouses, children, parents, grandparents, siblings, aunts, uncles, cousins, or any other relatives that may be allegedly involved in illegal money exchanges.

With just a person’s name and date of birth, a Federal Taxpayer Registry (RFC for its initials in Spanish) or a Unique Population Registry Code (CURP for its initials in Spanish)<sup>53</sup> can be procured to cross-reference and verify the information with other databases with details about the number and characteristics of properties owned by the suspect or their potential associates.

In the case of this type of evidence, prosecutors must ensure that certificates and records are certified by a registrar or another authorized public entity. The evidence should include accounting reports; economic, financial, and equity network data; tax returns; main clients and suppliers; asset statements; bank account information; and national and international transfers.<sup>54</sup>

Once the family network has been established, prosecutors cannot disregard the business network side, namely, the companies in which the suspect holds shares or interests. For this, it is essential to check the public registry of com-

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<sup>51</sup> Leopoldo Burruel Huerta, *PRINCIPIOS CONSTITUCIONALES, PRINCIPIO DE LIBRE Y LÓGICA VALORACIÓN DE LA PRUEBA* 80 (Porrúa 2013).

<sup>52</sup> A sentence of five to fifteen years in prison and a fine of one thousand to five thousand days will be imposed on whoever, by themselves or through another person, violates Article 400 bis of the Código Penal Federal [Federal Penal Code].

<sup>53</sup> The CURP, or Unique Population Registry Code, is a unique identity number issued by the Ministry of the Interior to officially identify Mexican citizens and residents. This code consists of 18 digits, which correspond to the first letter of the paternal surname, the first vowel of the paternal surname, the first letter of the maternal surname, the first letter of the first name, the person’s date of birth without spaces (year, month, day), two letters corresponding to the state of birth, the first internal consonant of the paternal surname, the first consonant of the maternal surname, the first consonant of the first name, a digit between 0 and 9, and a verification digit to ensure document integrity. Available at: <https://consulmex.sre.gob.mx/sanantonio/index.php/documentos-de-identidad/curp>

<sup>54</sup> Pedro Rubén Torres Estrada, *Estado Actual del Castigo Judicial del Delito de Operaciones con Recursos de Procedencia Ilícita ORPI en México*, in *POLÍTICAS PÚBLICAS PARA LA PREVENCIÓN DE LAVADO DE DINERO* 16-48 (Tirant lo Blanch, 2022).

merce to find out if the individual is a legal representative and to examine all transactions conducted by these companies, such as increases and decreases in capital and any changes in business partner or legal representatives.<sup>55</sup>

This information can also help identify possible collaborators who might be interested in cooperating if they act as accomplices or need to regularize their tax or administrative situation. In the latter case, it is possible to find notaries, public brokers, customs agents, or the like, even if they are not directly involved in the crimes.<sup>56</sup>

This makes it possible to identify with whom the person has formal business relationships. Furthermore, this evidence is irrefutable proof since these records are found in public registers and notarial records, where it is assumed that the signatures, biometric records, and identity documents were verified to set up the companies.<sup>57</sup>

This category of crimes, in terms of the evidence required, may be easier to substantiate and have a higher success rate in court than, for example, proving intent, which involves a certain degree of subjectivity, or recidivism. This is because notarial, commercial, patrimonial, and financial records are factual; they either exist or do not exist, and economic or patrimonial activities typically leave traces, which provide a judge with a higher degree of certainty when issuing a guilty verdict.

In addition to the family network, prosecutors can inform the judge of the commercial network. Knowing the history of a person's business behavior can provide insights into stages of capital growth or decline and political affiliations to generate timelines. It can also help identify criminals and even politically exposed individuals who may have had connections with these companies when investigating corruption or influence trafficking cases. The social network cannot be overlooked either, as it can provide information on the person's lifestyle, relationships, and consumption patterns, including those of their family, partners, and friends.

Access to information from the Financial Intelligence Unit is also of great value. The reports issued by banks, SOFOMEs,<sup>58</sup> savings and loan institutions, and all members of the financial system contain information on deposits, ac-

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<sup>55</sup> Mexico has the Public Registry of Commerce SIGER 2.0 tool. Available at: <https://rpc.economia.gob.mx/siger2/xhtml/login/login.xhtml>; and Colombia uses the Single Business Registry RUES available at: <https://www.rues.org.co/>

<sup>56</sup> These officials hold licenses granted by the State, which may be taken away in case of any irregularities.

<sup>57</sup> It is increasingly common for notaries to verify the identity of individuals through fingerprint verification, cross-referencing this information with the National Electoral Institute's database to ensure that the person matches the identification and thus prevent identity theft.

