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No. 06-1005

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

EFRAIN SANTOS AND BENEDICTO DIAZ

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

The principal federal money laundering statute, 18 U.S.C. 1956(a)(1), makes it a crime to engage in financial transactions using the "proceeds" of specified unlawful activities with the intent to promote those activities or to conceal the proceeds. The question presented is whether "proceeds" means the gross receipts from the unlawful activities or only the profits, *i.e.*, the gross receipts less expenses.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 461 F.3d 886. The opinion of the district court granting in part respondent Santos's motion for collateral relief (Pet. App. 17a-50a) is reported at 342 F. Supp. 2d 781. The opinion of the district court granting in part respondent Diaz's motion for collateral relief (Pet. App. 51a-79a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 25, 2006. On November 13, 2006, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including December 23, 2006. On December 14, 2006, Justice Stevens further extended the time within which to file a petition to and including January 22, 2007, and the petition was filed on that date. The petition was granted on April 23, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-9a.

## STATEMENT

The principal federal money laundering statute criminalizes financial transactions using the "proceeds" of specified unlawful activities to promote those activities or to conceal the proceeds. 18 U.S.C. 1956(a)(1). Respondents Efrain Santos and Benedicto Diaz were convicted of money laundering and conspiracy to commit money laundering based on the use of the proceeds of an illegal gambling business to promote the business by paying its employees and winning bettors. The United States Court of Appeals for the Seventh Circuit affirmed orders of the United States District Court for the Northern District of Indiana that granted respondents collateral relief from their convictions. The court of appeals held that respondents had not committed money laundering because "proceeds," as used in Section 1956(a)(1), means the "profits" or "net income" of the underlying crime, rather than the "gross receipts" of that crime. Pet. App. 1a-16a. This Court has granted review of that holding.

1. Section 1956(a)(1) makes it a crime when anyone,

> 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 * * *

> (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.

18 U.S.C. 1956(a)(1).

Section 1956 defines "specified unlawful activity" to include, among a variety of other offenses, the racketeering crimes enumerated in 18 U.S.C. 1961(1) (Supp. IV 2004). See 18 U.S.C. 1956(c)(7)(A). The racketeering offenses listed in Section 1961(1) in turn include the running of an illegal gambling business, in violation of 18 U.S.C. 1955. See 18 U.S.C. 1961(1) (Supp. IV 2004).

2. From the 1970s through the 1990s (except for a brief period in the late 1970s and early 1980s), Santos operated an illegal lottery, known as a bolita, in northwest Indiana. Gamblers placed bets with the bolita's runners, primarily at restaurants and taverns. The runners took a commission from the bet money and then delivered the betting slips and remaining money to collectors. After taking a "salary" out of those funds, the collectors delivered the slips and the rest of the money to Santos. Santos paid the bolita's winners out of the funds collected. Diaz was a collector in the operation. Pet. App. 2a, 19a.

Based on that conduct, Santos was convicted, after a jury trial, of running an illegal gambling business, in violation of 18 U.S.C. 1955, conspiracy to commit that offense, in violation of 18 U.S.C. 371, promotional money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i), and conspiracy to commit that offense, in violation of 18 U.S.C. 1956(h). Pet. App. 2a-3a. Diaz was convicted,

after a guilty plea, of conspiracy to commit money laundering, in violation of Section 1956(h). *Id.* at 3a. The money laundering charges against Santos were premised on his payments to the bolita's collectors and winners. The charge against Diaz was based on his receipt of payment for his collection services. *Id.* at 6a.

Santos was sentenced to concurrent terms of 60 months of imprisonment for the illegal gambling convictions and 210 months of imprisonment for the money laundering convictions. Diaz was sentenced to 108 months of imprisonment. Pet. App. 3a.

3. On direct appeal, Santos challenged his money laundering convictions. *United States* v. *Febus*, 218 F.3d 784, 789 (7th Cir.), cert. denied, 531 U.S. 1021 (2000). He contended that the payments to the collectors and winning bettors did not "promote" the bolita because they were "essential transactions of the illegal gambling business" and thus merely completed the gambling offense. *Ibid.* He argued that the money laundering statute "only punishes the practice of reinvesting the proceeds of an already completed unlawful activity to promote the expansion of that unlawful activity." *Ibid.*

The court of appeals rejected that argument. The court relied on Seventh Circuit precedent holding that "[a] transaction satisfies the promotion provision of the money laundering statute if it constitutes 'the practice of plowing back proceeds of [the illegal activity] to promote that activity.'" *Febus*, 218 F.3d at 789 (quoting *United States* v. *Jackson*, 935 F.2d 832, 842 (7th Cir. 1991)). The court concluded that the government had proved that type of promotion in this case by establishing that Santos had "reinvested the bolita's proceeds to ensure its continued operation for over 5 years." *Id.* at 790. The court explained that the "payments to [the]

collectors * * * compensated them for collecting the increased revenues and transferring those funds back to [Santos]. And [the] payments to the winning players promoted the bolita's continuing prosperity by maintaining and increasing the players' patronage." *Ibid.* The court noted that the annual receipts of the bolita expanded from approximately $250,000 in 1989 to approximately $410,000 in 1994. *Ibid.*

Diaz, for his part, challenged the district court's refusal to allow him to withdraw his guilty plea. Diaz argued that the government had breached the plea agreement by failing to seek a downward departure for substantial assistance. The court of appeals concluded that Diaz did not provide substantial assistance because he failed to give complete, truthful, and candid testimony at the trial of his co-conspirators. The court of appeals therefore upheld the district court's refusal to allow Diaz to withdraw his plea. *Febus*, 218 F.3d at 790-791.

Accordingly, the court of appeals affirmed respondents' convictions. *Febus*, 218 F.3d at 798. Santos petitioned for a writ of certiorari, and this Court denied the petition. 531 U.S. 1021 (2000).

4. After respondents' convictions became final on direct review, the Seventh Circuit reversed money laundering convictions stemming from acts very similar to those committed by respondents. In *United States* v. *Scialabba*, 282 F.3d 475 (7th Cir.), cert. denied, 537 U.S. 1071 (2002), the defendants provided video poker and slot machines to bars, restaurants, and other retail outlets. Each week, the defendants opened the machines and collected any deposited money, which they then used to reimburse the outlet owners for payments to winning customers, to compensate the outlet owners for their role, to lease the gambling machines, and to obtain

the amusement licenses necessary to operate the machines. See *id.* at 476. Based on those expenditures, the *Scialabba* defendants were convicted of laundering the proceeds of an illegal gambling operation, in violation of 18 U.S.C. 1956(a)(1)(A)(i). The court of appeals vacated the money laundering convictions. It held that funds used to cover the expenses of an illegal activity are not "proceeds" within the meaning of Section 1956(a)(1) because the word "proceeds" means only the "net income" or "profits" of illegal activity. See *Scialabba*, 282 F.3d at 478.

The government petitioned for rehearing en banc, arguing that the term "proceeds" in the money laundering statute means "gross receipts" and is not limited to profits. The petition was denied by an evenly-divided court, with one judge recused. See Pet. App. 8a n.3. The government then unsuccessfully petitioned for a writ of certiorari on the same issue. *United States* v. *Scialabba*, 537 U.S. 1071 (2002).

5. Following the decision in *Scialabba*, respondents filed motions for collateral relief under 28 U.S.C. 2255 (2000 & Supp. IV 2004). The district court granted the motions in part and vacated respondents' money laundering convictions. Pet. App. 17a-79a.

The district court concluded that it was not precluded from granting relief by the Seventh Circuit's affirmance of Santos's money laundering convictions in *Febus*. The district court reasoned that *Febus* and *Scialabba* addressed different issues: "while the *Scialabba* court concerned itself with the interpretation of the term 'proceeds,' as used in § 1956(a)(1), the *Febus* [c]ourt was not asked to, and therefore did not decide *anything* about the term 'proceeds.'" Pet. App. 44a, 73a. The district court then held that respondents were

entitled to the benefit of *Scialabba*, because, under the Seventh Circuit's narrow interpretation of "proceeds," they stood convicted of conduct that did not violate the money laundering statute. *Id.* at 45a-49a, 73a-78a. The district court explained that *Scialabba* undermined respondents' money laundering convictions because "the proceeds admittedly used by Santos to pay winners and couriers [including Diaz] *could only have been gross* proceeds." *Id.* at 49a; see *id.* at 77a-78a.

6. The government appealed to the Seventh Circuit with a request for initial en banc consideration. The court of appeals denied the request for initial en banc consideration. Pet. App. 80a. A panel of the court subsequently reaffirmed *Scialabba* and upheld the judgments of the district court. *Id.* at 1a-16a.

