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

REPLY BRIEF FOR THE UNITED STATES

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The Seventh Circuit has seriously misconstrued the principal federal money laundering statute, 18 U.S.C. 1956(a)(1), by interpreting the term "proceeds" to mean "profits." As the government's opening brief demonstrates, the statutory text, background, and purposes make clear that "proceeds" instead means "gross receipts." Respondents rely on secondary dictionary definitions, statements in the legislative history, and a claimed need to employ a "profits" definition in order to distinguish money laundering from the underlying crimes. But in the end they are unable to support their contention that Congress would have adopted the onerous and impractical requirement that the government establish that a criminal venture is profitable before a defendant may be held liable for seeking to promote its continued existence or conceal its ill-gotten gains. Section 1956(a)(1) unambiguously reaches all otherwise-covered transactions involving "proceeds," and the court of appeals erred in holding otherwise.

A. The "Gross Receipts" Definition Of "Proceeds" Accords With The Word's Primary Meaning, The Legislative History Of The Money Laundering Statute, And The Meaning That Congress Has Given The Word In Related Statutes

1. Respondents argue (Diaz Br. 7-9; Santos Br. 20-23) that dictionary definitions of "proceeds" establish that the term "may just as easily mean 'profits'" as "gross receipts." Diaz Br. 7. But respondents' dictionary citations establish only that "proceeds" may *sometimes* mean "profits," a fact that the government has never disputed. Respondents have not undercut the government's fundamental point, which is that the *primary* meaning of "proceeds" is "gross receipts."

Respondents do not dispute that dictionaries that list only one meaning of "proceeds" generally give a "gross receipts" definition. See U.S. Br. 14. They also fail to rebut the government's showing that dictionaries that provide more than one definition generally list the "gross receipts" meaning first. Respondents do not cite any dictionary that lists a "profits" definition first. See Diaz Br. 7-8; Santos Br. 21, 22 n.8. Even the dictionaries Santos cites that combine the two meanings in a single entry lead with the "gross receipts" meaning. See *Webster's Universal College Dictionary* 629 (2001); *Webster's New World Dictionary of the American English* 1072 (3d coll. ed. 1988). Although Diaz asserts (Br. 7) that the *Oxford English Dictionary* (2d ed. 1989) (*OED*) does not lead with a gross receipts definition, he is incorrect. The *OED*'s initial definition is "[t]hat which proceeds, is derived, or results from something," a broad description that provides no deduction for costs. 12 *OED* 544. "Profit" is listed last among the five meanings provided. *Ibid.* And respondents do not dispute that the *Random House Dictionary of the English Language* (2d ed. 1987) (*Random House*), which expressly states that it lists first the most frequently used meaning of a word, begins

with the "gross receipts" definition. See *id.* at xxxii, 1542. Because the primary meaning of "proceeds" is "gross receipts," if Congress had intended to limit the money laundering statute to "profits," it likely would have used that word or modified "proceeds" with the adjective "net." Congress's use of the unadorned word "proceeds" signals an intent to employ the word's broader primary meaning.

2. Respondents also incorrectly contend (Diaz Br. 20-23; Santos Br. 23-27) that the legislative history of the money laundering statute supports a "profits" definition of "proceeds." They cite various statements indicating that Congress was concerned about the profitability of criminal organizations and the laundering of "profits." Significantly, none of those statements addresses the meaning of the word "proceeds" or indicates that the statute prohibits only the laundering of profits. The section-by-section analysis of the legislation in the Committee reports never uses the word "profits" to describe laundered "proceeds." See H.R. Rep. No. 855, 99th Cong., 2d Sess. Pt. 1, at 10-24 (1986); S. Rep. No. 433, 99th Cong., 2d Sess. 9-24 (1986). On the contrary, the Senate Report states that Section 1956 proscribes "transactions used to launder the *funds* derived from illegal activity." *Id.* at 9 (emphasis added). The unqualified term "funds" encompasses all money derived from a crime, not just profits. Thus, far from supporting a "profits" definition of "proceeds," the legislative history supports a "gross receipts" definition.

