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DOES “PROCEEDS” REALLY MEAN “NET
PROFITS”? THE SUPREME COURT’S EFFORTS TO
DIMINISH THE UTILITY OF THE FEDERAL MONEY
LAUNDERING STATUTE

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INTRODUCTION

Drug traffickers, mobsters, white collar criminals, and terrorist financiers must be breathing a huge sigh of relief. In *United States v. Santos*, a deeply divided Supreme Court held that the undefined term “proceeds” in the federal money laundering statute, 18 U.S.C. § 1956(a)(1), is limited to the net profits, not gross receipts, of unlawful activity.¹ The Supreme Court’s ruling restricts the scope of the money laundering statute. After *Santos*, the statute only punishes “financial transactions”² with illicit profits derived from “specified unlawful activity,”³ not any funds derived from or obtained, directly

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1. *United States v. Santos*, 128 S. Ct. 2020, 2025, 2031 (2008) (plurality opinion). The federal money laundering statute, 18 U.S.C. § 1956(a)(1) (2006), makes it a federal crime to knowingly conduct a financial transaction involving the “proceeds” of unlawful activity “with the intent to promote the carrying on of specified unlawful activity,” or knowing that the financial transaction is designed “to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds.”

2. The term “financial transaction” is defined to mean:

(A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree

18 U.S.C. § 1956(c)(4).

3. The term “specified unlawful activity” is a term of art under the statute and applies to more than 250 predicate offenses. *Id.* § 1956(c)(7); *Santos*, 128 S. Ct. at 2027 (plurality opinion) (citing MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, MONEY LAUNDERING OFFENDERS, 1994–2001, at 2 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mlo01.pdf>).

or indirectly, through the commission of such criminal activity.⁴ The legal implications of the Supreme Court's decision are far reaching and directly benefit defendants involved in criminal enterprises. Restricting the money laundering statute to "financial transactions" involving illicit "profits" derived from specified predicate offenses imposes significant obstacles to successful prosecution under the statute. Prosecutors must trace the tainted funds and prove that they constitute the net profits, not merely the gross receipts, of criminal activity. To prove net profits, prosecutors will be required to prove what the defendants' overhead expenses were. For example, the costs for purchasing, transporting, storing, and distributing illicit drugs would have to be deducted from the gross receipts. Further, in a securities fraud case involving insider trading, a defendant could argue that only the profits of the securities fraud (excluding the funds used to purchase the securities) would be the subject of a money laundering charge.

The potential scope of the Supreme Court's holding in *Santos* also raises other serious concerns. While the *Santos* case involved a prosecution under the "promotion theory" of money laundering, 18 U.S.C. § 1956(a)(1)(A)(i), the Court's holding applies to other subsections of the federal money laundering statute that require proof of "proceeds," including the concealment provision of money laundering.⁵ Unless the term "proceeds" is interpreted to mean one thing under § 1956(a)(1)(A)(i), the promotion provision, and something different under the concealment provision, § 1956(a)(1)(B)(i), the government must prove that the property involved in the financial transaction constitutes the "net profits" of specified criminal activity. The *Santos* decision further restricts the reach of § 1956(a)(2)(B)(i), the international money laundering provision, which criminalizes the transportation, transmission, or transfer of a monetary instrument or funds into or out of the United States with knowledge that the property involved represents the "proceeds" of some form of unlawful activity, and with the intent to conceal or disguise the

4. *Santos*, 128 S. Ct. at 2029 (plurality opinion).

5. 18 U.S.C. § 1956(a)(1)(B)(i). This section punishes whoever conducts or attempts to conduct a financial transaction knowing that the property involved in the transaction represents the "proceeds" of some form of unlawful activity, which in fact involves the "proceeds" of specified unlawful activity, knowing that the transaction is designed to conceal or disguise the nature, location, source, ownership, or control of the "proceeds" of specified unlawful activity. Under § 1956(a)(1)(B)(i), proof that the financial transaction involved the "proceeds" of specified unlawful activity is an essential element of the offense.

nature, location, source, ownership, or control of the "proceeds" of specified unlawful activity.⁶ After *Santos*, the government must prove that the monetary instruments or funds involved in the transportation, transmission, or transfer represent the "net profits" of specified unlawful activity. Further, the Supreme Court's narrow construction of the term "proceeds" appears to limit the application of § 1957(a), which punishes "[w]hoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than \$10,000."⁷ After *Santos*, § 1957 is seemingly limited to criminalizing only monetary transactions with illegal profits.

The Supreme Court's ruling also has clear implications for the application of the federal forfeiture statutes. The criminal and civil forfeiture statutes authorize the forfeiture of "proceeds."⁸ If the term

6. *Id.* § 1956(a)(2)(B)(i).

7. *Id.* § 1957(a). As used in the statute, the term "monetary transaction" means "the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument . . . by, through, or to a financial institution . . . , including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title." *Id.* § 1957(f)(1). For purposes of the statute, the term "criminally derived property" means any property constituting or derived from "proceeds" obtained from a criminal offense. *Id.* § 1957(f)(2).

8. See 18 U.S.C. §§ 981(a)(1), 982(a)(2), (6)(A)(ii), 1963(a)(3) (2006); 21 U.S.C. §§ 853(a)(1), (c), 881(a)(6) (2006). The criminal drug forfeiture statute, 21 U.S.C. § 853(a)(1), authorizes the forfeiture of "any property constituting, or derived from, any *proceeds* the person obtained, directly or indirectly, as the result of [a felony drug] violation." 21 U.S.C. § 853(a)(1) (emphasis added). The RICO criminal forfeiture statute, 18 U.S.C. § 1963(a)(3), provides that whoever violates any provision of § 1962 shall forfeit to the United States "any property constituting, or derived from, any *proceeds* which the person obtained, directly or indirectly, from racketeering activity . . . in violation of section 1962." 18 U.S.C. § 1963(a)(3) (emphasis added). Criminal forfeiture is also authorized under 18 U.S.C. § 982. Section 982 provides that in imposing sentence on a person convicted for a violation of 18 U.S.C. §§ 1956, 1957, or 1960, the court "shall order that the person forfeit to the United States any property, real or personal, *involved in* such offense, or any property traceable to such property." *Id.* § 982(a)(1) (emphasis added). However, for other delineated offenses, the court shall order that the person forfeit "any property constituting, or derived from, *proceeds* the person obtained directly or indirectly, as the result of such violation." *Id.* § 982(a)(2) (emphasis added). Further, with respect to statutorily enumerated fraud-related offenses, the defendant shall forfeit to the United States "any property, real or personal, which represents or is traceable to the *gross receipts* obtained, directly or indirectly, as a result of such violation." *Id.* § 982(a)(3) (emphasis added). Moreover, for persons convicted of altering or removing motor vehicle identification numbers, importing or exporting stolen motor vehicles, armed robbery of automobiles, transporting stolen motor vehicles in interstate commerce, or possessing or selling a stolen motor vehicle that has moved in interstate commerce, § 982(a)(5) authorizes forfeiture of "gross proceeds." Forfeiture of gross proceeds is also authorized for persons convicted of a federal health care offense or an offense involving telemarketing. *Id.* § 982(a)(7)–(8). Finally, § 982(a)(6)(A)(ii) authorizes forfeiture of

“proceeds” is interpreted consistent with the Supreme Court’s decision in *Santos*, federal prosecutors would have to trace the funds to net criminal profits, excluding the defendant’s overhead expenses from forfeiture. This would impose a heavy burden on the government of proving net profits in criminal and civil forfeiture cases. Finally, since after *Santos* the money laundering statute only prohibits the laundering of illicit net profits, financing specified unlawful activity, including acts of terrorism, with clean money is no longer criminalized under § 1956(a). For example, 18 U.S.C. § 2339C, the terrorist financing statute, punishes whoever, directly or indirectly, “unlawfully and willfully provides or collects funds” with the intention or with the knowledge that such funds are to be used to commit enumerated acts of terrorism.⁹ However, the terrorist funds can be derived from either an illegal or a lawful source. Under the Supreme Court’s narrow definition of “proceeds,” conducting a financial transaction with the proceeds of terrorist financing derived from a *legitimate* source is not prohibited by the money laundering statute.

At a minimum, the *Santos* decision (1) imposes an unreasonable burden on prosecutors to prove net profits (money acquired less defendant’s overhead expenses), (2) restricts other provisions of the money laundering statute and generates confusion with respect to whether the Court’s restrictive construction of the term “proceeds” applies to the federal forfeiture statutes, and (3) limits the application of the money laundering statute to predicate acts that generate illicit profits, rendering null and void terrorist financing and other predicate offenses involving financial transactions with funds derived from a lawful source.¹⁰ To remedy the deleterious effects of the

mere “proceeds” derived from or traceable to a violation of enumerated provisions of the Immigration and Nationality Act.

Civil forfeiture of “all proceeds” traceable to a federal drug crime is authorized under 21 U.S.C. § 881(a)(6). Additionally, 18 U.S.C. § 981(a)(1) authorizes forfeiture of “any proceeds,” “gross receipts,” or “gross proceeds” based on the specific underlying offense giving rise to forfeiture.

9. 18 U.S.C. § 2339C(a) (2006). The term “specified unlawful activity” includes violations of 18 U.S.C. § 2339C, which prohibits the willful provision or collection of funds to finance acts of terrorism. *Id.* § 1956(c)(7)(D).

10. *See* 18 U.S.C. §§ 2339A–2339B (2006) (prohibiting the provision of material support to terrorists and foreign terrorist organizations), *invalidated in part by* Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1134–36 (9th Cir. 2007) (holding that the terms “training,” “service,” and “expert advise or assistance” based on “other specialized knowledge” were void for vagueness); 18 U.S.C. § 2339C (punishing the financing of terrorism). However, these statutes punish the provision of financial support to terrorists and foreign terrorist organizations

Santos decision, Congress should amend the federal money laundering statute to make it a crime to engage in a financial transaction involving any funds derived, directly or indirectly, from specified unlawful activity, and not limited to the net gain or profits realized from such criminal acts.

Part I of this Article discusses the Supreme Court's decision in *Santos*, including the unusual alignment of Justices comprising the majority, concurring, and dissenting opinions. Part II provides an overview of the legislative history and structure of the federal money laundering statute. Part III examines the legal implications of the *Santos* decision on other sections of the federal money laundering statute. Part IV further discusses the legal effect of the Supreme Court's ruling on the federal forfeiture statutes that authorize the forfeiture of "proceeds." Specifically, following *Santos*, is the criminal and civil forfeiture of "proceeds" limited to the net profits of criminal activity? Are the defendant's criminal overhead expenses exempt from forfeiture? Part V analyzes Justice Scalia's erroneous construction of § 1956(a)(1)(A)(i), and rejects his overly broad application of the promotion theory of money laundering. Part VI discusses how the *Santos* decision excludes from the money laundering statute predicate offenses that do not generate illicit profits, such as the terrorist financing statute. Finally, this Article concludes by proposing several amendments to strengthen and enhance the effectiveness of the federal money laundering statute.

I. THE *SANTOS* DECISION

Respondent Elfrain Santos was charged with operating an illegal lottery in Indiana for over two decades.¹¹ According to the government, Santos, the ring-leader of the gambling enterprise, employed various helpers to run the lottery.¹² These helpers gathered bets from gamblers, kept a portion of the bets as their commissions, and delivered the balance to Santos's collectors.¹³ One of the collectors was respondent Benedicto Diaz, who delivered the money to Santos.¹⁴ The money received by Santos was used to pay the

regardless of whether the funds were derived from an unlawful or lawful source. *See id.* §§ 2339A–2339C.

11. United States v. Santos, 128 S. Ct. 2020, 2022–23 (2008) (plurality opinion).
12. *Id.* at 2022.
13. *Id.*
14. *Id.*

salaries of his collectors, including Diaz, and to pay off the winners.¹⁵ After a jury trial, Santos was found guilty of conspiracy to run an illegal gambling business (18 U.S.C. § 371), running an illegal gambling business (18 U.S.C. § 1955), conspiracy to launder money (18 U.S.C. § 1956(a)(1)(A)(i) and § 1956(h)), and money laundering (18 U.S.C. § 1956(a)(1)(A)(i)).¹⁶ Santos was sentenced to sixty months of imprisonment on the gambling counts and to 210 months of incarceration on the money laundering counts.¹⁷ Diaz pleaded guilty to conspiracy to launder money and was sentenced to 108 months of imprisonment.¹⁸ The convictions were affirmed on appeal.¹⁹ Thereafter, the Seventh Circuit decided *United States v. Scialabba*, another gambling case involving video poker machines, which held that the money laundering statute's use of "proceeds" meant net profits, not gross receipts.²⁰

Respondents filed motions under 28 U.S.C. § 2255, collaterally attacking their convictions and sentences.²¹ Applying the holding in *Scialabba*, the district court vacated the money laundering convictions, finding no evidence that the financial transactions on which the money laundering convictions were based involved net profits, as opposed to gross receipts, of the illegal gambling business.²² The court of appeals affirmed.²³

Justice Scalia, in an opinion joined by Justices Souter and Ginsburg, and Thomas in part, affirmed the Seventh Circuit's dismissal of the money laundering counts, holding that the term "proceeds" in the federal money laundering statute, 18 U.S.C. § 1956(a)(1), means illicit "profits," not "gross receipts."²⁴ Justice Stevens provided the necessary fifth vote, concurring in the judgment.²⁵

15. *Id.* at 2022–23.

16. *Id.* at 2023.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*; *United States v. Scialabba*, 282 F.3d 475, 475, 478 (7th Cir. 2002).

21. *Santos*, 128 S. Ct. at 2023 (plurality opinion).

22. *Id.*; *see also Santos v. United States*, 461 F.3d 886, 888–89 (7th Cir. 2006), *aff'd*, 128 S. Ct. 2020 (2008).

23. *Santos*, 128 S. Ct. at 2023 (plurality opinion); *see also Santos*, 461 F.3d at 894.

24. *Santos*, 128 S. Ct. at 2023, 2031 (plurality opinion). Justice Thomas joined all but Part IV of Justice Scalia's opinion. *Id.* at 2022.

25. *Id.* at 2031 (Stevens, J., concurring in the judgment).

Justice Scalia advanced two principal arguments in support of the Court's holding that the term "proceeds" means "net profits" for purposes of the federal money laundering statute. First, Justice Scalia reviewed the "ordinary meaning" of the term from the dictionary and concluded that "proceeds" can mean either profits or gross receipts.²⁶ Recognizing the word's inherent "ambiguity" in the money laundering statute, Justice Scalia concluded that the "tie must go to the defendant" under the rule of lenity.²⁷ Pursuant to the rule of lenity, ambiguous criminal laws must be interpreted in favor of the defendant.²⁸ Second, Justice Scalia argued that 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."²⁹ According to Justice Scalia, every payment of gambling winnings with lottery money would violate both the illegal gambling and the money laundering statutes, creating a "merger" problem.³⁰ Justice Scalia explained: "Since few lotteries, if any, will not pay their winners, the statute criminalizing illegal lotteries, 18 U.S.C. § 1955, would 'merge' with the money-laundering statute."³¹ As a result of this merger, lottery operators ordinarily facing five years of imprisonment for running an illegal gambling business would be subject instead to twenty years of imprisonment for violating the federal money laundering statute.³² It would be unfair to impose the heavier money laundering penalty for transactions that normally occur during the course of running an illegal lottery and warrant a lighter penalty, according to Justice Scalia.³³

Justice Scalia further argued that the "merger problem" is not limited to lottery operators, but extends to a host of other predicate crimes. Advancing an expansionist view of the promotion theory of money laundering, Justice Scalia declared:

26. *Id.* at 2024 (plurality opinion).