The court of appeals explained that, under the doctrine of stare decisis, its decision in *Scialabba* was entitled to "considerable weight." Pet. App. 9a. Although the court believed that "[t]he government [had] raise[d] several important points in favor of its position," the court concluded the government's arguments were not sufficient to satisfy the heavy standard for overturning circuit precedent. *Id.* at 10a; see *id.* at 14a-15a.

The court of appeals acknowledged that, since *Scialabba* was decided, several other courts of appeals had addressed the meaning of "proceeds" in Section 1956(a)(1), and "all the other circuits" had "rejected *Scialabba's* approach." Pet. App. 10a. See *id.* at 10a-12a (discussing *United States* v. *Grasso*, 381 F.3d 160 (3d Cir. 2004), vacated and remanded on other grounds, 544 U.S. 945 (2005), reinstated in relevant part, No. 03-1441 (3d Cir. May 20, 2005); *United States* v. *Iacaboni*, 363 F.3d 1 (1st Cir.), cert. denied, 543 U.S. 978 (2004); and

*United States* v. *Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005)).

The court of appeals then considered the government's contention that *Scialabba* had eviscerated the promotional subsection of Section 1956(a)(1) by limiting the crime of money laundering to situations in which criminals conceal their proceeds. The court stated that the government was reading the *Scialabba* opinion too broadly. The court explained that, "[w]hile, under *Scialabba*, the act of paying a criminal operation's expenses out of its gross income is not punishable under § 1956(a)(1)(A)(i)—but rather is punishable as part of the underlying crime—the act of reinvesting a criminal operation's net income to promote the carrying on of the operation is still punishable under § 1956(a)(1)(A)(i)." Pet. App. 12a.

Addressing the government's contention that the "profits" rule impedes enforcement of the money laundering statute, the court acknowledged that interpreting "proceeds" to mean "net income" could cause "evidentiary problems" for the government and complicate the work of judges and juries. Pet. App. 13a. The court explained that "criminals do not always keep ready records of their dealings, and, when they do, the line between the payment of expenses and reinvestment of net income is, generally speaking, murky, especially given the likely absence of accounting standards." *Ibid.* Nevertheless, the court did not believe that this "solid policy point" was enough to justify overruling *Scialabba*. *Ibid.*

The court of appeals also observed that the sentencing consequences of *Scialabba* would weaken the government's hand in combating large-scale gambling operations. Pet. App. 13a-14a. The court explained that, if the government is unable to establish a business's net

income, the statutory maximum for a defendant engaged in an illegal gambling operation falls from 240 months of imprisonment under Section 1956(a)(1) to 60 months of imprisonment under Section 1955(a). *Id.* at 13a. See *id.* at 13a-14a (noting that, unlike the Sentencing Guidelines for illegal gambling, the Guidelines for money laundering provide for greater punishment if a larger amount of funds are laundered).

The court of appeals concluded that "the government ha[d] demonstrated that the question of whether Congress intended the term proceeds in § 1956(a)(1)(A)(i) to mean gross or net income is a debatable one." Pet. App. 14a. The court determined, however, that the government's showing was not compelling enough to justify overturning circuit precedent. *Id.* at 14a-15a. Accordingly, the court affirmed the district court's orders granting respondents collateral relief. *Id.* at 16a.

## SUMMARY OF ARGUMENT

A. The term "proceeds" in the federal money laundering statute, 18 U.S.C. 1956(a)(1), means "gross receipts," not "profits" as the Seventh Circuit held. The primary meaning of "proceeds" is "gross receipts"—the total amount produced by a transaction or activity. This Court generally presumes that Congress intends a word to have its primary meaning unless there are contrary indications in the relevant statute. Nothing in the money laundering statute suggests that Congress intended "proceeds" to have a different meaning. The "gross receipts" definition also accords with the meaning that Congress has given the term "proceeds" in related statutes. For example, just two years before Congress enacted the money laundering statute, it used the term "proceeds" in amending the forfeiture provision of

the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1963(a)(3), and in enacting the drug forfeiture statute, 21 U.S.C. 853(a). Judicial decisions interpreting those provisions, as well as their legislative histories, make clear that Congress used the term "proceeds" for the specific purpose of covering all gross receipts and not only profits. Indeed, the Senate Report on the RICO statute states that Congress used the "term 'proceeds' * * * in lieu of the term 'profits' in order to alleviate the unreasonable burden on the government of proving net profits." S. Rep. No. 225, 98th Cong., 1st Sess. 199 (1983). There is no reason to believe that Congress deviated from that approach when it enacted the money laundering statute shortly thereafter and again used the word "proceeds."

B. The "gross receipts" definition of "proceeds" gives the money laundering statute its proper scope. The gross receipts of a crime reflect the magnitude of the criminal activity. All of the gross receipts can be used to promote further crime. And concealing the gross receipts can be just as effective in impeding detection and prosecution of the crime as concealing any profits from the crime. In contrast, the "profits" definition of "proceeds" would constrict the money laundering statute in ways that Congress could not have intended. For example, it would foreclose prosecutions based on a criminal's payment of the expenses of his crime even when those payments promote the continuation or expansion of the illegal business or conceal the origins of the ill-gotten funds. The "profits" definition would also give a defense against money laundering charges to criminals whose illicit activities have not yet turned a profit. Yet those criminals have just as great a need—and no greater entitlement—to avoid detection

by laundering their ill-gotten funds. And those criminals can use the receipts from their crimes to promote further crimes just as effectively as criminals whose initial crimes were profitable.

C. The "profits" definition of "proceeds" would also create serious obstacles to effective enforcement of the money laundering statute in those cases that it did not outright preclude. The government would be required, in every money laundering case, to prove that the predicate criminal activity was profitable and that the alleged money launderer knew that the funds he was laundering were profits. That would be an unreasonable burden because criminal enterprises rarely keep accounting records, much less records that are accurate, complete, and decipherable by law enforcement. Moreover, it would be particularly difficult for the government to prove that professional money launderers knew that the funds they laundered were profits. Those defendants are unlikely to have participated in the predicate crime, and they generally have no reason to inquire into the profitability of that crime, because it does not affect the need for their services. The "profits" definition would also encumber the courts with complicated and novel questions about what accounting principles should apply to criminal enterprises. Because there is no clear body of authority to resolve those issues, money laundering trials would likely turn into a battle of accounting experts—arduous, expensive, and confusing for all concerned. Congress could not have intended to saddle the government and the courts with those burdens.

D. Neither of the justifications offered by the court of appeals for its "profits" definition withstands scrutiny. The court of appeals asserted that its definition was necessary to avoid convicting defendants for both

money laundering and the underlying offense based on the same conduct. But other elements of the money laundering statute ensure that the money laundering offense and the underlying crime remain distinct. The money laundering statute can be violated only when there is a separate financial transaction that "involves the proceeds" of the underlying crime. 18 U.S.C. 1956(a)(1). The laundering transaction thus cannot occur until the crime's proceeds have been realized. The court of appeals also reasoned that the "profits" definition is required by the rule of lenity. But that rule applies only if, after employing all available tools of statutory construction, the Court can make no more than a guess as to what Congress intended. Here, based on the text, context, history, and purposes of the statute, Congress's intent is clear: Congress intended "proceeds" to mean "gross receipts."

## ARGUMENT

### THE TERM "PROCEEDS" IN THE MONEY LAUNDERING STATUTE MEANS "GROSS RECEIPTS" RATHER THAN "NET INCOME" OR "PROFITS"

Contrary to the view of the court of appeals that "proceeds" in the principal federal money laundering statute means the "profits" of illegal activity, the text, background, and purposes of the statute all confirm that Congress instead intended "proceeds" to have its more common and far more practical meaning of "gross receipts." Accordingly, a defendant violates the money laundering statute by conducting a financial transaction with the receipts of specified illegal activity, with the intent to promote that activity or to conceal the proceeds, whether or not those receipts represent profits.

### A. Construing "Proceeds" To Mean "Gross Receipts" Reflects The Word's Primary Meaning And The Meaning That Congress Has Given It In Related Statutes

1. This Court generally presumes that Congress intends a word to have its most common and primary meaning unless there are contrary indications in the statute. See, *e.g.*, *Muscarello* v. *United States*, 524 U.S. 125, 128 (1998); *BP Am. Prod. Co.* v. *Burton*, 127 S. Ct. 638, 643-644 (2006). The primary meaning of "proceeds" is the total amount produced by a transaction or activity—in short, "gross receipts." Nothing in the money laundering statute suggests that Congress intended to depart from that ordinary meaning.