In fact, the "profits" definition would undermine Congress's goal of curtailing criminal activity intended to generate financial gains. It would foreclose prosecutions based on expense payments even when those payments promote criminal activity or conceal ill-gotten funds; it would provide a defense to money laundering charges for criminals whose illicit activities have not yet turned a profit; and it would create serious obstacles to effective enforcement of the statute in

other circumstances. See U.S. Br. 22-32. Thus, to the extent they are relevant, the legislative statements evincing concern about the profitability of criminal activity favor a "gross receipts," not a "profits," definition of "proceeds."

3. The "gross receipts" definition also accords with the meaning of "proceeds" in related statutes, including the RICO forfeiture provision, 18 U.S.C. 1963(a)(3), and the drug forfeiture statute, 21 U.S.C. 853(a)(1), which were enacted just two years before the money laundering statute. Except for the Seventh Circuit, every court of appeals that has addressed the issue has held that "proceeds" in those provisions means "gross receipts." See U.S. Br. 15-16. That conclusion is confirmed by the Senate Report accompanying the legislation, which states that Congress used the word "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); see *id.* at 211.

Respondents fail to identify even a single statute in which the undefined term "proceeds" means "profits." Santos argues (Br. 28) that "proceeds" in the Racketeer Influenced and Corrupt Organizations Act (RICO) and drug forfeiture statutes may mean "gross profits," *i.e.*, gross receipts minus direct costs, but he is incorrect. No court of appeals has given "proceeds" a "gross profits" meaning, even in the two decisions that he cites. *United States* v. *Lizza Indus., Inc.*, 775 F.2d 492 (2d Cir. 1985), cert. denied, 475 U.S. 1082 (1986), construed a prior version of the RICO statute that did not contain the word "proceeds." And, in *United States* v. *Riley*, 78 F.3d 367, 371 (8th Cir. 1996), the court stated only that, when a business's "gross receipts" include money obtained through legal activity as well as through RICO violations, "something less than [all] gross receipts" would be forfeitable. See *United States* v. *Simmons*, 154 F.3d 765, 770-771 (8th Cir. 1998) (adopting that reading of *Riley* and holding that "pro-

ceeds" in the RICO forfeiture statute means "gross receipts"). Although Santos purports to find support for a "gross profits" meaning in the Senate Report's reference to "net profits," the Report uses "net profits" interchangeably with "profits," as the quotation cited above indicates. Notably, the term "gross profits" does not appear in the Report.[1]

Diaz takes a different tack, arguing that the government's reliance on forfeiture statutes is misplaced because those statutes generally "sweep more broadly than the definition of the associated offense." Br. 15. He points out, for example, that the forfeiture provision for illegal gambling covers *"[a]ny property * * * used* in" the offense, not just the proceeds. Br. 14 (quoting 18 U.S.C. 1955(d)). As that example indicates, however, when forfeiture statutes sweep more broadly than the associated offenses, they do so by using words other than proceeds that have broader meanings. Nothing about the explicitly broader scope of certain forfeiture provisions suggests that the *identical word* "proceeds" should be given a different meaning in a forfeiture statute than in a statute defining a substantive offense.

In any event, offense-defining statutes also use the term "proceeds" to mean "gross receipts," including statutes that delineate offenses similar to money laundering. For example, 18 U.S.C. 2339C (Supp. V 2005) prohibits the concealment of funds or "proceeds" of funds intended for use in financing terrorism, and it expressly defines "proceeds" to mean "any funds derived from or obtained, directly or indirectly, through" commission of a terrorism-financing offense. 18 U.S.C. 2339C(c)(2) and (e)(3) (Supp. V 2005). Another statute,

[1] Indeed, the RICO and drug forfeiture statutes themselves make clear that "proceeds" has a broader meaning than either "profits" or "gross profits." See 18 U.S.C. 1963(a) ("In lieu of a fine otherwise authorized by this section, a defendant who derives *profits or other proceeds* from an offense may be fined not more than twice the *gross profits or other proceeds*.") (emphasis added); 21 U.S.C. 853(a) (same).

18 U.S.C. 1202(b), criminalizes the interstate transmission or receipt of the "proceeds" of a state-law kidnapping offense. It is highly unlikely that Congress intended a kidnapper to escape liability for interstate transmission of the ransom payment because the payment did not exceed the expenses of the abduction.

