The Supreme Court Provides Post-Conviction Opportunities to Defendants Convicted of Money Laundering

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For many years, the federal government has wielded the statutes prohibiting money laundering, 18 U.S.C. § § 1956 and 1957, to great effect in a wide variety of cases, due in part to the traditional flexibility and breadth of the money laundering statutes, as well as their potential jury appeal and significant potential sentences under the United States Sentencing Guidelines. However, on June 2, 2008, the Supreme Court issued an opinion, United States v. Santos, 128 S. Ct. 2020 (2008), which has undermined the ability of the government to rely easily upon the primary money laundering statute, Section 1956, particularly in cases in which the underlying "specified unlawful activity," i.e., the SUA, is charged as an ongoing scheme which involves periodic financial transactions, and in which and the monetary gain of the defendant attributable to any given transaction is unclear. Although the Santos opinion has raised a host of legal and practical issues which must be litigated over time, one of the most immediately compelling aspects of Santos – a case which arose on collateral review – is that it has created opportunities for defendants already convicted and sentenced under Section 1956, including those who have exhausted their appeal.

THE SANTOS OPINION

In Santos, Efrain Santos filed a petition under 28 U.S.C. § 2255 attacking his money laundering convictions under 18 U.S.C. § 1956(a)(1)(A)(i), which prohibits financial transactions which "promote" an SUA. As with every provision of Section 1956(a)(1), the government must show that a charged transaction involved the "proceeds" of a SUA, and that the defendant knew that the property involved in the transaction represents such "proceeds." Here, the SUA was running an illegal gambling business. The financial transactions at issue were Santos's payments to runners, winners, and collectors, and his coconspirator Diaz's receipt of payment for his collection services. A four-vote plurality opinion penned by Justice Scalia found that, as a matter of statutory interpretation, "proceeds" under Section 1956(a)(1) refers only to the net profits of criminal activity, rather than gross receipts. Because the district court had found that there was no evidence that the charged transactions involved any profits of the illegal lottery, and based upon a

fifth vote by Justice Stevens concurring in the outcome, the Court upheld the vacation of the convictions.

Noting that "proceeds" plausibly could be interpreted as meaning either profits or receipts, the plurality opinion rested its conclusion on the rule of lenity.[1] However, the plurality also stressed its concern regarding what it described as the "merger" problem: that a contrary, more expansive interpretation would produce the untenable result that any transaction representing a normal step in the commission of the SUA also would be punishable simultaneously as the additional crime of money laundering. Per the plurality, the mere payment for the costs of a crime with its proceeds – such as payment for a getaway car, or the distribution of shares to confederates – does not alone constitute money laundering under the "promotion" prong, because "[d]efraying an activity's costs with its receipts simply will not be covered." The plurality similarly found that co-defendant Diaz's receipt of employee payments could not "fairly be characterized as involving the lottery's profits." Thus, Santos can be interpreted as holding not only that the government must show that the charged financial transaction involved scheme profits, but also that the transaction itself was not a traditional "cost of business." Put another way, an expense of even a profitable scheme cannot, by definition, represent profit. This burden will be a challenge for the government, which has a history of charging "promotion" transactions based on the payment of necessary SUA expenses.[2] Further, prosecutors will have to re-examine the wisdom of adding money laundering charges in fraud cases which rest primarily on the losses suffered by the victims, rather than on profits reaped by the defendants.

The dissent by Justice Alito complained that the plurality opinion created myriad and difficult problems of proof for the government, and that the opinion in effect immunizes financially unsuccessful criminal enterprises, as well as financially successful ones during periods when they operated temporarily in the red. Proof problems anticipated by Justice Alito include showing the requisite knowledge of individuals enlisted to launder the funds of those directly involved in

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[1] The emphasis placed by the plurality opinion on the rule of lenity reflects the continuing vitality of that doctrine, despite verbiage to the contrary in some opinions, and should be pertinent to statutory interpretation issues in a variety of contexts, beyond just money laundering.

[2] The interpreted term "proceeds," however, uniformly applies to all four prongs under Section 1956(a)(1). Therefore, the government also should have to prove that the financial transaction involved net profits even in a money laundering case based upon, for example, the concealment prong, even though a concealment theory would not pose the merger problem. Accordingly, the apparent result is that if a defendant buys an item with SUA funds through a false name, he has committed concealment money laundering only if the item was not a routine expense of the underlying SUA (i.e., an overseas vacation home, as opposed to a getaway car).

committing the SUA, and the tracing of funds to particular crimes, coupled with showing that those particular crimes produced net income. Justice Alito noted that issues also will arise as to whether a given transaction, including payment for other illegal activities, constitute a traditional expense of the underlying SUA at issue, and therefore would not constitute "proceeds" under the analysis of the plurality.

