United States v. Santos: Deciphering the Majority and Taking Lessons from the Plurality

by Adam Schwartz & Rachel May

The federal money-laundering statute, codified at 18 U.S.C. § 1956, forbids using the "proceeds" of unlawful activities for a variety of purposes.[1] The United States Supreme Court, in its recent decision in *United States v. Santos,*[2] held that "proceeds," for purposes of § 1956, must be defined narrowly, so as to prohibit only the use of net "profits" which resulted from predicate criminal activities. In so holding, the Court rejected the alternative view that proceeds should be defined to include all gross "receipts" which were obtained from the underlying offense.

Notably, there is no majority opinion in *Santos*. Rather, Justice Scalia penned the five-part plurality opinion. He was joined by Justices Souter and Ginsburg in all parts, and by Justice Thomas except in Part IV. Justice Stevens concurred in the judgment, resulting in a narrow 5-4 majority, but wrote a concurring opinion, thereby limiting the holding of the case.

This article examines the plurality opinion and concludes with a discussion of the lessons that can be learned from the Court's holding and the plurality opinion. Section I discusses the factual and procedural history of the case. Section II discusses the plurality's analysis, including the arguments advanced by the government and the manner in which the plurality rejected them. Section III discusses Part IV of the plurality opinion, where Justice Scalia opined on the effect of Justice Stevens' concurring opinion, both on *Santos* and on future cases. Finally, the article concludes with suggestions on how practitioners may use *Santos* to benefit their clients.

Factual and Procedural History

Respondent Santos ran an illegal gambling ring in the Northern District of Indiana. Santos employed runners to gather bets from various bars and restaurants. The runners retained 15-25% of the money they gathered as commission, and delivered the remaining 75-85% to Santos' salaried collectors. The collectors in turn delivered the money to Santos. In addition to paying commissions to the runners, Santos used some of the money to pay the collectors' salaries and the winning gamblers' bets. Respondent Diaz was one of Santos' salaried collectors.

The gambling ring, which Santos operated for over twenty years, was prohibited by state law. The federal government brought a 10-count indictment against Santos, Diaz, and eleven co-defendants. The indictment included money-laundering charges. The money Santos paid to the runners, collectors, and winning gamblers formed the factual basis for the money laundering charges.

A jury found Santos guilty of one count of conspiracy to launder money, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(h), and two counts of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i), as well two counts relating to running an illegal gambling business. Diaz pleaded guilty to one count of conspiracy to launder money. The district court sentenced Santos to 210 months' imprisonment on the money-laundering counts, and 60 months on the gambling counts. The Court sentenced Diaz to 108 months' imprisonment.
After Santos' and Diaz's convictions and sentencings, the Seventh Circuit Court of Appeals decided *United States v. Scialabba*.[3] In *Scialabba*, the Seventh Circuit held that the federal money-laundering statute's prohibition on the use of criminal "proceeds" extended only to the use of criminal "profits," not to the criminal "receipts." Based upon this decision, Santos and Diaz filed 28 U.S.C. § 2255 motions attacking their convictions and sentences.

The district court found that Santos' payments to the runners, collectors, and winning gamblers involved only the receipts of criminal activity. Accordingly, the court vacated Diaz's and Santos' money-laundering convictions. The Seventh Circuit affirmed. The United States Supreme Court granted certiorari.

The Plurality's Analysis

The United States Supreme Court, in a plurality opinion, began its analysis with a painstaking, step-by-step examination of the term "proceeds" under the traditional rules of statutory construction. Upon reaching a conclusion, the Court addressed the government's arguments. In doing so, it explained why such arguments were simply not persuasive in the realm of criminal law.

As an initial matter, the Court noted that Congress had not specifically defined "proceeds" in the statute. Thus, it was required to follow the methodology mandated by the traditional canons of statutory construction. First, the Court sought the "natural meaning," or "ordinary usage," of the word.

The government argued that dictionaries "prefer" the "receipts" definition over the "profits" definition. However, the Court found that dictionaries use "proceeds" interchangeably with both "receipts" and "profits"[4] and that "any preference is too slight … to conclude that 'receipts' is the *primary* meaning of 'proceeds.'"[5] Further, the Court noted that there was no common meaning of "proceeds" within the Federal Criminal Code. Rather, Congress had defined the term to mean "profits" in some statutes, and "receipts" in others.

