The Supreme Court Trims Money-Laundering Laws

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The Supreme Court issued two decisions in June 2008 that clarified the scope of the federal money-laundering laws. In *United States v. Santos*[1] and *Cuellar v. United States*,[2] the Supreme Court increased the threshold of proof that federal prosecutors will be required to meet to prove money-laundering violations. These additional hurdles reduce (at least somewhat) the leverage that prosecutors have and use to induce guilty pleas to underlying offenses by threatening to tack on money-laundering charges.

In *Santos*, a fractured Supreme Court ruled that the meaning of the word "proceeds" as used in the federal money-laundering statute is limited to "profits" rather than "gross receipts."[3] In *Cuellar*, a unanimous Court held that even though the government does not need to prove an intention to create the impression of legitimate wealth, it must prove that the overall purpose of the transportation of funds was to conceal or disguise the funds' nature, location, source, ownership, or control.[4]

United States v. Santos

In *United States v. Santos*, the Respondent had been convicted of running an illegal lottery and, based on payments he made to runners, collectors, and winners, was also convicted of violating the federal money-laundering statute.[5] Section 1956(a)(1)(A)(i) of Title 18 targets those who use the "proceeds" from an unlawful activity in order to promote that activity.[6] Santos appealed on the issue of whether the word "proceeds" referred to total receipts from the illegal activity, as the government argued, or whether "proceeds" referred only to profits.[7] The federal money-laundering statute does not provide a definition for the term "proceeds."[8] On collateral review, the District Court defined "proceeds" as criminal profits and vacated the conviction. The Seventh Circuit affirmed.[9]

Justice Scalia, in a plurality opinion joined by Justices Souter, Thomas and Ginsburg, wrote that because the word "proceeds" was equally susceptible of both the "profits" and the "receipts" definitions in common usage as well as in the federal Criminal Code, the rule of lenity dictated that the ambiguity must favor the defendant,[10] and thus the narrower definition of "profits" must apply.[11]

Justice Scalia also found that the narrower definition of "proceeds" solved what the Court referred to as the "merger problem."[12] The "merger problem" is essentially a double jeopardy concept raised by Respondent to point out the unfairness of the broader "receipts" definition of the word "proceeds."[13] Respondent argued that if "proceeds" meant "receipts," then the elements required to prove the underlying charge of illegal gambling would merge with the elements required to prove money-laundering, an offense with quadruple the maximum sentence relative to the maximum sentence for running an illegal gambling business.[14] Justice Scalia found that the merger problem could exist whenever there is a predicate crime that involves expenses that must be paid in order to carry out the illegal activity.[15] The "merger problem" was resolved by defining "proceeds" more narrowly, because "profits" specifically addresses the leveraging of one criminal activity into another, which is beyond the scope of the predicate crime.[16]

The Court's analysis on this point, however, was fractured by Justice Stevens's narrower concurring opinion, so this issue may resurface in cases involving different contexts.[17] Justice Stevens's concurrence was based on the absence of legislative intent to suggest that the "gross receipts" definition was intended in the context of a stand-alone illegal gambling venture.[18] Justice Stevens argued that the definition of the word "proceeds" may change depending on the discernible legislative intent for each predicate crime. [19] Thus, Justice Stevens pointed to organized crime syndicates as an example of where legislative intent would suggest the broader "receipts" definition.[20]

Justice Scalia's response, joined only by Justices Souter and Ginsburg, strongly rejected Justice Stevens's view that the definition changes depending on legislative intent, as applied to different factual contexts, calling it the "purest of *dicta*."[21] Justice Scalia also addressed the ambiguous *stare decisis* impact of the split opinions, which he said was only that "'proceeds' means 'profits' where there is no legislative history to the contrary."[22] Justice Scalia warned, however, that the Court does "not hold that the outcome is different where contrary legislative history does exist."[23]

In a dissent joined by Chief Justice Roberts and Justices Kennedy and Breyer, Justice Alito took issue with the majority's "profits" definition, based on a pragmatic concern over the difficulties of parsing the limited or non-existent financial records of criminal enterprises to prove whether "profits" or mere gross receipts were used.[24] Justice Alito also argued that while dictionary definitions of the term "proceeds" may be ambiguous, rather than turning to the rule of lenity, a pattern of usage could be discerned from state laws and international treaties, which interpret "proceeds" to include gross receipts.[25] Justice Breyer, also dissenting, suggested that the "merger problem" was a fairness issue and should be resolved through revisions to the U.S. Sentencing Guidelines, not through judicial interpretation of the term "proceeds."[26]

Cuellar v. United States

In *Cuellar*, the Petitioner was convicted under 18 U.S.C. § 1956 after he was found transporting $81,000 in cash hidden in a secret compartment in his car as he was driving in Texas toward the Mexican border.[27] The Fifth Circuit first reversed[28] and then, following an *en banc* rehearing, upheld the conviction under the illegal transportation section of the money-laundering statute, 18 U.S.C. § 1956(a)(2)(B)(i).[29] This section of the statute prohibits the transportation of funds "designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of some specified unlawful activity."[30] The Petitioner argued that this section of the statute required the government to show that there was an attempt to create the appearance of legitimate wealth, and that concealment alone did not satisfy the requirements of the statute.[31]