The initial definitions of "proceeds" provided by the *Random House Dictionary of the English Language* (2d ed. 1987), which lists first the most frequently encountered meaning of a word, *id.* at xxxii, are "something that results or accrues" and "the *total* amount derived from a sale or other transaction." *Id.* at 1542 (emphasis added). The dictionary offers "profits" only as a secondary, less common definition. *Ibid.* Likewise, *Black's Law Dictionary* (8th ed. 2004) defines "proceeds" as "1. The value of land, goods, or investments when converted into money; the amount of money received from a sale. * * * 2. Something received upon selling, exchanging, collecting, or otherwise disposing of collateral." *Id.* at 1242. *Black's Law Dictionary* distinguishes "proceeds" from "net proceeds," which, in a subentry under "proceeds," it defines as "[t]he amount received in a transaction minus the costs of the transaction (such as expenses and commissions)." *Ibid.* *Webster's Third New International Dictionary* (2002) also leads with the "gross receipts" definition of "proceeds"—"what is produced by or derived from something (as a

sale, investment, levy, business) by way of *total revenue*: the *total* amount brought in." *Id.* at 1807 (emphasis added). Likewise, the *Oxford English Dictionary* (2d ed. 1989) lists the "gross receipts" meaning of "proceeds" first. See 12 *id.* at 544.

Moreover, dictionaries that provide only one definition for "proceeds" generally give a "gross receipts," rather than "net income," definition. See, *e.g.*, *Cambridge Advanced Learner's Dictionary* 1005 (2005) ("the amount of money received from a particular event or activity or when something is sold"); *Cambridge Dictionary of American English* 677 (2000) ("the amount of money received from a particular sale or event"); *Compact Oxford English Dictionary of Current English* 902 (rev. 2d ed. 2003) ("money obtained from an event or activity"); *Funk & Wagnalls New Standard Dictionary of the English Language* 1974 (1946) ("The useful or material results of an action or course; also, that which accrues from possession, as of a check; the sum derived from the disposal of goods, work, or the use of capital."); *The Oxford American Dictionary and Language Guide* 793 (1999) ("money produced by a transaction or other undertaking"); *Webster's New International Dictionary of the English Language* 1972 (2d ed. 1958) ("That which results, proceeds, or accrues from some possession or transaction; esp., the amount realized from a sale of property."); see also, *e.g.*, *A Dictionary of Modern American Usage* 524 (1998) ("the value of land, goods, or investments when converted into money"); *Prentice Hall Encyclopedic Dictionary of English Usage* 301 (2d ed. 1993) ("amount realized from a sale").

2. The "gross receipts" definition also accords with the meaning that Congress has given the term "proceeds" in related statutes.

a. Most notable are two forfeiture provisions that Congress enacted just two years before the money laundering statute. See Comprehensive Forfeiture Act of 1984, Pub L. No. 98-473, Tit. II, §§ 302, 303, 98 Stat. 2040, 2044-2045 (18 U.S.C. 1963(a), 21 U.S.C. 853(a)). Judicial decisions interpreting those provisions, as well as their legislative histories, make clear that Congress used the term "proceeds" in those provisions for the specific purpose of covering all gross receipts and not only profits.

In 1984, Congress substantially amended the forfeiture provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq*., to resolve a disagreement among the courts of appeals over whether the provision, as originally enacted, provided for the forfeiture of the profits and other proceeds of racketeering activities. The amended provision states that a RICO offender must forfeit "any property constituting, or derived from, any *proceeds* which the person obtained, directly or indirectly, from racketeering activity." 18 U.S.C. 1963(a)(3) (emphasis added). All but one of the courts of appeals that have addressed the issue have held that the word "proceeds," as used in the RICO provision, means "gross receipts," not "profits." See *United States* v. *Simmons*, 154 F.3d 765, 770-771 (8th Cir. 1998); *United States* v. *DeFries*, 129 F.3d 1293, 1313-1314 (D.C. Cir. 1997); *United States* v. *Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996). As with the money laundering statute, see pp. 7-8, *supra*, the Seventh Circuit is the sole exception. See *United States* v. *Genova*, 333 F.3d 750, 761 (2003) (reaffirming *United States* v. *Masters*, 924 F.2d 1362, 1369-1370, cert. denied, 500 U.S. 919 and 502 U.S. 823 (1991)).

The legislative history of the RICO provision confirms that "proceeds" is not limited to profits. The Senate Judiciary Committee Report explains that Congress used the "term 'proceeds' * * * in lieu of the term 'profits' in order to alleviate the unreasonable burden on the government of proving net profits." S. Rep. No. 225, 98th Cong., 1st Sess. 199 (1983). Noting the "extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits," the Senate Report states that "[i]t should not be necessary for the prosecutor to prove what the defendant's overhead expenses were." *Id.* at 199 & n.24 (quoting *United States* v. *Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), aff'd in part and vacated in part, 432 U.S. 137 (1977)).

In the same legislation that amended the RICO forfeiture provision, Congress also provided for the forfeiture of "any property constituting, or derived from, any *proceeds* the person obtained, directly or indirectly, as the result of" a violation of the federal drug laws. 21 U.S.C. 853(a) (emphasis added). Every court of appeals that has considered the meaning of "proceeds" in the drug forfeiture statute, once again with the lone exception of the Seventh Circuit, has concluded that the word means "gross receipts." See *United States* v. *Casey*, 444 F.3d 1071, 1076 n.4 (9th Cir.), cert. denied, 127 S. Ct. 532 (2006); *United States* v. *Keeling*, 235 F.3d 533, 537 (10th Cir. 2000), cert. denied, 533 U.S. 940 (2001); *United States* v. *McHan*, 101 F.3d 1027, 1041-1042 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997); but see *United States* v. *Jarrett*, 133 F.3d 519, 530-531 (7th Cir.), cert. denied, 523 U.S. 1112 (1998). That conclusion is supported by the Senate Report, which states that the term "proceeds" was used in the drug forfeiture statute for the same reason that it was used in the RICO forfei-

ture provision. See S. Rep. No. 225, *supra*, at 211. The Senate Report also notes that "the same type of property is now subject to civil forfeiture under 21 U.S.C. 881(a)(6)," *ibid.*, which likewise uses the word "proceeds." As the Fourth Circuit observed in *McHan*, Section 881(a)(6) "has never been interpreted to permit a deduction for the costs of illicit drug transactions." 101 F.3d at 1042.

Nothing suggests that Congress deviated from its approach in the RICO and drug forfeiture statutes when it enacted the money laundering statute shortly thereafter and again used the term "proceeds." The difficulty of proving profits is just as substantial in the money laundering context as in the RICO and drug forfeiture contexts. And if the money laundering statute did not reach the concealment of drug proceeds unless the drug crimes were profitable, a drug dealer could lawfully conceal the gross proceeds of his crime and potentially evade the forfeiture of *all* receipts, contrary to Congress's clear intent. The only logical conclusion is that "proceeds" has the same meaning in the money laundering statute as it has in the RICO and drug forfeiture provisions.

b. That conclusion is buttressed by the fact that Congress has also used "proceeds" to mean "gross receipts" in other related statutes. For example, Congress explicitly defined "proceeds," as used in 18 U.S.C. 2339C(c)(2) (Supp. IV 2004), which proscribes the concealment of the "proceeds" of funds intended for use in financing terrorism, to mean "*any* funds derived from or obtained, directly or indirectly, through the commission of" a terrorism financing offense. 18 U.S.C. 2339C(e)(3) (Supp. IV 2004) (emphasis added). And, in *United States* v. *Silvestri*, 409 F.3d 1311, cert. denied, 126 S. Ct.

772 (2005), the Eleventh Circuit concluded that the word "proceeds" in 18 U.S.C. 1957, another money laundering statute, means "total revenue" or "the total amount brought in." 409 F.3d at 1333 (quoting *Webster's Third New International Dictionary* 1807 (3d ed. 1961)).