The Court proceeded to the second tenet of statutory interpretation and examined "proceeds" specifically within the context of the money laundering statute. The Court noted that, using either definition, all of the statutory provisions were "coherent; no provisions are redundant; and the statute is not rendered utterly absurd."[6] Thus, the contextual usage of "proceeds" was no more helpful than its natural meaning.

Because neither of the basic tenets of statutory interpretation could cure its ambiguity, the Court defined "proceeds" according to the rule of lenity, which "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them;" i.e., "the tie must go the defendant."[7] Accordingly, the Court

adopted the "profits" definition of "proceeds," finding that it is "always more defendant-friendly than the 'receipts' definition."[8]
The Court then identified two arguments the government offered in support of its position that the "receipts" definition was appropriate, and explained why neither was persuasive. First, the government contended that the "profits" definition undermined Congressional intent to "penalize criminals who conceal or promote their illegal activities"[9] because the "gross receipts of a crime accurately reflect[ed] the scale of the criminal activity, because the illegal activity generated all of the funds."[10] The Court, however, rejected this theory, stating that it would not "play the part of a mind reader," and must "reject the impulse to speculate."[11]

The Court further noted that if it "accepted the Government's invitation to speculate about congressional purpose,"[12] and concluded that "proceeds" meant "receipts" generally, almost every illegal-lottery-statute violation would also be a violation of the money laundering statute. Thus, the two statutes would "merge," and violations of the illegal-lottery statute, with a maximum of five years of imprisonment, would merge into violations of the money-laundering statute, with a maximum of twenty years of imprisonment. The Court noted that a "merger problem" would be true of "more than 250 predicate offenses for the money-laundering statute."[13]

Second, the government argued that the "receipts" definition should be adopted "because – quite frankly – it [was] easier to prosecute."[14] Though the Court acknowledged that the "profits" definition demanded a heavier burden of proof, it summarily dismissed the government's argument as "turn[ing] the rule of lenity upside down" and confirmed that it "intrerpret[ed] ambiguous criminal statutes in favor of defendants, not prosecutors."[15]

Additionally, the Court found that the government's argument "exaggerate[d] the difficulties" of proving money-laundering violations, noting that "the prosecution need[ed] to show only that a single instance of specified unlawful activity was profitable and gave rise to the money involved in a charged transaction."[16] The Court instructed that the "factfinder [did] not need to consider gains, expenses, and losses attributable to other instances of specified unlawful activity, which go to the profitability of some entire criminal enterprise."[17] Instead, the Court concluded, "[w]hat count[ed] [was] whether the receipts from the charged unlawful act exceeded the costs fairly attributable to it."[18]

Even, the Court reasoned, when the government chose to charge an enterprise crime as a predicate offense, it was only required to prove the profitability of a "continuing series of violations,"[19] which could consist of as few as three violations.

Part IV of the Plurality Opinion: The Effect of Justice Stevens' Concurrence

Part IV of the plurality opinion, which, as noted above, Justice Thomas did not join, involved Justice Stevens' concurring opinion. Justice Stevens agreed with the plurality that the rule of lenity should apply in *Santos* because there was no legislative history indicating whether "proceeds" should mean "receipts" or "profits" when the predicate crime was an illegal lottery operation. However, Justice Stevens agreed with the dissent that legislative history suggests that "proceeds" should mean gross receipts when the predicate crime is the "sale of contraband and the operation of organized crime syndicates involving such sales."[20]

The plurality strongly disagreed with this approach as "interpretive contortion."[21] It recalled that Justice Stevens had joined in the prior Court opinion in *Clark v. Martinez*,[22] which held that "meanings of words in a statute [could not] change with the statute's application."

