Confusion in Defining "Proceeds" Under the Money-Laundering Statute: A Survey of Circuit Opinions

Efraim Santos received a 60-month sentence for operating an illegal gambling operation as well as a 210 month sentence for money-laundering. The latter was based on an interpretation of the undefined term "proceeds" under the money-laundering statute to include payments made to Santos' employees and the gambling winners. This obviously created a wide-reaching effect of the statute, allowing prosecution to tack on money-laundering charges to almost any illegal enterprise. What follows is a brief overview of the various approaches taken by courts throughout the United States.

By Brian Dickerson and Klodiana Basko

In the plurality decision handed down in *United States v. Santos*, the U.S. Supreme Court unsuccessfully attempted to make sense of the undefined term "proceeds" found in 18 U.S.C. § 1956, the federal money-laundering statute—a statute whose wide-reaching effect was well illustrated by the facts of the case. The lead defendant in *Santos*, Efraim Santos, operated an illicit lottery in Indiana for more than two decades.[1] Gamblers would place their bets with "runners" at local establishments. The runners took their commission from the wagers and handed the remaining money over to "collectors," who then delivered the money to Santos. Santos used the money he received to pay the collectors' salaries and to pay off the winners of the lottery. The prosecution charged Santos not only with illegal gambling but also with conspiracy to launder money and with money laundering. Santos received a 60-month sentence for the gambling charges and a 210-month sentence for the money-laundering charges.

The question before the Court was whether the payments to Santos' employees and the winners constituted criminally derived proceeds under the money-laundering statute. If they did, then Santos' 210-month sentence for money laundering would be affirmed. The justices were sharply divided on the question and wrote four separate opinions, none commanding a majority.[2] The plurality decision, written by Justice Antonin Scalia and joined by Justices Clarence Thomas, David Souter, and Ruth Bader Ginsburg, recognized that the term "proceeds" is inherently ambiguous, not defined by the statute, and subject to at least two conflicting interpretations—profits and receipts—neither of which is facially or contextually implausible. Therefore, with no legislative history to indicate congressional intent to define "proceeds" as "receipts," the ambiguity triggered the "rule of lenity," which requires ambiguous terms in criminal statutes to be construed in favor of the defendant. Thus, the term "proceeds" should be defined as "profits" of the activity, rather than merely "receipts."

In addition, according to Justice Scalia's plurality opinion, adopting the definition of the term as "receipts" would create a "merger problem," which he described as follows:

> If "proceeds" meant "receipt," nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery. Since few lotteries, if any, will not pay their winners, the statute criminalizing illegal lotteries, 18 U.S.C. § 1955 would "merge" with the money-laundering statute. Congress evidently decided that lottery operators ordinarily deserve up to 5 years of imprisonment, § 1955(a), but as a result of the merger they would face an additional 20 years, § 1956(a)(1).

Id. at 2026.

Justice Stevens, writing for himself, concurred in the judgment in favor of Santos but rejected the always-the-one

or always-the-other approaches offered by his colleagues. Justice Stevens determined that the meaning of "proceeds," as found in § 1956, varies depending on the underlying predicate offense.[3] He opined that "proceeds" means "profits" if the laundered funds derived from operating an illegal lottery, but it might mean "gross receipts" if the laundered funds derived from distributing cocaine. *See id.* at 2031–32 (Stevens, J., concurring in the judgment). Two factors drove Justice Stevens' assessment of how to apply the provision in various settings as well as his ultimate decision to apply a profits definition to *Santos*: (1) Defining "proceeds" as "profits" when the predicate offense is operating an illegal lottery created a "merger problem" that "radically increase[d] the sentence for that crime" and led to a "perverse result" that "Congress could not have intended." *Id.*, quoting *Santos* at 2033. (2) Nothing in the legislative history of § 1956 suggested that Congress was aware of this problem and still chose to treat "proceeds" as gross receipts when the laundered funds derive from operating an illegal lottery. *Id.* Under these circumstances, Justice Stevens concluded that the rule of lenity tipped the scale in favor of defining "proceeds" as profits when the predicate offense is operating an illegal lottery. *Id.*, quoting *Santos* at 2033–34.