27. *Id.* at 2025.

28. *Id.* at 2025–26.

29. *Id.* at 2026.

30. *Id.*

31. *Id.*

32. *Id.*

33. *See id.* at 2027.

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 money-laundering statute. And any wealth-acquiring crime with multiple participants would become money-laundering when the initial recipient of the wealth gives his confederates their shares.³⁴

In sum, a financial transaction with proceeds of specified unlawful activity that facilitates, directly or indirectly, such unlawful activity, would constitute money laundering under the promotion theory, 18 U.S.C. § 1956(a)(1)(A)(i), and “any specified unlawful activity, an episode of which includes transactions which are not elements of the offense and in which a participant passes receipts on to someone else, would merge with money laundering.”³⁵ For Justice Scalia, the answer to the merger problem is to restrict the statutory term “proceeds” to mean illicit “profits.” Thus, for example, the money laundering statute would not apply to “[a] criminal who enters into a transaction paying the expenses of his illegal activity . . . , because by definition profits consist of what remains after expenses are paid.”³⁶ Further, defraying the costs of criminal activity with its receipts would not be covered.³⁷

Justice Stevens filed a separate opinion, concurring in the judgment.³⁸ Justice Stevens observed that the term “proceeds” in the money laundering statute applies to a varied and lengthy list of enumerated crimes, including, *inter alia*, drug offenses, murder, bribery, fraud, terrorist financing, environmental offenses, and health care offenses.³⁹ He stated 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,” but failed to do so.⁴⁰ While 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,” Justice Stevens posited that the congressional history sheds no light on how to

34. *Id.* at 2026–27.

35. *Id.* at 2027.

36. *Id.*

37. *Id.*

38. *Id.* at 2031 (Stevens, J., concurring in the judgment).

39. *Id.*

40. *Id.*

identify the "proceeds" of many other types of specified unlawful activities, including the operation of an illegal gambling business.⁴¹ While recognizing that the term "proceeds" could be construed to mean either the "gross receipts" or "profits" derived from an illegal gambling operation, Justice Stevens adopted the more restrictive construction of the term.⁴² He opined that to interpret the "proceeds" of a gambling business to include gross receipts would permit the government to treat the mere payment of the expenses of an illegal gambling business as money laundering.⁴³ Such a result would be unfair because the penalties for money laundering are substantially more severe than those for operating an illegal gambling business.⁴⁴ "Faced with both a lack of legislative history speaking to the definition of 'proceeds' when operating a gambling business is the 'specified unlawful activity'" and his conviction that Congress could not have intended the mere payment of expenses incurred in operating a gambling enterprise to support a money laundering conviction and substantially increase the defendant's criminal sentence, Justice Stevens agreed with Justice Scalia that the rule of lenity must apply.⁴⁵

Justice Breyer authored a dissenting opinion, which focused on two points.⁴⁶ First, he maintained that the way to avoid the merger problem is not by restricting the meaning of "proceeds," but by narrowing the application of the promotion provision.⁴⁷ Justice Breyer posited that the money laundering offense must be separate and distinct from and follow in time the underlying crime that generated the money to be laundered.⁴⁸ He further suggested that the statutory requirement that the financial transaction be conducted "with the intent to promote the carrying on of specified unlawful activity" is not satisfied where, for example, "only one instance of that underlying activity is at issue."⁴⁹ In other words, a person cannot promote "the carrying on" of completed, as opposed to ongoing,

41. *Id.* at 2032.

42. *Id.*

43. *Id.* at 2033.

44. *See id.*

45. *Id.* at 2033–34.

46. *Id.* at 2034–35 (Breyer, J., dissenting).

47. *Id.*

48. *Id.* at 2035 (citing *United States v. Edgmon*, 952 F.2d 1206, 1214 (10th Cir. 1991)).

49. *Id.* (emphasis omitted).

criminal activity.⁵⁰ Second, Justice Breyer proposed that any unfairness in sentencing could be addressed by the U.S. Sentencing Commission, which has been vested with the authority to “avoi[d] unwarranted sentencing disparities among those found guilty of *similar criminal conduct*.”⁵¹ Justice Breyer stated that the money laundering guideline “by making no exception for a situation where nothing but a single instance of the underlying crime has taken place, would seem to create a serious and unwarranted disparity among defendants who have engaged in identical conduct.”⁵² Justice Breyer was cautiously hopeful that the U.S. Sentencing Commission’s past efforts to tie more closely the offense level for money laundering to the offense level of the underlying crime could prevent any disparity in sentencing.⁵³

Justice Alito, with whom Chief Justice Roberts, and Justices Kennedy and Breyer joined, authored a strong dissenting opinion, raising multiple arguments.⁵⁴ Justice Alito stated that concluding that “proceeds” means “profits” would “frustrate Congress’[s] intent and maim a statute that was enacted as an important defense against organized criminal enterprises.”⁵⁵ He criticized Justice Scalia’s plurality opinion, stating:

Ignoring the context in which the term is used, the problems that the money laundering statute was enacted to address, and the obvious practical considerations that those responsible for drafting the statute almost certainly had in mind, that opinion is quick to pronounce the term hopelessly ambiguous and thus to invoke the rule of lenity.⁵⁶

Justice Alito argued that when a word has more than one meaning, as the term “proceeds” obviously does, the Court should consider what the term customarily means in the context in which it is used, rather than abandon any effort at interpretation and rush to apply the rule of lenity.⁵⁷ He found the United Nations Convention

50. *See id.*

51. *Id.* (alteration in original) (internal quotation marks omitted) (quoting 28 U.S.C. § 991(b)(1)(B) (2006)).

52. *Id.* (emphasis omitted).

53. *Id.*

54. *Id.* (Alito, J., dissenting).

55. *Id.*

56. *Id.*

57. *Id.* at 2036.

Against Transnational Organized Crime, the leading treaty on international money laundering, which has been adopted by the United States and 146 other countries, instructive on the meaning of the term "proceeds" in the context of money laundering.⁵⁸ Article 6.1 of the Convention imposes an obligation on State Parties to enact domestic legislation to criminalize "[t]he . . . transfer of property, knowing that such property is the *proceeds* of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action."⁵⁹ The Convention defines the term "proceeds" to mean "any property derived from or obtained, directly or indirectly, through the commission of an offence."⁶⁰ Thus, the Convention does not limit the term "proceeds" to illicit profits, but covers gross receipts.⁶¹ Moreover, Justice Alito argued that if the federal money laundering statute, 18 U.S.C. § 1956(a)(1), were limited to illicit profits, the United States would not be in compliance with its treaty obligations, because the Convention requires State Parties to criminalize the laundering of any property derived from a criminal offense, not merely illicit profits.⁶²

Next, Justice Alito observed that the term "proceeds" is given broad scope in the Model Money Laundering Act, and that fourteen states have money laundering statutes that define the term "proceeds" to encompass gross receipts.⁶³ He concluded that this "pattern of usage . . . strongly suggests that when lawmakers, knowledgeable about the nature and problem of money laundering, use the term 'proceeds' in a money laundering provision, they customarily mean for the term to reach all receipts and not just profits."⁶⁴

58. *Id.*; see also United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, S. TREATY DOC. NO. 108-16 (2004), 2225 U.N.T.S. 209 [hereinafter Convention Against Transnational Organized Crime].

59. Convention Against Transnational Organized Crime, *supra* note 58, S. TREATY DOC. 108-16, at 4-5, 2225 U.N.T.S. at 277 (emphasis added).

60. *Id.* S. TREATY DOC. 108-16, at 2, 2225 U.N.T.S. at 275.

61. *Santos*, 128 S. Ct. at 2036 (Alito, J., dissenting).

62. *Id.* at 2036 n.3; Convention Against Transnational Organized Crime, *supra* note 58, S. TREATY DOC. 108-16, at 2, 4-5, 2225 U.N.T.S. at 275, 277.

63. *Santos*, 128 S. Ct. at 2037 (Alito, J., dissenting); Model Money Laundering Act § 4(a), in THE WHITE HOUSE, PRESIDENT'S COMMISSION ON MODEL STATE DRUG LAWS: ECONOMIC REMEDIES, at C-112 (1993).

64. *Santos*, 128 S. Ct. at 2037 (Alito, J., dissenting).

Justice Alito further posited that restricting “proceeds” to mean “profits” would make it more difficult to obtain a conviction under the federal money laundering statute. He cited as support for his argument § 1956(c), which explicitly provides that a money launderer need only know that “the property involved in the transaction represented the proceeds of some form, though not necessarily which form, of [specified illegal] activity.”⁶⁵ Under § 1956(c), the prosecution is not required to prove that the money launderer knew that the illegal proceeds were derived from a specific crime, such as drug trafficking or fraud. If Congress, pursuant to § 1956(c), did not intend to impose a burden on prosecutors to prove that the defendant acted with knowledge that the tainted money was derived from a particular crime, Justice Alito maintained that Congress did not intend to require prosecutors to prove that the money launderer acted with knowledge that the funds provided for laundering were illicit profits, not gross receipts.⁶⁶

Furthermore, tracing funds back to particular criminal activity and proving the profitability of these sales may often prove impossible, according to Justice Alito.⁶⁷ Proving net income would require the government to prove “[t]he excess of revenues over all related expenses for a given period.”⁶⁸ In drug-money laundering cases, for example, the courts would have to decide whether the drug enterprise’s net income should be calculated annually, quarterly, or on some other basis.⁶⁹ Rules would need to be established in order to determine whether particular illegal expenses should be excluded from net profits.⁷⁰ The problem is further compounded by the fact that illegal enterprises do not keep books and records detailing their

65. *Id.* at 2039 (alteration in original) (quoting 18 U.S.C. § 1956(c)(1) (2006)).

66. *See id.* Justice Scalia rather cavalierly diminished the burden imposed on prosecutors to trace the funds to net profits. *See id.* at 2029 (plurality opinion). This view stands in stark contrast to federal court decisions holding that the government need not trace the proceeds to a particular instance of fraud or criminal activity. In *United States v. Ward*, the Eleventh Circuit stated: “Congress did not intend for participants in unlawful activities to escape conviction for money laundering ‘simply by commingling funds derived from both “specified unlawful activities” and other activities.’” 197 F.3d 1076, 1083 (11th Cir. 1999) (quoting *United States v. Cancelliere*, 69 F.3d 1116, 1120 (11th Cir. 1995)). While *Ward* was concerned with tracing criminal proceeds commingled with funds derived from lawful activities, tracing funds to exclude overhead expenses from illicit net profits also presents an enormous problem for prosecutors. *See id.* at 1078.

67. *Santos*, 128 S. Ct. at 2040 (Alito, J., dissenting).

68. *Id.* (citing RALPH W. ESTES, *DICTIONARY OF ACCOUNTING* 88 (1981)).

69. *Id.* at 2041.

70. *See id.* at 2040–41.

criminal expenditures. Thus, in a complex case, occurring over a substantial period of time involving multiple financial transactions, it may be difficult to prove whether individual transactions represented illicit profits, or payment for crime-related expenses. In sum, adopting a restrictive construction of "proceeds" creates a myriad of proof problems, which Justice Alito maintained serve no discernible purpose.

II. THE MONEY LAUNDERING CONTROL ACT OF 1986: ITS STRUCTURE AND LEGISLATIVE HISTORY

Given the fractured approach of the Court in interpreting "proceeds," it is fitting to examine the statute itself and its legislative history. The Money Laundering Control Act of 1986 ("MLCA") makes it a federal crime to launder the "proceeds" from "specified unlawful activity."⁷¹ In enacting the MLCA, Congress had two purposes in mind. First, it was Congress's intent to criminalize the "process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate."⁷² Second, the MLCA aimed to stem the flow of illicit funds back to the criminal enterprise for the purpose of capitalizing and expanding unlawful activity.⁷³ Congress was keenly aware that the lucrative profits generated by organized crime and international drug cartels had created, out of necessity, the

71. Money Laundering Control Act, Pub. L. No. 99-570, § 1352, 100 Stat. 3207, 3207-18 to -21 (codified at 18 U.S.C. §§ 1956-1957 (2006)). "Specified unlawful activity" is a term of art under the federal money laundering statute and applies to more than 250 predicate offenses. 18 U.S.C. § 1956(c)(7); *Santos*, 128 S. Ct. at 2027 (plurality opinion) (citing *MOTIVANS*, *supra* note 3).

72. Cf. PRESIDENT'S COMM'N ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 7 (1984) [hereinafter INTERIM REPORT].

73. See JIMMY GURULÉ, COMPLEX CRIMINAL LITIGATION: PROSECUTING DRUG ENTERPRISES AND ORGANIZED CRIME 120 (2d ed. 2000). Senator Alphonse D'Amato, a chief sponsor of the Senate bill, stated that "[m]oney laundering permits drug traffickers . . . to buy more drugs for resale, and to acquire the planes, boats, and front corporations they use to smuggle drugs into the United States." *Drug Money Laundering: Hearing on S. 571 Before the S. Comm. on Banking, Housing, and Urban Affairs*, 99th Cong. 7 (1985) (statement of Sen. Alphonse D'Amato, Member, S. Comm. on Banking, Housing, and Urban Affairs). Senator Dennis DeConcini remarked that "[w]ithout the means to launder money, thereby making cash generated by a criminal enterprise appear to come from a legitimate source, organized crime could not flourish as it now does." *Money Laundering Legislation: Hearing on S. 527, S. 1335, and S. 1385 Before the S. Comm. on the Judiciary*, 99th Cong. 30 (1985) (statement of Sen. Dennis DeConcini, Member, S. Comm. on the Judiciary).

professional money launderer.⁷⁴ Congress was particularly concerned with “the increasing number of professionals, such as lawyers, accountants, and bankers, willing to look the other way or become active participants in the laundering of illicit monies.”⁷⁵ One of the sponsors of the House bill, declared: “I am sick and tired of watching people sit back and say, ‘I am not part of the problem, I am not committing the crime, and, therefore, my hands are clean even though I know the money is dirty I am handling.’”⁷⁶ In short, the MLCA was intended to put a stop to the activities of both “those who make and [. . .] those who take dirty money.”⁷⁷

The MLCA makes it a crime to knowingly engage in a financial transaction with the “proceeds” of some form of unlawful activity either with the intent to promote the carrying on of specified unlawful activity, 18 U.S.C. § 1956(a)(1)(A)(i), or with the intent of concealing or disguising the nature, location, source, ownership, or control of proceeds derived from specified criminal activity, 18 U.S.C. § 1956(a)(1)(B)(i).⁷⁸ Subsections 1956(a)(1)(A)(i) and (a)(1)(B)(i) are

74. See GURULÉ, *supra* note 73, at 121.

75. *Id.* at 121 n.7. Senator Sasser commented, “[I]t’s no secret that for some banks, paying the \$10,000 fine [for failure to file a suspicious transaction report under the Bank Secrecy Act] or the risk of paying it is really a small price to pay for the large cash deposits that may find their way into the vaults of these particular banks.” *The Drug Money Seizure Act and the Bank Secrecy Act Amendments: Hearing on S. 571 and S. 2306 Before the S. Comm. on Banking, Housing, and Urban Affairs*, 99th Cong. 17 (1986) (statement of Sen. Jim Sasser, Member, S. Comm. on Banking, Housing, and Urban Affairs).