Santos also contends (Br. 29) that the term "proceeds" in the money laundering statute cannot mean "gross receipts" because Congress has used the terms "gross receipts" and "gross proceeds" in other criminal statutes. But, as Diaz concedes (Br. 12-13), Congress sometimes uses different words to mean the same thing. See U.S. Br. 20. Moreover, under Santos's logic, the term "proceeds" also could not mean "profits," because Congress has used that term in other criminal statutes as well. See *id.* at 21 (citing statutes).[2]

Nor is there merit to Diaz's related argument (Br. 12) that, if Congress had intended "proceeds" to mean "gross receipts" in the money laundering statute, it would have included an express definition, as it did in Section 2339C(e)(3) and 18 U.S.C. 981(a)(2)(A), a civil forfeiture provision. Both of those provisions were enacted after the Seventh Circuit held in *United States* v. *Masters*, 924 F.2d 1362, 1369-1370,

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[2] As we explain in our opening brief (at 19 & n.2), Congress used the terms "proceeds," "gross receipts," and "gross proceeds" interchangeably in the different subsections of the general criminal forfeiture statute, 18 U.S.C. 982 (2000 & Supp. V 2005), depending on when each subsection was enacted. Santos asserts (Br. 28) that "gross proceeds" has a broader meaning than "proceeds" in the statute, but he makes no effort to explain how the various subsections of the statute could be rationalized under such a reading. For example, Section 982(a)(2)(A) authorizes the forfeiture of the "proceeds" of a mail fraud offense affecting a financial institution, while Section 982(a)(8) authorizes the forfeiture of the "gross proceeds" of a mail fraud offense involving telemarketing. There is no reason why Congress would have wanted the scope of the forfeiture to be broader for telemarketing fraud than for fraud affecting a financial institution.

cert. denied, 500 U.S. 919, and 502 U.S. 823 (1991), that "proceeds" in the RICO forfeiture statute means "profits." Given the uncertainty created by *Masters*, Congress may have wanted to clarify its intent that "proceeds" be given its primary meaning. Moreover, Diaz's argument proves too much, because Congress has also included express definitions of "proceeds" where the term means "gross receipts" less certain costs. See 18 U.S.C. 981(a)(2)(B) and (a)(2)(C).

B. The "Gross Receipts" Definition Gives The Money Laundering Statute Its Proper Scope

1. Diaz also contends (Br. 15-20) that a "profits" definition of "proceeds" "fits best with" the money laundering statute's "two key concepts"—promotion and concealment. On the contrary, a "gross receipts" definition best advances the statute's purpose of preventing criminals from using the fruits of their crimes to promote or to conceal their illegal activities. All of the gross receipts of a crime can be used to promote further crime. And concealing the gross receipts of a crime would, if anything, be more effective in impeding its detection than concealing profits from the crime. See U.S. Br. 21-22.

Diaz mistakenly argues (Br. 15-17) that paying an activity's expenses cannot "promote" criminal activity. He contends that promoting an activity means facilitating its expansion, and that paying an activity's expenses enables it only to survive, not to expand. But one can promote an activity not only by enabling it to expand but also by enabling it to continue. The dictionary definition of "promote" on which Diaz himself relies makes that clear. See 12 *OED* 616 (defining promote as "to further the * * * progress of" or, more generally, "to further, advance, encourage"); see also, *e.g.*, *Random House* 1548 (defining "promote" as "to help or encourage to exist or flourish"). Moreover, paying the expenses of an activity can facilitate its expansion, for example, by enhancing its reputation. See *United States* v. *Iacaboni*, 363 F.3d 1, 5

(1st Cir.) ("[N]othing makes an illegal gambling operation flourish more than the prompt payment of winners.") (citation omitted), cert. denied, 543 U.S. 978 (2004). Indeed, the Seventh Circuit found that the expense payments in this very case did precisely that. See *United States* v. *Febus*, 218 F.3d 784, 790, cert. denied, 531 U.S. 1021 (2000). Thus, instead of giving "promote" its proper meaning, a "profits" definition of "proceeds" would unduly constrict the statute by precluding prosecution of transactions in which criminals use the receipts from criminal activity to promote the continuation and expansion of that activity.

