INTERNATIONAL ENFORCEMENT LAW REPORTER

Volume 24, Issue 8, August 2008

I. MONEY LAUNDERING AND BANK SECRECY

A. U.S. Supreme Court Gives Narrow Definition to U.S. Money-Laundering Law in *United States v. Santos*

by Russell Bikoff[1]

On June 2, 2008, an uncharacteristic line-up of Justices in a court divided 5 to 4 threw federal anti-money laundering law into a state of, if not chaos, then certainly confusion. Focusing on the undefined word "proceeds" in 18 U.S.C. § 1956(a)(1)(A)(i), a majority of the Court agreed on the narrow holding that in a prosecution of a stand-alone gambling operation, the government was required to prove that the "financial transaction" at issue involved profits, not merely gross receipts, from the "specified unlawful activity" of gambling.[2]

Efrain Santos and Benedicto Diaz were convicted in the U.S. District Court for the Northern District of Indiana for running an illegal lottery operation over six years. Diaz received bets taken by runners at bars and restaurants, and after paying the runners delivered the balance to Santos, the ring-leader. Santos used the money to pay the salaries of Diaz and other collectors and to pay off the winners. Santos was convicted at trial of conspiracy to run and running an illegal gambling business (18 U.S.C. § 1955) and of conspiracy to launder money and money laundering (18 U.S.C. § 1956(a)(1)(A)(i)). He received 60 months imprisonment on the gambling counts and 210 months on the three money laundering counts. Diaz pleaded guilty to conspiracy to launder money and was sentenced to 108 months imprisonment. Their convictions were sustained in the U.S. Court of Appeals for the Seventh Circuit, in *U.S. v. Febus*, 218 F. 3d 784 (2000), and the Supreme Court declined to review the case. Thereafter, the Seventh Circuit decided in *U.S. v. Scialabba*, 282 F. 3d 475 (2002), another gambling case involving video poker machines, that the money laundering statute's use of "proceeds" meant net profits or receipts, not gross profits. Pursuing a collateral motion under 28 U.S.C. §2255, Santos and Diaz successfully argued that their conviction under the same statute had to be set aside. *See Santos v. U.S.*, 461 F. 3d 886 (CA7 2006). The government appealed.

A plurality of the Court, in an opinion by Justice Scalia, joined by Justices Souter and Ginsburg, and Thomas in part, affirmed the Seventh Circuit's dismissal of the money laundering counts. The statute used in this prosecution, 18 U.S.C. § 1956(a)(1)(A)(i), is directed at transactions that promote a criminal activity. It used the term "proceeds" to describe two elements of the offense: the government must prove that a transaction "in fact involves the proceeds of specified unlawful activity" (the proceeds element) and it must also prove the defendant knew "that the property involved in" the charged transaction "represents the proceeds of some form of unlawful activity" (the knowledge element). In the absence of a definition of "proceeds" in the statute, Justice Scalia reviewed the "ordinary meaning" from the dictionary and concluded that it could mean either gross receipts or profits. Since he could find no answer to this "ambiguity," Justice Scalia declared that "the tie must go to the defendant" under the "Rule of Lenity."

---

[1] Russell Bikoff is an attorney with an active criminal practice in the D.C. Superior Court. Earlier in his career he was an assistant district attorney in Manhattan, a career foreign service officer, and an official in the U.S. Department of Justice (Criminal Division). He is admitted in New York and D.C., and is a graduate of the University of Michigan, college and law school.

[2] *U.S. v. Santos et al.*, U.S. Supreme Court, No. 06–1005, decided June 2, 2008, 553 U.S. ___ (2008).

His opinion also noted the problem of "merger," in which the facts that support a conviction for violating the illegal gambling statute would also support a conviction under the money laundering statute. Here, when Santos paid the winning bettors and paid salary to Diaz and other assistants, he was engaged in transactions, involving receipts, that he intended to promote the carrying on of the lottery. The result was that prosecutors could charge and obtain convictions on the far harsher money laundering statute (20 years maximum), as well as the more lenient gambling statute (5 years maximum).