76. GURULÉ, *supra* note 73, at 121 (quoting The Markup by The Subcommittee on Crime of H.R. 99-5077, at 22–23 (1986)).

77. *Id.* (quoting Emily J. Lawrence, Note, *Let the Seller Beware: Money Laundering, Merchants and 18 U.S.C. §§ 1956, 1957*, 33 B.C. L. REV. 841, 849 (1992)).

78. Section 1956(a)(1) provides in relevant part:

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
 - (ii) with the intent to . . . [violate] section 7201 or 7206 of the Internal Revenue Code of 1986; 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; or
 - (ii) to avoid a transaction reporting requirement . . .

shall be sentenced to a fine . . . or imprisonment . . . , or both.

18 U.S.C. § 1956(a)(1) (2006).

aimed at criminalizing different activities. Section 1956(a)(1)(A)(i), the "promotion" provision, is aimed at the practice of "plowing back proceeds of 'specified unlawful activity' to promote" the carrying on of such activity.⁷⁹ In contrast, § 1956(a)(1)(B)(i), the "concealment" theory, makes it a crime to conceal or disguise the proceeds of specified unlawful activity.⁸⁰ Section 1956(h) further punishes whoever conspires to commit a money laundering offense.⁸¹

To obtain a conviction under § 1956(a)(1)(A)(i), the government must prove the following elements: (1) the defendant conducted or attempted to conduct a "financial transaction," (2) which the defendant knew involved the "proceeds" of some form of unlawful activity, (3) which in fact involved the "proceeds" of "specified unlawful activity," (4) with the intent to "promote the carrying on" of "specified unlawful activity."⁸² To sustain a violation of § 1956(a)(1)(B)(i), the government must prove that the defendant (1) knowingly conducted or attempted to conduct a financial transaction, (2) with the "proceeds" of some form of unlawful activity, (3) which in fact involved the "proceeds" of specified unlawful activity, (4) knowing that the transaction is 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 specified unlawful activity.⁸³

To sustain a conviction under either § 1956(a)(1)(A)(i) or (a)(1)(B)(i), the government must prove that the defendant engaged in a "financial transaction" with criminal proceeds. The term "financial transaction" means—

- (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or

79. *United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991); *see also* *United States v. Miller*, 22 F.3d 1075, 1080 (11th Cir. 1994) (distinguishing money laundering theories under § 1956(a)(1)(A)(i) and (a)(1)(B)(i)).

80. 18 U.S.C. § 1956(a)(1)(B)(i); *Jackson*, 935 F.2d at 842.

81. 18 U.S.C. § 1956(h). Section 1956(h) provides: "Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

82. *Id.* § 1956(a)(1)(A)(i); *see* *United States v. Piervinanzi*, 23 F.3d 670, 679–80 (2d Cir. 1994); *United States v. Puig-Infante*, 19 F.3d 929, 937 (5th Cir. 1994); *United States v. Brown*, 944 F.2d 1377, 1387 (7th Cir. 1991); *United States v. Montoya*, 945 F.2d 1068, 1076 (9th Cir. 1991).

83. *See* 18 U.S.C. § 1956(a)(1)(B)(i); *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1473 (10th Cir. 1994); *United States v. Baker*, 985 F.2d 1248, 1252 (4th Cir. 1993); *United States v. Jackson*, 983 F.2d 757, 766 (7th Cir. 1993); *United States v. Levine*, 970 F.2d 681, 686 (10th Cir. 1992).

(iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree⁸⁴

The term “transaction” is broadly defined in § 1956(c)(3) to include the “purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition.”⁸⁵ With respect to a “financial institution,” the term “transaction” includes a “deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution.”⁸⁶

“Specified unlawful activity” is a legal term of art under 18 U.S.C. § 1956(a).⁸⁷ The term is similar by analogy to the term “racketeering activity” in 18 U.S.C. § 1961(a), which is an essential element of a RICO violation.⁸⁸ Both “racketeering activity” and “specified unlawful activity” encompass numerous predicate crimes. In fact, there are more than 250 predicate offenses covered by the money laundering

84. 18 U.S.C. § 1956(c)(4); *see* United States v. Reed, 77 F.3d 139, 142 (6th Cir. 1996) (discussing the statutory construction of the terms “transaction” and “financial transaction”); United States v. Turner, 975 F.2d 490, 497 (8th Cir. 1992) (affirming a money laundering conviction where evidence showed that defendant was a drug dealer and made over \$600,000 in payments on a building and its renovation in cash); *Jackson*, 935 F.2d at 841 (holding that writing a check, whether for cash or to a vendor for services provided, falls within the definition of “financial transaction,” because the bank from which the money was drawn was a financial institution affecting interstate commerce); United States v. Blackman, 904 F.2d 1250, 1256–57 (8th Cir. 1990) (finding that the transfer of title of defendant’s pickup truck constituted a “financial transaction”).

85. 18 U.S.C. § 1956(c)(3). The term “transaction” has been broadly construed by the courts. *See, e.g.*, United States v. France, 164 F.3d 203, 208 (4th Cir. 1998) (“The posting of bond constitutes a sufficient financial transaction for money laundering purposes.”); United States v. Leslie, 103 F.3d 1093, 1101 (2d Cir. 1997) (holding that surrendering a check to an undercover federal agent in exchange for cash constituted a “transaction” within the meaning of the money laundering statute); United States v. Dimeck, 24 F.3d 1239, 1246 (10th Cir. 1994) (“Subsection 1956(c)(3) defines ‘transaction’ to include ‘delivery’ of the illegal proceeds.”).

86. 18 U.S.C. § 1956(c)(3).

87. *Id.* § 1956(c)(7).

88. *See id.* § 1961(a). To establish a violation of RICO under 18 U.S.C. § 1962(a), the government must prove, among other things, that the defendant participated in a “pattern of racketeering activity or [in the] collection of an unlawful debt.” *See id.* § 1962(a) (emphasis added). The term “racketeering activity” is defined to include murder, kidnapping, gambling, arson, robbery, bribery, extortion, drug dealing, and dozens of federal crimes. *Id.* § 1961(1); *see also* GURULÉ, *supra* note 73, at 61 (discussing the prohibited conduct under RICO).

statute.⁸⁹ For example, § 1956(c)(7) defines the term “specified unlawful activity” to include any act that would constitute “racketeering activity” under the RICO statute,⁹⁰ bank fraud,⁹¹ bankruptcy fraud,⁹² mail fraud,⁹³ conducting an illegal gambling business and interstate transmission of wagering information,⁹⁴ a violation of the Hobbs Act,⁹⁵ narcotics trafficking,⁹⁶ as well as numerous other felony offenses.

III. THE LEGAL IMPLICATIONS OF THE *SANTOS* DECISION

A. *The Concealment Theory*

In the *Santos* case the defendant was charged under the promotion theory of money laundering, 18 U.S.C. § 1956(a)(1)(A)(i).⁹⁷ However, the Court’s holding that “proceeds” means “net profits” is not limited to prosecutions under the promotion theory, but has legal implications for other subsections of the federal money laundering statute. Proof that the defendant knowingly engaged in a financial transaction with the “proceeds” of specified criminal activity is also an essential element for conviction under the concealment theory of

89. 18 U.S.C. § 1956(c)(7); *United States v. Santos*, 128 S. Ct. 2020, 2027 (plurality opinion) (citing *MOTIVANS*, *supra* note 3).

90. 18 U.S.C. § 1956(c)(7)(A); *e.g.*, *United States v. Hare*, 49 F.3d 447, 451–52 (8th Cir. 1995); *see also* 18 U.S.C. § 1961(1) (racketeering offenses).

91. 18 U.S.C. § 1956(c)(7)(A); *e.g.*, *United States v. Piervinanzi*, 23 F.3d 670, 676 n.4, 679 (2d Cir. 1994); *see also* 18 U.S.C. § 1961(1)(B) (financial institution fraud offenses).

92. 18 U.S.C. § 1956(c)(7)(D); *e.g.*, *United States v. Ward*, 197 F.3d 1076, 1082 (11th Cir. 1999).

93. 18 U.S.C. § 1956(c)(7)(A); *e.g.*, *United States v. Habhab*, 132 F.3d 410, 414 (8th Cir. 1997); *Hare*, 49 F.3d at 451–52 (finding that because § 1956(c)(7)(A) defines “specified unlawful activity” as “any act or activity constituting an offense listed in section 1961(1) [‘racketeering activity’ under the RICO statute],” and wire fraud is specifically listed in § 1961(1)(B), wire fraud is therefore a predicate offense within the meaning of the money laundering statute); *see also* 18 U.S.C. § 1961(1)(B) (wire fraud offenses).

94. 18 U.S.C. § 1956(c)(7)(A); *e.g.*, *United States v. Manarite*, 44 F.3d 1407, 1414 (9th Cir. 1995); *United States v. Miller*, 22 F.3d 1075, 1077 (11th Cir. 1994); *United States v. LeBlanc*, 24 F.3d 340, 346 (1st Cir. 1994); *see also* 18 U.S.C. § 1961(1)(B) (illegal gambling business and transmission of gambling information offenses).

95. 18 U.S.C. § 1956(c)(7)(A); *e.g.*, *United States v. Carcione*, 272 F.3d 1297, 1303 (11th Cir. 2001); *see also* 18 U.S.C. § 1961(1)(B) (Hobbs Act offenses).

96. 18 U.S.C. § 1956(c)(7)(C); *see also* *United States v. Carr*, 25 F.3d 1194, 1206 (3d Cir. 1994); *United States v. Jackson*, 935 F.2d 832, 841 (7th Cir. 1991).

97. *United States v. Santos*, 128 S. Ct. 2020, 2023 (2008) (plurality opinion).

money laundering, 18 U.S.C. § 1956(a)(1)(B)(i).⁹⁸ A defendant is guilty of money laundering under the concealment theory if he conducted or attempted to conduct a financial transaction which he knew involved the “proceeds” of some form of unlawful activity, which in fact involved the “proceeds” of specified unlawful activity, knowing that the transaction was designed to conceal or disguise the nature, location, source, ownership, or the control of the “proceeds” of specified unlawful activity.⁹⁹ After the Supreme Court’s ruling in *Santos*, in order to sustain a conviction under the concealment theory, the government must prove that the defendant engaged in a financial transaction with knowledge that the property involved in such transaction represents the “net profits” of some form of criminal activity and the funds actually involved the “net profits” of specified unlawful activity.¹⁰⁰

The *Santos* Court’s restrictive reading of “proceeds” to mean “net profits” will make it more difficult for prosecutors to convict under the concealment theory of money laundering.¹⁰¹ Not only must the government prove beyond a reasonable doubt that the funds involved in the financial transaction constituted “net profits,” meaning the excess of returns over expenditures in the criminal enterprise, but it must also prove that the defendant acted with *knowledge* that the funds involved in the transaction represented the “net profits” of criminal activity. Determining “net profits” raises numerous troubling issues. For example, how are “net profits” to be measured? What if the overall operations of the criminal enterprise are profitable, but the particular transaction at issue involved a net loss? In his dissenting opinion, Justice Alito raised the following scenario:

Suppose . . . that a drug cartel sends a large shipment of drugs to this country, a good part of the shipment is intercepted, the remainder is sold, the cartel ends up with a net loss but with a large quantity of cash on its hands, and the cartel uses the cash in financial

98. See 18 U.S.C. § 1956(a)(1)(B)(i); see also GURULÉ, *supra* note 73, at 124–25 (discussing the concealment theory).

99. 18 U.S.C. § 1956(a)(1)(B)(i).

100. See *Santos*, 128 S. Ct. at 2025 (plurality opinion). The reasoning of the plurality opinion in *Santos*, including the Court’s reliance on the rule of lenity, appears to apply with equal force when construing the term “proceeds” as used in § 1956(a)(1)(B)(i). Furthermore, there is no reason to suggest that the term “proceeds” should be construed to mean “profits” for purposes of § 1956(a)(1)(A)(i), but interpreted to mean something different under § 1956(a)(1)(B)(i).

101. See *Santos*, 128 S. Ct. at 2039 (Alito, J., dissenting).

transactions that are designed to conceal the source of the cash or to promote further crime.¹⁰²

Under the ruling of the majority of the Justices on the Court, the evidence arguably would not support a conviction for money laundering because the dirty money involved in the financial transactions did not represent the "net profits" of specified unlawful activity (drug trafficking). Yet, as Justice Alito correctly stated, "[t]here is no plausible reason why Congress would not have wanted the money laundering statute to apply to these financial transactions."¹⁰³ Justice Alito further explained: "If the cartel leaders use the money to live in luxury, this provides an incentive for these individuals to stay in the business and for others to enter. If the cartel uses the money to finance future drug shipments or to expand the business, public safety is harmed."¹⁰⁴

It makes no sense to punish money launderers who participate in financial transactions with dirty money, intending to conceal the funds from law enforcement, but exempt those same individuals from prosecution if the property involved in the transactions was derived from criminal activity, but did not involve the net profits of such illegal conduct. In both cases, the money launderer acted with a guilty mind, intending to disguise the nature, source, ownership, or control of funds derived from criminal activity.

It should further be emphasized that the principle reason articulated by the Supreme Court for restricting the reach of the money laundering statute to "net profits" has no application to the concealment provision. In his plurality opinion, Justice Scalia argued that narrowing the term "proceeds" to mean "net proceeds" is necessary to avoid the so-called merger problem.¹⁰⁵ However, the merger problem has no application under the concealment theory of money laundering. There is no concern that the evidence used to convict for the underlying predicate offense would also prove a violation of the money laundering statute under the concealment theory. For example, evidence that Santos took money derived from his gambling business and paid winning bettors would not establish money laundering under the concealment theory. The elements of proof required to sustain a conviction for operating an illegal

102. *Id.* at 2038.