Justice Stevens' opinion prompted Justice Scalia to add language to comment on stare decisis effect of the ruling. He observed that, because Justice Stevens' vote was necessary to the judgment and because his opinion rested on the narrower ground, the Court's opinion would be limited accordingly. However, the "narrowest ground," as defined by Justice Scalia, was "that 'proceeds' means 'profits' when there is no legislative history to the contrary." *Id.* at 2031. Justice Alito, in his dissenting opinion, expressed his concern that the burden to prove that transactions underlying a charge of profits produced by money laundering would be extremely difficult for the government to meet.

In sum, the divided Court expressed three views on the meaning of the term "proceeds": The more "defendant-friendly" definition held that the term "proceeds" means "profits" in all money-laundering cases;[4] four justices reached the opposite conclusion, deciding that "proceeds" means "the total amount brought in," or the "gross receipts" of a crime;[5] and Justice Stevens was the only one to interpret "proceeds" to mean "profits" for some predicate crimes and "receipts" for others.[6] Thus, it appears that a driving force behind the Court's decision was the disproportionate penalty imposed for the money-laundering convictions.[7] Even though the Court's decision was quite fragmented, none of the justices defended the rationality of disproportionate punishment. After the Court released its opinion, criminal law practitioners and scholars predicted that *Santos* would have a radical impact on the way money-laundering cases would be prosecuted.[8]

Legislative Response to *Santos*

Before examining how courts have applied the *Santos* decision, it is important to note that its holding has no effect or application on current money-laundering cases. Congress gave a response to the *Santos* decision by modifying 18 U.S.C. § 1956 in the Fraud Enforcement and Recovery Act of 2009 (FERA), which provided clarity and uniformity.[9] Legislatively overruling *Santos*, FERA, in 18 U.S.C. § 1956(c)(9), added a new paragraph to the federal money-laundering statute, now explicitly defining "proceeds" as "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." In addition, the act allocated more than $500 million to investigating and prosecuting fraud. According to Sen. Patrick Leahy (D-Vt.), the *Santos* decision was inconsistent with congressional intent and, if left uncorrected, it would have allowed those committing fraud to escape liability by pleading that their Ponzi scheme or original trades had not turned a profit.[10]

Despite the clear direction provided by Congress for the current money-laundering cases, *Santos* is still controlling law for the numerous cases that preceded the new revisions to the statute. Courts are forced to apply *Santos* in many instances and are guided in doing so by the Supreme Court's own instruction in *Marks v. United States*, 430 U.S. 188, 193 (1977), which states the following: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest ground." It is, however, difficult to determine the "narrowest" ground in the *Santos* opinion, and, as this article illustrates, lower courts have struggled to do so.

Judicial Application of *Santos*

The Narrow Approach: Limiting Santos *to Its Facts*

It is no surprise that courts are divided in their application of the *Santos* decision. Some courts have taken a narrow view and held that the term "proceeds" means "profits" when the specified unlawful activity is the operation of an illegal gambling business—the position taken by Justice Stevens. Basing their holdings on *Marks,* these courts found that the "narrowest ground" was to limit *Santos* to its facts. Accordingly, these courts adopted the position that, at most, "proceeds" under § 1956 meant the profits of an unlicensed gambling operation.[11]

It seems that courts holding this narrow view are in the majority, especially when the underlying offense is a drug offense or other related narcotics charges, which require the courts to define "narcotics proceeds." In *United States v. Spencer*, 592 F.3d 866 (8th Cir. 2009), the Eighth Circuit held that *Santos* does not apply in cases involving narcotics and drugs. The *Spencer* court based its opinion not only on Justice Stevens' narrow rationale but more so on Justice Alito's statement in his dissenting opinion that "five Justices agree with the position that the legislative history of [18 U.S.C.] § 1956 makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Santos* at 2032 (J. Stevens' acknowledgment of J. Alito's statement) and at 2035, n.1 (J. Alito, dissenting.)

Various other courts adopted a similar position. The Fourth Circuit held that "*Santos* does not establish a bind-

ing precedent that the term 'proceeds' means 'profits' except regarding an illegal gambling charge." *United States v. Howard*, 309 F. App'x 760, 771 (4th Cir. 2009) (rejecting the defendant's argument that the money earned by prostitutes was put back into the business in the form of new clothes and room and board and was therefore not "proceeds" under *Santos*). The Third Circuit held that the "term 'proceeds' includes gross revenues for drug sales," thus denying any effect of *Santos* on drug-related cases. *United States v. Fleming*, 287 F. App'x 150, 155 (3d Cir. 2008). The Eleventh Circuit also held that *Santos* has limited value, restricting its holding only to cases of illegal gambling operations in *United States v. Demarest*, 570 F.3d 1232 (11th Cir. 2009).