2. Diaz also erroneously contends (Br. 18-20) that a "profits" definition is consistent with the concealment subsection of the money laundering statute. He asserts that expense payments cannot constitute money laundering under the concealment subsection because they are not made to hide the tainted source or nature of the funds involved. But the need for concealment arises from the threat of detection posed by large amounts of unexplained cash. The threat of detection and corresponding need to conceal depend on the existence of cash without any legitimate explanation, not on whether the cash represents profits or the results of an illicit, but unprofitable, transaction. It is not hard, moreover, to imagine a transaction designed both to cover an expense of the underlying crime and to conceal the nature or source of the funds—*e.g.*, the purchase of a stash house by a drug trafficker in the name of an innocent third party. In addition, under a "profits" definition, the statute would not apply to a transaction designed to conceal illicit funds that will eventually be used to pay the expenses of a criminal operation, such as temporarily depositing those funds in a third party's bank account. Nor would it apply to a transaction that is designed to conceal the proceeds of criminal activity that has not yet become profitable. Con-

gress could not have wanted to exclude those efforts to elude detection of crime from the statute's coverage.

Santos does not contest that a "profits" definition of "proceeds" makes no sense for concealment cases. Instead, he argues (Br. 19) that courts can give "proceeds" a different meaning in those cases. That argument is illogical. The term "proceeds" appears in the introductory language of Section 1956(a)(1), which applies equally to both the promotion and the concealment subsections of the statute. See Pet. App. 15a-16a. "To give th[at] same word[] a different meaning" for concealment cases than for promotion cases "would be to invent a statute rather than interpret one." *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005).

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

A "profits" definition would also seriously impede the enforcement of the statute in those money laundering cases that it did not outright preclude.

1. For example, prosecutions of money launderers, including professionals, who did not participate in the predicate crime form a vital component of the government's enforcement efforts. *E.g.*, *United States* v. *Flores*, 454 F.3d 149 (3d Cir.), cert. denied, 127 S. Ct. 614 (2006); *United States* v. *Awada*, 425 F.3d 522 (8th Cir. 2005); *United States* v. *Wert-Ruiz*, 228 F.3d 250 (3d Cir. 2000); *United States* v. *Giraldi*, 86 F.3d 1368 (5th Cir. 1996); *United States* v. *Wynn*, 61 F.3d 921 (D.C. Cir.), cert. denied, 516 U.S. 1015 (1995). The government explains in its opening brief that the "profits" definition would make it very difficult to convict those professional money launderers, because it will frequently be impossible to prove that they knew that the funds they handled were profits. U.S. Br. 11, 29. Neither Santos nor Diaz offers any response.

2. A "profits" definition would also create enforcement difficulties in other cases because criminal enterprises often do not keep accounting records, much less records that are accurate, complete, and decipherable by law enforcement. Respondents assert that concern about inadequate records is "speculat[ive]" (Santos Br. 31) and "[u]nsubstantiated" (Diaz Br. 23). But even the court below acknowledged that "criminals do not always keep ready records," and that could "complicate the government's task of proving promotional money laundering" under a "profits" definition. Pet. App. 13a; see *United States* v. *Grasso*, 381 F.3d 160, 169 n.13 (3d Cir. 2004) (making similar observation), vacated and remanded on other grounds, 544 U.S. 945 (2005), reinstated in relevant part, 197 Fed. Appx. 200 (3d Cir. 2005). Congress too has recognized the "extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits," and, for that reason, rejected a "profits" definition of "proceeds" in the RICO and drug forfeiture provisions. S. Rep. No. 225, *supra*, at 199 (citation omitted); *id.* at 211. Neither the availability of some records in this case nor Diaz's citation of a handful of other cases in which some records were available (Br. 27-28) suggests that records adequate to prove profits are generally available. Indeed, Diaz himself acknowledges that "[t]he incentive to avoid creating a paper trail, or to manipulate whatever trail is created, exists in every criminal case." Br. 24.