<sup>58</sup> SOFOMES, also known as Multiple Purpose Financial Societies, are defined by the National Banking and Securities Commission as anonymous companies whose objective is to provide loans, leases, or financial factoring. Available at: <https://www.cnbv.gob.mx/SECTORES-SUPERVISADOS/OTROS-SUPERVISADOS/Descripci%C3%B3n-del-Sector/Paginas/SOFOMES-Reguladas.aspx>

count holders, and individuals authorized to use these accounts, as well as links to politically exposed persons.<sup>59</sup>

It is also possible to identify if the accused has loans, savings, cash deposits, expenses on credit or service cards, and cryptocurrencies, as well as to track national and international transactions, whether these come from tax havens, and the end use of the money.

Evidently, information from tax authorities regarding income and expenses declarations, suppliers, clients, tax payments, billing movements, and whether their tax seals are active or have been canceled for any reason is pivotal. Institutions like the Mexican Social Security Institute can provide data on whether the individual or their company has employees, and if so, how many, their positions in the company, and their base salary for social security contributions.

When a public servant is involved in ML, the public sector has the means to identify whether the person in question has been sanctioned, the types of penalties imposed, their asset declarations at the beginning and at the end of their term, their current salary, conflicts of interest, changes in assets, their positions, and who their direct and indirect supervisors have been. Finally, it is crucial to verify whether the official is a politically exposed person. As mentioned earlier, tax information is decisive, especially in discovering potential discrepancies between income and expenses.

## V. Conclusions

For prosecutors, it is imperative to trace the evidence based on the data provided, while ensuring that it is not tainted by illegal actions. In other words, obtaining evidence through legitimate channels, as is the case in the examples discussed herein, requires the authorization of a pre-trial judge. In addition, when prosecutors request the aforementioned evidence, they must also justify their reasons, as discussed above, as any evidence requested from the pre-trial judge must pass the *proportionality test*.

The path we have analyzed in this article is the mainstay of the evidence that can be obtained to prove the unlawful use and origins of money and the factors that ultimately define this crime. Money laundering prepares the groundwork for building up and sustaining the criminal networks involved in offenses that

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<sup>59</sup> A Politically Exposed Person (PEP) is someone who holds one of the following positions: a government position in legislative, executive, diplomatic, judicial bodies, or in public enterprises; a position in international financial organizations, armed forces, or international sports committees; close family members of PEPs such as parents, children, spouse, partner, siblings, aunts, or uncles. <https://risk.lexisnexis.com/global/es/insights-resources/article/what-is-a-politically-exposed-person>. This information can be consulted on the National List of Politically Exposed Persons issued by the Secretaría de Hacienda y Crédito Público [Ministry of Finance and Public Credit] Available at: <https://www.gob.mx/cnbv/documentos/personas-politicamente-expuestas-nacionales>

have a strong impact on the population and, in the long run, weaken the rule of law and public institutions.

As seen, successful ML convictions are still a challenge for authorities, as the number of actual convictions is still relatively low compared to the overall number of criminal convictions.

It is also important to note that prosecuting this crime is not solely a matter for legal experts; rather, it requires multidisciplinary teams that are responsible not only for contributing to the case theory but, above all, for producing intelligence products that serve as evidence to prove the commission of this offense beyond a reasonable doubt. Multidisciplinary collaboration among accountants, economists, lawyers, and asset analysts, among others, is the key to changing the way we address this phenomenon.

In this way, teamwork is essential to ensure that investigative and financial intelligence units do not taint evidence by obtaining it illegally or accessing the accused's information without authorization from a pre-trial judge. Therefore, the prosecutors should continually monitor the process.

Additionally, the intelligence products arising from information analysis units, which include accounting reports, tax discrepancies, networks of financial connections, and specific evidence like bank transfers, form the basis of the prosecution's case and must have a logical and rational basis within the case theory.

To achieve this, the importance of the balancing test is critical when considering what evidence requires the authorization of a pre-trial judge for its arrest. It is essential to justify the request in light of the legal reasoning presented to reach the ultimate goal, which is undoubtedly to protect human rights and safeguard constitutional legal interests to the extent possible.

These interests can range from preventing terrorism financing, maintaining a balanced market, targeting criminal instruments to debilitate criminal organizations, bribing authorities, or preventing illicit funds from being funneled into political campaigns. This directly weakens the institutional structures of the State and, in many cases, challenges the constitutional rule of law, posing a threat to the State and affecting the social and political stability of the country.