However, the concurring opinion of Justice Stevens, which was the fifth vote necessary for vacation of the conviction, has muddied the waters. According to Justice Stevens, the single term "proceeds" in Section 1956 is mutable and presents different meanings, which will vary according to the SUA at hand. Justice Stevens stated that Congress intended "proceeds" to be expansive and thus include gross receipts in cases involving the sale of contraband and the operation of organized crime syndicates, but also stated that in other cases, particularly cases presenting the "merger" problem or the possibility that the money laundering sentence would eclipse the SUA sentence, "proceeds" instead means only net profits. The plurality opinion strongly criticized this approach, and stressed that the judgment of the Court was that "proceeds" means "profits" when there is no legislative history to the contrary, but that the converse proposition did not represent the judgment. Given the fact that over 250 different crimes serve as potential SUAs, how federal courts will apply Section 1956 in this uncertain legal context, and how aggressively federal prosecutors will continue to charge Section 1956, is unclear. Even if it represents the controlling test, however, Justice Stevens' concurring opinion appears to rescue only narcotics and organized crime cases from the need to show net profit, rather than the vast majority of SUAs, which typically involve conduct inherently presenting less potential violence or obvious danger to society.

EVIDENTIARY ISSUES FOR THE GOVERNMENT

Once a court determines that the analysis of the Santos plurality opinion does apply to a case at hand, there are many potential issues regarding the demonstration of net profit, as explained in detail throughout the dissenting opinion of Justice Alito. Many of these issues will be fact-intensive and will turn on the timing and nature of the charged financial transaction. Generally, the more esoteric and complex the underlying SUA is – which are the sorts of cases in which the government would most likely be obligated to show net profits even according to the opinion of Justice Stevens – the harder it will be to identify net profit. Further, and as noted, Santos invites the argument that any cost or expense of the underlying SUA cannot represent a money laundering transaction, no matter how many overall profits the SUA generates.

Moreover, even if the government can prove that a transaction in fact involved net profit, it still must prove that the defendant subjectively knew of that profit. Although the plurality opinion in Santos was sanguine regarding the ability of the government to meet its evidentiary burden through circumstantial evidence and willful blindness theories, the burdens facing the government will rise or fall upon the breadth of the scheme, the organization of the scheme and any record keeping, the financial sophistication of the defendant, and the defendant's degree of involvement and general awareness of the running of the scheme. Ultimately, if the objective existence of net profit is hard to show, the harder it will be to show subjective knowledge of such profit.[3] The practical difficulties of tracing money, and the time and resources that such tracing would require, may lead prosecutors to simply forego the pursuit of money laundering charges in certain fraud cases which otherwise would have included such additional charges as a matter of course.

The Santos opinion will affect many federal jurisdictions because only the Seventh Circuit – from which the Santos case arose – interpreted "proceeds" as net profit. See United States v. Scialabba, 282 F.3d 475 (7th Cir. 2002). All other federal circuits to have addressed the issue instead had interpreted "proceeds" to refer expansively to gross receipts. See United States v. Huber, 404 F.3d 1047, 1058 (8th Cir. 2005); United States v. Grasso, 381 F.3d 160, 169 (3d Cir. 2004), vacated on other grounds, 544 U.S. 945 (2005); United States v. Iacaboni, 363 F.3d 1, 4 (1st Cir. 2004). Cf. United States v. Akintobi, 159 F.3d 401, 403 (9th Cir. 1998) (although precise issue was not presented, treating "proceeds" as gross income); United States v. Haun, 90 F.3d 1096, 1101 (6th Cir. 1996) (the same). Accordingly, most federal prosecutors and investigating agents are not accustomed to establishing net profit as a factual matter for the purposes of money laundering prosecutions, and, importantly, have not done so within completed prosecutions.

OPTIONS FOR THE DEFENSE

Clearly, any defendant facing trial on Section 1956 charges immediately should consider and likely raise the net profit requirement as an issue involving jury instructions and the ability of the government to carry its burden of proof.

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[3] The Santos Court did not address the "spending" money laundering statute, 18 U.S.C. § 1957, which prohibits monetary transactions "in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity[.]" Section 1957 defines the term "criminally derived property" as "any property constituting, or derived from, proceeds obtained from a criminal offense." Presumably, "proceeds" under Section 1957 will be interpreted in the same manner as "proceeds" under Section 1956, and therefore will refer only to net profit.