Diaz also cites a government study stating that, in 2001, almost half of the prosecutions in which money laundering was the lead offense were predicated on "property offenses." Br. 26 (citing Bureau of Justice Statistics, U.S. Dep't of Justice, *Money Laundering Offenders 1994-2001*, at 6, Table 2 (2003) (*Money Laundering Study*) <http://www.ojp.usdoj.gov/bjs/pub/pdf/mlo01.pdf.)>. Diaz asserts that property offenses—which include embezzlement, fraud, transportation of stolen property, and counterfeiting—"tend[] to generate

business records or other financial evidence." Br. 26. But it is far from clear that those offenses commonly generate the kind of records necessary to prove profits. Embezzlers, for example, are unlikely to keep ledgers showing the expenses that they incurred in their illegal activities. In any event, more than half of the prosecutions in which money laundering was the lead charge were predicated on non-property offenses, including drug trafficking, which are unlikely to generate reliable records of profits. *Money Laundering Study* 6, Table 2. And, in cases in which money laundering was not the most serious charge, 94% of money laundering charges were predicated on non-property offenses. *Id.* at 8.

Diaz argues (Br. 32-33) that forfeiture and sentencing cases show that the government is able to prove profits. But forfeiture statutes generally do not require proof of profits. See U.S. Br. 15-20. Although the Seventh Circuit (unlike every other court of appeals) has construed the word "proceeds" in the RICO and drug forfeiture statutes to mean "profits," Diaz is not correct that proof of "profits" under those provisions has been "*routine*[]." Br. 32. The government has found it to be very burdensome, even though neither the reasonable doubt standard nor the rules of evidence apply. See Stefan D. Cassella, *Asset Forfeiture Law in the United States* § 18-5(d), at 552-553 (2007); Fed. R. Evid. 1101(d)(3). Because of the proof difficulties, prosecutors in drug cases frequently rely on alternative forfeiture provisions that do not require proof of proceeds. See 21 U.S.C. 853(a)(2) (providing for forfeiture of any "property used, or intended to be used * * * to commit, or to facilitate" a drug offense). And, in racketeering cases, prosecutors have permitted defendants to stipulate to amounts of forfeitable "proceeds" that the prosecutors believe are significantly less than the actual "profits" earned by the defendants. See, *e.g.*, *United States* v. *Warner*, No. 06-3517, 2007 WL 2363220 (7th Cir. Aug. 21, 2007). In contrast,

in money laundering cases, the government would face the beyond-a-reasonable-doubt standard and would have no alternative charges that did not require proof of profits. At the same time, defendants would be highly unlikely to stipulate to a critical element of the money laundering offense.

Nor do cases involving sentencing for bribery offenses show that the government could prove "profits" in money laundering cases. As Diaz notes, the Sentencing Guidelines provide for an offense level increase based on the "net value" of the "benefit received" for a bribe. See, *e.g.*, Sentencing Guidelines § 2C1.1(b)(2) & comment. (n.3). At sentencing, however, unlike at trial, the government need prove its case only by a preponderance of the evidence, and it is unconstrained by the Federal Rules of Evidence. See *United States* v. *Watts*, 519 U.S. 148, 156 (1997) (per curiam); Fed. R. Evid. 1101(d)(3). Moreover, several courts of appeals have held that the defendant, not the government, bears the burden of proving the costs that should be subtracted in determining the net benefit. See *United States* v. *DeVegter*, 439 F.3d 1299, 1305 (11th Cir. 2006); *United States* v. *Glick*, 142 F.3d 520, 525 (2d Cir. 1998); *United States* v. *Landers*, 68 F.3d 882, 885 (5th Cir. 1995); but see *United States* v. *Sapoznik*, 161 F.3d 1117, 1119 (7th Cir. 1998). Thus, the sentencing cases shed little light on the government's ability to prove profits as an element of a money laundering offense.

Santos similarly argues (Br. 31) that tax evasion cases show the government's ability to prove net amounts using indirect methods. But the indirect methods of proof used in tax cases are difficult and consume substantial resources. See *Holland* v. *United States*, 348 U.S. 121, 125 (1954); Roger M. Olsen, *Criminal Tax Procedure* § 1401, at 255 (1995 ed.). Moreover, the government is often able to charge alternative criminal tax violations that do not require proof of a tax deficiency. See, *e.g.*, 26 U.S.C. 7203 (failure to file return); 26

U.S.C. 7206 (filing false return). It is unlikely that Congress had an unspoken intent that the government prove routine money laundering cases using complex and burdensome methods drawn from tax prosecutions, particularly when there are no alternative money laundering charges available if those methods prove too onerous in a particular case.

