United States v. Santos: "Proceeds" in Federal Criminal Money Laundering Statute, 18 U.S.C. Section 1956, Means "Profits," Not "Gross Receipts"

name redacted
Legislative Attorney

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Summary

On June 2, 2008, the U. S. Supreme Court, in *United States v. Santos* (No. 06-1005), vacated convictions of the operator of an illegal lottery and one of his runners who had been charged with conducting financial transactions involving the "proceeds" of an illegal gaming business in violation of 18 U.S.C. § 1956. The ruling is that "proceeds," as used in this money laundering statute, means "profits" rather than "gross receipts" of the underlying unlawful activity. The decision combines a plurality opinion interpreting the word "proceeds" in the statute to mean "profits" and a concurring opinion, necessary for a majority ruling, that leaves room for interpreting "proceeds" as "gross receipts" in other circumstances. A strong dissenting opinion emphasized the constraints the ruling will place on prosecutors. The interpretation rests on two principles of statutory construction: the rule of lenity and the merger doctrine. Under the rule of lenity, ambiguities in criminal statutes are construed in favor of the defendant. Application of the merger doctrine avoids the prospect that a defendant would receive two punishments under different statutes for what is essentially a single offense. On February 5, 2009, Senator Leahy introduced S. 386, the Fraud Enforcement and Recovery Act of 2009, which was reported favorably by the Senate Committee on the Judiciary on March 23, 2009, S.Rept. 111-10. On April 28, the bill, as amended, was passed by the Senate. On May 7, an amended version of the bill was passed by the House. It was returned to the Senate, amended, and passed; thereafter, on May 18, it was passed by the House for presentation to the President. The bill includes provisions amending the definition of "proceeds" under the anti-money laundering criminal statutes, 18 U.S.C. § 1956(c)(8) and 1957(c), to specify that the term includes the "gross receipts" of the underlying criminal activity. As passed by the House, the bill also includes a provision addressing the possibility of a merger problem in money laundering prosecutions for predicate offenses closely connected with the elements of the money laundering offense. Other legislation with provisions to cover "gross receipts" includes S. 378 and H.R. 1793. This report will be updated on the basis of major legislative activity.

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Background of the Case

United States v. Santos[1] involved a challenge to the conviction of the operator of an illegal lottery and one of his collectors for violating a provision of 18 U.S.C. § 1956, a key federal criminal anti-money laundering statute.[2] The defendants were charged with using the "proceeds" of unlawful activity to conduct a financial transaction with intent to promote the illegal gambling business.[3] For a conviction under this particular subsection of the statute, which covers a form of money laundering, referred to as "promotional money laundering," the prosecution must prove: (1) that the defendant engaged in a financial transaction involving the "proceeds" of an unlawful activity; (2) that the unlawful activity had been designated by the statute as a "specified unlawful activity"; (3) that defendant knew that the property involved in the transaction "represents the proceeds of some form of unlawful activity"; and (4) the defendant had the "intent to promote the carrying on of specified unlawful activity."[4]

At their trial, the defendants were convicted of operating an illegal gambling business in violation of 18 U.S.C. § 1955. Under 18 U.S.C. § 1955, anyone convicted of conducting or owning an illegal gambling business is subject to a criminal fine and imprisonment for up to five years. Proof of "illegal gambling business" requires a showing that the gambling business violates state law; involves five or more persons; and has been in operation for more than thirty days or has a gross revenue of $2,000 a day.[5] The evidence showed that gambling receipts were used to pay the expenses of the operation—payouts to winners, salaries to employees, costs of betting slips, etc.—as well as to realize profits. The promotional money laundering charge was based on payments to winners and to employees—runners—of the gambling business. These payments were part of the underlying charge of operating an illegal gambling business.[6] The defendant convicted of operating the gambling business received a 60-month sentence for the illegal gambling conviction and 210 months for the money laundering.