The reasons for adopting such a narrow view have not differed much among the courts, whose rationale rests on the Supreme Court's decision in *Marks*. For example, the D.C. Circuit held that it would not reach the same conclusion that Justice Scalia did in his opinion. Rather, the D.C. Circuit found that when Justice Scalia's and Justice Stevens' opinions are read together, *Santos* defines "proceeds" as "profits" only in the context of an illegal gambling operation, and it does not mandate a definition in the context of another alleged unlawful activity, such as mail fraud. *United States v. Darui*, 614 F. Supp. 2d 25, 30 (D.D.C. 2009). This decision reflects the straight application of the rule in *Marks*.

Even though other courts have aligned themselves with the narrow view, they have found it to be a less than perfect guide in interpreting and applying *Santos*. The Western District of Tennessee clearly expressed the resulting inconsistencies in *United States v. Prince*, 627 F. Supp. 2d 863, 864–65 (W.D. Tenn. 2008). In this case, the defendant operated several companies that provided physical therapy services and was convicted of money laundering for having conducted transactions that involved proceeds derived from health care fraud. The defendant argued that, in light of *Santos*, he should be acquitted of some of the money-laundering charges because his payments to billing companies and to individuals performing quality control "constituted part of the costs of operations of the clinics." *Id.* at 868–69. The court disagreed, holding that Santos was limited to cases involving illegal gambling, and therefore it would continue to apply the definition of "proceeds" as "receipts" in cases in which the specified unlawful activity is health care fraud.

It is important to note, however, that the *Prince* court acknowledged that the application of the definition of "proceeds" as "profits" in the context of illegal gambling and as "receipts" in the context of health care fraud is in tension with (1) the holding in *Clark v. Martinez*, 543 U.S. 371 (2005), which forbids giving a word a different meaning in different applications of the same statute; (2) the view of at least seven Supreme Court justices in *Santos*; and (3) Justice Stevens' own dissent in *Pace v. DiGuglielmo*, 544 U.S. 408, 425–26 (2005), in which he stated that "this Court has generally declined to adopt rules that would give the same statutory provision different meanings in different contexts and I would decline to do so here." *Id* at n.5. Surrendering to this fact, the *Prince* court stated that this tension is the inevitable result of application of the *Marks* rule to the fragmented decision in *Santos*. *Id*.

The Second Approach: Reconciling the Plurality and Concurring Santos *Opinions*

The second view of *Santos* is offered by the Sixth Circuit, which has taken two slightly different views of the case. Even though Judge White did not specifically apply *Santos* in *United States v. Hall*, 549 F.3d 1033, 1042 (6th Cir. May 2009), she concluded that the proposition established in *Santos* was "that transactions involved in the normal course of running the illegal operation do not constitute transactions involving criminal proceeds in violation of the money-laundering statute." This position indicates that Judge White would sign on to the narrow view and straight application of *Marks*, as described above.

However, recognizing the tension created by a straight application of *Marks*, Judge Sutton,[12] who also sits on the Sixth Circuit, took a different approach in *United States v. Kratt*. After providing an extensive analysis of the *Santos* decision, he seemed openly dissatisfied with simply adopting the narrow approach and recognized the difficulty of reconciling the plurality and concurring decisions and thus making sense of the *Santos* decision. Judge Sutton's decision is worth reviewing in detail.

The defendant in *Kratt* refinanced his airplane by obtaining a loan based on fraudulent income tax returns that inflated his adjusted gross income. Kratt was indicted on three counts of engaging in monetary transactions in criminally derived property under 18 U.S.C. § 1957, a statute that also uses the term "proceeds" and "covers the same subject matter [as § 1956 discussed in *Santos*] in a common way." *Kratt* at 560. First, Judge Sutton held that the term "proceeds" under § 1957(f)(2) has the same meaning as "proceeds" under § 1956(a), because the statutes "criminalize similar acts—money transactions in criminal proceeds"—and simply do so from different angles. Next, he analyzed the holding in *Santos*, and, because no opinion in *Santos* commanded a majority, he applied the rule that was applied in *Marks*. Clear about the challenge that *Marks* presents, Judge Sutton candidly wrote that interpreting and "applying the position taken by the Justice who concurred on the narrowest ground ... is easier said than done." *Id*. at 560–61. He explained that, unless the concurring opinion is "a logical subset" of the other opinion or opinions, applying *Marks* can be "an exercise in chasing the wind." *Id*. at 561.