In cases which a defendant has been convicted at trial and awaits sentencing, Santos represents a potential issue under Federal Rule of Criminal Procedure 29, that is, a request to vacate the convictions because no evidence regarding net profit was introduced during the government's case, and/or under Federal Rule of Criminal Procedure 33, that is, a request for a new trial, because the jury never was instructed regarding the need to find net profit. Because any jury instruction claim likely will be raised for the first time,[4] a defendant will have to show plain error under Federal Rule of Criminal Procedure 52(b). See United States v. Olano, 507 U.S. 725, 732 (1993). Although this showing will turn on the specific facts, in many cases, such as Santos itself, the government will have introduced no evidence of net profit, rendering error manifest (as well as a reason to vacate). Moreover, although Santos did not interpret the United States Sentencing Guidelines ("U.S.S.G."), U.S.S.G. § 2S1.1(a)(2), which establishes the base offense for money laundering offenses in part according to the "value of the laundered funds," defines "laundered funds" as "the property, funds, or monetary instrument involved in the [illegal] transaction, financial transaction, monetary transaction, transportation, transfer, or transmission[.]" If Santos means that the property involved in a money laundering transaction, by definition, involves only profits, then the base offense under Section 2S1.1(a)(2) will drop in relevant cases.

Even after sentencing and appeal, a defendant still may invoke Santos, which itself came before the Court through a collateral attack under 28 U.S.C. § 2255. "Courts have long allowed defendants collaterally attacking their conviction the benefit of decisions which give the federal criminal statute under which they were convicted a more narrow reading than had previously been applied at the time of their conviction." United States v. Santos, 342 F.Supp. 2d 781, 797 (N.D. Ind. 2004), citing in part Bousley v. United States, 523 U.S. 614, 619-20 (1998). Thus, if the trial included no required evidence of net profits, then a convicted defendant who has completed his direct appeal still may claim in a timely Section 2255 petition that he is "actually innocent" of the crime of money laundering – that is, that the conduct at issue simply did not constitute a defined crime. The traditional bar against the retroactive application during collateral review of new procedural rules does not apply in this context, because Santos involves the substantive reach of the statute. Bousley, 523 U.S. at 618-21.

[4] Although Rules 29 and 33 require post-trial motions to be filed within seven days, the time requirement is not issue-specific under the explicit terms of the rules, which refer only to a motion. Regardless, Federal Rule of Criminal Procedure 45(b)(1)(B) allows district courts to extend these time requirements for good cause and on a showing of excusable neglect.

If a defendant pleaded guilty, rather than having proceeded to trial, he must show during collateral review that his guilty plea was not knowing or intelligent, and that he can overcome any procedural default in failing to attack his guilty plea during his direct appeal. However, here the issues tend to overlap in the defendant's favor. Because a guilty plea entered to conduct which the defendant, his counsel, and the court misunderstood at the time as constituting a crime is not a knowing or intelligent plea (thereby rendering the plea constitutionally invalid), Bousley, 523 U.S. at 618-19, and because any procedural default in not previously attacking a guilty plea can be overcome through a claim of actual innocence, id. at 623-24, then the entire logic of a defendant's Section 2255 petition – that he never committed money laundering because the transaction did not involve net profit – will serve to satisfy simultaneously the substantive and procedural requirements. See also United States v. Garth, 188 F.3d 99, 105-110, 114 (3d Cir. 1999) (outlining process under Bousley for collaterally attacking guilty plea, on basis of actual innocence, to crime subsequently narrowed by court opinions). The record, however, must support the claim of actual innocence, and the available remedy is an evidentiary hearing, at which the government may introduce additional evidence of guilt to disprove actual innocence. Bousley, 523 U.S. at 623-24; Garth, 188 F.3d at 109-110. Defendants considering a collateral attack on their guilty pleas therefore should weigh what other evidence the government could introduce, although the passage of time may have reduced the availability of such proofs.

A defendant still proceeding on direct appeal also clearly should consider invoking Santos under Rules 29 and 33, even if a failure to have raised the issue at trial may result in plain error review. For the reasons already discussed, and particularly given the fact that defendants still may obtain relief even on defaulted collateral claims, cases involving little or no evidence of net profit are excellent candidates for findings of plain error, if not outright vacations of the convictions.

CONCLUSION

The clear and immediate impact of Santos is that many money laundering prosecutions are now more difficult, and many established convictions are suddenly vulnerable on direct appeal and collateral attack.[5] Although the Santos

[5] The opportunities created by Santos may not linger. Because Santos concerns only an issue of statutory interpretation, and given the potential confusion created by the concurring opinion of Justice Stevens, it is conceivable that Congress might amend Section 1956 in order to undo the effect of Santos and explicitly define "proceeds" as including gross receipts. Congress has so acted before in similar circumstances, including when the Supreme Court narrowed the reach of the anti-structuring statute, 31 U.S.C. §§ 5313, 5322, 5324; see United States v. Ratzlaf, 510 U.S. 134 (1995), and "honest services" fraud under the mail and wire fraud statutes, 18

plurality and concurring opinions have created many legal and practical issues which will be resolved only over time, the net profits requirement is now a critical issue in any Section 1956 case, whether ongoing, completed, or contemplated.

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U.S.C. § § 1341, 1343, 1346; see United States v. McNally, 483 U.S. 350 (1987). Nonetheless, even if Congress were to amend Section 1956 in reaction to Santos, the effects of Santos will apply to all conduct committed up until the date of any statutory amendment.