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[1] (No. 06-1005), 553 U. S ___, 76 U.S.L.W. 4341 (2008), *affirming* 461 F. 3d 886 (7th Cir. 2006). Hereinafter, *Santos.*

[2] See CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, by (name redacted) and (name redacted), and CRS Report RS22401, *Money Laundering: An Abridged Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, by (name redacted).

[3] This was the "specified unlawful activity" which formed the predicate for the money laundering charge. "Specified unlawful activity" is defined in 18 U.S.C. § 1956(c)(7)(A) to include racketeering crimes enumerated in 18 U.S.C. § 1961(1), which includes running an illegal gambling business in violation of 18 U.S.C. § 1955.

[4] 18 U.S.C. § 1956(a)(1)(emphasis added). The statute, in pertinent part, provides:

> (a)(1)Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or ...
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (I) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity....

[5] 18 U.S.C. § 1955(b)(1).

[6] Establishing gross revenue of $2,000 is a necessary element of an offense under 18 U.S.C. § 1955. United States v. Reitano, 862 F. 2d 982 (2nd Cir. 1988). Monetary volume constitutes evidence of gross wagering activity, and evidence that a defendant shared in the profits of an illegal gambling business may be used as evidence of conducting the business. United States v. Balistrieri, 577 F. Supp. 1532 (E. D. Wis. 1984).

Supreme Court Decision

The issue presented to the Court was a straightforward question of statutory interpretation: as used in 18 U.S.C. § 1956, does "proceeds" mean "profits" or "gross receipts?" For Santos and his co-conspirators, the answer the Court provided is "profits." For others, however, the answer is not clear because there is no majority opinion in the case; there is an opinion for a plurality of four justices which is joined by a concurring opinion by a fifth justice, Justice Stevens, that limits the reach of the holding to a narrower ground. This means that the case may be cited as authority only for the narrow ground. Complicating this, however, are two factors: (1) the plurality opinion includes language seeking to confine the meaning of Justice Stevens's opinion; and (2) all of the other justices disavowed the approach taken by Justice Stevens.

Justice Scalia, in the plurality opinion, writing for himself and Justices Souter, Ginsburg, and Thomas, found no way to decipher what Congress intended in using the word "proceeds" in 18 U.S.C. § 1956. He found that (1) there is no definition of "proceeds" in 18 U.S.C. § 1956; (2) the federal criminal code does not provide a consistent definition or use for the term; (3) either "profits" or "gross receipts" would fit everywhere "proceeds' is used in the statute; and (3) dictionaries revealed no overwhelming preference for a primary ordinary meaning of the term. Declaring himself unable to resolve the ambiguity, Justice Scalia resorted to the rule of lenity[7] which requires clarity in criminal statutes[8] and ambiguities resolved in favor of defendants.[9] He reasoned that, because "profits" is harder to prove[10] than "gross receipts," defining "proceeds" as "profits" is more lenient towards defendants, and, therefore, it is the required interpretation in the statute. This means that, under this statute, prosecutors must prove, in addition to the other elements of the offense, that the defendant knew that the property involved in the transaction is "*profits*" of "some form of unlawful activity" and that the transaction involves "*profits*" of "specified unlawful activity."[11]

In the opinion, Justice Scalia seeks to dispel arguments raised by the Solicitor General that defining "proceeds" as "profits" undermines the purpose of the money laundering statute—punishing concealment and promotion of illegal activities—because it does not capture all the funds generated by the illegal activity. He first asserts that the purpose of the money laundering laws might well have been eliminating the harm caused by pouring criminal profits into expanded criminal activity (i.e., "leveraging" profits).[12] He, then, notes that the "profits" interpretation

[7] To invoke the rule of lenity, a court must find that the statute is grievously ambiguous. See Muscarello v. United States, 524 U.S. 125, 138-139 (1998); Staples v. United States, 511 U.S. 600, 619, n. 17 (1994); Chapman v. United States, 500 U.S. 453, 463 (1926).