The "gross receipts" definition of "proceeds" also accords with how Congress has treated cases comparable to this one under the general forfeiture statutes. For civil forfeiture cases that (like this one) involve illegal goods, services, or activities, Congress has expressly defined "proceeds" to mean all property obtained as a result of the offense, "not limited to the net gain or profit." 18 U.S.C. 981(a)(2)(A).[1] The general criminal for-

[1] Congress has adopted a different definition of "proceeds" for two limited categories of civil forfeiture. First, in cases involving *lawful* goods or services that are sold or provided in an illegal manner, the statute requires subtraction of "the direct costs incurred in providing the goods or services," but it does not authorize deduction of overhead or income tax expenses, and it requires the forfeiting party to bear the burden of proving the costs. 18 U.S.C. 981(a)(2)(B). Second, in cases involving fraud in the process of obtaining a loan or extension of credit, the statute allows the forfeiting party to claim a "deduction" from the amount of forfeiture "to the extent that the loan was repaid." 18 U.S.C. 981(a)(2)(C). Notably, in both provisions, Congress carefully defined the category of costs that may be deducted, thus reducing the administrative burdens on the courts. Moreover, recognizing that proving costs will be difficult even under the preponderance-of-the-evidence standard applicable to forfeitures, Congress shifted the burden of proof to the forfeiting party—explicitly in Section 981(a)(2)(B), and implicitly in Section 981(a)(2)(C), by providing for a "deduction" only upon that party's request. Nothing in the two civil forfeiture provisions suggests that Congress intended to vary from its reliance on the primary definition of "proceeds" in statutes defining criminal offenses. On the contrary, as the legislative history of the civil forfeiture provisions indicates, Congress believed that, even in the forfeiture context, it generally "makes no sense" to construe "proceeds" to mean "net profits,"

feiture statute also uses "proceeds" to mean all property obtained from the offense. That statute uses the terms "proceeds," "gross receipts," and "gross proceeds" interchangeably in its different subsections, depending on when each subsection was enacted. See, *e.g.*, 18 U.S.C. 982(a)(2), (3), (4), (5), (6)(A)(ii)(I) and (7); 18 U.S.C. 982(a)(8)(B) (2000 & Supp. IV 2004).[2] Thus, the "gross

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because "[a] person committing a fraud on a financial institution has no right to recover the money he invested in the fraud scheme; nor does a drug dealer have any right to recover his overhead expenses when ordered to forfeit the proceeds of drug trafficking." H.R. Rep. No. 358, 105th Cong., 1st Sess. Pt. 1, at 48 (1997) (discussing the precursor to the provision that amended Section 981(a)(2)).

[2] As originally enacted, the criminal forfeiture statute applied only to money laundering offenses under 18 U.S.C. 1956 and 1957, and it used only the term "gross receipts." See Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1366(a), 100 Stat. 3207-35. The reference to "gross receipts" was eliminated two years later. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6463(c), 102 Stat. 4374 (now codified at 18 U.S.C. 982(a)(1) (Supp. IV 2004)). Congress added provisions referring to the "proceeds" of other violations in 1989, see Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 963(c)(1)(B), 103 Stat. 504-505 (18 U.S.C. 982(a)(2)), but returned to the formulation "gross receipts" when it added additional provisions one year later, see Crime Control Act of 1990, Pub. L. No. 101-647, § 2525(b), 104 Stat. 4874-4875 (18 U.S.C. 982(a)(3) and (4)). Congress used the term "gross proceeds" for the first time in 1992, see Anti Car Theft Act of 1992, Pub. L. No. 102-519, § 104(b), 106 Stat. 3385 (18 U.S.C. 982(a)(5)), and then again in 1996, see Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 249(a), 110 Stat. 2020 (18 U.S.C. 982(a)(7)). In a separate enactment later in 1996, Congress returned to the term "proceeds," see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 217, 110 Stat. 3009-573 (18 U.S.C. 982(a)(6)), but, most recently, in 1998, again used the term "gross proceeds," see Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184, § 2(1)(B), 112 Stat. 520 (now codified at 18 U.S.C. 982(a)(8) (Supp. IV 2004)). Nothing in the legislative history of any of the enact-

receipts" definition is consistent with both the ordinary meaning of "proceeds" and Congress's use of the term in related contexts.

3. The Seventh Circuit reasoned that, if Congress had intended the "gross receipts" meaning, it would have used that term instead of "proceeds." *United States* v. *Scialabba*, 282 F.3d 475, 477, cert. denied, 537 U.S. 1071 (2002). Respondent Diaz makes the same argument, citing as support the fact that Congress has used the terms "gross revenue" and "gross receipts" in other criminal statutes. See Diaz Br. in Opp. 12. That argument is incorrect.

Because the primary and ordinary meaning of "proceeds" is "gross receipts," Congress would have expected courts to give the term that meaning, whether or not Congress had used different terms with the same meaning, such as "gross receipts" and "gross revenues," in other statutes. As this Court has recognized, Congress sometimes uses different words in different statutes even though it intends those words to have the same meaning. See *Limtiaco* v. *Camacho*, 127 S. Ct. 1413, 1419 (2007) (holding that "tax valuation" in 48 U.S.C. 1423a means "assessed valuation" even though Congress used "assessed valuation" in another statute); *Deal* v. *United States*, 508 U.S. 129, 134 (1993) ("No one can disagree * * * that 'Congress sometimes uses slightly different language to convey the same message.'"). Congress's failure to rely uniformly on one of two synonyms hardly empowers courts to ignore a word's primary and ordinary meaning.

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ments indicates that Congress attached any significance to the changes in phraseology. And nothing about the nature of the predicate offenses suggests any reason why Congress would have wanted the scope of forfeiture to vary for the different offenses.

Moreover, respondent's argument proves too much. The logic behind the argument dictates that "proceeds" also cannot mean "profits," as the Seventh Circuit has held, because Congress has likewise used that term in other criminal statutes. *E.g.*, 18 U.S.C. 2318(f)(2)(C)(i) and (3)(A)(ii) (Supp. IV 2004); 18 U.S.C. 2520(c)(2)(A); see *United States* v. *Grasso*, 381 F.3d 160, 167 (3d Cir. 2004) (noting that Congress "might just as readily have used the term 'profits'"), vacated and remanded on other grounds, 544 U.S. 945 (2005), reinstated in relevant part, No. 03-1441 (3d Cir. May 20, 2005).

Indeed, to the extent that Congress's choice of words in the money laundering statute creates any negative inference, the inference is that Congress did not mean "profits." Because the primary meaning of "proceeds" is "gross receipts," Congress presumably would have qualified the term "proceeds" with the modifier "net" (or used the alternative term "profits") if it had intended to limit the statute's coverage to that subcategory of proceeds. See *BP Am. Prod. Co.*, 127 S. Ct. at 644-645 (suggesting that the absence of the modifier "administrative" indicates that Congress intended the primary meaning of "action"—judicial proceeding—rather than the secondary meaning, which includes an administrative proceeding).

### B. The "Gross Receipts" Definition Gives The Money Laundering Statute Its Proper Scope, While The "Profits" Definition Would Unnaturally Constrict The Statute

1. The "gross receipts" definition of "proceeds" gives the money laundering statute its appropriate scope. The gross receipts of a crime accurately reflect the scale of the criminal activity, because the illegal activity generated all of the funds. And all of the gross

receipts of the crime can be used to promote further crime. For example, a drug dealer can use the money that he is paid for a drug sale to purchase new drugs for distribution whether or not the first sale was made at a profit. Moreover, the gross receipts of a criminal enterprise represent the amount of unexplained cash that could lead to detection, and thus concealing any of the gross receipts can impede detection and prosecution of the crime. A drug dealer who launders the proceeds of a loss-leading sale by funneling them through a legitimate business conceals his drug trafficking just as effectively as a dealer who launders the proceeds of a profitable deal. In either case, the drug-dealing business generates cash that is not associated with any legitimate business and could give rise to suspicions, and the laundering transaction conceals that cash and helps conceal the crime. Construing "proceeds" to mean "gross receipts" thus advances the policies underlying the money laundering statute, which seeks to prevent criminals from using the fruits of their crimes to conceal or to further their illegal activities. See *United States* v. *Iacaboni*, 363 F.3d 1, 5-6 (1st Cir.), cert. denied, 543 U.S. 978 (2004).

2. In contrast, the "profits" definition of "proceeds" would constrict the money laundering statute in significant ways that Congress could not have intended. As both the district court and the court of appeals recognized, the "profits" definition would categorically preclude money laundering prosecutions based on the use of receipts of underlying crime to pay the expenses incurred in committing that crime. See Pet. App. 12a, 49a, 77a-78a. That limitation follows from the "profits" definition because funds used to pay the expenses of a crime are, by definition, not the net income or profits of that

crime. See *id.* at 49a, 77a-78a. But there is no justification for that limitation on the scope of the money laundering statute, which expressly covers transactions designed to promote unlawful activity. The payment of the expenses of a crime commonly promotes the continuation and expansion of the criminal enterprise.