Moreover, the indirect methods of proof used in tax cases do not readily translate to money laundering cases. The principal method used in tax cases requires calculation of the taxpayer's "net worth." See *Holland*, *supra*. But what would it mean to calculate the "net worth" of a criminal activity? Even assuming that the "net worth" concept could be applied to a criminal activity, its application would present significant difficulties.

In addition, the indirect methods of proof used in tax cases depend on accounting and procedural rules contained in the tax code and regulations. It is unclear which, if any, of those rules would apply to the determination of "profits" in a money laundering case. See U.S. Br. 33-35. In particular, several rules that facilitate the government's ability to prove a tax deficiency might well not apply. For example, in tax evasion prosecutions, the government may rely on deductions claimed by the taxpayer on his tax return, and the burden of going forward is generally on the taxpayer to establish deductions not reported. See, *e.g.*, *United States* v. *Kayser*, 488 F.3d 1070, 1073 (9th Cir. 2007); *United States* v. *Garguilo*, 554 F.2d 59, 62 (2d Cir. 1977). The Seventh Circuit has given no indication that a similar burden-shifting rule would apply to proof of expenses in a money laundering prosecution.

3. Respondents also take issue with the government's observation that a "profits" definition of "proceeds" would encumber the courts with complicated questions about what accounting principles should apply to criminal enterprises. Neither respondent disputes that accounting issues will arise,

and Diaz acknowledges that they are "unavoidable." Br. 30. But respondents assert (Diaz Br. 30-31; Santos Br. 32) that the government will have broad discretion to choose the relevant accounting principles. Although that is a generous concession, it is unlikely defendants would be so accommodating at actual money laundering trials conducted under a "profits" definition. Disputes would be certain to arise over difficult issues, including the relevant criminal activity for purposes of assessing profitability; the time period over which profits should be measured; what items qualify as income and expense; and how to differentiate between the payment of expenses and the reinvestment of profits in the case of continuing criminal activity. Even the court below acknowledged that "the line between the payment of expenses and reinvestment of net income is, generally speaking, murky" and that "determining what is and is not net income" could "complicate" money laundering trials. Pet. App. 13a.

Diaz argues (Br. 32) that the sentencing and forfeiture experience discussed above shows that courts can develop the necessary accounting principles. But, as we have already pointed out, most courts of appeals do not require the government to prove profits in forfeiture cases. And none of the cases cited by Diaz supports his claim that courts in the Seventh Circuit have successfully "identif[ied] and appl[ied] the necessary accounting principles" in forfeiture cases. *Ibid.*[3]

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[3] In *Masters*, 924 F.2d at 1369-1370, the court of appeals affirmed the forfeiture determination even though the court below had not calculated "profits," because the only asserted expenses were payments to co-defendants, who were jointly liable for the forfeited amount. In *United States* v. *Genova*, 333 F.3d 750, 761 (7th Cir. 2003), the court of appeals reversed the forfeiture verdicts because the lower court had not required proof of profits. *United States* v. *Arthur*, No. 04-CR-122, 2006 WL 2992865, at *1 (E.D. Wis. Oct. 18, 2006), involved forfeiture under 18 U.S.C. 982(a)(1) (Supp. V 2005), which provides for forfeiture of "property * * * involved in" the underlying offense, not profits. And, in *United States* v. *Dote*, 150 F. Supp. 2d 935 (N.D. Ill. 2001),

Diaz is also not assisted by sentencing cases involving proof of the net benefit from bribes. Bribery cases frequently involve the payment of a bribe to obtain a specific contract provided by an otherwise legitimate business. In that context, standard financial accounting records are readily available, and the determination of net benefit is relatively straightforward. Nonetheless, accounting disputes have still arisen in bribery sentencing cases, and resolution of those disputes has divided the courts of appeals. Compare, *e.g.*, *United States* v. *Pena*, 268 F.3d 215, 219-220 (3d Cir. 2001) (where benefit obtained from bribe is ability to operate illegal business, deduction of business's expenses is not required), cert. denied, 536 U.S. 960 (2002), with *Sapoznik*, 161 F.3d at 1119 (deduction of expenses is required). Courts facing accounting issues at sentencing can consult the Sentencing Guidelines, and the Sentencing Commission is available to provide additional guidance if necessary. But no comparable sources of guidance could resolve the accounting issues posed by a "profits" interpretation of the word "proceeds" in the money laundering statute. Given the lack of guidance, it is unlikely that Congress intended to saddle the courts with those difficult issues.