103. *Id.*

104. *Id.*

105. *Id.* at 2026–27 (plurality opinion).

gambling business, in violation of 18 U.S.C. § 1955(a), and violating the money laundering statute under the concealment theory, 18 U.S.C. § 1956(a)(1)(B)(i), are completely different. The illegal gambling statute punishes “[w]hoever conducts, finances, manages, supervises, directs, or owns . . . an illegal gambling business.”¹⁰⁶ The money laundering statute, on the other hand, requires proof that the defendant conducted a financial transaction knowing that the funds involved some form of criminal activity, the funds actually involved the proceeds of specified unlawful activity, and the transaction was conducted with the intent to conceal or disguise the proceeds of specified unlawful activity.¹⁰⁷ Simply stated, Santos’s guilt for financing, managing, supervising, or directing an illegal gambling business would not automatically establish a violation of the federal money laundering statute under the concealment theory. The same holds true for other predicate crimes. For example, evidence that the defendant trafficked in illegal drugs or participated in other wealth-acquiring crimes would not automatically prove money laundering under a theory of concealment. Those crimes do not require proof that the defendant conducted a financial transaction with the intent to conceal the proceeds of criminal activity.¹⁰⁸ Thus, while Justice Scalia’s merger argument may have application in certain cases prosecuted under the promotion theory, this reasoning offers no justification whatsoever for restricting the application of the money laundering statute and imposing unnecessary problems of proof for prosecutors under the concealment theory.

B. *The International Money Laundering Provision*

The *Santos* decision further implicates § 1956(a)(2), the international federal money laundering statute, under a theory of

106. 18 U.S.C. § 1955(a) (2006).

107. *Id.* § 1956(a)(1)(B)(i).

108. For example, 21 U.S.C. § 841(a)(1) (2006), the federal drug statute, makes it unlawful for any person to knowingly or intentionally “manufacture, distribute, or dispense, or possess with the intent to manufacture, distribute, or dispense, a controlled substance.” Proof that the defendant engaged in a financial transaction with the proceeds of specified unlawful activity with the intent to conceal or disguise such proceeds is irrelevant to whether the defendant is guilty of violating § 841(a)(1). The elements required to prove a federal drug offense are entirely different from those elements required to prove a money laundering violation under the concealment theory. *See* 18 U.S.C. § 1956(a)(1)(B)(i).

concealment.¹⁰⁹ Section 1956(a)(2) criminalizes the transportation, transmission, or transfer of a monetary instrument or funds into or out of the United States with the intent to promote the carrying on of specified unlawful activity, or for the purpose of concealing or disguising the nature, location, source, ownership, or control of the proceeds of specified unlawful activity.¹¹⁰ At first glance, the international money laundering provision, § 1956(a)(2)(A), appears similar to its domestic counterpart, § 1956(a)(1)(A)(i). However, while both the domestic and international money laundering statutes require proof that the defendant acted with the intent to promote the carrying on of specified unlawful activity, the statutes are dissimilar in several important respects.¹¹¹ "First, § 1956(a)(2)(A) does not require proof that the defendant conducted a 'financial transaction.' Second, there is no requirement under § 1956(a)(2)(A) that the monetary instruments or funds transported, transmitted, or transferred internationally represent the proceeds of criminal activity."¹¹² Unlike § 1956(a)(1)(A)(i), § 1956(a)(2)(A) punishes the mere transportation, transmission, or transfer of funds, obtained from an unlawful or lawful source, if done with the requisite intent.¹¹³ Stated another way, the international money laundering statute punishes the transportation, transmission, or transfer of either dirty or clean money intended to promote the carrying on of specified unlawful activity. Because proof that the transportation, transmission, or transfer involved "proceeds" of specified unlawful

109. See 18 U.S.C. § 1956(a)(2)(B)(i); see also *Cuellar v. United States*, 128 S. Ct. 1994, 1998, 2006 (2008) (holding that § 1956(a)(2)(B)(i) requires more than evidence that the defendant hid cash during its transportation out of the country; prosecutors must prove that the purpose of the transportation of the cash was to conceal the nature, location, source, ownership, or control of the funds).

The subsequent discussion of the international money laundering statute is taken, in part, from GURULÉ, *supra* note 73, at 156–57.

110. 18 U.S.C. § 1956(a)(2)(A)–(B)(i). Under the statute, the term "monetary instrument" means "(i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery." *Id.* § 1956(c)(5).

111. GURULÉ, *supra* note 73, at 157.

112. *Id.*; see also *United States v. Piervinanzi*, 23 F.3d 670, 680 (2d Cir. 1994) ("[Section] 1956(a)(2) contains no requirement that the 'proceeds' first be generated by unlawful activity, followed by a financial transaction with those proceeds, for criminal liability to attach."); *United States v. Hamilton*, 931 F.2d 1046, 1052 (5th Cir. 1991) (same holding).

113. 18 U.S.C. § 1956(a)(1)(A)(i), (a)(2)(A); GURULÉ, *supra* note 73, at 157.

activity is *not* an element of the offense, the *Santos* decision has no application and does not limit the reach of § 1956(a)(2)(A).

The international money laundering provision, however, also contains a concealment provision, 18 U.S.C. § 1956(a)(2)(B)(i), which requires proof of proceeds. The *Santos* decision directly impacts this subsection of the statute. Section 1956(a)(2)(B)(i) punishes

[w]hoever transports, transmits, or transfers . . . a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the *proceeds* of some form of unlawful activity and knowing that such transportation, transmission, or transfer 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 activity¹¹⁴

Under the concealment theory, proof that the transportation, transmission, or transfer of the monetary instrument or funds involved the “proceeds” of specified unlawful activity is an essential element of the offense.¹¹⁵ Because *Santos* holds that “proceeds” means “net profits,” the government arguably must prove that the defendant participated in such conduct knowing that the monetary instrument or funds represented the “net profits” of some form of criminal activity.¹¹⁶ The prosecution must further prove that the monetary instrument or funds transported, transmitted, or transferred in fact involved the “net profits” of specified unlawful activity.¹¹⁷

In this context, the merger argument Justice Scalia relied on in restricting the reach of the money laundering statute has no application. Proof of the criminal activity that generated the property involved in the international transportation, transmission, or transfer of a monetary instrument or funds does not automatically prove a

114. 18 U.S.C. § 1956(a)(2)(B)(i) (emphasis added).

115. *Id.*

116. *See* United States v. Santos, 128 S. Ct. 2020, 2025 (2008) (plurality opinion).

117. *See id.*

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violation of § 1956(a)(2)(B)(i). Merging the underlying predicate crime with the money laundering offense is therefore not required. Moreover, the defendant is not subjected to harsher punishment under the money laundering statute for merely engaging in conduct required to convict for the predicate offense.

C. *Engaging in Monetary Transactions Greater than \$10,000*

The *Santos* decision also has legal implications for proving violations of 18 U.S.C. § 1957. Section 1957 makes it a crime to knowingly engage or attempt to engage in a "monetary transaction" in criminally derived property of a value greater than \$10,000, involving funds derived from specified unlawful activity.¹¹⁸ To obtain a conviction under § 1957(a), the government must prove five elements: "(1) the defendant engage[d] or attempt[ed] to engage (2) in a monetary transaction (3) in criminally derived property that is of a value greater than \$10,000 (4) knowing that the property is derived from unlawful activity, and (5) the property is, in fact, derived from 'specified unlawful activity.'"¹¹⁹ The statute defines "monetary transaction" to mean "the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument . . . by, through, or to a financial institution."¹²⁰ The term "criminally derived property" means "any property constituting, or derived from, *proceeds* obtained from a criminal offense."¹²¹

Section 1957(a) criminalizes any bank transaction with proceeds in excess of \$10,000 derived from specified unlawful activity. In *United States v. Rutgard*, the Ninth Circuit declared:

[Section 1957(a)] is a powerful tool because it makes any dealing with a bank potentially a trap for the drug dealer or any other defendant who has a hoard of criminal cash derived from the specified crimes. If he makes a "deposit, withdrawal, transfer[,] or exchange" with this cash, he commits the crime; he's forced to commit another felony if he wants to use a bank. . . . As long as the underlying crime has been completed and the defendant "possesses"

118. 18 U.S.C. § 1957(a) (2006).

119. *United States v. Sokolow*, 91 F.3d 396, 408 (3d Cir. 1996) (quoting *United States v. Johnson*, 971 F.2d 562, 567 n.3 (10th Cir. 1992)); see also *United States v. Rutgard*, 116 F.3d 1270, 1291 (9th Cir. 1997) (discussing the application of § 1957).

120. 18 U.S.C. § 1957(f)(1).

121. *Id.* § 1957(f)(2) (emphasis added).

the funds at the time of deposit, the proceeds cannot enter the banking system without a new crime being committed.¹²²

Section 1957(a) is distinguishable from § 1956(a) because it does not require proof that the transaction was conducted with the specific intent to conceal illicit proceeds or promote the carrying on of specified unlawful activity. The statute eliminates the specific intent requirement of § 1956(a). The differences between § 1957(a) and § 1956(a) have been described as follows:

The description of the crime [in § 1957(a)] does not speak to the attempt to cleanse dirty money by putting it in a clean form and so disguising it. This statute applies to the most open, above-board transaction. The intent to commit a crime or the design of concealing criminal fruits is eliminated. These differences make [a] violation of § 1957 easier to prove [than a violation of § 1956].¹²³

Section 1957(a) requires proof that the defendant engaged in a “monetary transaction” with “criminally derived property” in excess of \$10,000.¹²⁴ The term “criminally derived property” is defined as property constituting, or derived from, the “proceeds” of criminal activity.¹²⁵ Thus, proof that the defendant participated in a “monetary transaction” involving “proceeds” is an essential element of the offense. Because *Santos* interprets “proceeds” to mean “net profits,” the government arguably must prove that the monetary transaction represents the “net profits” of specified unlawful activity.¹²⁶ For the reasons previously highlighted, requiring proof of “net profits” makes it more difficult to convict under § 1957(a), undermining the effectiveness of the money laundering statute. Moreover, restricting the reach of § 1957(a) to monetary transactions involving the “net profits” of specified unlawful activity is not justified by concerns related to merger. Essential to a violation of § 1957(a) is proof that the defendant engaged in a “monetary transaction.”¹²⁷ Thus, operating an illegal gambling business, selling illicit drugs, or participating in any other profit-making crime does not, by itself,

122. *Rutgard*, 116 F.3d at 1291; accord *United States v. Allen*, 129 F.3d 1159, 1165 (10th Cir. 1997).

123. *Rutgard*, 116 F.3d at 1291 (citation omitted).

124. 18 U.S.C. § 1957(a).

125. *Id.* § 1957(f)(2).

126. See *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion).

127. 18 U.S.C. § 1957(a).

establish a violation of § 1957. Moreover, the underlying predicate crimes do not merge with § 1957 and the defendant is not subjected to the risk of unfair punishment. Merger is simply not an issue in prosecutions under § 1957. Finally, the intent of § 1957 is to maintain the integrity of the financial system by deterring criminals from using banks to transfer dirty money.¹²⁸ That purpose is undermined by restricting § 1957 to monetary transactions involving "net profits" rather than "gross receipts" of specified unlawful activity. Simply stated, important policy interests favor a broader definition of "proceeds" to include the "gross receipts" of unlawful activity.

D. *Criminal and Civil Forfeiture of Proceeds*

1. *Criminal Forfeiture*

The use of the term "proceeds" is not limited to the federal money laundering statutes. Both criminal and civil forfeiture statutes authorize the forfeiture of illicit "proceeds."¹²⁹ Left unresolved by the *Santos* decision is whether the Supreme Court's restrictive interpretation of "proceeds" to mean "net profits" applies to the federal forfeiture statutes. In other words, is the forfeiture of "proceeds" limited to the forfeiture of "net profits"? More specifically, are the overhead expenses of a criminal enterprise exempt from criminal and civil forfeiture? In the criminal setting, the forfeiture of illicit proceeds is authorized by three major federal forfeiture statutes. First, 21 U.S.C. § 853(a)(1) authorizes the forfeiture of "any property constituting, or derived from, any *proceeds* the person obtained, directly or indirectly, as the result of [a federal drug] violation."¹³⁰ Second, the RICO criminal forfeiture statute, 18 U.S.C. § 1963(a)(3), provides for forfeiture to the United States "any property constituting, or derived from, any *proceeds* which the person obtained, directly or indirectly, from racketeering activity... in violation of section 1962."¹³¹ Finally, 18 U.S.C. § 982 authorizes the

128. See GURULÉ, *supra* note 73, at 120–21.

129. JIMMY GURULÉ, SANDRA GUERRA THOMPSON & MICHAEL O'HEAR, *THE LAW OF ASSET FORFEITURE* 193 (2d ed. 2004) [hereinafter *THE LAW OF ASSET FORFEITURE*].

130. 21 U.S.C. § 853(a)(1) (2006) (emphasis added); see also *id.* § 853(a) (providing that "[i]n lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds"). Congress distinguishes between "profits" and "proceeds." The terms are not synonymous under the statute.

131. 18 U.S.C. § 1963(a)(3) (2006) (emphasis added).

forfeiture of “proceeds,” “gross proceeds,” and “gross receipts,” depending on the particular underlying offense giving rise to forfeiture.¹³²

The courts have consistently construed the term “proceeds” to mean “gross receipts,” rejecting the restrictive interpretation that “proceeds” includes only “net profits” realized from unlawful activity. For example, in *United States v. McHan*, the Fourth Circuit reversed a district court ruling that the costs of drug operations were exempt from criminal forfeiture under 21 U.S.C. § 853.¹³³ The court held that § 853 authorizes the forfeiture of gross proceeds, not merely the profits accrued from illicit drug trafficking.¹³⁴ The court based its conclusion on several grounds. First, the court observed that the drug forfeiture statute originally limited criminal forfeitures for a person convicted of engaging in a continuing criminal enterprise to “profits obtained . . . in such enterprise.”¹³⁵ However, the provision was replaced by 21 U.S.C. § 853, when Congress passed the Comprehensive Forfeiture Act.¹³⁶ Section 853(a)(1) now authorizes the forfeiture of “any property constituting, or derived from, any proceeds . . . obtained, directly or indirectly, as the result of” a Continuing Criminal Enterprise (“CCE”) offense.¹³⁷ In using the term “proceeds,” as distinguished from “profits,” Congress intended to broaden the scope of the statute to encompass more than merely illicit profits derived from drug trafficking.¹³⁸

Second, the *McHan* court argued that Congress intended to subject to forfeiture, pursuant to § 853(a)(1), “[t]he same type of property [that was already] subject to *civil* forfeiture under 21 U.S.C.

132. *Id.* § 982; *see id.* § 982(a)(2)(A)–(B), (6)(A)(ii)(I) (authorizing forfeiture of “proceeds”); *id.* § 982(a)(5), (7), (8)(B) (authorizing forfeiture of “gross proceeds”); *id.* § 982(a)(3)–(4) (authorizing forfeiture of “gross receipts”).

