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WHITE-COLLAR CRIME

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The U.S. Supreme Court: Money-Laundering Decisions

In our November 2007 article, we noted the government's aggressive enforcement and broad interpretation of federal money-laundering statutes, expressing concern that prosecutorial use of the statutes had been unfairly and improperly expanded.[1] In the same article, we expressed hope that the U.S. Supreme Court would take corrective action in cases then pending before it.

This term, the Supreme Court decided two money-laundering cases, *United States v. Santos* and *Cuellar v. United States*, both of which have been touted as "defense wins."[2] Using a baseball metaphor, in *Santos*, the outlook for the day's game wasn't brilliant sunshine before the Supreme Court's nine that day. The defense invoked the rule of lenity and the money-laundering statute was in play. But Justice Antonin Scalia "lightly doffed his hat"[3] to the baseball comparison by applying the rule of lenity to recognize that "under a long line of our decisions, the tie must go to the defendant"—as in baseball, where a tie is deemed to "go to the base runner."

'United States v. Santos'[4]

In *United States v. Santos*, a divided Supreme Court examined the definition of "proceeds" as set forth in the federal money-laundering statute. Mr. Santos operated an illegal lottery in Indiana for approximately 20 years. At bars and restaurants, Mr. Santos' employees would gather bets from gamblers, keeping portions of the money as their commission, delivering the rest to Mr. Santos. He then used the money to pay the lottery winners and his employees. He was convicted of money laundering, but then filed a habeas petition, arguing that the funds received were not profits, but receipts and therefore could not form the basis for money laundering.

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The district court agreed, reversing Mr. Santos' conviction, relying on an earlier circuit court opinion which held that the federal money-laundering statute's prohibition of transactions involving criminal "proceeds" applies only to transactions involving criminal profits, not receipts.[5] The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's decision.

A divided Supreme Court agreed with Mr. Santos and the Seventh Circuit. The majority opinion was authored by Justice Antonin Scalia, and was joined by Justices David Souter and Ruth Bader Ginsburg and, in part, by Justice Clarence Thomas. Justice John Paul Stevens filed an opinion concurring in the judgment, which resulted in the majority of the Court. Four justices dissented, however. Justice Samuel Alito wrote the primary dissent, which was joined by Justices John Roberts and Anthony Kennedy. Justice Stephen Breyer also wrote a dissent which was joined by Justice Alito.

The majority opinion began by noting that the federal money-laundering statute does not define the term "proceeds," but that both "receipts" and "profits" are recognized and acceptable definitions of the term. Moreover, the Court stated that Congress previously has recognized the word's inherent ambiguity by defining it in other statutes, sometimes as "receipts" and sometimes as "profits." Finally, the word's use within the money-laundering statute did not resolve the ambiguity and use of either interpretation [and] did not render the statute incoherent, redundant or utterly absurd. Accordingly, Justice Scalia applied the rule of lenity in defining the term "proceeds" in the money-laundering statute as the more "defendant-friendly" "profits," finding that "[u]nder a long line of our decisions, the tie must go to the defendant."[6]

The government objected to this finding, arguing that to define "proceeds" as "profits" only would limit the scope of the federal money-laundering statute and hinder its enforcement. Specifically, the government argued that the purpose of the money-laundering law is to penalize criminals who conceal or promote their illegal activities and the "gross receipts" of a crime more accurately reflects the scale of the criminal activity. The primary dissent, authored by Justice Alito, also expressed concern that to limit "proceeds" to "profits" would frustrate the purposes of the money-laundering statute to: 1) provide deterrence by preventing criminals who amass large quantities of cash from enjoying the fruits of their crimes, and 2) inhibit the growth of criminal enterprises by preventing the use of dirty money to promote the enterprise.[7]

The Court did not find any of these contentions significant enough to overcome the rule of lenity, however. Furthermore, the Court felt that to interpret the money-laundering statute as encompassing the gross receipts of an illicit activity would result in the merger of a number of less-harsh crimes

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with the crime of money laundering. For instance, the Court noted that in Mr. Santos' case, "[i]f 'proceeds' meant 'receipts,' nearly every violation of the illegal-lottery statute, [18 U.S.C. §1955], 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." The Court noted that while lottery operators ordinarily could face a term of up to five years imprisonment, they would face an additional 20 years as a result of the merger of the illegal lottery statute with the money-laundering statute.[8]

According to the Court, this merger problem applied to "a host of predicate crimes." "The Government suggests no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime. Interpreting 'proceeds' to mean 'profits' eliminates the merger problem."

In response to the majority's clear discomfort with and focus on the "merger problem," the two dissents countered with a number of remedies. First, both dissents suggest that the merger issue is essentially a sentencing problem for which the proper remedy is a sentencing remedy. Justice Scalia disagreed with this assertion, contending rather that the merger issue affects not only sentencing, but also charging decisions and plea bargaining negotiations and can not be left to the Sentencing Commission to resolve.