Nonetheless, Judge Sutton found that there was a coherent way to apply *Marks* in the case before him. Specifically, he found a "narrowest ground" in Justice Stevens' approach that also created a logical subset of Justice Scalia's approach, at least in terms of outcome: "'Proceeds' does not always mean profits; … it means profits only when the § 1956 predicate offense creates a merger problem that leads to a radical increase in the statutory maximum sentence and only when nothing in the legislative history suggests that Congress intended such an increase. … Whenever a predicate offense satisfies this narrow rule, the Justices in the plurality would hold 'proceeds' means profits as well, because they would define 'proceeds' as profits for every predicate offense." *Kratt* at 562.

However, he also acknowledged that this approach has two unsatisfactory features: (1) It will require courts to define "proceeds" for more than 250 predicate offenses under the money-laundering statute—"a regime that may generate a cottage industry of *Santos* litigation for years to come." (2) The approach "will create a more severe notice/rule-of-lenity problem than the one that predated *Santos*." These concerns are not as significant now that Congress has adopted a clear "gross receipts" position. However, courts that are still attempting to interpret *Santos* are now provided significant guidance if they choose to take the approach suggested by Judge Sutton.

Ultimately, Judge Sutton held that the term "proceeds obtained from a criminal offense," in 18 U.S.C. § 1957(f)(2), refers to "gross receipts" rather than "profits," except in two instances: (1) when an 18 U.S.C. § 1956 predicate offense creates a merger problem that leads to a radical increase in the statutory maximum sentence and (2) only when nothing in the legislative history suggests that Congress intended such an increase. Applying this rule to the facts in *Kratt*, Judge Sutton found that the merger problem existed for offenses under § 1957, but the merger was not the kind that troubled Justice Stevens. In cases when the predicate offenses are "bank fraud" and "making false statements," there was no radical increase in the statutory maximum sentence.

The Ninth Circuit adopted Judge Sutton's analysis of *Santos* and applied it to the circuit's latest case. *See United States v. Van Alstyne*, 584 F.3d 803 (9th Cir. 2009). The predicate offense in *Van Alstyne* was mail fraud in conjunction with a scheme to defraud investors. The court had to determine whether the offense could present the "merger" problem "that was a fulcrum consideration for the *Santos* plurality and concurrence." *Id*. at 814. Analyzing the specific facts of the case, the court found that this particular mail fraud scheme involved payments that could implicate the "merger" problem, but other cases might not involve such payments.

As an example of the latter type of offense, the court mentioned the case of *Bridge v. Phoenix Bond & Indem. Co.,* 128 S. Ct. 2131, 2138 (2008). The mail fraud scheme in this case hinged on the defendants' false attestations of compliance with a particular rule for bidding for a fair opportunity to participate in an auction. The scheme itself did not require payments to be made in order for it to succeed or advance. This was not so in the case of Van Alstyne, in which the scheme involved the distribution of checks that allegedly represented generous returns on Van Alstyne's victims' investments. Distributing such payments, the court found, was a central component of the "scheme to defraud." *Van Alstyne*, 884 F.3d at 815.

The court ultimately held that *Santos* suggests that "the 'profits' definition of 'proceeds' should apply where the particular crime at issue depends on necessary payments. … The plurality [in *Santos*] noted that 'any wealth-acquiring crime with multiple participants would become money laundering when the initial recipient of the wealth gives his confederate their shares.'" *Id*., quoting *Santos* at 2026–27. "The 'merger' problem may therefore be triggered when multiple participants share profits, regardless of whether the predicate crime would overlap with money laundering if executed by a single criminal." Hence, the court found it important to note that, in the context of mail fraud, the inquiry must focus on the concrete details of the particular "scheme to defraud," rather than on whether mail fraud generally requires payments of the kind implicated in *Santos.*