This case illustrates the point. As the Seventh Circuit held at an earlier stage of the case, the payments to the bolita's runners, collectors, and winners promoted the prosperity and growth of the illegal gambling operation. *United States* v. *Febus*, 218 F.3d 784, 790 (describing how those payments enabled the bolita to grow from approximately $250,000 in annual revenue in 1989 to approximately $410,000 in annual revenue in 2004), cert. denied, 531 U.S. 1021 (2000). See *Iacaboni*, 363 F.3d at 5 ("[n]othing makes an illegal gambling operation flourish more than the prompt payment of winners") (brackets in original; citation omitted). Because paying the expenses of illegal businesses enables them to continue and to expand (and distributes cash that otherwise could lead to detection), prosecutions based on expense payments have long comprised a substantial portion of the cases brought under the promotion subsection of the money laundering statute.[3] By fore-

[3] See, *e.g.*, *United States* v. *Thorn*, 446 F.3d 378, 392 (2d Cir. 2006) (proceeds of illegal business used for operating expenses necessary for business to "continue and expand"); *United States* v. *Angelos*, 433 F.3d 738, 748 (10th Cir.) (use of proceeds of marijuana distribution business to pay rent on stash house), cert. denied, 127 S. Ct. 723 (2006); *United States* v. *Alerre*, 430 F.3d 681, 695 (4th Cir. 2005) (distribution of funds obtained from unlawful prescription drug sales and health care fraud to compensate physicians, employees, and owners), cert. denied, 126 S. Ct. 1925 (2006); *United States* v. *Lawrence*, 405 F.3d 888, 901 (10th Cir.) (use of proceeds of Medicare fraud to pay doctor whose participation was essential to the scheme), cert. denied, 126 S. Ct. 468 (2005); *United*

closing prosecution of those cases, the "profits" rule would dramatically curtail the scope of the promotion component of the statute as it has traditionally been understood.

The definition of "proceeds" adopted by the Seventh Circuit would also curtail prosecutions under the money laundering statute in another significant way. Under that definition, the government could not prosecute de-

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*States* v. *Caplinger*, 339 F.3d 226, 233 (4th Cir. 2003) (use of fraudulently obtained funds to purchase supplies, make repairs to corporate plane, and pay rent and salaries); *United States* v. *Bolden*, 325 F.3d 471, 489 (4th Cir. 2003) (use of fraudulently obtained funds to compensate accomplice, "encouraging his continued participation"); *United States* v. *Johnson*, 297 F.3d 845, 868 (9th Cir. 2002) (use of proceeds of telemarketing fraud to "fund the operation"), cert. denied, 537 U.S. 1242 and 538 U.S. 955 (2003); *United States* v. *Evans*, 272 F.3d 1069, 1082 (8th Cir. 2001) (prostitute's payments to escort agency from proceeds of prostitution), cert. denied, 535 U.S. 1029, 535 U.S. 1072, 535 U.S. 1087 and 537 U.S. 857 (2002); *United States* v. *Wyly*, 193 F.3d 289, 295-296 (5th Cir. 1999) (kickback to public official for his participation in fraud scheme); *United States* v. *Rudisill*, 187 F.3d 1260, 1267 (11th Cir. 1999) (use of proceeds from illegal telemarketing scheme to cover payroll expenses of scheme); *United States* v. *Reed*, 167 F.3d 984, 993 (6th Cir.) (drug proceeds used to pay antecedent drug debt), cert. denied, 528 U.S. 897 (1999); *United States* v. *King*, 169 F.3d 1035, 1039 (6th Cir.) (use of drug proceeds to pay drug couriers for drugs delivered on consignment), cert. denied, 528 U.S. 892 (1999); *United States* v. *France*, 164 F.3d 203, 208-209 (4th Cir. 1998) (drug proceeds used to post bail for confederate in scheme), cert. denied, 527 U.S. 1010 (1999); *United States* v. *Hildebrand*, 152 F.3d 756, 762 (8th Cir.) (use of proceeds of fraud to pay for office supplies, secretarial services, and staff wages in furtherance of scheme), cert. denied, 525 U.S. 1033 (1998); *United States* v. *Coscarelli*, 105 F.3d 984, 990 (5th Cir.) (proceeds of telemarketing fraud used to pay co-conspirators and overhead), vacated, 111 F.3d 376 (5th Cir. 1997), reinstated, 149 F.3d 342 (5th Cir. 1998) (en banc); *United States* v. *Marbella*, 73 F.3d 1508, 1514 (9th Cir.) (use of proceeds from fraudulent scheme to compensate individuals for referring victims), cert. denied, 518 U.S. 1020 (1996).

fendants for money laundering connected to an illegal activity unless the government could prove that the illegal activity made a profit. As a result, a criminal who laundered his ill-gotten funds as they came in would not be guilty of money laundering until he turned a profit, and an inept criminal who never managed to earn a profit would never be guilty of money laundering at all. See *McHan*, 101 F.3d at 1042 (defining "proceeds" as "profits" "would be rewarding unsuccessful drug dealers"). But it makes little sense to give a money laundering defense to drug dealers, gambling enterprise operators, and racketeers whose expenses over a period of time happen to exceed their revenue. As illustrated by this case, criminals can use the gross receipts of their crimes to expand their illegal activities or to promote other illegal activities in the very same way that they can use profits to facilitate further crime.[4]

3. The unwarranted limitations on money laundering prosecutions imposed by the court of appeals' rule would also apply to the concealment component of the statute. Like the promotion subsection, the concealment subsection is violated only if a financial transaction involves the "proceeds" of specified unlawful activity. See 18 U.S.C. 1956(a)(1)(B)(i). The term "proceeds" that the court of appeals construed in *Scialabba* and this case appears in the introductory language of Section 1956(a)(1), which applies to both subsections. And the court in this case

[4] As a practical matter, it may be that few individuals will run the risk of criminal sanctions to pursue an illegal enterprise that is not profitable. Even so, it will be easy for defendants to assert an absence of profits and difficult for the government to prove profitability. See pp. 27-29, *infra*. And, even in the rare case, when an enterprise runs at a loss for some period of time, use of the proceeds still promotes the enterprise and concealing the gross receipts still assists the enterprise to expand.

described *Scialabba* as "holding that the term 'proceeds' in *§ 1956(a)(1)* means net income." Pet. App. 15a-16a (emphasis added). Thus, the court's "profits" requirement would logically also apply in concealment cases.[5]

The "profits" requirement makes no more sense in concealment cases than in promotion cases. The purpose of prohibiting financial transactions designed to conceal the proceeds of criminal activity is to facilitate crime detection and prosecution. See, *e.g.*, *United States* v. *Castellini*, 392 F.3d 35, 49 (1st Cir. 2004); *Iacaboni*, 363 F.3d at 5-6. As discussed above, large amounts of unexplained cash create a risk of detection whether or not the enterprise is profitable, and concealing the gross receipts of criminal activity therefore can impede its detection and prosecution just as effectively as concealing its profits. Thus, the purpose of the statute squarely

[5] The "profits" definition would presumably also apply to other money laundering provisions that contain the term "proceeds." See, *e.g.,* 18 U.S.C. 1956(a)(1)(A)(ii) (criminalizing transactions involving the "proceeds" of specified unlawful activity undertaken with the intent to evade taxes); 18 U.S.C. 1956(a)(1)(B)(ii) (criminalizing transactions involving the "proceeds" of specified unlawful activity undertaken with the intent to evade currency reporting requirements); 18 U.S.C. 1956(a)(2) (criminalizing the transfer of funds between the United States and a foreign country with knowledge that the funds are the "proceeds" of unlawful activity and that the transfer is designed to conceal the "proceeds" or to avoid a transaction reporting requirement); 18 U.S.C. 1956(a)(3) (criminalizing a financial transaction involving property represented by another, at the direction of a federal official, to be the "proceeds" of specified unlawful activity, with the intent to promote specified criminal activity, to conceal the "proceeds," or to avoid a transaction reporting requirement); 18 U.S.C. 1956(h) (criminalizing conspiracy to commit any substantive violation of Section 1956); and 18 U.S.C. 1957 (criminalizing financial transactions in "criminally derived property" of a value greater than $10,000 and defining "criminally derived property" to include the "proceeds" of, or property derived from the "proceeds" of, a criminal offense).

applies to a transaction designed to conceal ill-gotten funds that will be used to pay the expenses of the revenue-generating crime. Yet the "profits" definition of "proceeds" would foreclose that kind of prosecution, just as it would foreclose prosecutions based on expense payments under the promotion subsection of the statute.