In addition, the majority dissent said that a narrow reading of the "promotion prong" of the money-laundering statute may resolve the merger issue, deeming only those defendants who "promote" the business —doing those things that will cause a business to grow— liable for money laundering. The majority rejected this position as well, arguing that "to believe that this 'narrow' interpretation of 'promote' would solve the merger problem one must share the dissent's misperception that the statute applies just to the conduct of ongoing enterprises rather than individual unlawful acts."[9]

Finally, the majority rejected the government's position that to define "proceeds" as "profits" will make money-laundering cases harder to prosecute. "It is true that the 'profits' interpretation demands more from the Government than the 'receipts' interpretation. Not so much more, however, as to render such a disposition inconceivable—as proved by the fact that Congress has imposed similar proof burdens upon the prosecution elsewhere."

In closing, Justice Scalia addressed Justice Stevens' concurrence. In the concurring opinion, Justice Stevens said that the word "proceeds" may have two different meanings within the same statute, asserting that it may mean "profits" for some predicate money-laundering crimes, while meaning "receipts" for others. To distinguish between the two, Justice Stevens suggested a review of the legislative history. The majority opinion discarded this position, noting that Justice Stevens' position is "original with him; neither the United States nor any amicus suggested it; it has no precedent in our cases." Moreover, the majority argued that the proposition that one undefined word can have different meaning in different statutory provisions to be "worlds apart from giving the same word, *in the same statutory provision*, different meanings *in different factual contexts*."[10]

Given Justice Stevens' position and the necessity of his vote to carry the majority, Justice Scalia believed it appropriate to comment upon the limiting effect of the concurring opinion and stare decisis. "[T]he narrowness of [the concurring opinion's] 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 where contrary legislative history does exist. Justice Stevens' speculations on that point address a case that is not before him, are the purest of dicta, and form no part of today's holding."[11]

'Cuellar v. United States'[12]

In July 2004, Humberto Cuellar was stopped while driving on a state highway in Texas towards Mexico. A legal search of Mr. Cuellar's car revealed a hidden compartment containing approximately $81,000 in cash, bundled in plastic bags and duct tape. Mr. Cuellar was charged with and found guilty of attempting to transport the proceeds of unlawful activity across the border, knowing that the transportation was designed "to conceal or disguise the nature, the location, the source, the ownership, or the control" of the money in violation of the federal money-laundering statute.[13]

A divided panel of the Fifth Circuit reversed the conviction, holding that although the evidence showed that Mr. Cuellar concealed the money for the purpose of transporting it, the statute requires that the purpose of the transportation itself must be to conceal or disguise the unlawful proceeds. The Court further stated that the transportation must be undertaken in an attempt to "create the appearance of legitimate wealth."[14]

After granting rehearing en banc, a full panel of the Fifth Circuit affirmed Mr. Cuellar's conviction, finding that Mr. Cuellar's extensive efforts to prevent detection of the money during transportation showed that he sought to conceal or disguise the nature, location, and source, ownership, or control of the funds as required by the statute.[15] The Supreme Court granted certiorari to consider the nature of the concealment element of the money-laundering statute.

As articulated by the defendant and amicus curiae National Association of Criminal Defense Lawyers (NACDL), the question presented was "[w]hether merely hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a money-laundering conviction." The government posed the question as whether proof that the defendant transported cash proceeds of drug trafficking concealed in a hidden and disguised compartment in a car destined for Mexico was sufficient to establish that he transported money in a manner "designed," at least "in part," to "conceal or disguise" either "the nature, the location, the source, the ownership, or the control" of those proceeds, within the meaning of the statute.

Justice Thomas delivered the unanimous opinion of the Supreme Court, stating in the opinion's opening paragraph that "[a]lthough we agree with the Government that the statute does not require proof that the defendant attempted to 'legitimize' tainted funds, we agree with petitioner that the Government must demonstrate that the defendant did more than merely hide the money during its transport."

The Court focused on the "designed to conceal" element of the money-laundering statute. Although the Court agreed with petitioner Cuellar that taking steps to make the money appear legitimate is the common meaning of money laundering, it noted that it was compelled to look not at the common meaning of the words, but at the words of the operative statutory provision. "Here, Congress used broad language that captures more than classic money laundering: In addition to concealing or

disguising the nature or source of illegal funds, Congress also sought to reach transportation designed to conceal or disguise the location, ownership, or control of the funds." Accordingly, the Court said that the statute's text did not support petitioner's "appearance of legitimate wealth" requirement.[16]

In so finding, the Court rejected petitioner's argument that the transportation provision of the money-laundering statute must be aimed at something other than secretive transportation of illicit funds because that conduct is already punishable by the bulk smuggling statute set forth in 31 U.S.C. §5332. Rather, the Court found that a comparison of the two statutes revealed that each targeted distinct conduct. For instance, the bulk smuggling statute focuses on those defendants who transport money with the intent to evade a reporting requirement (which also may be money laundering) and in addition may be expanded to cover the transportation of lawfully derived proceeds.