The view taken by the Ninth Circuit was a reconciling application of the *Santos* opinion and provided further guidance after the *Kratt* decision. It also brought to light and even deepened the concerns expressed by Judge Sutton: that the approach would create a "cottage industry of *Santos* litigation." The Ninth Circuit not only focused on the predicate offense but also focused even more on the actual details of the particular activity underlying the charges of the predicate offense. Therefore, unless the facts of the case establish that the payment of expenses is necessary to advance a particular "scheme" or "crime," defendants need not call upon the *Santos* ruling for help. The questions as to whether the payment of expenses is necessary and whether a certain payment is made out of "profits" or "gross receipts" are also problematic to answer, even under the approach adopted by the Sixth and Ninth Circuits. This dilemma can be especially difficult for courts that take the next and third approach—adopting a bright-line rule based on the plurality's opinion.

The Broad Approach: Providing Uniformity in Defining "Proceeds"

Some courts have held that the definition of "proceeds" adopted in the *Santos* ruling applies to unlawful activities other than illegal gambling. This bright-line rule seems to be as easy to apply as the narrow approach is, but it also provides the most consistency in defining the term "proceeds" throughout § 1956, with its 250 predicate offenses underlying money-laundering charges. However, this approach has several drawbacks.[13] First, "adopting [it] ignores the fact that five Justices clearly stated that they believed that Congress intended a 'gross profits' definition of 'proceeds' to apply in cases involving drug trafficking and related activities of organized crime."[14] Second, as in the second approach, a "profits" definition across the board "may encourage lower courts to define 'profits' expansively to allow the government to seek convictions under the money-laundering statute." *Id*.

The discussion that follows offers a few illustrations of the "expansive" view of "profits" taken by some courts. In *United States v. Yusuf*, 536 F.3d 178, 190 (3d Cir. 2008) "proceeds" was defined as "profits" when the defendants intentionally misrepresented the total amount of their supermarket's gross receipts through the mailing of fraudulent tax returns. The court determined that the defendants were able to secretly "pocket" the 4 percent gross receipts taxes on the unreported amounts that were the property of the Virgin Islands government. Also, in *United States v. Baker*, No. 06-CR-20663, 2008 WL 4056998, at *4 (E.D. Mich. Aug. 27, 2008), the court affirmed a defendant's money-laundering conviction when "conspirators purchased cars, homes, and jewelry for their own use with

some part of the money which they did not use for essential expenses relating to drug trafficking."

The Eastern District of New York adopted the narrow view, limiting *Santos* to its facts, and hypothetically addressed the definition of "profits" given in *United States v. Gotti*, No. 08-CV-2664(FB), 2009 WL 197132 (E.D.N.Y., Jan. 28, 2009). Relying on Justice Scalia's opinion, the court examined clues found in the plurality decision as to what they consider the definition of "proceeds": "By definition profits consist of what remains after expenses are paid." *Id.* at *3, quoting *Santos* at 2027. The *Gotti* court also determined that "proceeds" also include that "defraying an activity's costs with its receipts simply will not be covered." *Id.* As such, the court held that payment of tributes to the head of an organized crime family is precisely "what remains after expenses are paid."

On the other hand, the broad bright-line approach can also allow courts to expand the type of payments that are considered "necessary expenses." Some cases are clear, but others are not, especially those in which business expenses are intertwined with the defendants' personal expenses. An example of the former is the Seventh Circuit's finding that the rent, utilities, and wages paid by a prostitution enterprise were insufficient to support a separate conviction on money-laundering charges, because these costs are regular expenses that are essential to the spa's operation, and as such, they are not "proceeds" within the meaning of § 1956(a)(1). *United States v. Lee*, 558 F.3d 638, 643 (7th Cir. 2009).

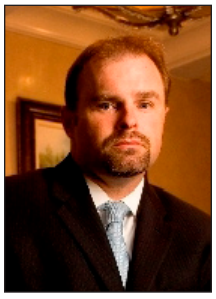
An example of the latter is presented in a Northern District of California case, in which the prosecution based the money-laundering conviction for a marijuana cultivator on the fact that he had used a portion of the proceeds from his crop to pay the mortgage on the building used to grow marijuana. *United States v. Hedlund*, No. CR-06-346-DLJ, 2008 WL 4183958, at *5 (N.D. Cal. Sept. 9, 2008). The court set aside the defendant's money-laundering conviction, because the court considered the mortgage payment to be a business expense, as opposed to profit. According to the court, "Justice Scalia made it very clear that [*Santos*] was not to be read as permitting the word 'proceeds' to be given different meanings for different applications of the statute." *Id.* at *6.