Nonetheless, the plurality noted that Justice Stevens' vote was the necessary fifth to form a majority in favor of judgment, and thus the holding rested on narrower principles. In so recognizing, however, Justice Scalia gave the following comment regarding the effect of Justice Stevens' concurring opinion:

> But the narrowness of his ground consists of finding that "proceeds" means "profits" when there is no legislative history to the contrary. That is all that our judgment holds. It does not hold that the outcome is different when contrary legislative history does exist. Justice Stevens' speculations on that point address a case that is not before him, are the purest form of dicta, and form no part of today's holding. Thus, as far as this particular statute is concerned, counsel remain free to argue Justice Stevens' view (and to explain why it does not overrule *Clark v. Martinez*). They should be warned, however: Not only do the Justices joining this opinion reject that view, but so also (apparently) do the Justices joining the principal dissent.[23]

The Court concluded that the money-laundering charges against Santos and Diaz were not based upon profits obtained from the illegal gambling ring, and affirmed the Seventh Circuit decision. Santos' and Diaz's money-laundering convictions were vacated.

Conclusion

Though the holding in *Santos* is limited to defining "proceeds" as "profits" in the context of an illegal gambling operation, the opinion may have broader implications. The Court appears to be sending a message that the money-laundering statute needs to be read more narrowly. This decision somewhat reins in the government's expansive view of the money-laundering statutes.

In a money-laundering context, a criminal practitioner using this case to support a position that "proceeds" should be interpreted as "profits" instead of "receipts" must be prepared to discuss the statutory history of the predicate offense(s) to show that there is no statutory history to the contrary. A practitioner should then argue that the rule of lenity applies, as the statutory history of the predicate offense(s) is ambiguous, and ask the Court to find that "proceeds" means "profits."

The implication of the use of *Santos* in White Collar cases may be significant. For example, in a securities fraud case, a defendant may be able to argue that under *Santos* only the profit of a fraudulent sale of securities, not the entire proceeds of the sale, may support a money-laundering charge. Similarly, a bank that violates the Patriot Act and allows a customer to deposit criminal proceeds into an account may argue that only the profit that the bank earned on the account, and not the entire proceeds that were deposited, may support a money-laundering charge. Ultimately, *Santos* may be used far more often outside of the money-laundering context for the proposition that the rule of lenity is a crucial and active doctrine of statutory interpretation where the underlying statutory language is ambiguous.

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[1] 18 U.S.C. § 1956.
[2] 553 U.S. __ (2008), Slip Opinion, No. 06-1005.
[3] *Id.* at 2 (plurality opinion) (citing *Scialabba*, 282 F.2d 475 (7th Cir. 2002)).
[4] *Id.* at 3. The Court found that "[b]oth meanings [were] accepted, and [had] long been accepted, in ordinary usage." Id. (citing Oxford English Dictionary 544 (2d ed. 1989); Random House Dictionary of the English Language 1542 (2d ed. 1987); Webster's New International Dictionary 1972 (2d ed. 1957)).
[5] *Id.* at 4 (emphasis in original).
[6] *Id.* at 6.
[7] *Id.* at 6 (citing *United States v. Gradwell*, 243 U.S. 476, 485 (1917); *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *United States v. Bass*, 404 U.S. 336, 347-349 (1971)).
[8] *Id.*
[9] *Id.* at 7.
[10] *Id.* (citing Brief for United States 21; *Santos*, 553 U.S. __, No. 06-1005 at 5-7 (Alito, J., dissenting)).
[11] *Id.*
[12] *Id.* at 8.
[13] *Id.* The Court further noted that "the merger problem affect[ed] more than just sentencing; it affects charging decisions and plea-bargaining as well. *Id.* at 9.

[14] *Id.* at 11.
[15] *Id.* at 12.
[16] *Id.* The Court further noted that "the Government, of course, can select the instances of which the profitability is the clearest." *Id.*
[17] *Id* .at 13.
[18] *Id.*
[19] *Id.* (citing 18 U.S.C. § 1956(c)(7)(C)).
[20] *Id.* at 14 n. 8 (quoting *Santos*, Slip Op., Dissent at 2-3 (Stevens, J., concurring)).
[21] *Id.* at 15.
[22] 543 U.S. 371 (2005).
[23] *Santos*, Slip. Op. at 16 (plurality op.) (internal citation omitted) (citing *Santos*, Slip. Op., Dissent at 2, 17) (Alito, J., dissenting)).

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