D. A "Profits" Definition Is Not Needed To Maintain A Distinction Between Money Laundering And The Predicate Offense

1. Respondents also incorrectly argue (Diaz Br. 30-38; Santos Br. 9-16) that the "profits" definition is necessary to maintain a distinction between money laundering and the underlying offense. As we explain in our opening brief (at 36-42), that distinction is maintained by another provision of the money laundering statute—the requirement that there be a distinct financial transaction that "involves the proceeds" of

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the court merely denied a motion to dismiss an indictment that included a forfeiture charge without determining the appropriate amount of forfeiture.

the predicate crime. 18 U.S.C. 1956(a). The "profits" definition is thus unnecessary to maintain a separation between money laundering and the predicate offense and, as described above, it would do so at the cost of unnaturally constricting the scope of the statute and impairing its enforcement.

Diaz contends (Br. 34-36) that the "distinct transaction" approach produces illogical results. For example, he asserts (Br. 35) that it "makes no economic sense" that a bank robber's payment of his accomplices using the proceeds from a bank robbery should qualify as money laundering, whereas the accomplices' payment of themselves by keeping whatever they found at the cashiers' window would not qualify as money laundering (because the robbery and the payment of the accomplices would be a single transaction).

A "profits" definition would not, however, avoid differential treatment of conduct that has similar economic effects. Suppose that several bank robbers agreed to share the profits of a robbery. If they paid themselves in the same way as the accomplices in Diaz's hypothetical, and each paid his share of the expenses of the crime, there would be no money laundering offense under a "profits" definition. But there could be a money laundering offense if they pooled the loot to pay the expenses and then later divided the profits.

Moreover, the differential treatment that Diaz describes simply reflects Congress's decision to criminalize as money laundering only transactions that involve pre-existing, illicitly-obtained funds. Because of that decision, criminals may sometimes make expenditures that promote criminal activity without committing money laundering. And that will be true under either a "profits" or a "gross receipts" definition of "proceeds." For example, under either definition, a would-be criminal would not commit money laundering if he invested in his criminal enterprise before engaging in any crime. But the same criminal would face money laundering

charges if he waited and made the investment using the profits of his criminal activity.

Furthermore, contrary to Diaz's assertion (Br. 34), a "profits" definition alone would not ensure the separation of the money laundering offense and the underlying crime. Absent a distinct-transaction requirement, the bank robbers in the above hypothetical, who agreed to share the profits of the robbery by keeping what each of them took from the cashiers' window, would simultaneously commit both bank robbery and money laundering when they stole the money (provided it exceeded the expenses of the crime). A distinct-transaction requirement, rather than an artificial "profits" rule, therefore best effectuates Congress's intent to punish money laundering only when it is a separate offense.

2. Santos agrees with the government (Br. 34) that the money laundering statute requires the laundering transaction to be distinct from the predicate offense. He claims, however, that his payment of winners and collectors did not satisfy that requirement, and he suggests that this Court should affirm the court of appeals' judgment on that alternative ground. See Br. 34-43. Santos raised a virtually identical claim on direct appeal, the Seventh Circuit rejected that claim, and this Court denied certiorari. See *Febus*, 218 F.3d at 789 (rejecting argument that the evidence was insufficient to convict Santos of money laundering "because his cash payments to the bolita's collectors and winners were essential transactions of the illegal gambling business, and thus cannot also constitute transactions under the promotion provision of the money laundering statute"). Santos did not renew the claim in his motion for collateral relief, see Pet. App. 24a-25a, and the courts below did not address it. Moreover, the issue is not "fairly included" in the question on which this Court has granted review—the construction of the statutory term "proceeds." *Yee* v. *Escondido*, 503 U.S. 519, 533 (1992). Under

those circumstances, it would be inappropriate for this Court to affirm the judgment below based on Santos's claim, even if it had merit. See *Withrow* v. *Williams*, 507 U.S. 680, 720-721 (1993) (Scalia, J., concurring in part and dissenting in part) (issue decided adversely on direct review cannot be relitigated on collateral attack); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 39 (1989) (Court ordinarily will not consider argument not raised below as alternative ground for affirmance).