The *Hedlund* decision is especially interesting, because the predicate offense involved the growing of drugs or contraband. As the government argued, five justices agreed that "proceeds" meant "gross receipts" in drug trafficking cases. The California District Court dismissed such a view by stating that "the bottom line is that five Justices said that, but they did not vote that. The specific result of *Santos* is that five Justices voted that 'proceeds' means 'profits'" *Id.* at *6. Even though the mortgage payment in *Hedlund* was for a warehouse in which the defendant was growing marijuana, the inquiry would necessarily become more problematic in cases in which the payments are made for a defendant's home out of which he or she also operated the illegal activity. The "necessary expenses" and "personal expenses" are not as easy to discern. Thus, the bright-line approach might not provide as clear guidance as the plurality hoped for in *Santos*.

Conclusion

The Supreme Court justices wrestled with the appropriate definition of the ambiguous term "proceeds" found in 18 U.S.C. § 1956, the federal money-laundering statute. The splintered decision of the Court spurred Congress to clearly define "proceeds" as "gross receipts," thus ending the inquiry for current and future money-laundering cases. However, courts throughout the United States have had to make sense of the *Santos* decision with regard to cases decided prior to the new amendment to the law. The courts have taken three different approaches. Most of the courts have chosen to adopt the opinion of the justice who decided the case on the narrowest grounds, thus limiting the *Santos* decision to money-laundering charges in cases in which the predicate offense is illegal gambling. Some courts have applied the bright-line rule of the plurality decision, whereby the term "proceeds" would be defined as "profits," thus providing uniformity in interpreting 18 U.S.C. § 1956 in connection with its 250 predicate offenses. Finally, the Sixth Circuit took yet a different approach, which the Ninth Circuit adopted, and defined "proceeds" as "gross receipts" rather than "profits," except when a predicate offense under 18 U.S.C. § 1956 creates a merger problem that leads to a radical increase in the statutory maximum sentence and only when nothing in the legislative history suggests that Congress intended such an increase. However, courts that have applied these approaches have not been fully satisfied with either their conclusions on the *Santos* opinion or the application of *Santos* to the cases in front of them, finding flaws and inconsistencies.

Thus, unless the U.S. Supreme Court undertakes to clarify its opinion, it is recommended that practitioners whose cases are affected by the *Santos* decision should not only conduct research on the position taken by the applicable circuit or district court but also incorporate into their arguments the rationale adopted by other circuits, as the explanation offered by them might very well serve as persuasive authority. **TFL**



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PROCEEDS *continued on page 51*

PROCEEDS *continued from page 27*

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Endnotes

[1]*United States v. Santos*, 553 U.S. 507, 128 S. Ct. 2020, 2023 (2008).

[2]Fernich, Marc, *Money Laundering After* "Santos": *A Supreme Mess*, 240 N.Y.L.J. (Oct. 17, 2008).

[3]*U.S. v. Kratt*, 579 F.3d 558, 561–562 (6th Cir. 2009).

[4]Carlos F. Gonzalez and Regan Kruse, *U.S. Anti-Money Laundering Laws in the Wake of* U.S. v. Santos, ANDREWS WHITE-COLLAR CRIME REPORTER, 24 No. 4 ANWCCR 2, at 3 (Dec. 31, 2009), quoting *Santos* at 2025 (Scalia J., joined by Souter, Thomas and Ginsburg J.J.)

[5]*Id.* quoting *Santos* at 2035–36, 2044 (Alito, J., dissenting, joined by Roberts, C.J., Kennedy, and Breyer, J.J.).

[6]*Id.*

[7]Barry Boss, Jon May, and Matt Swerdlin, *Money Laundering Defense After* Santos *and* Regalado Cuellar, 32 SEP. CHAMP. 2., at 3.