[8] "[B]efore a man can be punished as a criminal ... his case must be plainly and unmistakably within the provisions of some statute." United States v. Gradwell, 243 U.S. 476, 485 (1917).

[9] "[W]here text, structure, and [legislative] history fail to establish that the Government's position is unambiguously correct ... we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." United States v. Granderson, 511, U.S. 39, 54 (1994). *See also* Hughey v. United States, 495 U.S. 411 (1990); United States v. Granderson, 511 U.S. 39 (1994).

[10] In dissent, Justice Alito illustrated some of the problems inherent in requiring prosecutors to prove beyond a reasonable doubt that illegal enterprises have produced "profits" and that those conducting financial transactions for them know that the funds they are using represent the "profits" from some unlawful activity.

[11] 18 U.S.C. § 1956(a)(1).

[12] "A rational Congress could surely have decided that the risk of leveraging one criminal activity into the next poses a greater threat to society than the mere payment of crime-related expenses and justifies the money-laundering statute's harsh penalties." *Santos*, Scalia, J., plurality op. (slip op. 7-8).

avoids the merger[13] problem that would occur in many of the predicate offenses named in 18 U.S.C. 1956, including operating an illegal gambling business in violation of 18 U.S.C. § 1955. This is because, if "proceeds" were interpreted to mean "gross receipts," every separate expense of the underlying crime paid after its commission would be subject to prosecution both as the substantive crime and as the money laundering offense. This would raise the double-jeopardy-like situation[14] that the merger doctrine seeks to prevent.[15]

In a concurring opinion, Justice Stevens essentially limits the reach of the plurality opinion. He did not focus on the rule of lenity although his rationale is consistent with it to the extent that he would interpret "proceeds" to mean "profits" in the case before the Court. He begins with a premise which no other justice embraces—that courts may choose different interpretations of ambiguous terms in statutes depending on the factual circumstances.[16] He draws a parallel between the scope of judicial interpretation of statutes and the power of Congress to flesh out terms in statutes. He concludes that because Congress could specify separate meanings for a term in a statute, courts having to fill in statutory gaps occasioned by ambiguous language do not have to decide on one meaning for all circumstances. To him, the logic is: if Congress may apply different definitions drafting legislation, courts may also do so.[17] From this premise, he seems to have concluded that Congress intended different meanings for "proceeds" in § 1956. Following this conclusion, Justice Stevens finds that "proceeds" is intended to mean "profits" where, as with the predicate offense of conducting an illegal gambling business, there is no legislative history of congressional intent to the contrary.[18] On the other hand, the opinion seems to assert that legislative history of congressional intent is necessary before courts may extend the meaning of "proceeds" to gross receipts. The opinion also contains language indicating that there is the possibility that there is legislative history to substantiate congressional intent to authorize money laundering prosecutions based on gross receipts transactions for certain offenses.[19]

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[13] For a merger, "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockberger v. United States, 284 U.S. 299, 303 (1932).

[14] Justice Stevens raises this issue: "Allowing the Government to treat the mere payment of the expense of operating an illegal gambling business as a separate offense is in practical effect tantamount to double jeopardy, which is particularly unfair in this case because the penalties for money laundering are substantially more severe than those for the underlying offense...." *Santos*, Stevens, J., concurring op. (slip op. 4).

[15] Justice Scalia disputes the effectiveness of the solution to the merger problem suggested by Justice Alito in dissent—limiting "promote" in the statute to exclude expenses of running the criminal activity—both by noting that many of the predicate offenses are not ongoing violations and distinguishing between the kind of evidence that might satisfy the statutory requirement of "intent to promote," from the activity of promoting.

[16] Justice Scalia characterized this approach as unique to Justice Stevens and contrary to precedent, saying that Justice Stevens "relies on the proposition that one undefined word, repeated in different statutory provisions, can have different meanings in each provision .... [which] is worlds apart from giving the same word, *in the same statutory provision, different meanings in different factual contexts.*" *Santos*, Scalia, J., plurality op. (slip op. 15) (emphasis in the original).