In any event, Santos's claim lacks merit. He asserts (Br. 36, 39) that the distinct transaction requirement is not met because compensating collectors and paying winners constituted "components" of the underlying federal gambling offense. That is not so. Paying collectors and winners may be necessary for a gambling business to be successful (just as a getaway car may be necessary for a bank robbery to succeed), but those payments are not essential elements of a gambling offense under 18 U.S.C. 1955 (any more than use of a getaway car is an element of the offense of bank robbery).

Santos's arguments to the contrary (Br. 41-43) are unpersuasive. Neither the federal illegal gambling statute, 18 U.S.C. 1955, nor the state statutes on which the Section 1955 offense was predicated require proof of payments to employees or winners in order to establish a violation. See U.S. Br. 41-42. Santos notes (Br. 42) that one element of the federal offense is that the illegal gambling business involves five or more persons. There is, however, no requirement that those persons be employees who have been paid a salary. See 18 U.S.C. 1955(b)(2)(ii). Santos also seeks support (Br. 41) from the definition of "gambling" in Indiana Code Annotated § 35-45-5-1 (LexisNexis Supp. 2006) as "*risking* money or other property for gain" (emphasis added). But money is risked for gain when a gambler places a bet in expectation of a possible payout, even if he does not win, or the gambling enterprise never intends to pay him. Nor is Santos helped by

Indiana's definition of a "lottery" as "a scheme for the distribution of prizes by lot or chance." *Pruitt* v. *State*, 557 N.E.2d 684, 690 (Ind. Ct. App. 1990). A person who sells chances that purport to offer the prospect of a prize is guilty of "selling chances" in a such a scheme whether or not he is willing or able to supply the prize.

3. Both respondents contend (Diaz Br. 37-38; Santos Br. 9-16) that, under a "gross receipts" definition of "proceeds," virtually every violation of the federal illegal gambling statute, 18 U.S.C. 1955, would constitute money laundering. They argue that Congress could not have intended to impose the greater penalties for money laundering simply for committing the underlying crime. No doubt, certain criminal enterprises, such as gambling businesses and drug-trafficking operations, need to launder money in order to survive and to prosper. If they are to stay in business and to expand, gambling businesses must pay their winners and collectors, and drug kingpins must pay their couriers and purchase new stock-in-trade. But it is precisely those types of transactions—transactions that facilitate the continuation and expansion of criminal activity—that Congress targeted in the promotion subsection of the money laundering statute. When those transactions are separate and distinct from the elements of the underlying offense, they may constitute money laundering. Allowing a defendant to defeat a money laundering charge on the ground that money laundering was otherwise integral to his criminal operation would undermine the purpose of the statute.

E. The Rule Of Lenity Does Not Support A "Profits" Definition of "Proceeds"

In the end, respondents place heavy reliance (Diaz Br. 29-30; Santos Br. 38-40) on the rule of lenity. That reliance is mistaken. The purposes of the rule are to ensure that defendants have fair warning of the boundaries of criminal conduct and that Congress, not the judiciary, defines criminal liability.

See *Crandon* v. *United States*, 494 U.S. 152, 158 (1990). The rule should therefore not be applied when it would create a host of new uncertainties about the scope of the criminal statute, which would have to be resolved by the courts. That is precisely what would occur if this Court adopted a "profits" definition of "proceeds." See pp. 13-14, *supra*; U.S. Br. 29-32.

Moreover, the rule of lenity has the greatest force when the broader reading of a statute threatens to criminalize conduct that reasonable people could regard as innocent. See *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703-704 (2005). But there is no danger of that here, because the money laundering statute's *mens rea* requirement ensures that innocuous conduct will not be criminalized. See 18 U.S.C. 1956(a)(1)(A)(i) and (B)(i) (requiring intent to promote specified unlawful activity or knowledge that transaction is intended to conceal the character of the proceeds of specified unlawful activity).

Finally, the rule of lenity comes into play only "after seizing everything from which aid can be derived" in order to prevent courts from having to "make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998) (internal quotation marks and citation omitted). Here, no guesswork is required: Congress intended "proceeds" to mean "gross receipts."

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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