Concluding that the money-laundering statute did not require that the defendant transport the funds with the intent to create the "appearance of legitimate wealth," the Court considered "whether the evidence that petitioner concealed the money during transportation is sufficient to sustain his conviction." To prove a violation of the statute, the Court noted that the government was required to prove that the petitioner knew that transporting the funds to Mexico was "designed," at least in part, to conceal or disguise one of the statutory attributes—the "nature, location, source, ownership, or control" of the funds.

The Court agreed with the petitioner that merely hiding funds during transportation was not sufficient to violate the statute, even if substantial efforts had been made to conceal the money. "Our conclusion turns on the text of [the statute], and particularly on the term 'design.'" The Court found that within the context of the money-laundering statute, "design" means "purpose or plan." "Congress wrote 'knowing that such transportation is designed…to conceal or disguise' a listed attribute of the funds, and when an act is 'designed to' do something, the most natural reading is that it has that something as its purpose."[17]

Addressing the Fifth Circuit's en banc opinion, the Court observed that the circuit court had used "design" to refer to the "structure or arrangement" of the plan, rather than its purpose. Although a recognized definition of design, the Supreme Court did not believe it was the proper meaning of "design" as written in the money-laundering statute. "If the statutory term had this meaning, it would apply whenever a person transported illicit funds in a secretive manner." In this way, a petty thief who hides money in his shoe while crossing the border with the intent to spend it in a bar across the border would be guilty of money laundering. If Congress had intended this result, the Court reasoned, it could have drafted the statute in a much simpler manner, eliminating any reference to the word "design" altogether.[18]

Although, "purpose" and "structure or arrangement" often are related, the Court noted, as had the original Fifth Circuit panel, that "*how* one moves the money is distinct from *why* one moves the money. Evidence of the former, standing alone, is not sufficient to prove the latter."[19] Applying these principles to the evidence submitted by the government in this case, the Court found that it was not sufficient to permit a reasonable jury to conclude beyond a reasonable doubt that petitioner's transportation was "designed…to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds."

Noting that the government had submitted evidence that the secretive manner of the transportation was consistent with drug smuggling, the Court observed that the government had failed to introduce any evidence that the reason drug smugglers move money to Mexico is to conceal or disguise a listed attribute of the funds. "Although the evidence suggested that petitioner's transportation would have had the effect of concealing the funds, the evidence did not demonstrate that such concealment was the purpose of the transportation because, for instance, there was no evidence that petitioner knew about or intended the effect."

Conclusion

Both cases highlight the way in which the government has expanded the money-laundering laws to encompass actions already prohibited under other criminal statutes. The Supreme Court's decisions, narrowing certain provisions of the statute, send a signal that money-laundering prosecutions, and others, must stay within the confines of the statute that authorizes them.

1. Elkan Abramowitz and Barry A. Bohrer, "Federal Money-Laundering Statutes: Course Correction?" New York Law Journal (Nov. 6, 2007).
2. Ellen Podgor, "Supreme Court Rules Against the Government in Two Money-laundering Cases," White Collar Crime Prof Blog (June 2, 2008) (available at http://lawprofessors.typepad.com/whitecollarcrime_blog/2008/06/supreme-court-r.html); Douglas A. Berman, "Two Defense Wins on Federal Money-laundering Issues," Sentencing Law and Policy Blog (June 2, 2008) (available at http://sentencing.typepad.com/sentencing_law_and_policy/2008/06/two-defense-win.html).
3. See Ernest Lawrence Thayer, "Casey at the Bat" (available at http://www.baseball-almanac.com/poetry/po_case.shtml).
4. 128 S.Ct. 2020 (2008).
5. 461 F.3d 886 (7th Cir. 2006) (citing *United States v. Scialabba*, 282 F.3d 475 (2002)).
6. 128 S.Ct. at 2025. In so holding the majority rejected the dissent's point that 14 state money-laundering statutes, the Model Money-laundering Act and an international treaty on the subject use and define the word "proceeds" as a term of art for "receipts." According to Justice Scalia, the majority of states with money-laundering laws leave the term undefined and most state laws, as well as the Model Act and the treaty relied upon by the dissent, post-date the federal money-laundering statute. Id.
7. Id. at 2038.
8. Id. at 2026.
9. Id. at 2027-28.
10. Id. at 2030 (emphasis included). The majority also noted that Justice Stevens failed to identify any legislative history to the money-laundering statute which would support a contention that Congress intended "proceeds" to mean "receipts" or "profits" in certain instances. Id. at 2030 and fn. 8.
11. Id. at 2031.
12. 128 S.Ct. 1994 (2008).
13. 18 U.S.C. §1956(a)(2)(B)(i).
14. 441 F.3d 329, 333-34 (2006).
15. 478 F.3d 282, 290 (2007).
16. 128 S.Ct. at 2000.
17. Id. at 2003.
18. Id. at 2004.
19. Id. at 2005 (emphasis included).