133. *United States v. McHan*, 101 F.3d 1027, 1041 (4th Cir. 1996); THE LAW OF ASSET FORFEITURE, *supra* note 129, at 194; *see also* *United States v. Simmons*, 154 F.3d 765, 770 (8th Cir. 1998) (“We think the better view is the one that defines proceeds as the gross receipts of the illegal activity.”).

134. *McHan*, 101 F.3d at 1041–42; THE LAW OF ASSET FORFEITURE, *supra* note 129, at 194.

135. *McHan*, 101 F.3d at 1041 (internal quotation marks omitted) (quoting 21 U.S.C. § 848(a)(2)(A) (1982) (current version at 21 U.S.C. § 853(a)(1) (2006))); THE LAW OF ASSET FORFEITURE, *supra* note 129, at 194.

136. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, sec 303, § 413, 98 Stat. 2040, 2044–45 (1984) (codified at 21 U.S.C. § 853(a)); THE LAW OF ASSET FORFEITURE, *supra* note 129, at 194.

137. 21 U.S.C. § 853(a)(1); THE LAW OF ASSET FORFEITURE, *supra* note 129, at 194. A CCE offense involves a violation of 21 U.S.C. § 848.

138. THE LAW OF ASSET FORFEITURE, *supra* note 129, at 194.

§ 881(a)(6)."¹³⁹ The court observed that the reach of § 881(a)(6) extends beyond merely forfeiting illicit drug profits.¹⁴⁰ Further, the *McHan* court posited that "[t]he civil forfeiture provision has never been interpreted to permit a deduction for the costs of illicit drug transactions."¹⁴¹

The *McHan* court found additional support for its position in the legislative history of the RICO criminal forfeiture statute, 18 U.S.C. § 1963.¹⁴² The Comprehensive Forfeiture Act amended both the RICO and CCE forfeiture provisions.¹⁴³ The court observed that the language of 21 U.S.C. § 853 closely tracks that of the RICO criminal forfeiture provision, 18 U.S.C. § 1963.¹⁴⁴ Thus, the legislative history of § 1963(a)(3) was found to be illuminating when interpreting 21 U.S.C. § 853.¹⁴⁵ The *McHan* court posited that the legislative history of § 1963(a) "reveals that Congress believed '[i]t should not be necessary for the prosecutor to prove what the defendant's overhead expenses were' and, therefore, used the term 'proceeds' rather than 'profits' . . . 'to alleviate the unreasonable burden on the government of proving net profits.'"¹⁴⁶ The *McHan* court concluded that Congress intended the term "proceeds" to be given the same meaning under the drug and RICO criminal forfeiture statutes.¹⁴⁷ Finally, the court maintained that sound public policy reasons support the forfeiture of gross receipts rather than merely drug profits under § 853.¹⁴⁸ The court stated:

Were we to read proceeds in § 853 to mean only profits . . . we would create perverse incentives for criminals to employ complicated accounting measures to shelter the profits of their illegal enterprises. The purpose of forfeiture is to remove property facilitating crime or

139. *McHan*, 101 F.3d at 1041–42 (alteration in original) (quoting S. REP. NO. 98-225, at 211 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3394).

140. THE LAW OF ASSET FORFEITURE, *supra* note 129, at 194.

141. *McHan*, 101 F.3d at 1042.

142. THE LAW OF ASSET FORFEITURE, *supra* note 129, at 195.

143. *McHan*, 101 F.3d at 1042 (citing Comprehensive Forfeiture Act of 1984, sec 303, § 413, 98 Stat. 2040); THE LAW OF ASSET FORFEITURE, *supra* note 129, at 195.

144. *McHan*, 101 F.3d at 1042; THE LAW OF ASSET FORFEITURE, *supra* note 129, at 195.

145. THE LAW OF ASSET FORFEITURE, *supra* note 129, at 195; *see McHan*, 101 F.3d at 1042.

146. *McHan*, 101 F.3d at 1042 (alteration in original) (quoting S. REP. NO. 98-225, *supra* note 139, at 199); *see also* United States v. Riley, 78 F.3d 367, 371 (8th Cir. 1996) (explaining that Congress used the term "proceeds" to spare the government the burden of proving net profits); United States v. Hurley, 63 F.3d 1, 21 (1st Cir. 1995) (same).

147. *McHan*, 101 F.3d at 1042; THE LAW OF ASSET FORFEITURE, *supra* note 129, at 195.

148. *McHan*, 101 F.3d at 1041–42; THE LAW OF ASSET FORFEITURE, *supra* note 129, at 195.

property produced by crime—all of which is tainted by the illegal activity.¹⁴⁹

Thus, forfeiture of gross receipts is consistent with the intent of Congress to attack the economic base of criminal enterprises.

The RICO statute, 18 U.S.C. § 1963(a)(3), authorizes the forfeiture of the “proceeds” derived from a pattern of racketeering activity. “The term ‘proceeds’ as used in § 1963(a)(3) has been construed to mean the entire amount realized from racketeering activity and not just the ‘profits’ made by the defendant. Forfeiture of gross profits rather than net profits is mandated by the statute.”¹⁵⁰ One court reasoned:

Forfeiture under RICO is a punitive, not a restitutive, measure. Often proof of overhead expenses and the like is subject to bookkeeping conjecture and is therefore speculative. RICO does not require the prosecution to prove or the trial court to resolve complex computations, so as to ensure that a convicted racketeer is not deprived of a single farthing more than his criminal acts produced. RICO’s object is to prevent the practice of racketeering, not to make the punishment so slight that the economic risk of being caught is worth the potential gain. Using net profits as the measure for forfeiture could tip such business decisions in favor of illegal conduct.¹⁵¹

Construing “proceeds” to mean “net profits” would clearly undermine the effectiveness of the RICO forfeiture statute.

The money laundering forfeiture statute, 18 U.S.C. § 982(a)(1), authorizes the criminal forfeiture of property “involved in” or “traceable to” a violation of § 1956 or § 1957.¹⁵² The money

149. *McHan*, 101 F.3d at 1042. The court further opined that the costs of the drug operations were forfeitable under a “facilitation” theory. *Id.* at 1041–43. Section 853 directs the forfeiture of any “property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of” a felony drug offense. 21 U.S.C. § 853(a)(2) (2006). The court stated that because the money spent to buy and transport marijuana was used to “facilitate” the defendant’s criminal enterprise, § 853(a)(2) subjects that money to forfeiture. *McHan*, 101 F.3d at 1042–43.

150. GURULÉ, *supra* note 73, at 243 (footnote omitted); *see also* *United States v. Simmons*, 154 F.3d 765, 770 (8th Cir. 1998) (“We think the better view is the one that defines proceeds as the gross receipts of the illegal activity.”); *United States v. Lizza Indus., Inc.*, 775 F.2d 492, 498 (2d Cir. 1985) (supporting same proposition); *United States v. Saccoccia*, 823 F. Supp. 994, 1003 (D.R.I. 1993) (same).

151. *Lizza Indus.*, 775 F.2d at 498–99.

152. 18 U.S.C. § 982(a)(1) (2006). The criminal forfeiture provision in § 982(a)(1) also authorizes forfeiture of property “involved in” or “traceable” to a violation of 18 U.S.C. § 1960.

laundering forfeiture provision does not use the term "proceeds."¹⁵³ The requirement that the property be "involved in" a money laundering offense is not limited to money derived from criminal activity or illicit profits. For example, legitimate funds used to disguise illegitimate funds are forfeitable as property "involved in" a money laundering offense.¹⁵⁴ In reaching this conclusion, one court reasoned:

[L]imiting the forfeiture of funds . . . to the proceeds of the initial fraudulent activity would effectively undermine the purpose of the forfeiture statute. Criminal activity such as money laundering largely depends upon the use of legitimate monies to advance or facilitate the scheme. It is precisely the commingling of tainted funds with legitimate money that facilitates the laundering and enables it to continue.¹⁵⁵

The Supreme Court's ruling in *Santos* creates an interesting dichotomy with respect to the application of § 982(a)(1), the money laundering forfeiture statute. *Santos* limits the federal money laundering statute to financial transactions with illicit profits derived from specified unlawful activity.¹⁵⁶ However, § 982(a)(1) authorizes forfeiture of property "involved in" or "traceable to" a violation of § 1956 and § 1957, and courts have construed the forfeiture statute to include forfeiture of legitimate funds used to disguise dirty money.¹⁵⁷ Thus, the money laundering forfeiture provision appears to have greater reach than the federal money laundering statute giving rise to forfeiture.

Other subsections of § 982 authorize forfeiture of proceeds, gross proceeds, or gross receipts.¹⁵⁸ The potential impact of *Santos* on these forfeiture provisions is unclear. For example, does *Santos* limit forfeiture of "proceeds" under § 982 to "net profits"? What is the

153. *Id.* § 982(a)(1).

154. *United States v. Trost*, 152 F.3d 715, 721 (7th Cir. 1998).

155. *Contents of Account Nos. 208-06070 & 208-06068-1-2*, 847 F. Supp. 329, 334–35 (S.D.N.Y. 1994) (first alteration in original) (quoting *United States v. Certain Funds on Deposit in Account No. 01-0-71417*, 769 F. Supp. 80, 84–85 (E.D.N.Y. 1991)).

156. *See United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion).

157. *See United States v. McGauley*, 279 F.3d 62, 75–77 (1st Cir. 2002) (affirming jury instructions that stated "the commingling of tainted funds (mail fraud proceeds) with legitimate funds is enough to expose the legitimate funds to forfeiture, if the commingling was done for the purpose of concealing the nature or source of the tainted funds"); *Trost*, 152 F.3d at 721 ("Money does not need to be derived from the crime to be forfeited.").

158. *See supra* note 132 and accompanying text.

legal impact of the *Santos* decision on the forfeiture of “gross proceeds” authorized by § 982(5), (7), and (8)(B)? Does *Santos* limit forfeiture to “gross net profits,” whatever that means?

2. *Civil Forfeiture*

The civil forfeiture of drug proceeds is authorized by 21 U.S.C. § 881(a)(6). The statute provides that “[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished . . . in exchange for a controlled substance” and “all proceeds traceable to such an exchange” shall be forfeited to the United States.¹⁵⁹ Civil forfeiture is further authorized under 18 U.S.C. § 981(a)(1)(B), which permits forfeiture of any “proceeds” obtained directly or indirectly from an offense against a foreign nation, if the offense “involves trafficking in nuclear, chemical, biological, or radiological weapons technology or material, or the manufacture, importation, sale, or distribution of a controlled substance.”¹⁶⁰ Additionally, § 981(a)(1)(C) authorizes civil forfeiture of the “proceeds” of statutorily enumerated crimes, including any offense defined as “specified unlawful activity” under the federal money laundering statute, 18 U.S.C. § 1956(c)(7).¹⁶¹ Other provisions authorize civil forfeiture of gross proceeds or gross receipts.¹⁶²

Section 981 also authorizes civil forfeiture of property, real or personal, which constitutes or is derived from “proceeds” traceable to a violation of 18 U.S.C. § 2339C.¹⁶³ Section 2339C prohibits the financing of terrorism.¹⁶⁴ Specifically, § 2339C prohibits directly or indirectly providing or collecting “funds with the intention that such funds be used, or with knowledge that such funds are to be used” to commit enumerated terrorism-related predicate acts.¹⁶⁵ The relevant predicate acts include offenses within the scope of nine international counter-terrorism treaties, including, for example, treaties condemning hijacking, the destruction of aircraft, crimes against

159. 21 U.S.C. § 881(a)(6) (2006) (emphasis added).

160. 18 U.S.C. § 981(a)(1)(B)(i) (2006). Forfeiture of “gross proceeds” is authorized by § 981(a)(1)(F). Further, § 981(a)(1)(D) and (E) authorize forfeiture of “gross receipts” for certain crimes.

161. *Id.* § 981(a)(1)(C).

162. *See, e.g., id.* § 981(a)(1)(D)–(E) (forfeiture of gross receipts); *id.* § 981(a)(1)(F) (forfeiture of gross proceeds).

163. *Id.* § 981(a)(1)(H).

164. *Id.* § 2339C.

165. *Id.* § 2339C(a)(1).

internationally protected persons, hostage-taking, and terrorist bombings.¹⁶⁶ Section 2339C further prohibits financing other terrorism-related acts, including acts of violence directed at any civilian or other person not taking part in hostilities in a situation of an "armed conflict, when the purpose of such act . . . is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."¹⁶⁷

If *Santos* is construed to limit civil forfeiture under 18 U.S.C. § 981(a)(1)(H) to the "net profits" from specified terrorism-related crimes, such a result would seriously undermine the effectiveness of the civil forfeiture statute. Unlike money laundering, the financing of terrorism may involve funds derived from legal as well as illegal activity. "A terrorist sympathizer may choose to support the activities of a terrorist organization using funds derived from legitimate business activity or some other legal source."¹⁶⁸ Restricting § 981(a)(1)(H) to "net profits" would exempt from civil forfeiture funds derived from a legitimate source intended to finance acts of terrorism.

Finally, § 981(a)(2) provides that in cases involving "illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term 'proceeds' . . . is not limited to the net gain or profit realized from the offense."¹⁶⁹ Thus, forfeiture of proceeds is not limited to illicit net profits. However, in cases of "lawful goods or lawful services that are sold or provided in an illegal manner, the term 'proceeds' means the amount of money acquired through the illegal transactions . . . less the direct costs incurred in providing the goods or services."¹⁷⁰ Thus, the civil forfeiture statute, 18 U.S.C. § 981(a), draws a distinction between whether the proceeds were obtained as the result of engaging in illegal activities or providing legal goods or services in an illegal manner.¹⁷¹ Only in cases involving legal goods or services provided in an illegal manner is the term "proceeds" construed to exclude direct costs incurred in providing the goods and services.¹⁷² The Supreme Court's

166. *Id.* § 2339C(e)(7).

167. *Id.* § 2339C(a)(1)(B).

168. JIMMY GURULÉ, UNFUNDING TERROR: THE LEGAL RESPONSE TO THE FINANCING OF GLOBAL TERRORISM 104 (2008).

169. 18 U.S.C. § 981(a)(2)(A) (2006).

170. *Id.* § 981(a)(2)(B).

171. *See id.* § 981(a)(2)(A)-(B).