[17] Justice Scalia finds this approach inconsistent with Clark v. Martinez, 543 U.S. 371 (2005) (term in immigration law interpreted to apply in one manner to one class of aliens which it covers may not be interpreted in a different manner for other classes of aliens covered). *Id.*

[18] Justice Stevens reinforces the conclusion with respect to requiring "profits" for any money laundering prosecution predicated on operating an illegal gambling business operation. He opines that the result of a prosecution for money laundering (a 20-year felony) based on the kind of business expenses involved in paying winners and employees in connection with an illegal gambling business (a five-year felony) would be "so perverse" that he could not conceive of Congress intending such a result. *Santos*, Stevens, J., concurring, (slip op. 3).

[19] "As JUSTICE ALITO rightly argues, the legislative history of § 1956 makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Santos*, (Stevens, J., concurring, slip op. 2-3.). He further adds, "[t]hus, I cannot agree with the (continued...)

Potential Impact

Although Justice Stevens alludes to the possibility that legislative history supports interpreting "proceeds" as "gross receipts" for some types of prosecutions, it is significant that the plurality opinion disputes this and characterizes it as dicta.[20] This may raise uncertainty as to the sustainability of convictions involving the contraband and organized crime offenses of the kind Justice Stevens cited as having legislative history supporting a "gross receipts" definition of "proceeds." Because many of the money laundering cases that have been brought under the subsection of 18 U.S.C. § 1956 at issue have involved payment of expenses of the underlying crime,[21] the Justice Department's ability to shut off the funding of criminal activities may be severely inhibited. An added problem will be the difficulty of sustaining the burden of proof that will be required to show "profits" of criminal activities. In its merits brief, the Solicitor General argued that this burden would be substantial and perhaps insurmountable.[22]

In a dissenting opinion, written by Justice Alito, joined by Chief Justice Roberts, and Justices Kennedy and Breyer, there is a further indication of the difficulties that the "profits' definition will present to prosecutors: (1) one of the main purposes of enacting the money laundering laws was to target professional money launderers who are unlikely to know or care whether the property they are dealing with is "profits" or "gross receipts"; (2) a "profits" interpretation would require courts to determine the ordinary expenditures of criminal activities to distinguish them from "profits"; and (3) under the plurality opinion, if the government charges a continuing offense over period of years—as in the case before the Court—the government would have to show that the operation yielded a profit over the course of time charged.

Another dissenting opinion, written by Justice Breyer, who also joined Justice Alito's dissent, alludes to possible solutions to what he, agreeing with the Justices Scalia and Stevens, sees as a merger problem—that prosecutors are able to transform one crime into two and add the money laundering punishments for "financial transactions that constitute an essential part of" the predicate offense.[23] One approach he mentions is requiring that the money laundering transaction be "distinct" from the underlying offense.[24] He also suggests that the merger problem could be

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plurality that the rule of lenity must apply to the definition of 'proceeds' for these types of unlawful activities." *Id.* 3, n. 3.

[20] *Santos*, Scalia, J., concurring opinion (slip op. 16), notes that no other justice adheres to Justice Stevens's view that one word in one statute may be interpreted different ways in different case: "... the narrowness of his ground consists of finding that 'proceeds' means 'profits' when there is no legislative history to the contrary.. That is all that our judgment holds. It does not hold that the outcome is different when contrary legislative history does exist."

[21] Brief for the United States, United States v. Santos (No. 06-1005) 3, n. 3 (citing 16 appellate court cases in which money laundering prosecutions were predicated on expense payments rather than profits).

[22] *Id.* 28. Among the factors cited by the government are: poor record keeping on the part of criminals; incentive to falsify records to show losses if money laundering prosecution hinges on profitability of the criminal activity; and, problems that courts will face confronting in devising rules for determining profits and expenses in illegal activities as contrasted with the precise accounting rules for legitimate businesses.

[23] *Santos*, Breyer, J., concurring op. (slip. op. 1).