[8]"Transactions that 'normally occur' during the course of committing a particular crime are likely 'not identifiable uses of profits and thus do not violate the money-laundering statute'. ... '[P]aying the expenses of … illegal activity cannot possibly violate the money laundering statute, because by definition profits consist of what remains after expenses are paid. Defraying an activity's costs with its receipts simply will not be covered.' Based on this reasoning, *Santos* would seem to stand for the remarkable proposition that distributions to co-conspirators are outside the money laundering statute and that only financial transactions involving an individual's or entity's take-home profit from criminal activities (after paying all expenses) can qualify as money laundering." *Id.* at 4.

[9]*Id.*, quoting Pub. L. No. 111-21, 123 Stat. 1617 (2009).

[10]Daniel Margolis and Anne Lefever, *What Proceeds? Whether the Term is Defined as Net or Gross Profits Makes the Big Difference*, 242 N.Y.L.J., quoting Press Release of Sen. Patrick Leahy, Chairman, S. Judiciary Comm., *Introducing the Fraud Enforcement and Recovery Act* (Feb. 5, 2009), S. 386, 111th Cong. § 2 (2009), available at leahy.senate.gov/press/press_releases/release/?id=c556b483-a161-4e19-894d-dc9221b8cac3 (Last checked on April 6, 2010).

[11]*See U.S. v. Kelley, II,* No. 08-00327-CG, 2009 WL 2382752 at *4 (S.D. Ala. July 29, 2009).

[12]Judge Jeffrey S. Sutton served as a law clerk to Justice Antonin Scalia between 1991 and 1992.

[13]Evan Ennis, *An Uncertain Precedent,* U.S. v. Santos *and the Possibility of a Legislative Remedy,* 95 CORNELL L. REV. 191 (Nov. 2009) at 203.

[14]*Id.*

WAIVERS *continued from page 47*

Cir. 2009); *United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005); *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc); *United States v. Andis*, 333 F.3d 886, 889 (8th Cir. 2003) (en banc); *United States v. Khattak*, 273 F.3d 557, 563 (3rd Cir. 2001); *United States v. Teeter*, 257 F.3d 14, 25–26 (1st Cir. 2001).

[13]The case that formed the basis for the example here came from the Fourth Circuit, which ruled that an appeal waiver is ineffective if the district court fails to question the defendant about it, *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992); *United States v. Wessells*, 936 F.2d 165, 167–68 (4th Cir. 1991), unless other evidence in the record shows that the waiver was informed and voluntary. *United States v. Davis,* 954 F.2d 182, 186 (4th Cir. 1992). *See, e.g., United States v. Goins*, 51 F.3d 400, 403 (4th Cir. 1995).

[14]Also before the Sixth Circuit was the question of whether the appeal waiver was enforceable. *Robinson*, 455 F.3d at 609. The district court had mentioned the existence of the appeal waiver at the plea hearing but had not addressed the appellant to ascertain if he understood that provision. *Id.* The Sixth Circuit reviewed the decision for plain error and found none. *Id.* at 610. This was not the analysis in *Robinson*, in which the Sixth Circuit cited *Hare*, and this analysis did not address the question of whether an appeal waiver could be severed from a plea agreement. Thus, this section of *Robinson* was not relevant to the district court's decision.

[15]The *Robinson* decision cites *Hare*, 269 F.3d at 862, for this quote; but the quote is found at 860.

[16]*See Wenger*, 58 F.3d at 282 ("Most waivers are effective when set out in writing and signed."); *see, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041 (1973) (Fourth Amendment right to privacy); *United States v. Mezzanatto*, 513 U.S. 196, 115 S. Ct. 797 (1995) (right to exclude from evidence a proffer made as part of plea negotiations).

[17]It is interesting to note that the *Hare* court cited *Teeter* despite the recognition that *Wenger* could no longer control the issue. *Hare* cited *Teeter* for the proposition that an appeal waiver must be enforced unless the complete plea agreement is annulled. *Hare*, 269 F.3d at 860. But *Teeter* does not support the all-or-nothing approach to plea agreements. Instead, *Teeter* stands for the proposition that appeal waivers are valid but only if they are knowingly and intelligently entered.

[18]*See Goodson*, 544 F.3d at 540 n.10 (concluding that Rule 11 "error was compounded, in our view, by the government's failure to ask the District Court to comply with the mandate of Rule 11(b)(1)(N)").