172. *Id.* § 981(a)(2)(B).

construction of “proceeds” in the *Santos* decision is more restrictive in scope.¹⁷³ Under this interpretation, “proceeds” always means net profits, regardless of whether the proceeds were obtained as the result of the commission of illegal activities or lawful goods or lawful services provided in an illegal manner.¹⁷⁴ Thus, the term “proceeds” has a narrow meaning under the federal money laundering statute (illicit profits) after *Santos*, and a broader meaning under the civil forfeiture provision, 18 U.S.C. § 981(a)(2)(A) (“not limited to the net gain or profit realized from the offense”).¹⁷⁵

IV. “PROMOTING THE CARRYING ON” OF AN ILLEGAL GAMBLING ENTERPRISE

In his plurality opinion, Justice Scalia argued that a restrictive construction of “proceeds” is mandated, otherwise every payment to runners, collectors, and winning gamblers in the illegal lottery operation would constitute money laundering, because such transactions were intended to promote the carrying on of the lottery.¹⁷⁶ In his view, the same conduct that would constitute operating an illegal lottery would also support a conviction for money laundering. Justice Scalia posited that “[s]ince few lotteries, if any, will not pay their winners, the statute criminalizing illegal lotteries would ‘merge’ with the money-laundering statute.”¹⁷⁷ As a result of this merger, lottery operators who ordinarily would be subject to five years of imprisonment for a violation of the illegal lottery statute, 18 U.S.C. § 1955(a), would face an additional twenty years for money laundering under § 1956(a)(1)(A)(i).¹⁷⁸ Justice Scalia further maintained that there is no evidence that Congress intended to radically increase the criminal sentence for a financial transaction that is a normal part of the underlying predicate offense and punished elsewhere in the criminal code.¹⁷⁹ Finally, interpreting “proceeds” to mean “profits” would eliminate the merger problem.¹⁸⁰ Justice

173. See *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion).

174. *Id.* (“Because the ‘profits’ definition of ‘proceeds’ is always more defendant-friendly than the ‘receipts’ definition, the rule of lenity dictates that it should be adopted.”).

175. Compare 18 U.S.C. § 1956(a) (2006), with *id.* § 981(a)(2)(A).

176. See *Santos*, 128 S. Ct. at 2026 (plurality opinion).

177. *Id.* (citation omitted).

178. *Id.*

179. *Id.* at 2027.

180. *Id.*

Scalia declared that "[t]ransactions that normally occur during the course of running a lottery are not identifiable uses of *profits* and thus do not violate the money-laundering statute."¹⁸¹

Justice Scalia's reasoning is seriously flawed and demonstrates a fundamental misunderstanding of the promotion theory of money laundering. He seeks to justify his restrictive construction of the term "proceeds" by his erroneous and unreasonably broad application of the promotion provision. However, once the promotion provision is properly understood to prohibit the flow of illicit proceeds back to the criminal enterprise to capitalize and continue the commission of specified criminal activity, Justice Scalia's argument proffered to support a restrictive reading of "proceeds" fails. Justice Scalia's plurality opinion further reflects an arrogant disregard of the legislative intent of the MLCA and prior court decisions interpreting § 1956(a)(1)(A)(i).¹⁸² His plurality opinion never even mentions the legislative history of the MLCA or relevant court decisions interpreting the promotion provision.¹⁸³ The legislative history makes clear that the federal money laundering statute was aimed at conduct that follows in time the underlying predicate crime. The money laundering statute created a new crime, rather than merely affording prosecutors an alternative means to punish "specified unlawful activity."¹⁸⁴ As noted by another court, "Congress clearly intended the money laundering statutes to punish new conduct that occurs after the completion of certain criminal activity, rather than simply to create an additional punishment for that criminal activity."¹⁸⁵ One court reached the same conclusion with respect to § 1957, stating that "both the plain language of § 1957 and the legislative history behind it suggest that Congress targeted only those transactions occurring after proceeds have been obtained from the underlying unlawful

181. *Id.* (emphasis added).

182. *Id.* at 2026 (rejecting the government's invitation to "speculate" about congressional purpose, stating that "[w]hen interpreting a criminal statute, we do not play the part of a mind reader").

183. *See id.* For example, Justice Scalia's plurality decision fails to even mention *United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991), which held that 18 U.S.C. § 1956(a)(1)(A)(i) requires evidence that the defendant intended to "plow back" illicit proceeds to promote the carrying on of specified unlawful activity.

184. *See GURULÉ, supra* note 73, at 150–51 (citing *United States v. Edgmon*, 952 F.2d 1206, 1213 (10th Cir. 1991), and *United States v. Heaps*, 39 F.3d 479, 485–86 (4th Cir. 1994), *abrogated in part on other grounds by* *United States v. Villarini*, 238 F.3d 530 (4th Cir. 2001)).

185. *United States v. Kennedy*, 64 F.3d 1465, 1478 (10th Cir. 1995); *accord* *United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992); *Edgmon*, 952 F.2d at 1213–14.

activity.”¹⁸⁶ Moreover, the federal courts have repeatedly held that conducting a financial transaction with the proceeds of specified unlawful activity that merely facilitates such activity does not constitute money laundering under the promotion theory.¹⁸⁷ To violate the promotion provision, the financial transaction at issue must follow in time and be distinct from the offense that generated the illicit funds.

Section 1956(a)(1)(A)(i) makes it a federal crime to conduct a financial transaction involving the proceeds of unlawful activity “with the intent to promote the carrying on of specified unlawful activity.”¹⁸⁸ This subsection is aimed at deterring “the practice of plowing proceeds of ‘specified unlawful activity’ to promote that activity.”¹⁸⁹ It differs from § 1956(a)(1)(B)(i), the concealment provision, in that intent to launder, disguise, or conceal the nature or source of the proceeds is not an essential element of the offense.¹⁹⁰ The dispositive issue in a § 1956(a)(1)(A)(i) prosecution is whether the defendant engaged in a financial transaction with the specific intent to reinvest the proceeds to promote the carrying on of specified unlawful activity, not merely to facilitate the commission of the underlying predicate offense.¹⁹¹ Justice Scalia erroneously interpreted the statutory language “to promote the carrying on” to mean “facilitate” specified unlawful activity.¹⁹² However, if Congress intended

186. *Johnson*, 971 F.2d at 569.

187. *See, e.g., Heaps*, 39 F.3d at 486; *United States v. Dimeck*, 24 F.3d 1239, 1246–47 (10th Cir. 1994).

188. 18 U.S.C. § 1956(a)(1)(A)(i) (2006); *United States v. Paramo*, 998 F.2d 1212, 1216 (3d Cir. 1993).

189. *United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991); *see also United States v. Reed*, 167 F.3d 984, 993 (6th Cir. 1999) (affirming a money laundering conviction where defendant made her law office available for drug buyer to drop off money covering debt owed to drug seller, and for seller’s representative to pick up money, promoting prior unlawful activity); *United States v. France*, 164 F.3d 203, 205, 209 (4th Cir. 1998) (affirming a money laundering conviction where defendant used drug money to post bail for a member of a drug conspiracy, thus furthering drug trafficking activity); *United States v. Hildebrand*, 152 F.3d 756, 760, 762 (8th Cir. 1998) (holding that evidence that monies obtained from scheme to defraud were used to pay office supplies, secretarial services, office staff wages, and promotional expenses to promote ongoing scheme to defraud was sufficient to sustain money laundering conviction under “reinvestment” theory).

190. *Compare* 18 U.S.C. § 1956(a)(1)(A)(i), *with id.* § 1956(a)(1)(B)(i).

191. *See GURULÉ, supra* note 73, at 148–49 (citing *Jackson*, 935 F.2d at 841–42).

192. *See United States v. Santos*, 128 S. Ct. 2020, 2026 (2008) (plurality opinion) (“Anyone who pays for the costs of a crime with its proceeds . . . would violate the money-laundering statute.”). While Justice Scalia does not use the term “facilitate” in the opinion, this certainly seems to be the way that he interprets “to promote the carrying on.”

§ 1956(a)(1)(A)(i) to punish whoever engages in a financial transaction with the criminal proceeds with the intent to "facilitate" or aid and abet specified unlawful activity, it easily could have said so. At the very least, using the language "to promote the carrying on" is an extremely awkward way of saying to "facilitate." Furthermore, 18 U.S.C. § 2, the federal aiding and abetting statute, makes it a crime to aid and abet the commission of an offense.¹⁹³ Pursuant to § 2, whoever "aids, abets, counsels, commands, induces or procures" the commission of a federal crime is punishable as a principal.¹⁹⁴ Certainly, Congress did not intend by the promotion theory of the money laundering statute to merely provide an alternative means of punishing aiders and abettors of specified unlawful activity. Justice Scalia's statutory construction of the money laundering statute simply does not withstand close scrutiny and contradicts the ruling of numerous federal courts that have considered the issue.

In *United States v. Edgmon*, the Tenth Circuit analyzed the legislative intent of the MLCA.¹⁹⁵ The court observed that in the Senate report for § 1956, Congress expressed the need for a federal criminal law aimed at curbing the activity of laundering money derived from illegal activity.¹⁹⁶ The *Edgmon* court stated that "Congress aimed the crime of money laundering at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior 'specified unlawful activity.'"¹⁹⁷ In *United States v. Dimeck*, the court embraced the *Edgmon* court's construction of the MLCA.¹⁹⁸ The *Dimeck* court further identified that absent the additional step by the drug dealer of attempting to launder the money, the delivery of drug proceeds by the middleman to the drug seller (or money courier acting on his behalf) did not violate the money laundering statute.¹⁹⁹

In *United States v. Jackson*, the Seventh Circuit affirmed a money laundering conviction under the promotion theory where evidence showed that drug proceeds were used to purchase telephone paging beepers that were used to communicate with drug couriers to inform

193. 18 U.S.C. § 2(a) (2006).

194. *Id.*

195. *United States v. Edgmon*, 952 F.2d 1206, 1213-14 (10th Cir. 1991).

196. *Id.* at 1213 (citing S. REP. NO. 99-433, at 4 (1986)).

197. *Id.* at 1214.

198. *United States v. Dimeck*, 24 F.3d 1239, 1246-47 (10th Cir. 1994).

199. *Id.* at 1242, 1247.

them where to pick up and drop off drug money.²⁰⁰ The court found that the use of the beepers was an integral part of the drug operation and purchasing the beepers was intended to promote the carrying on of illegal drug trafficking activity.²⁰¹ Moreover, the financial transactions at issue (purchasing the beepers) were separate from and followed in time the criminal activity (drug transactions) that generated the illicit funds.²⁰² However, the court in *Jackson* reached a different result with respect to money laundering counts based on the use of drug money to pay apartment rental fees and purchase mobile car phones.²⁰³ The court found the evidence insufficient to support a violation of § 1956(a)(1)(A)(i), the promotion theory.²⁰⁴ The Seventh Circuit concluded that the government failed to prove that the cellular phones played any role in carrying on the drug operations, and although the rental payments helped maintain the defendant's personal lifestyle, the evidence failed to show how this promoted his drug activities.²⁰⁵ To sustain a conviction under the promotion provision, § 1956(a)(1)(A)(i), the Seventh Circuit held that the proceeds must be "plowed back" to promote the carrying on of specified unlawful activity, not merely used to personally benefit the defendant.²⁰⁶

In *Santos*, the payment of gambling winnings does not constitute "plowing back" or reinvesting gambling proceeds to continue the ongoing operation of the illegal gambling business. Unlike *Jackson*, the proceeds were not used to purchase beepers or other equipment needed to continue or expand the operation of the criminal enterprise.²⁰⁷ At most, the financial transactions in *Santos* were merely part of the underlying predicate crime of operating an illegal gambling business.²⁰⁸ Further, the collection and payment of gambling debts were not transactions separate from and following in time the criminal activity that generated the illicit funds.²⁰⁹

200. *United States v. Jackson*, 935 F.2d 832, 841 (7th Cir. 1991). The subsequent discussion of *Jackson* is taken in part from the discussion of the promotion theory of money laundering in GURULÉ, *supra* note 73, at 148–49.

201. *Jackson*, 935 F.2d at 841.

202. *See id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 841–42.

207. *See United States v. Santos*, 128 S. Ct. 2020, 2022–23 (2008) (plurality opinion).

208. *See id.*

209. *See id.*

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In *United States v. Heaps*, the Fourth Circuit reversed a defendant's money laundering convictions under the promotion theory, § 1956(a)(1)(A)(i).²¹⁰ In *Heaps*, the defendant distributed illegal drugs to two drug dealers, Beck and Boccia.²¹¹ Beck wired two money orders to Heaps's girlfriend, one in the amount of \$1500 and the other for \$500, to pay for the drugs.²¹² After the money was wire transferred, it was placed in a money box in Heaps's house.²¹³ Heaps was subsequently convicted on two counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i), the promotion theory.²¹⁴

The government predicated its argument that the transfer of the two money orders was intended to promote the carrying on of unlawful drug activity on two theories.²¹⁵ First, the prosecution argued that the transfers of funds were made to establish goodwill for the promotion of future sales of illicit drugs by the defendant.²¹⁶ Second, the government maintained that the transfers promoted the carrying on of unlawful activity by completing the antecedent drug sales.²¹⁷ The court rejected the government's first argument, finding no evidence to support the claim that the payment was made to create goodwill for future drug transactions.²¹⁸ The Fourth Circuit characterized the payments as being made merely to satisfy an outstanding debt from completed drug transactions, not to encourage subsequent drug transactions.²¹⁹ The court also dismissed the government's second theory of promotion, reasoning:

Were the payment for drugs itself held to be a transaction that promoted the unlawful activity of that same transaction virtually every sale of drugs would be an automatic money laundering violation as soon as money changed hands. Understood this way,

210. *United States v. Heaps*, 39 F.3d 479, 486–87 (4th Cir. 1994), *abrogated in part on other grounds by United States v. Villarini*, 238 F.3d 530 (4th Cir. 2001).

211. *Id.* at 480–81.

212. *Id.* at 481–82.

213. *Id.* at 482.

214. *Id.* at 480.

215. *Id.* at 484.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

§ 1956 would have such reach that it would criminalize the very same conduct already criminalized by the drug laws.²²⁰

The *Heaps* court concluded that the money laundering statute was intended to create a separate crime, distinct from the offense that generated the money to be laundered.²²¹ The Fourth Circuit followed the Seventh Circuit's reasoning in *Jackson*, holding that in the absence of any proof that the drug proceeds were "plowed back" into the criminal enterprise, the evidence was insufficient to sustain a conviction under the promotion theory.²²² Thus, the mere exchange of money for illegal drugs, without more, is insufficient to demonstrate that the financial transaction "promoted the carrying on" of specified unlawful activity.²²³

The reasoning of the court in *Heaps* applies with equal force to the facts in *Santos*. Were the collection of gambling debts and payment of gambling winnings held to be transactions that promoted the illegal gambling enterprise, virtually every such transaction would constitute an automatic money laundering violation. Understood this way, § 1956 would criminalize the very same conduct criminalized by the illegal gambling laws.²²⁴ The *Heaps* court emphatically rejected such an expansive application of the promotion provision.²²⁵ The mere collection of gambling receipts and payments to winning bettors do not constitute money laundering under the promotion theory. Such transactions are an integral part of the illegal gambling business and already criminalized by the illegal gambling statute. Defining the collection of gambling receipts and payment of winnings as promotion would merely provide an alternative punishment for operating a gambling business, which was not the legislative intent. Section 1956(a)(1)(A)(i) requires an additional promotional step beyond the operation of an illegal enterprise. Such transactions must follow in time the commission of the underlying predicate offense, operating an illegal gambling business.²²⁶ For example, purchasing communications equipment, such as cell phones and fax machines, could violate the promotion theory of money

220. *Id.* at 485–86.