Justice Thomas wrote a unanimous decision reversing the conviction.[32] The Court agreed with the government that the statute does not require proof of any attempt to create the appearance of legitimate wealth.[33] But on the issue of whether concealment during transportation is sufficient for a conviction under the statute, the Court agreed with Petitioner that there must be more than "mere hiding" to meet the "design" element of the statute.[34] The Fifth Circuit had interpreted "design" to refer to the manner in which the transportation was structured.[35] Justice Thomas disagreed with this analysis, holding that "design" should refer instead to the purpose—not merely the effect—of the transportation.[36] The Court held that defining the statutory term "design" to mean "manner" would be unintentionally broad, and Congress more likely intended "design" to mean purpose and intent, which is common in criminal law.[37] Because the government had argued that the purpose of the transportation was only to pay off the leaders of the operation, the government had not proven that the purpose of the transportation of the cash was to conceal its nature, location, source, ownership, or control.[38] The concealment of the money in the process of the larger plan to pay off people was not sufficient to support a conviction for money-laundering.[39]

In a concurring opinion joined by Chief Justice Roberts and Justice Kennedy, Justice Alito elaborated on what the prosecutors would have needed to prove in order to show illegal transportation under the money-laundering statute.[40] In addition to showing that the purpose of the transportation was to conceal the funds, the prosecutors would also need to prove that the defendant knew the purpose of the transportation.[41]

In deciding *Cuellar*, the Supreme Court contemporaneously vacated decisions of the Second,[42] Fifth[43] and Eleventh[44] Circuits, remanding these cases for further consideration in light of *Cuellar*.[45]

Santos and *Cuellar* clearly narrow the scope of the federal money-laundering laws, and will likely diminish prosecutors' ability to use the threat of money-laundering charges in the plea bargaining process. Instead of relying on a broad definition of money-laundering and the substantial associated recommended sentences, prosecutors will now need to take extra steps to meet their burden of proof. Indeed, the Supreme Court's clarification of the scope of the word "proceeds" has already resulted in the reversal of convictions in a number of cases.[46]

While it may not be difficult for a prosecutor under *Cuellar* to make the required showing concerning the purpose of the concealment of funds, the Supreme Court's confusing guidance on the scope of the term "proceeds" in *Santos* leaves it unclear how "proceeds" should be defined for different types of criminal activity. The uncertainty in the law and complications inherent in proving profits as opposed to gross receipts, especially in the context of street operations of narcotics sales and illegal gambling, may deter prosecutors from tacking on the money-laundering charge. Illegal businesses tend not to have books and records that comply with GAAP, so the difficulties of proving the profits (receipts minus business expenses) may often not be worth the time and resources required. The statutory maximums and guidelines ranges for most predicate offenses that could support add-on money-laundering charges give sentencing judges ample authority to impose substantial sentences, so after *Santos* and *Cuellar*, prosecutors interested in efficiency may focus on charging and proving just the underlying offenses.

Endnotes

1. 553 U.S. __, 128 S. Ct. 2020 (2008).
2. 553 U.S. __, 128 S. Ct. 1994 (2008).
3. *Santos*, 128 S. Ct. at 2025.
4. *Cuellar*, 128 S. Ct. at 2006.
5. *Santos*, 128 S. Ct. at 2021.
6. 18 U.S.C. § 1956(a)(1)(A)(i) (2008).
7. *Santos*, 128 S. Ct. at 2023.
8. *Id.* at 2024.
9. *Id.* at 2023 (finding that there was no evidence that the transactions involved profits, as opposed to receipts).
10. *Id.* at 2025 (stating that the rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them).
11. This plurality is not entirely extraordinary in light of Justice Scalia's past reliance on the rule of lenity in defendants' favor (*see, e.g.*, Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court's Criminal Docket*, 104 MICH. L. REV. 67, 72-73 (2005)) and Justices Ginsburg's and Souter's arguable skepticism toward money-laundering laws generally. *See, e.g.*, *Ratzlaf v. United States*, 510 U.S. 315 (1994) (concerning proof needed to convict under antistructuring provisions of the Money Laundering Control Act of 1986) (Ginsburg, J., delivered the opinion of the Court, in which Stevens, Scalia, Kennedy, and Souter, JJ., joined).
12. *Santos*, 128 S. Ct. at 2026.