[24] As authority for this approach Justice Breyer cites United Sates v. Edgmon, 952 F. 2d 1206 (10th Cir. 1991), *cert. denied*, 505 U.S. 1223 (1992). That case was predicated on conversion of property secured by a Farmers' Home Administration loan in violation of 18 U.S.C. § 658. The money laundering charge was based on the concealment prong of the statute, which requires proof that the defendant knew that the financial transaction was designed to conceal "the nature, the location, the source, the ownership, or the control of the proceeds of the specified unlawful activity." 18 (continued...)

corrected by relying on the U.S. Sentencing Commission to use its authority to address the unfairness resulting from using the money laundering statute to under 28 U.S.C. § 991(b)(1)(B).[25] Justice Scalia takes issue with each of these suggestions: the first because "it has no basis whatever in the words of the statute"[26]; the second because it lacks certainty.[27]

Legislation

S. 386, the Fraud Enforcement and Recovery Act of 2009, has been passed by both the House and Senate and, as of May 19, 2009, awaits the signature of the President. It was introduced on February 5, 2009, by Senator Leahy to enhance federal enforcement capabilities to counteract mortgage fraud, securities fraud, and fraud with respect to federal financial assistance. In addition to provisions which provide funding for investigation and prosecution of this type of fraud; substantive provisions extending the reach of specific criminal statutes addressing financial fraud; and (in the version passed by the House) the creation of a legislative branch Financial Crisis Inquiry Commission, the bill includes an amendment to the definition of "proceeds" in the anti-money laundering laws to cover "gross receipts" of the underlying criminal activity. This is designed to solve the problems identified in the *Santos* decision by clarifying the ambiguity found by the Court and making it clear that "proceeds" means "gross receipts." Specifically, as passed by both House and Senate, S. 386 would add the following provision to 18 U.S.C. § 1956(c) and incorporate it into 18 U.S.C.§ 1957(c): "the term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." The House-passed version also includes a provision addressing the merger problem. It sets forth a sense of Congress that prosecutions under the major anti-money laundering statutes, 18 U.S.C. §§ 1956 and 1957, should not be undertaken in combination with the prosecution of any other offense, without prior approval of specified Department of Justice Officials or the relevant United States Attorney if the underlying predicate offense for the money laundering prosecution "is so closely connected with the conduct to be charged as the other offense that there is no clear delineation between the two offenses." This provision also includes a requirement that, for the next five years, the Department of Justice provide the House and Senate Judiciary Committees with annual reports on the prosecutions under such approvals, denied such approvals, and undertaken without such approvals where such approvals would have been relevant.

Other measures in the 111th Congress include: S. 378, introduced by Senator Bayh, as a stand-alone measure to amend 18 U.S.C. § 1956(c)(8) to specify that "proceeds" includes "gross

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U.S.C. § 1956(a)(1)(B)(i). The facts showed that the defendant conspired with his son and sold, as if it were his own, the collateral on which his son had obtained a secured loan. He, then, used the proceeds of the conversion to buy other property on which he obtained a loan and turned those proceeds over to his son. Justice Breyer also appears to suggest that if there was a time difference between the offense and the money laundering that would show that the two are distinct. *Santos*, Breyer, J., concurring op. (slip. op. 1-2).

[25] This section sets forth the purposes of the U.S. Sentencing Commission, one of which is to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct...." 28 U.S.C. § 991(b)(1)(B). Another section, 28 U.S.C. § 994(f) requires the Commission, in promulgating guidelines to cover the purposes set forth in 28 U.S.C. § 994(b)(1) particularly.

[26] *Santos*, Scalia J., concurring op. 11.

[27] *Id.*

receipts," and H.R. 1793, introduced by Representative Lungren, to amend 18 U.S.C. § 1956(c) to define "proceeds" as "any property derived from or obtained, directly or indirectly, through the commission of any specified unlawful activity, including the gross proceeds of that specified unlawful activity."

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....