The opinion notes that for the more than 250 predicate offenses in the money laundering statute, "merger would depend on the manner and timing of payment for the expenses associated with the commission of the crime" and "anyone who pays for the costs of a crime with its proceeds – for example, the felon who uses the stolen money to pay for the rented getaway car – would violate" the statute. To eliminate the merger problem, "proceeds" should be defined to mean profits. Thus, the transactions that Santos engaged in to run his lottery "are not identifiable uses of profits" and cannot violate the money laundering statute.

In the guidance his opinion gives to prosecutors, Justice Scalia advises that to establish the proceeds element under the profits interpretation, "the prosecution needs to show only that a single instance of specified unlawful activity was profitable and gave rise to the money involved in a charged transaction." The government would presumably select the instances for which the profitability is clearest. "What counts is whether the receipts from the charged unlawful act exceed the costs fairly attributable to it." In a footnote, the opinion responds to the main dissent's challenge, asking how long does each gambling "instance" last. Justice Scalia says that it is "up to the government" to select the period of time "for which it can most readily establish the necessary elements of the charged offenses," including (when money laundering is charged) profitability. When the crime charged is a discrete act (fraud, bank robbery), rather than the conduct of a business as in Santos's case, the government need not bother identifying the relevant period.

The opinion indicates that the knowledge element of the money laundering offense – knowledge that the transaction involves profits of unlawful activity – will be "provable by circumstantial evidence." Again answering the dissent, Scalia states that "a jury could infer from a long-running launderer-criminal relationship that the launderer knew he was hiding the criminal's profits." Also, the government could obtain a willful blindness instruction if the professional money launderer, "aware of a high probability that the laundered funds were profits," avoids learning the truth about them.

The Scalia opinion concludes (in a section which Justice Thomas did not join) with a criticism of the concurring opinion of Justice Stevens for instructing that in the money laundering cases trial judges can sometimes use "proceeds" to mean profits and at other times to mean gross receipts, depending upon the underlying predicate crime. According to Justice Scalia, such varied meaning of the same statutory term is a violation of the Court's precedents. However, the Scalia opinion also recognizes that because Justice Stevens' vote is necessary to the judgment and his opinion rests on "the narrower ground," the Court's "holding is limited accordingly." Finally, the opinion notes accurately that most of the other Justices, those joining the plurality opinion, as well as the Alito dissent, rejected the Stevens' view that "proceeds" can have a different meaning (profits or gross receipts) depending on the predicate crime giving rise to the money laundering charges.

In Justice Stevens' concurrence (in the result only), which gives the Scalia plurality opinion the status of the Court's opinion, he contrasts Santos' "stand-alone" gambling operation with prosecutions of "organized crime syndicates" that sell contraband (Read: Narcotics and dangerous drugs). He finds that the legislative history makes

clear that "proceeds" refers to the gross revenues from these sales. By contrast, subjecting Santos to this definition would have the "perverse" result of treating his operating expenses as a separate offense and suggests double jeopardy, which he finds Congress would not have intended.

Justice Breyer filed his own dissent, arguing that Congress intended that a money laundering offense should be directed at conduct that follows in time the underlying crime. He also suggested that the federal Sentencing Guidelines be re-written to deal with the sentencing disparity between the underlying offense and the harsher money laundering penalty.

He also joined Justice Alito's dissent, as did Chief Justice Roberts and Justice Kennedy. Justice Alito highlighted words from the Stevens concurrence on *stare decisis* – the term "proceeds" includes "gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales"- and dropped a footnote stating that five Justices agree with that position. This means that drug enterprise prosecutions may perhaps proceed under 18 U.S.C. §1956(a)(1)(A)(i) and the neighboring provisions that employ "proceeds" using, as before, the broader definition of that term.

Space does not permit us to do more than list other objections that Justice Alito, a former federal prosecutor, raises against the Scalia opinion:

- it "maims" the money laundering statute, which has been an important defense against organized crime;
- disregards the treaties, model statute, and codes of 15 states that all treat "proceeds" as reaching all receipts, not just profits;
- frustrates the Congressional and public policy objectives of, first, deterring drug traffickers from amassing large amounts of cash and enjoying luxurious lifestyles as the fruits of their crimes, and, secondly, inhibiting the growth of criminal enterprises through the use of "dirty money" to fund that growth;
- hamstrings the prosecution of hired, professional money launderers;
- raises a series of unnecessary accounting and proof obstacles that Congress did not intend, and which are perhaps insurmountable (since criminal enterprises are not subject to the accounting rules of businesses nor do they keep records like businesses); and
- introduces an "instance" test (i.e. "the government must show only that a single instance of specified unlawful activity was profitable and gave rise to the money involved in a charged transaction") that is not in the statute and is unworkable in the usual cases, where numerous criminal acts occur over time and funds are accumulated from all these acts before they are laundered.