Nor is there any reason to give criminals a defense to concealment prosecutions because their crimes were not profitable. A criminal whose operation has yet to turn a profit has just as great a need—and no more of an entitlement—to avoid detection by laundering his ill-gotten funds. Moreover, the detection and prosecution of a crime is no less important because the crime is not yet or may never be profitable. For example, a profitable bank robbery may be accomplished without violence, while an unprofitable one may involve the murder of a bank guard or a customer. It would make little sense to preclude a concealment prosecution simply because the more violent robbers were prevented from stealing more than the amount needed to cover their expenses. Limiting the scope of the money laundering statute by adoption of the court of appeals' "profits" rule would thus undermine the statute's purposes.

### C. The "Profits" Definition Would Impose Unreasonable Burdens On The Government And The Courts

The "profits" definition of "proceeds" would also create serious obstacles to effective enforcement of the money laundering statute in those cases that it did not outright preclude. The government would be required, in every money laundering case, to prove that the predicate criminal activity was profitable and that the alleged money launderer knew that the funds that he was laundering were profits. That would be an unreasonable

burden in light of "the extreme difficulty in th[e] conspiratorial, criminal area of finding hard evidence of net profits." S. Rep. No. 225, *supra*, at 199 n.24 (quoting *Jeffers*, 532 F.2d at 1117). Moreover, the "profits" definition would encumber the courts with complicated questions about what accounting principles should apply to criminal enterprises. Thus, as even the Seventh Circuit recognized, the "profits" rule would complicate both the government's efforts to prosecute money laundering violations and the courts' task of resolving money laundering prosecutions. Pet. App. 13a.

1. The difficulties of proof confronting the government under the "profits" definition would be substantial. Unlike legitimate businesses, which keep accounting records for tax and financial reporting purposes, criminal enterprises do not ordinarily keep such records. See Pet. App. 13a; *Grasso*, 381 F.3d at 169 n.13. When criminals do keep records, they are unlikely to be accurate and complete, and they may even be recorded in code and thus impossible to interpret. See, *e.g.*, *Stinnett* v. *Iron Works Gym/Executive Health Spa, Inc.*, 301 F.3d 610, 612 (7th Cir. 2002); *United States* v. *Smith*, 31 F.3d 1294, 1299 (4th Cir. 1994), cert. denied, 513 U.S. 1181 (1995). To the extent that criminals keep decipherable records, they have an incentive to falsify those records or to keep two sets of accounts. By doing so, they may disguise the financial success of their operations and reduce their sentencing and forfeiture exposure. A "profits" definition of "proceeds" would provide criminals with even more reasons to manipulate their books. See *McHan*, 101 F.3d at 1042 (defining "proceeds" as "profits" would "create perverse incentives for criminals to employ complicated accounting measures to shelter the profits of their illegal enterprises"). The lack of reli-

able records would make it difficult for the government to prove that the criminal activity underlying a money laundering prosecution was profitable.

The burdens on the government would extend beyond the difficulty in finding reliable financial records. The money laundering statute requires not only that the money laundering transaction "involve[] the proceeds of specified unlawful activity" but also that the alleged money launderer "know[] that the property involved in [the] financial transaction represents the proceeds of some form of unlawful activity." 18 U.S.C. 1956(a)(1). Therefore, the "profits" definition would require the government to prove that the defendant knew that the underlying crime was profitable. Proving that knowledge would be challenging in many cases and particularly difficult when the money launderer did not participate in the underlying crime. A "profits" definition would thus pose an especially great impediment to prosecutions of professional money launderers—situations in which money laundering charges may be the only ones available.

2. The "profits" definition would also impose substantial burdens on the courts. The terms "profits" and "net income" have concrete meaning only after the application of a system of accounting principles. But there are no generally accepted accounting principles for criminal enterprises. Therefore, application of a "profits" approach would require the courts to formulate an accounting theory for illegal businesses. That would be a burdensome task, necessitating the resolution of a host of difficult and novel questions.

The difficulties that would arise are illustrated by the following hypothetical: The government brings a money laundering prosecution against a defendant who, over a

period of years, robbed banks and used the loot to buy drugs for distribution. Under the "profits" approach, a court resolving that case would first have to choose the relevant activity for purposes of assessing profitability. In other words, the court would have to decide whether to evaluate the profitability of each individual bank robbery, the overall bank robbery operation, or the entire criminal enterprise, including both the bank robbery and the drug trafficking components. Next, the court would have to determine the relevant accounting period. It would need to decide whether profits should be measured on annual basis, a quarterly basis, or over some other period, such as the entire course of criminal conduct.

If the court decided to measure profits using an annual or other recurring period, the court would also have to choose a method for determining when to recognize income and expenses. Possible options would include the cash method of accounting, the accrual method, or some combination of the two. Under the cash method, income is generally recognized when cash is received, and expenses are generally recognized when cash is paid out. See Stephen F. Gertzman, *Federal Tax Accounting* ¶ 3.01, at 3-2 to 3-3 (2d ed. 1993) (Gertzman). The accrual method, in contrast, generally "attempts to record the financial effects on an enterprise of transactions and other events and circumstances that have cash consequences for [the] enterprise in the periods in which the transactions, events, and circumstances occur rather than only in the periods in which cash is received or paid by the enterprise." Financial Accounting Standards Board (FASB), *Statement of Financial Accounting Concepts No. 1* para. 44 (Nov. 1978) <http://www.fasb.org/pdf/con1.pdf>. Because the choice of account-

ing method affects when income and expenses are recognized, that choice—like the choice of the relevant activity and the accounting period—could have a significant impact on whether the criminal enterprise was determined to be profitable.

After the court resolved those issues, it would face the additional task of determining what qualifies as income and what qualifies as an expense of the predicate criminal activity. For example, if the defendant stole a getaway car before each bank robbery and sold the car to a "chop shop" after each robbery, would the proceeds of those sales count as income from the bank robbery operation? Similarly, if, during one robbery, the defendant noticed that a bank customer was wearing a beautiful ring, and the defendant stole the ring for his girlfriend, would the value of the ring count as income from the bank robbery? As for expenses, could the defendant deduct the value of his time as a "salary" that reduced his profits? And, if the defendant's accomplices received a percentage of the take from each robbery, rather than a fixed salary, would their compensation be profits rather than an expense? Would the expenses associated with an aborted bank robbery be deductible? And, if the defendant paid bribes to corrupt police officers for protection of his unlawful activities, would the bribes be allowed as expenses?

Still more complications could arise because, as the court of appeals acknowledged, "the line between the payment of expenses and reinvestment of net income is, generally speaking, murky." Pet. App. 13a. Distinguishing between the two would be especially difficult when the predicate offense involved continuing criminal activity, such as a drug conspiracy. Under the "profits" rule, if the predicate offense was a discrete drug sale for

which the drug dealer's supplier had provided the drugs on credit, the government apparently could not prosecute as money laundering the use of the proceeds of the sale to pay the supplier, because that transaction would involve the payment of an expense. See *id.* at 12a.[6] The government could, however, prosecute as money laundering the use of the net income from the sale to buy additional drugs for future distribution. That transaction would involve the reinvestment of profits to promote illegal activity, which would qualify as money laundering even under the "profits" rule. See *ibid.* If the predicate offense was a drug conspiracy, however, the purchase of new drugs using the net income from the sale would entail both the payment of an expense of the conspiracy and, if the overall conspiracy was profitable, a reinvestment of its profits. Yet a court would have to categorize the transaction as one or the other. If the transaction were deemed an expense payment, it could not support a money laundering prosecution. But if it were deemed the reinvestment of profits, it could. The court of appeals provided no guidance on how a court should resolve that conundrum.

3. Respondent Diaz argues that the lack of accounting principles for illegal businesses is not a problem because courts can use the accounting rules applicable to legitimate businesses. See Diaz Br. in Opp. 8. That is incorrect.

Legitimate businesses are required by various statutes and regulations to follow particular accounting methods for tax and financial reporting purposes. *E.g.*,

[6] However, a money laundering prosecution might be permissible if courts applied tax accounting rules, which do not allow deductions for amounts paid in carrying out a drug trafficking business. See p. 34, *infra* (citing 26 U.S.C. 280E).

26 U.S.C. 441-448 (2000 & Supp. IV 2004); 15 U.S.C. 77s(b), 7218 (Supp. IV 2004); 17 C.F.R. 210.4-01(a)(1). But, even when criminals keep financial records, those records are not likely to comply with the accounting methods required for legal businesses. See *Grasso*, 381 F.3d at 169 n.13.