221. *Id.* at 486.

222. *Id.* (citing *United States v. Jackson*, 935 F.2d 832, 841–42 (7th Cir. 1991)).

223. *See id.*

224. *See id.* at 485–86.

225. *See id.*

226. *See United States v. Edgmon*, 952 F.2d 1206, 1213–14 (10th Cir. 1991).

laundering. Purchasing communications equipment involves a promotional step beyond the mere operation of the illegal gambling venture; the mere collection of gambling receipts and payments to winning bettors do not.²²⁷

Justice Scalia was simply wrong when he claimed that "nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute."²²⁸ While the financial transactions involving collectors, runners, and winners would violate the illegal lottery statute, such transactions would not necessarily violate § 1956(a)(1)(A)(i). Only those transactions that followed in time the collection and payment of gambling debts and were "plowed back" to promote the carrying on of the illegal gambling enterprise would violate the promotion provision.²²⁹ While those individuals may be guilty of operating an illegal gambling business, they did not commit money laundering. Thus, there is no "merger problem."²³⁰ At the same time, if the defendants engaged in a distinct and separate transaction "plowing back" proceeds to promote the carrying on of the illegal gambling business, increased punishment would be justified. Congress intended to punish separately the practice of plowing back proceeds of specified unlawful activity to promote the continuation of that activity.²³¹

Justice Scalia also failed to cite any authority to support the view that the federal money laundering statute was intended to afford prosecutors an alternative means of punishing individuals that aid and abet the commission of specified unlawful activity.²³² He was wrong when he stated that anyone who pays for the costs of a crime with its proceeds would be guilty of money laundering.²³³ According to Justice Scalia, "the felon who uses the stolen money to pay for the rented getaway car—would violate the money-laundering statute."²³⁴ Once again, Justice Scalia misconstrued § 1956(a)(1)(A)(i), which was intended to prevent the financing of *future* criminal activity with criminal proceeds. In his hypothetical, the financial transaction would not satisfy the "intent to promote the carrying on" requirement

227. See *Jackson*, 935 F.2d at 841.

228. *United States v. Santos*, 128 S. Ct. 2020, 2026 (2008) (plurality opinion).

229. See *id.* at 2034 (Breyer, J., dissenting).

230. See *id.* at 2044–45 (Alito, J., dissenting).

231. See *Jackson*, 935 F.2d at 842; *Edgmon*, 952 F.2d at 1213–14.

232. See *Santos*, 128 S. Ct. at 2026 (plurality opinion).

233. *Id.*

234. *Id.*

if the rental car payment was related to a completed crime.²³⁵ If there were no plans to commit future criminal acts, the payment could not have been intended to promote the “carrying on” of criminal activity.²³⁶ Simply stated, one cannot promote the “carrying on” of already completed unlawful activity.²³⁷

Justice Scalia further erroneously concluded that giving confederates their share of the proceeds of criminal activity would always violate the promotion provision of money laundering.²³⁸ He stated that “any wealth-acquiring crime with multiple participants would become money-laundering when the initial recipient of the wealth gives his confederates their shares.”²³⁹ Whether such transactions constitute money laundering would depend on whether the payments were intended to promote the commission of future crimes. The promotion provision looks forward, not backward. If the payments were intended to pay for past criminal activity, such transactions would fail to satisfy the specific intent requirement “to promote the carrying on” of specified unlawful activity.²⁴⁰ However, if future crimes were contemplated and the payments were intended to recruit confederates for the commission of such criminal acts, the payments would constitute money laundering. To sustain a violation of § 1956(a)(1)(A)(i), Justice Scalia would simply require that the financial transaction somehow facilitated the commission of specified unlawful activity.²⁴¹ However, this construction of the money laundering statute would render the statutory language “carrying on” superfluous and meaningless. Justice Scalia placed undue emphasis on the word “promote” and apparently read out of the statute the requirement that the financial transaction promote the “carrying on” of specified criminal activity. Moreover, if Congress intended the money laundering statute to criminalize any financial transaction that

235. *Id.* at 2035 (Breyer, J., dissenting) (“Alternatively the money laundering statute’s phrase ‘with the intent to promote the carrying on of specified unlawful activity’ may not apply where, for example, only one instance of that underlying activity is at issue.”).

236. *See id.*

237. *But see* United States v. Paramo, 998 F.2d 1212, 1216–17 (3d Cir. 1993) (concluding that there was sufficient evidence from which a jury could find that the deposit of a check amounted to an “intent to promote the carrying on of” a specified unlawful activity already completed, namely, embezzlement); United States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991) (same regarding bribery).

238. *Santos*, 128 S. Ct. at 2026–27 (plurality opinion).

239. *Id.*

240. *See id.* at 2034 (Breyer, J., dissenting).

241. *See id.* at 2027 (plurality opinion).

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facilitates the commission of predicate crimes, it easily could have inserted the word "facilitate" into the statute. Instead, Congress used the language "to promote the carrying on" of specified unlawful activity.

In sum, Justice Scalia erroneously concluded that any financial transaction that facilitates the commission of specified unlawful activity violates the promotion theory, creating a false dilemma (the so-called merger problem).²⁴² He then narrowly interpreted "proceeds" to mean "profits" to limit the scope and reach of § 1956(a)(1)(A)(i) to address the merger problem.²⁴³ The better approach is to interpret § 1956(a)(1)(A)(i) to require an additional promotional step beyond the mere commission of the underlying predicate offense.²⁴⁴ However, that promotional step must occur *after* the completion of the underlying criminal conduct giving rise to money laundering.²⁴⁵ A narrow construction of the promotion provision avoids any merger problem without undermining the effectiveness of the money laundering statute.

V. REVERSE MONEY LAUNDERING AND THE FINANCING OF TERRORISM

Justice Scalia's restrictive interpretation of "proceeds" to mean illicit "profits" would decriminalize conducting a financial transaction involving money obtained from a lawful source with the intent to conceal or disguise the proceeds of specified unlawful activity, including providing financial support to terrorists or foreign terrorist organizations. For example, assume that an al Qaeda sympathizer provided funds derived from legal activity, not illicit profits, to a corrupt Islamic charitable organization with the intention or knowledge that such funds are to be used to carry out a terrorist attack. Such conduct would constitute a violation of the terrorist financing statute, 18 U.S.C. § 2339C.²⁴⁶ Assume further that the terrorist fundraiser then deposits the funds into the corrupt charity's bank account with the intent to disguise the true purpose of the donation and make it appear that the money was intended to fund humanitarian activities. Under *Santos*, the terrorist fundraiser would

242. See *id.* at 2026–27.

243. *Id.* at 2027.

244. See *id.* at 2034–35 (Breyer, J., dissenting).

245. See *id.* at 2034.

246. 18 U.S.C. § 2339C(a) (2006).

not be guilty of money laundering, because the financial transaction did not involve criminal profits. A similar result would occur under the material support statutes, 18 U.S.C. § 2339A and § 2339B, which criminalize providing material support or resources, including financial support, to terrorists or foreign terrorist organizations.²⁴⁷ After *Santos*, conducting a financial transaction with money derived from specified unlawful activity, including violations of the terrorist financing and material support statutes, but obtained from a lawful source, does not violate § 1956(a)(1).

As previously discussed, to sustain a money laundering conviction under the concealment theory, 18 U.S.C. § 1956(a)(1)(B)(i), the prosecution must prove that (1) the defendant conducted or attempted to conduct a financial transaction, (2) knowing that the property involved in the financial transaction represented some form of unlawful activity, (3) which in fact involved the proceeds of “specified unlawful activity,” and (4) the financial transaction was conducted with the intent to conceal or disguise the nature, location, source, ownership, or control of such proceeds.²⁴⁸ As already noted, the term “specified unlawful activity” includes over 250 predicate offenses.²⁴⁹ The terrorist financing statute, 18 U.S.C. § 2339C, as well as the material support statutes, 18 U.S.C. § 2339A and § 2339B, are included within the definition of “specified unlawful activity.”²⁵⁰ These criminal statutes punish the provision of financial assistance to terrorists or foreign terrorist organizations.²⁵¹ However, the statutes are not restricted to monetary donations with funds derived from illicit profits.²⁵² Terrorist financing is prohibited regardless of whether the funds were derived from a criminal or lawful source.

247. *Id.* §§ 2339A–2339B, *invalidated in part by* Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1134–36 (9th Cir. 2007) (holding that the terms “training,” “service,” and “expert advise or assistance” based on “other specialized knowledge” were void for vagueness”).

248. *See* GURULÉ, *supra* note 73, at 124–25.

249. 18 U.S.C. § 1956(c)(7) (2006); *Santos*, 128 S. Ct. at 2027 (plurality opinion) (citing MOTIVANS, *supra* note 3).

250. 18 U.S.C. § 1956(c)(7)(D) (defining “specified unlawful activity” to include violations of 18 U.S.C. §§ 2339A–2339C).

251. 18 U.S.C. § 2339C prohibits the unlawful and willful collection or provision of funds for the purpose of financing terrorist acts. Sections 2339A and 2339B prohibit providing “material support or resources” to terrorists and foreign terrorist organizations.

252. *See infra* note 269 and accompanying text. The definition of “material support or resources” includes “any property,” including currency or monetary instruments, and makes no distinction between clean and dirty money. 18 U.S.C. § 2339A(b)(1); *see also id.* § 2339B(g)(4) (adopting this definition of the term by reference).

Terrorist financing is similar in several respects to money laundering.²⁵³ Both offenses involve an element of concealment.²⁵⁴ Money laundering is the "process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate."²⁵⁵ The objective of money laundering is to disguise the source of the illicit proceeds to make it appear that the funds were derived from a legitimate source.²⁵⁶ "The money laundering statute criminalizes behavior that masks the relationship between an individual and his illegally obtained proceeds" ²⁵⁷ This is often accomplished through complex or unnecessary financial transactions intended "to add extra 'degrees of separation' between [the owner] and the [illegal] source of the funds."²⁵⁸

Unlike money laundering, terrorist financing may involve funds derived from legal as well as illegal activity. A terrorist sympathizer may choose to support the activities of a terrorist organization using funds derived from legitimate business activity. Thus, terrorist financing may involve using legitimate income to finance illegal activity, which is money laundering in reverse. Regardless of the source of the funds, the terrorist financier must conceal the true purpose of the financial donation. The objective is to make it appear that the funds are being given, donated, or transmitted for a legitimate purpose, such as funding charitable or social activities. In the case of money laundering, the concealment element is directed backwards at concealing the illegal source of the funds. In terrorist financing, the concealment element looks forward, disguising the illegal purpose and intended beneficiary of the funds.

The terrorist purpose may be disguised by transferring the funds through a corrupt organization or fictional intermediary which claims to have charitable, social, or cultural goals.²⁵⁹ Terrorist financing may also involve complex or highly unusual financial transactions

253. The discussion of how terrorist financing differs from money laundering is taken largely from GURULÉ, *supra* note 168, at 104.

254. See 18 U.S.C. § 1956(a)(1)(B)(i) (the concealment provision of the money laundering statute); *id.* § 2339C(c) (the concealment provision of the terrorist financing statute).

255. INTERIM REPORT, *supra* note 72, at 7.

256. See GURULÉ, *supra* note 73, at 120.

257. *United States v. Adefehinti*, 510 F.3d 319, 322 (D.C. Cir. 2007).

258. *United States v. Blankenship*, 382 F.3d 1110, 1129 (11th Cir. 2004).

259. See International Convention for the Suppression of the Financing of Terrorism pmbl., Dec. 9, 1999, S. TREATY DOC. 106-49, at 2, 2178 U.N.T.S. 229.

intended to disguise or conceal the relationship between the donor and the illegal purpose of the donation. In both money laundering and terrorist financing, the owner of the funds seeks to disguise the money trail, but for different purposes. While the money launderer seeks to conceal where the money came from, the terrorist financier attempts to conceal or disguise where the money is going.

Three federal statutes prohibit the financing of terrorism: 18 U.S.C. § 2339C (relating to terrorist financing) and § 2339A and § 2339B (relating to providing material support to terrorists).²⁶⁰ Moreover, each of these statutes prohibits providing financial assistance to terrorists with clean or dirty money.²⁶¹ Section 2339C punishes providing or collecting funds for terror, making it a crime to “unlawfully and willfully provide[] or collect[]” funds with the intention or knowledge that the funds are to be used to carry out (1) a crime which constitutes an offense within the scope of any of nine anti-terrorism treaties enumerated in the statute, or (2) another act intended to cause death or serious bodily injury to a civilian, when the purpose of the deadly act was “to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”²⁶² An individual is also criminally liable if he attempts or conspires to commit an offense under the statute.²⁶³ The statute defines “provides” to include “giving, donating, and transmitting” terrorist funds.²⁶⁴ The term “collects” includes both “raising and receiving” such funds.²⁶⁵ The broader “transmit” and “receive” language extends liability to persons who knowingly transfer money to terrorists and terrorist groups. Thus, the provision of financial services and other administrative assistance to transfer money globally to fund terrorist activities may be prosecuted under the statute. “In sum, the donors, fund raisers, and persons or entities responsible, directly or indirectly, for transmitting terror money may be held criminally liable for engaging in terrorist financing.”²⁶⁶

260. See 18 U.S.C. §§ 2339A–2339B (2006), *invalidated in part by* Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1134–36 (9th Cir. 2007) (holding that the terms “training,” “service,” and “expert advice or assistance” based on “other specialized knowledge” were void for vagueness); *id.* § 2339C.

261. See *supra* note 252 and *infra* note 269 and accompanying text.

262. 18 U.S.C. § 2339C(a)(1) (2006); see GURULÉ, *supra* note 168, at 293.

263. 18 U.S.C. § 2339C(a)(2).

264. *Id.* § 2339C(e)(4).

265. *Id.* § 2339C(e)(5).

266. GURULÉ, *supra* note 168, at 104. Section 2339C(c) further makes it a crime to conceal the financing of terrorism. The statute punishes:

The terrorist financing statute defines "funds" to include assets of every kind "however acquired."²⁶⁷ Thus, the funds involved in a § 2339C violation are not limited to illicit profits. The term "proceeds" means "any funds derived from or obtained . . . through the commission" of a terrorist financing offense.²⁶⁸ Funds "collected" or "provided" to finance acts of terrorism may be derived from a legitimate or illegitimate source.²⁶⁹ Thus, a person can be convicted of violating § 2339C for financing acts of terrorism with clean or dirty money.