Justice Alito concludes his dissent arguing that the "merger problem" does not justify "hobbling a statute that applies to more than 250 predicate offenses and not just running an illegal gambling business." Since the federal Sentencing Guidelines are now voluntary, a defendant who is convicted of money laundering for doing "no more than is required for a violation" of the gambling statute should be sentenced as if he had only violated the latter statute. Where the Guidelines now advise a longer sentence, the remedy is an amendment to the Guidelines. Merger occurs in only a subset of cases, while the statute reaches financial transactions that are intended to promote more than 250 other crimes. The statute in a different subsection also reaches transactions that are intended to conceal or disguise the nature, location, ownership, or control of illegally obtained funds. *See* 18 U.S. C. § 1956(a)(1)(B)(i). The meaning of "proceeds" should not be interpreted merely to deal with a problem that arises in only a subset of

cases. The "rule of lenity" does not require that an ambiguity be found and the narrowest possible dictionary definition be adopted in a criminal statute.

While the mischief this case causes for prosecutors may well be limited, as all the opinions suggest, to gambling cases, defense attorneys can attempt to expand the scope of the Scalia plurality opinion to many or all of the 250 predicate crimes. Congress can amend the statute to clarify the meaning of "proceeds" as gross receipts, revenues, or income and ensure that the term is not limited to profits. It is interesting that a plurality of a divided Court, speaking with a multitude of voices, chose to adopt the position of the Seventh Circuit in the *Scialabba* case. There was no split in the Circuits: *Scialabba* stood alone and its reasoning and holding was rejected by the other circuits (First, Third, and Eighth) that had considered this question.

The final word goes to the Seventh Circuit in its *Santos* case: "[T]he line between the payment of expenses and reinvestment of net income is, generally speaking, murky, especially given the likely absence of accounting standards. (citation omitted) Sorting out an illicit business's net income, therefore, can complicate the government's task of proving promotional money laundering, not to mention courts' and juries' respective roles in defining and determining what is and is not net income." If the government tries to bring money laundering prosecutions where judges determine that "proceeds" means profits under the Supreme Court's plurality opinion, defense attorneys and their clients are likely to have a field day gaining acquittals.

B. U.S. Supreme Court Clarifies International Transportation of Criminal Proceeds

by Bruce Zagaris

On June 2, 2008, the United States Supreme Court in a unanimous decision written by Justice Clarence Thomas clarified in favor of the defendants the definition of the money laundering statute that criminalizes international transportation of funds.

The case, *Cuellar v. U.S.*,[1] involved defendant Regalado Cuellar, who was arrested after a search of the car he drove through Texas toward Mexico (114 miles away) showed nearly $81,000 bundled in plastic bags and covered with animal hair in a secret compartment under the rear floorboard. Cuellar was charged with, and convicted of, attempting to transport "funds from a place in the Untied States to ... A place outside the United States ...knowing that the...funds...represent the proceeds of...unlawful activity and...that such transportation...is designed...to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of "the money in violation of the federal money laundering statute, 18 U.S.C. § 1956(a)(2)(B)(i)."

The U.S. Court of Appeals for the Fifth Circuit affirmed the conviction after a rehearing *en banc*, rejecting as inconsistent with the statutory text Cuellar's argument that the government must prove that he tried to create the appearance of legitimate wealth but held that his extensive efforts to prevent the funds' detection during transportation showed that he sought to conceal or disguise their nature, location, source, ownership, or control.[2]

---

[1] *Regalado Cuellar v. United States*, U.S. Supreme Court, No. 06-1456, decided June 2, 2008, 553 U.S. ____ (slip opinion).

[2] 478 F.3d 282 (2007).