In addition, there is no one, uniform set of accounting principles that applies in all contexts, even for lawful businesses. To begin with, the rules governing financial accounting frequently differ from those governing tax accounting. See Durwood L. Alkire, *Tax Accounting* § 2.02[1][c] at 2-8 (LexisNexis 2006) (Alkire); *id.* § 2.02[3][c] at 2-16 to 2-22. As this Court has observed, financial accounting and tax accounting have "vastly different objectives," and those different objectives are "mirrored in numerous differences of treatment." *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 542-543 (1979). For example, individuals and unincorporated business generally may use the cash method of accounting, rather than the accrual method, in calculating their taxable income. See 26 U.S.C. 446. In contrast, the cash method is not widely used for financial reporting because generally accepted accounting principles (GAAP) require use of the accrual method. See Gertzman ¶ 3.01[1], at 3-3; FASB, *Statement of Financial Accounting Concepts No. 6* para. 134 (Dec. 1985) <http://www.fasb.org/pdf/ con6.pdf>. Even when taxpayers use the accrual method, accrual accounting for tax purposes differs significantly from accrual accounting for financial reporting purposes. See Gertzman ¶ 4.01[2], at 4-3. Tax and financial accounting also diverge in the treatment of illegal payments, such as bribes. Those payments are not deductible as expenses for tax purposes, see, *e.g.*, 26 U.S.C. 162(c), but they are treated as expenses for fi-

nancial reporting, see Alkire § 2.02[3][iv], at 2-22. See also 26 U.S.C. 280E (expenses of carrying on a drug trafficking business are not deductible for tax purposes). Thus, in the money laundering context, the choice between tax and financial accounting could have significant consequences for whether an illegal business was determined to be profitable under a "profits" definition of "proceeds."

Nor would it be a solution for this Court to require all courts considering money laundering cases to use, for example, GAAP to determine profitability. Most businesses are not required to keep their books according to GAAP. See Robert N. Anthony et al., *Accounting: Text and Cases* 11 (12th ed. 2007). Many businesses do not do so; for instance, smaller businesses sometimes keep their books using the cash method (which is not permitted by GAAP). See Gertzman ¶ 3.01[2], at 3-3 to 3-4. Moreover, this Court has recognized that GAAP "are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions. [GAAP], rather, tolerate a range of 'reasonable' treatments, leaving the choice among alternatives to management." *Thor Power Tool Co.*, 439 U.S. at 544 (footnote omitted).

Courts would also face the intractable problem of defining the time period for determining profitability. Both tax and financial accounting require the determination of income and expenses based on fixed and regularly recurring periods. See *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359, 365 (1931); FASB, *Statement of Financial Accounting Concepts No. 1* para. 42. But periodic determination of income and expenses would not make sense for calculating profits under the money laundering statute. If profits were calculated on a peri-

odic basis, income from the same course of criminal conduct could be excluded from the profitability calculation merely because it fell outside some arbitrarily selected time period. For example, if profits were calculated on an annual basis, a criminal would be able to avoid a money laundering charge because his illicit business had a slightly unprofitable year, even though prior years were extremely profitable. That result would undermine the purposes of the money laundering statute, because the criminal would be able to conceal his receipts from the unprofitable year or to reinvest them in his illegal business without fear of prosecution for money laundering.

Thus, the "profits" definition of "proceeds" would embroil the courts in numerous accounting disputes. Because there is no clear body of authority to resolve those issues, money laundering trials would likely turn into a battle of accounting experts. They would become arduous, expensive, and confusing for all concerned. Although Congress could have provided guidance on how to resolve those difficulties, it did not. Cf. note 1, *supra* (noting that, in the two narrow circumstances in the civil forfeiture area in which Congress deviated from the "gross receipts" approach, it specified the deductible expenses and placed the burden of proof on the party seeking a deduction). Congress's silence surely reflects not a gross omission but rather an intent to use proceeds in its ordinary "gross receipts" sense, which obviates the need for accounting rules.

### D. The Court Of Appeals' Justifications For The "Profits" Definition Are Not Persuasive

The court of appeals offered two principal justifications for its "profits" definition of "proceeds." The

court stated that the "profits" definition "avoid[s] 'convict[ing] a person of multiple offenses when the transactions that violate one statute necessarily violate another.'" Pet. App. 7a-8a (second brackets in original) (quoting *Scialabba*, 282 F.3d at 477). The court also reasoned that the "profits" definition is required by the rule of lenity. *Id.* at 7a (citing *Scialabba*, 282 F.3d at 477). Neither of those purported justifications withstands scrutiny.

1. A "profits" definition is not necessary to avoid multiple punishments for a single offense. Other elements of the money laundering statute ensure that the money laundering offense and the underlying crime remain distinct.

a. The money laundering statute is not violated unless there is a financial transaction that "involves the proceeds" of the underlying crime. 18 U.S.C. 1956(a)(1). That statutory requirement ensures a separation between the conduct that constitutes the predicate crime and the conduct that constitutes money laundering. As the courts of appeals have held, the requirement means that the "predicate crime must have produced proceeds in acts distinct from the conduct that constitutes money laundering." *United States* v. *Mankarious*, 151 F.3d 694, 705 (7th Cir.), cert. denied, 525 U.S. 1056 (1998); see *ibid.* (the money laundering statute "criminalizes a transaction in proceeds, not the transaction that creates the proceeds"); see also *United States* v. *Awada*, 425 F.3d 522, 524 (8th Cir. 2005) (the "underlying activity must be separate from the actual laundering"); *United States* v. *Butler*, 211 F.3d 826, 830 (4th Cir. 2000) ("the laundering of funds cannot occur in the same transaction through which those funds first become tainted by crime"), cert. denied, 531 U.S. 1149 (2001); *United*

*States* v. *Christo*, 129 F.3d 578, 580 (11th Cir. 1997) (the money laundering statute requires "a monetary transaction that was separate from and in addition to the underlying criminal activity").

The requirement that there be a distinct transaction using proceeds generated by the underlying offense prevents money laundering prosecutions for the same conduct that constitutes that offense. For example, robbing a bank or selling illegal drugs cannot simultaneously be prosecuted as a predicate offense and as money laundering, because there are no proceeds until the bank has been robbed or the drugs have been sold. See *United States* v. *Heaps*, 39 F.3d 479, 485 (4th Cir. 1994). The requirement of a distinct transaction using proceeds generated by the underlying crime does not, however, generally pose any impediment to money laundering prosecutions based on the payment of the expenses or the reinvestment of the fruits of that crime. For example, when a bank robber uses the loot from a robbery to pay his accomplices, the payments are distinct from the conduct constituting the robbery. Likewise, when a drug trafficker uses the proceeds from a drug sale to buy a stash house for his enterprise, the house purchase and the drug sale constitute distinct transactions. In neither instance would prosecuting the offender for both the predicate offense and the money laundering transaction subject him to multiple punishment for the same conduct.

b. The courts of appeals sometimes describe the distinctness requirement as mandating that the money laundering transaction "*follow* and * * * be separate from any transaction necessary for the predicate offense to generate proceeds." *Mankarious*, 151 F.3d at 706 (emphasis added); see *United States* v. *Johnson*, 971

F.2d 562, 569 (10th Cir. 1992) ("Congress targeted only those transactions occurring after proceeds have been obtained from the underlying unlawful activity."). As those courts have clarified, however, the money laundering statute imposes a temporal requirement only in the sense that the predicate offense must first generate proceeds before those proceeds can be laundered. *Mankarious*, 151 F.3d at 706. But, as long as proceeds have been generated, "it does not matter when all the acts constituting the predicate offense take place." *Ibid.* Thus, proceeds may be derived either "from an already completed offense" or from "a completed phase of an ongoing offense." *United States* v. *Conley*, 37 F.3d 970, 980 (3d Cir. 1994); see B. Frederic Williams, Jr. & Frank D. Whitney, *Federal Money Laundering: Crimes and Forfeitures* § 9.2.4, at 104 n.201.9 (LexisNexis 2004 Supp.) (citing cases).

When the predicate crime is committed over a period of time, it can sometimes create proceeds, and those proceeds can be laundered, before the predicate crime is complete. For example, a mail fraud scheme may yield fraudulently obtained funds before any mailing takes place. If those funds are concealed or reinvested in the scheme in transactions that are not essential elements of the mail fraud offense, then those transactions may properly be prosecuted as money laundering. Thus, in *Mankarious*, the court of appeals upheld money laundering convictions arising out of a mail fraud scheme in which payments based on hand-delivered false invoices generated proceeds before confirmatory copies of the invoices were mailed. The money laundering occurred when, before the mailings, kickback checks derived from those payments were negotiated by cashing them through an intermediary or depositing them into third-

party bank accounts. See 151 F.3d at 696-698, 703-707. Of course, if the negotiation of the kickback checks had been an essential element of the underlying mail fraud offense, then the requirement of a distinct money laundering transaction would not have been satisfied, and there could not have been a money laundering prosecution. But an inquiry into whether the proceeds generated by the fraud were profits rather than gross receipts of the crime was not necessary to ensure a separation between the predicate offense and the money laundering.