Section 1956(c)(7)(D) also includes within the definition of "specified unlawful activity" violations of 18 U.S.C. § 2339A and § 2339B, which make it a crime to provide "material support or resources" to terrorists and foreign terrorist organizations ("FTOs" or "FTO").²⁷⁰ By enacting the material support statutes, Congress recognized that eliminating material support and resources, including currency and other financial assistance, to terrorists and FTOs is critical to preventing terrorist attacks. Among other objectives, the material support statutes were intended to prevent terrorists from raising money within the United States, and transferring such funds outside of the country to finance acts of terrorism.²⁷¹ As part of the

[Whoever] knowingly conceals or disguises the nature, location, source, ownership, or control of any material support or resources, or any funds or proceeds of such funds—

- (A) knowing or intending that the support or resources are to be provided, or knowing that the support or resources were provided, in violation of section 2339B of this title; or
- (B) knowing or intending that any such funds are to be provided or collected, or knowing that the funds were provided or collected, in violation of subsection (a)

18 U.S.C. § 2339C(c).

267. 18 U.S.C. § 2339C(e)(1).

268. *Id.* § 2339C(e)(3).

269. *See id.* § 2339C(c). Section 2339C(c) may provide an alternative means of prosecuting persons who engage in a financial transaction with the proceeds of violations of § 2339B or § 2339C to conceal or disguise the nature, location, source, ownership, or control of such funds. The statute punishes concealment and the term "proceeds" is not limited to illicit profits. *See id.* § 2339C(e)(3). Prosecutors could bring criminal charges for concealment until Congress has an opportunity to amend the federal money laundering statute to explicitly provide that "proceeds" means "gross receipts."

270. *See id.* § 1956(c)(7)(D); *id.* §§ 2339A–2339B, *invalidated in part by* Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1134–36 (9th Cir. 2007) (holding that the terms "training," "service," and "expert advise or assistance" based on "other specialized knowledge" were void for vagueness).

271. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(6), 110 Stat. 1214, 1247.

Violent Crime Control and Law Enforcement Act of 1994, Congress enacted 18 U.S.C. § 2339A, making it a federal crime to knowingly provide material support or resources “knowing or intending” that they are to be used in preparation for, or in carrying out, various federal crimes enumerated in the statute.²⁷²

Congress enacted § 2339B two years later as part of the 1996 Anti-Terrorism and Effective Death Penalty Act (“AEDPA”).²⁷³ Section 2339B criminalizes knowingly providing material support or resources to organizations designated by the Secretary of State as FTOs.²⁷⁴ This provision is primarily aimed at depriving funding and other resources to terrorist groups. In *Humanitarian Law Project v. Gonzales*, the court examined the legislative history of the statute, stating:

Congress enacted § 2339B in order to close a loophole left by § 2339A. Congress, concerned that terrorist organizations would raise funds “under the cloak of a humanitarian or charitable exercise,” sought to pass legislation that would “severely restrict the ability of terrorist organizations to raise much needed funds for their terrorist acts within the United States.”²⁷⁵

The court in *Humanitarian Law Project* further observed:

272. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 12005(a), 108 Stat. 1796, 2022 (codified at 18 U.S.C. § 2339A).

273. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250 (codified at 18 U.S.C. § 2339B).

274. 18 U.S.C. § 2339B(a). For purposes of § 2339B, a “foreign terrorist organization” is “an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.” *Id.* § 2339B(g)(6). Section 219 of the Immigration and Nationality Act, codified at 8 U.S.C. § 1189, authorizes the Secretary of State to designate a group as a “foreign terrorist organization” if the group meets the following criteria:

- (A) the organization is a foreign organization;
- (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title)] or terrorism (as defined in section 2656f(d)(2) of title 22), or retains the capability and intent to engage in terrorist activity or terrorism[]; and
- (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

8 U.S.C. § 1189(a)(1) (2006) (footnote omitted).

275. *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1146 (C.D. Cal. 2005) (quoting H.R. REP. NO. 104-383, at 43 (1995)), *enforced sub nom.* *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007).

[T]he AEDPA sought to prevent the United States from becoming a base for terrorist fundraising. Congress recognized that terrorist groups are often structured to include political or humanitarian components in addition to terrorist components. Such an organizational structure allows terrorist groups to raise funds under the guise of political or humanitarian causes. Those funds can then be diverted to terrorist activities.²⁷⁶

Section 2339A makes it a crime to provide "material support or resources" "knowing or intending" that they are to be used to prepare for or carry out certain statutorily enumerated terrorist-related offenses.²⁷⁷ That is, the statute prohibits knowingly providing material support or resources to facilitate specified crimes, such as terrorist bombings.²⁷⁸ By contrast, § 2339B punishes whoever knowingly provides "material support or resources" to an FTO, with knowledge that the organization has been designated an FTO, or has engaged in or engages in acts of terrorism.²⁷⁹

Section 2339A requires proof of a heightened *mens rea* not required under § 2339B. To convict for a violation of § 2339A, the government must prove that the defendant provided "material support or resources" "knowing or intending" that they are to be used to carry out certain terrorism-related crimes.²⁸⁰ By contrast, to prove a violation of § 2339B, the defendant must have knowledge that the organization is a designated foreign terrorist organization or engages or has engaged in acts of terrorism.²⁸¹ The government is not required to prove that the defendant intended to further the illegal aim of the FTO by the provision of material support or resources.

276. *Id.* at 1137.

277. 18 U.S.C. § 2339A(a). Section 2339A(a) punishes

[w]hoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [statutorily enumerated terrorist-related offenses] or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act

Id.

278. *See id.* For example, § 2339A criminalizes the provision of financial assistance "knowing or intending" that the funds be used in preparation for, or in carrying out, a conspiracy to kill, kidnap, maim, or injure persons in a foreign country, in violation of 18 U.S.C. § 956.

279. 18 U.S.C. § 2339B(a)(1).

280. *Id.* § 2339A(a).

281. *Id.* § 2339B(a).

Under § 2339B, the donor is criminally liable even if he intended to fund the purported humanitarian activities of the organization if he had knowledge that the group had been designated an FTO or engages in terrorist activities.²⁸² However, § 2339B does not render § 2339A totally obsolete. For instance, a prosecutor may file charges under § 2339A rather than § 2339B if the material support-type of activity was not undertaken on behalf of a particular designated FTO or where the provision of material support benefitted a terrorist group that has not been designated an FTO.²⁸³

The term “material support or resources” is a term of art under the statutes and proscribes various types of assistance and services. As used in these sections, the term “material support or resources” means

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.²⁸⁴

The “material support or resources” proscribed by § 2339A and § 2339B includes “any property,” tangible or intangible, including “currency, monetary instruments or financial securities, [and] financial services.”²⁸⁵ The financial support prohibited by the material support statutes is not restricted to funds derived from an illegal source.

Prior to *Santos*, a defendant could be convicted of money laundering if he engaged in a financial transaction with the proceeds derived from a violation of § 2339C (terrorist financing), or § 2339A or § 2339B (providing material support or resources to terrorists or FTOs) with the intent to promote the carrying on of acts of terrorism or to conceal or disguise such funds, even if the money was derived from a lawful source. However, after *Santos*, these statutes may only

282. *See id.*

283. *See* Jeff Breinholt, *Case Type: Material Support to Unknown Groups*, 51 U.S. ATTORNEY'S BULL. (U.S. Dep't of Justice, Washington, D.C.), July 2003, at 30, 30.

284. 18 U.S.C. § 2339A(b)(1) (the terms “training,” “service,” and “expert advice or assistance,” however, were held to be void for vagueness by *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122, 1134–36 (9th Cir. 2007)).

285. *Id.*; *id.* § 2339B(a), (g)(3)–(4).

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serve as predicate offenses for money laundering purposes if the funds constitute illicit profits.

VI. RECOMMENDATIONS TO ENHANCE THE EFFECTIVENESS OF THE MONEY LAUNDERING STATUTE

To undo that harm resulting from the Supreme Court's ill-conceived decision, Congress should add a new subsection to 18 U.S.C. § 1956(c) and explicitly define the term "proceeds" to mean "any funds derived from or obtained, directly or indirectly, through the commission of specified unlawful activity, and not limited to the net gain or profit realized from such criminal acts." There is a strong public policy interest in prohibiting the financial sector from being used as a conduit to conceal or facilitate criminal activity, especially acts of terrorism, regardless of whether the money was generated from lawful or unlawful activity.²⁸⁶ This important policy interest is undermined by punishing only those transactions with illicit profits.

Next, to avoid the merger problem, Congress should define the language "to promote the carrying on" of specified unlawful activity to require proof of a financial transaction that occurs after the completion of specified criminal activity. The transaction must be separate and distinct from and follow in time the underlying criminal activity that generated the proceeds. Further, Congress should make clear that engaging in a financial transaction that merely facilitates the commission of conduct already criminalized and falls within the definition of "specified unlawful activity" is not sufficient. Such transactions must be committed with the specific intent to capitalize or expand the commission of specified unlawful activity. For example, "plowing back" proceeds to sustain the ongoing operations of the criminal enterprise would satisfy the requirement that the defendant act with the intent "to promote the carrying on" of specified unlawful activity. The payment of crime-related expenses intended to support the continuing operations of the criminal enterprise would also satisfy the specific intent requirement under the promotion theory. Other examples include purchasing automobiles, vessels, and aircraft to transport drugs, as well as purchasing cell phones, computers, and other communications equipment, and payment of the salaries of members of the enterprise for the purpose of sustaining the ongoing operations of the criminal enterprise.

286. See GURULÉ, *supra* note 168, at 181–82.

Congress should further make explicitly clear that one *cannot* promote the carrying on of completed unlawful activities. The money laundering statute's phrase "'with the intent to promote the carrying on of specified unlawful activity'" may not apply where, for example, only one instance of that underlying activity is at issue.²⁸⁷ The promotion provision has no application to a single incident of a completed crime. Congress should also take this opportunity to amend 18 U.S.C. § 1956(a)(2)(A), which makes it a crime to transfer money—*any* money—into or out of the United States with the intent to promote specified unlawful activity.²⁸⁸ Congress should enact a *domestic* version of that offense, making it a crime to transport, transmit, or transfer a monetary instrument or funds with the intent to promote or commit another crime.

Finally, Congress needs to bring clarity and uniformity to the meaning given the term "proceeds" in the criminal and civil forfeiture context. The federal forfeiture laws currently authorize the forfeiture of "proceeds,"²⁸⁹ "gross proceeds,"²⁹⁰ "gross receipts,"²⁹¹ and "profits,"²⁹² depending on the underlying predicate offense giving rise to forfeiture. The use of these different terms is confusing and unwarranted. Congress should amend the forfeiture statutes to define the term "proceeds" to mean "any property derived, directly or indirectly, from specified unlawful activity, and not limited to net profits of unlawful activity." There are strong policy interests, such as deterring criminal activity and disgorging any property used to facilitate such activity, that favor forfeiting "any property" derived

287. *United States v. Santos*, 128 S. Ct. 2020, 2035 (2008) (Breyer, J., dissenting) (emphasis omitted).

288. *See* 18 U.S.C. § 1956(a)(2)(A) (2006).

289. Three criminal forfeiture statutes authorizing forfeiture of criminal "proceeds" are: 18 U.S.C. § 982(a)(2), (6)(A)(ii)(I) (2006) (forfeiture for various delineated offenses); 18 U.S.C. § 1963(a)(3) (2006) (RICO forfeiture provision); and 21 U.S.C. § 853(a)(1) (2006) (drug forfeiture provision). Two civil forfeiture statutes also authorizing the forfeiture of "proceeds" are: 18 U.S.C. § 981(a)(1)(B)–(C), (H) (2006) (forfeiture for various delineated offenses); and 21 U.S.C. § 881(a)(6) (2006) (drug forfeiture provision).

290. *E.g.*, 18 U.S.C. § 981(a)(1)(F); *id.* § 982(a)(5), (7), (8)(B).

291. *E.g.*, 18 U.S.C. § 981(a)(1)(D)–(E); *id.* § 982(a)(3)–(4).

292. *E.g.*, 18 U.S.C. § 981(a)(2)(A)–(B). This civil forfeiture statute distinguishes between cases involving illegal and lawful goods and services. In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" is not limited to the net gain or profit realized from the offense. *Id.* § 981(a)(2)(A). However, in cases involving lawful goods or services that are sold or provided in an illegal manner, the term "proceeds" means "the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services." *Id.* § 981(a)(2)(B). Thus, in the latter case "proceeds" means net profits. *Id.*

from criminal activity, not merely net profits. Further, if Congress seeks to exclude from forfeiture the direct costs of certain criminal activity, for whatever reason, it should explicitly say so. In other words, forfeiture of "any property" derived, directly or indirectly, from criminal activity should be the general rule. Any intent to exempt crime-related expenses from forfeiture should be expressly articulated in the statute.²⁹³

CONCLUSION

The Supreme Court's decision in *Santos* that "proceeds" means "profits" undermines the effectiveness of the money laundering statute. As Justice Alito correctly stated in his dissenting opinion, limiting the term "proceeds" to mean "profits" would "frustrate Congress[s] intent and maim a statute that was enacted as an important defense against organized criminal enterprises."²⁹⁴ The Supreme Court's decision has numerous negative legal effects. First, it imposes an unreasonable and unwarranted burden on prosecutors to prove net criminal profits (money acquired less the defendant's overhead expenses).²⁹⁵ Second, the Court's holding restricts other provisions of § 1956 and § 1957, including the concealment theory of money laundering.²⁹⁶ Third, the *Santos* decision creates confusion regarding whether the Court's restrictive construction of the term "proceeds" applies to the federal criminal and civil forfeiture laws.²⁹⁷ Finally, *Santos* limits the application of the federal money laundering statute to predicate acts that generate illicit profits, decriminalizing financial transactions with funds obtained from a legitimate source conducted with the intent to promote the carrying on of terrorism, or designed to conceal or disguise funds intended to finance terrorist activities.²⁹⁸ Congress must take immediate action to amend the

293. See, e.g., *id.* § 981(a)(2)(B).

294. *United States v. Santos*, 128 S. Ct. 2020, 2035 (2008) (Alito, J., dissenting).

295. See *id.* at 2038–39.

296. 18 U.S.C. § 1956(a)(1)(B)(i) (2006). The concealment provision requires proof of criminal "proceeds." *Id.* In 18 U.S.C. § 1957 (2006), "criminally derived property" means "proceeds" obtained from a criminal offense.

297. See, e.g., 18 U.S.C. § 1963(a)(3) (2006) (authorizing the criminal forfeiture of "any proceeds" obtained, directly or indirectly, from racketeering activity); 21 U.S.C. § 853(a) (2006) (authorizing the criminal forfeiture of drug proceeds); 21 U.S.C. § 881(a)(6) (2006) (authorizing civil forfeiture of "all proceeds" traceable to a federal drug felony offense).

298. See 18 U.S.C. §§ 2339A–2339B (2006), *invalidated in part by* Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1134–36 (9th Cir. 2007) (holding that the terms "training," "service,"

money laundering statute and enhance the utility of an important weapon in the prosecutor's arsenal to combat organized criminal enterprises and foreign terrorist organizations.

and "expert advise or assistance" based on "other specialized knowledge" were void for vagueness); 18 U.S.C. § 2339C (2006) (criminalizing the provision of any type of financial or material support to terrorists and foreign terrorist organizations).