13. *Id.* ("If 'proceeds' meant 'receipts,' nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery." (quoting Brief for Respondent Diaz 34)).
14. *Id.* (reasoning that Congress decided that lottery operators ordinarily deserve up to five years imprisonment, 18 U.S.C. § 1955(a), but as a result of merger they would face an additional 20 years, § 1956(a)(1)).
15. *See id.* at 2026–27 (explaining that anyone who pays for the costs of a crime with funds obtained from that crime violates the money-laundering statute).
16. *Id.* at 2028–29.
17. Other courts have since noted the somewhat confusing effect of the *Santos* split but declined to rule on the issue. *See*, *e.g.*, *United States v. Brown*, No. 05-20997, 2008 U.S. App. LEXIS 26431, at *33 (5th Cir. Dec. 18, 2008) (noting the "thorny issues" but holding that "even if the *Santos* plurality's more stringent reading of the statute governs in this case, the appellants lose"); *United States v. Happ*, No. CR2-06-129(8), 2008 U.S. Dist. LEXIS 103668, at *7 n.1 (S.D. Ohio Nov. 25, 2008) (stating that it is unnecessary to determine whether *Santos* is limited solely to gambling contexts because defendant's actions fell within narrower definition); *but cf. Bull v. United States*, No. CV 08-4191 CAS, 2008 U.S. Dist. LEXIS 100764, at *23–24 (C.D.Ca. Dec. 3, 2008) (denying defendant's collateral challenge because the court could not "conclude that *Santos* announces a 'new rule' defining the term 'proceeds' to mean 'profits' in all statutes").
18. *See Santos*, 128 S. Ct. at 2032 ("Just as the legislative history fails to tell us how to calculate the 'proceeds' of violations of § 541, it is equally silent on the proceeds of an unlicensed stand-alone gambling venture.").
19. *See id.* at 2031 ("[I]t seems clear that Congress could have provided that the term "proceeds" shall have one meaning when referring to some specified unlawful activities and a different meaning when referring to others.").
20. *Id.* at 2032.
21. *Id.* at 2031. Justice Alito's dissent also disagreed with Justice Stevens's approach, but noted that five Justices agree with Justice Stevens's conclusion that "proceeds" "include[s] gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Id*. at 2035 (Alito, J., dissenting).
22. *Id.* at 2031.
23. *Id.*
24. *Id.* at 2036.
25. The United Nations Convention Against Transnational Organized Crime, adopted by the United States and 146 other countries, contains a provision very similar to § 1956(a)(1)(B)(i) that covers "gross receipts." Interpreting 18 U.S.C. § 1956(a)(1) as limited to profits arguably violates the Convention. However, the U.S. State Department took the position—albeit in 2004—that no new legislation was needed to bring the United States into compliance with the Convention. 2008 U.S. LEXIS 4699, at *48, n.3 (Alito, J., dissenting).
26. *Id.* at 2035 (Breyer, J., dissenting).
27. *Cuellar v. United States*, 128 S. Ct. 1994, 1997–98 (2008).
28. *United States v. Cuellar*, 441 F.3d 329, 334 (2006).
29. *United States v. Cuellar*, 478 F.3d 282 (2007).
30. 18 U.S.C. § 1956(a)(2)(B)(i) (2008).
31. *Cuellar*, 478 F.3d at 290 (2007).
32. *Cuellar*, 128 S. Ct. 1994 (2008).
33. *Id.* at 2002.
34. *Id.* at 2003.
35. *Id.* (discussing how the money was packed, where it was placed, and other means used to disguise it); *see Cuellar*, 478 F.3d at 289–90 (referring to the efforts taken by the defendant to conceal the cash, the Circuit Court held that "[t]he jury could conclude that these aspects of the transportation were designed to conceal or disguise the nature of the cash as drug proceeds").
36. 128 S. Ct. at 2003.
37. *Id.* at 2005 (noting that the definition would be both underinclusive and overinclusive; it would fail to distinguish between "*how* one moves the money… from *why* one moves the money. Evidence of the former, standing alone, is not sufficient to prove the latter.") (emphasis in original).
38. *Id.* at 2004 (rejecting the court's definition of the term, the Court stated, "We think it implausible [] that Congress intended this meaning of 'design.' If it had, it could have expressed its intention simply by writing 'knowing that such transportation conceals or disguises,' rather than the more complex formulation 'knowing that such transportation . . . is designed . . . to conceal or disguise.'").
39. *Id.* at 2003, 2006.
40. *Id.* at 2006 (Alito, J., concurring).
41. *Id.*
42. *Ness v. United States*, 128 S. Ct. 2900 (2008).
43. *Balderas v. United States*, 128 S. Ct. 2901 (2008).
44. *Nunez-Virraizabal v. United States*, 128 S. Ct. 2901 (2008); *Moreno-Gonzalez v. United States*, 128 S. Ct. 2901 (2008).
45. 128 S. Ct. 2900 (2008).
46. *See, e.g., United States v. Kelley*, No. 1:08-CR-51, 2009 U.S. Dist. LEXIS 2484, at *3 (E.D. Tenn. Jan. 14, 2009) (denying defendant's motion to dismiss but warning that the "government will not only have to prove the elements of money laundering, but also that the money was 'proceeds' as discussed in *Santos*"), *United States v. Pope*, No. 2:08-cr-49, 2008 U.S. Dist. LEXIS 103195 (W.D. Pa. Dec. 19, 2008) (denying motion to dismiss indictment on basis that it did not specifically allege "profits").

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