Indeed, requiring a distinct transaction using proceeds provides even greater protection against multiple prosecutions for the same conduct than this Court generally demands. Traditionally, the Court has used the analysis in *Blockburger* v. *United States*, 284 U.S. 299 (1932), to determine whether Congress intended that a person be subject to punishment under multiple statutes for a single course of conduct. See *Rutledge* v. *United States*, 517 U.S. 292, 297 (1996). The *Blockburger* test examines the elements of the two offenses to determine whether each offense requires proof of a fact that the other does not. See *ibid.* That test is satisfied in the case of money laundering and its specified predicate crimes. See, *e.g.*, *Iacaboni*, 363 F.3d at 6 & n.8 (upholding a money laundering prosecution based on payment of the expenses of an illegal gambling business); *Conley*, 37 F.3d at 978 (same). The elements of money laundering include not only that the defendant conduct a transaction with the proceeds of the predicate crime but also that the defendant intend either to conceal those proceeds or to use them to promote specified unlawful activity. Neither of those elements is required to establish that the defendant committed the predicate crime.

Thus, the money laundering offense requires proof of facts that the predicate crime does not. Similarly, in order to convict the defendant of the underlying crime, the government must prove a fact that is not required to obtain a money laundering conviction—the defendant's participation in the underlying crime. Although proof that *someone* committed the predicate offense is necessary to establish money laundering, the government need not prove that the money laundering defendant committed that crime or even had anything to do with it.

c. This case illustrates that the "profits" definition is not necessary to ensure a distinction between the money laundering offense and the predicate crime. The predicate offense for respondents' money laundering convictions is conducting an illegal gambling business in violation of 18 U.S.C. 1955. See Indictment counts 3-4. The business operated by having bettors place wagers with runners, who took a commission from the receipts and delivered the remaining money to collectors. The collectors (including respondent Diaz) took their own salary out of those funds and delivered the rest to respondent Santos, who oversaw the operation and paid the winners. Pet. App. 2a, 19a. The gambling business was a continuing offense that generated proceeds each time that a bettor placed a wager. The commissions and salaries received by the runners and collectors were distinct transactions made with those previously generated proceeds, just like a bank robber's payments to his accomplices. Similarly, the payments to winners were distinct transactions that were also made with the previously generated proceeds of the gambling operation. The payments to the couriers and winners thus followed and were distinct from the predicate-offense conduct that generated the proceeds.

Respondents argue that the gambling and money laundering offenses were not distinct because the payments to employees and winners were constituent or integral parts of the underlying gambling offense. See Santos Br. in Opp. 6; Diaz Br. in Opp. 13. But those payments were not elements of the underlying offense. Conducting an illegal gambling business under Section 1955 entails three elements: the business must violate the law of the State in which it is conducted; it must involve five or more persons; and it must remain in substantially continuous operation for more than 30 days or have gross revenue of at least $2000 in any given day. 18 U.S.C. 1955(b)(1). Proof that payments were made to employees or to winners is not required to establish a violation. Nor is proof of those payments required to establish a violation of the Indiana gambling statutes on which the Section 1955 offense was predicated. Those statutes include Indiana Code § 35-45-5-3(a)(6) (LexisNexis 2006 Supp.), which makes it a crime to "accept[] * * * for profit, money * * * risked in gambling," and Indiana Code § 35-45-5-3(a)(4), which makes it a crime to "sell chances" in "lotteries." See Indictment count 2. Under the plain language of those provisions, a gambling offense in Indiana is complete at the time the wager is placed. Subsequent payments to employees or winners are not elements of the offense. If the law were otherwise, a defendant could avoid violating the statute, while enjoying the profits from his gambling operation, by fraudulently refusing to pay employees and successful bettors.[7] Thus, as this case illus-

[7] Respondents also incorrectly suggest (Santos Br. in Opp. 10; Diaz Br. in Opp. 13) that the compensation of the bolita's employees did not involve transactions distinct from the underlying gambling offense because the employees deducted their compensation from the money

trates, the "profits" definition is unnecessary to preserve a distinction between money laundering and the predicate crime.

2. The court of appeals also erred in concluding that the "profits" definition of "proceeds" is required by the rule of lenity. See Pet. App. 7a; *Scialabba*, 282 F.3d at 477. The rule of lenity "comes into operation" only "at the end of the process of construing what Congress has expressed." *Callahan* v. *United States*, 364 U.S. 587, 596 (1961). Moreover, the rule applies only if "there is a grievous ambiguity or uncertainty in the statute." *Muscarello*, 524 U.S. at 139 (internal quotation marks and citation omitted). Thus, neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of [the] rule," *Muscarello*, 524 U.S. at 138. Instead, the rule applies "only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (internal quotation marks and citation omitted).

The rule of lenity has no application in this case. Construing "proceeds" to mean "gross receipts" reflects the word's most common meaning and the meaning that Congress gave the same term in related statutes. Moreover, the "gross receipts" definition affords the money

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they collected before turning it over to Santos, instead of being paid by Santos after giving him the money. It makes no difference for purposes of the money laundering statute which method of payment Santos employed. Each employee's removal of his salary from the gross amount he collected (as previously arranged with Santos) was a financial transaction involving proceeds, and that transaction was separate from the underlying gambling offense.

laundering statute its proper scope and facilitates effective enforcement of the statute. In contrast, construing "proceeds" to mean "profits" would be contrary to its primary meaning and the meaning Congress has given the term in related contexts. That construction would unnaturally truncate the scope of the money laundering statute, render it exceedingly difficult to enforce in many cases, and seriously complicate money laundering trials—all without furthering any conceivable congressional objective. Congress's use of the term "proceeds" thus does not create any ambiguity, much less an ambiguity so serious that the Court can only guess at the term's intended meaning. "Proceeds" means "gross receipts."

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## STATUTORY APPENDIX

1. Section 1956 of Title 18, United States Code, provides in pertinent part:

> (a)(1) 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 intent to engage in conduct constituting a violation of 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 under State or Federal law,
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

* * * * *

(c) As used in this section—

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" including initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution 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, by whatever means effected;

(4) 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 (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;

* * * * *

(7) the term "specified unlawful activity" means—

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

* * * * *

2. Section 1961 of Title 18, United States Code (Supp. IV 2004), provides in pertinent part:

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related

activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1591 (relating to peonage, slavery, and trafficking in persons).,[1] section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in mone-

[1] So in original.

tary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled

substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

* * * * *

3. Section 1955 of Title 18, United States Code, provides in pertinent part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

* * * * *

4. Indiana Code § 35-45-5-1 (LexisNexis 2006 Supp.) provides in pertinent part:

As used in this chapter:

"Gain" means the direct realization of winnings.

"Gambling" means risking money or other property for gain, contingent in whole or in part upon lot, chance, or the operation of a gambling device; but it does not include participating in:

(1) bona fide contests of skill, speed, strength, or endurance in which awards are made only to entrants or the owners of entries; or

(2) bona fide business transactions that are valid under the law of contracts.

"Gambling device" means:

(1) a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance;

(2) a mechanism that, when operated for a consideration, does not return the same value or property for the same consideration upon each operation;

(3) a mechanism, furniture, fixture, construction, or installation designed primarily for use in connection with professional gambling;

(4) a policy ticket or wheel; or

(5) a subassembly or essential part designed or intended for use in connection with such a device, mechanism, furniture, fixture, construction, or installation.

In the application of this definition, an immediate and unrecorded right to replay mechanically conferred on players of pinball machines and similar amusement devices is presumed to be without value.

* * * * *

"Profit" means a realized or unrealized benefit (other than a gain) and includes benefits from proprietorship or management and unequal advantage in a series of transactions.

* * * * *

5. Indiana Code § 35-45-5-3 (LexisNexis 2006 Supp.) provides in pertinent part:

(a) A person who knowingly or intentionally:

(1) engages in pool-selling;

(2) engages in bookmaking;

(3) maintains, in a place accessible to the public, slot machines, one-ball machines or variants thereof, pinball machines that award anything other than an immediate and unrecorded right of replay, roulette wheels, dice tables, or money or merchandise pushcards, punchboards, jars, or spindles;

(4) conducts lotteries or policy or numbers games or sells chances therein;

(5) conducts any banking or percentage games played with cards, dice, or counters, or accepts any fixed share of the stakes therein; or

(6) accepts, or offers to accept, for profit, money, or other property risked in gambling;

commits professional gambling, a Class D felony.

* * * * *