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Money Laundering Defense After *Santos* And *Regalado Cuellar*

Money, it's a crime.
— Pink Floyd¹

For some time, prosecutors and money laundering charges have had a romantic relationship. For many years, the breadth of the statute was matched only by its draconian sentencing guideline ranges. In 2001, the Sentencing Commission amended U.S.S.G. § 2S1.1 to tie offense levels for money laundering more closely to the underlying conduct that was the source of the criminally derived funds.² Many expected that this amendment would eviscerate the plea bargaining leverage that prosecutors obtained when they included such charges in an indictment, and as a result, there would be a precipitous decrease in the number of money laundering cases brought. But, for reasons that are unclear, prosecutors continued to charge money laundering even in “mine-run” cases.³ Fortunately, recent developments, including most significantly the Supreme Court money laundering decisions during its 2007-08 term, may signal a sea change in how courts interpret the statute and, therefore, how prosecutors charge it.



In this article, we address two issues that defense attorneys should be aware of in any money laundering case. The first issue, as a result of the Supreme Court's decision in *United States v. Santos*,⁴ is that the financial transaction that allegedly constitutes the “laundering” must involve the profits, not merely the receipts, of a criminal operation.⁵ From a defense perspective, the primary significance of this holding is that it bolsters the argument that financial transactions that are part and parcel of the underlying criminal activity cannot likely serve as the basis for a separate money laundering conviction. The second issue, which is derived from the Supreme Court's holding in *United States v. Regalado Cuellar*,⁶ applies to cases brought under 18 U.S.C. § 1956(a)(1)(B)(i) (involving intent to conceal). Specifically, to be guilty of concealment money laundering, the defendant's *purpose* in engaging in a financial transaction or transporting money abroad must be to “conceal or disguise” the nature, location, source, ownership or control of those funds.⁷ The holding in *Regalado Cuellar* means that the inevitable effort to conceal every crime from law enforcement does not transform every financial transaction or transportation involving criminally derived funds into money laundering.

While the Court's decisions are heavily grounded in statutory construction, the holdings also reflect a concern, long held by defense attorneys, that the money laundering statute is being used abusively by prosecutors. These developments will provide substantial defense ammunition at the pre-trial, Rule 29, and jury instruction stages of a money laundering case.

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I. The Distinction, or Lack Thereof, Between the Underlying Crime and the Financial Transaction

Prior to the Court's decision in *Santos*, the threshold issue for defense attorneys to consider in any money laundering case was whether there was a sufficient distinction between the underlying conduct that allegedly generated the proceeds used in the financial transaction and the financial transaction itself. In *Santos*, the Court did an end-run on the substantial body of law discussing this distinction, and held that what it called the "merger problem"⁸ would be largely avoided if the definition of "proceeds" in the money laundering statute is limited to illegal "profits" from, and not merely receipts of, a criminal operation. In so doing, the Court did not reject the pre-existing law requiring that the charged financial transaction not be merely incidental to the underlying criminal activity, but it did change the landscape for defendants and defense attorneys seeking to challenge a broad application of the money laundering statute.

A. The Statutes

The Money Laundering Control Act of 1986⁹ allows the government to reach financial transactions and profits from specified unlawful activities.¹⁰ The legislation was designed to penalize financial transactions connected to organized crime and narcotics trafficking,¹¹ and targeted the means by which proceeds of illicit activities were cleansed and changed into a "useable form."¹² Despite these lofty objectives, in practice, prosecutors have relied on the Act to charge individuals who have committed crimes generating financial proceeds and then engaged in the most pedestrian of financial transactions.¹³

The government must prove four elements to convict a person of money laundering under § 1956.¹⁴ First, the person must conduct or attempt to conduct a financial transaction.¹⁵ Second, the transaction must in fact involve the proceeds of specified unlawful activity.¹⁶ The offenses constituting "specified unlawful activity" extend well beyond organized crime and narcotics trafficking to include fraud,¹⁷ bribery,¹⁸ gambling, counterfeit merchandise, and copyright infringement.¹⁹ Third, the person must have knowledge that the proceeds resulted from some form of unlawful activity.²⁰ Fourth, the person must act:

(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.²¹

While § 1956 requires one of the enumerated intents to be convicted (e.g., intent to promote certain criminal activity or intent to conceal the proceeds), § 1957 includes no such specific intent. Rather, in essence, § 1957 criminalizes any "monetary transaction" involving the "proceeds" of specified unlawful activity, assuming that the person engaging in the transaction knows that the proceeds are from some form of criminal activity and the amount of the transaction exceeds \$10,000.²²

B. The Decision in *Santos*

In *United States v. Santos*, the Court's fractured decision held that the term "proceeds" in 18 U.S.C. § 1956(a)(1)(i) (promotional money laundering) referred to the profits from criminal activities and not merely the receipts.²³ There, the underlying criminal activity was gambling. The defendant ran a lottery operation where money was taken from gamblers and a certain portion of those funds was kept by employees of the operation (e.g., runners) or paid to winners.²⁴ The question before the Court was whether these payments to employees and to the winners constituted criminally derived "proceeds" under the money laundering statute. Justice Antonin Scalia, writing for the Court, held that the term "proceeds" as used in § 1956 could mean either gross revenues (i.e., receipts) or profits. Based on the rule of lenity, the tie went to the defendant and, therefore, the "profits" definition was adopted.²⁵ Since the payments to the employees and winners could not be fairly characterized as involving the gambling operation's profits, the money laundering convictions were reversed.²⁶

It appears that a driving force behind the Court's decision was the disproportionate penalty imposed for the money laundering convictions. Although the payments that served as the basis for the money laundering charges were clearly inextricably linked to, and indistinguishable from, the gambling operation itself,²⁷

Santos received a 60-month sentence for the gambling charges, 18 U.S.C. § 1955, but a 210-month sentence for the money laundering charges.²⁸ The majority opinion recognized that the "receipts" theory of money laundering would turn every violation of a gambling statute into a money laundering case because paying a winning bettor is a transaction involving "receipts" from the criminal operation.²⁹ This problem is far from unique to gambling cases because "few crimes are entirely free of cost and costs are not always paid in advance."³⁰ Justice Scalia saw this more restrictive definition of "proceeds" as a way of eliminating this "merger problem":

The government suggests no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime. Interpreting "proceeds" to mean "profits" eliminates the merger problem.³¹

While the Court was quite fractured in its ruling and the case produced one concurrence and two dissents, none of the justices defended the rationality of such disproportionate punishment.³²

Santos will have a radical impact on how money laundering cases are prosecuted. 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."³³ "[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."³⁴ 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.

While the plurality opinion attempts to provide guidance as to how "profits" can be determined,³⁵ it is clear from Justice Alito's dissent that in many cases this burden will be extremely difficult for the government to meet.³⁶ Indeed, Justice Alito provides a roadmap to defense attorneys of all of the problems that the government

will now face in trying to establish that a financial transaction involved “proceeds.”³⁷

These proof problems are already beginning to play out. For example, in one of the first district court opinions applying *Santos*, the court vacated a money laundering conviction of a doctor accused of defrauding Medicaid based on his payment of business expenses for building and equipment rent and dental supplies because these payments were not from “proceeds.”³⁸ Similarly, in a case involving the alleged theft of government funds, the defendant shortly after the issuance of *Santos* filed a pretrial motion to dismiss the money laundering charge. The court noted that dismissal was premature but at the time of trial, the government will have to prove “whether all or some part of the monies (the ‘proceeds’) paid to [the defendant] were profits.”³⁹

In invoking *Santos*, the defense attorney must be mindful of Justice Stevens’ concurring opinion and the limited nature of the holding. While Justice Stevens agreed that with regard to the gambling statute at issue in that case, “proceeds” could only mean “profits,” he noted that “it seems clear that Congress could have provided that the term ‘proceeds’ shall have one meaning when referring to some specified unlawful activities and a different meaning when referring to others.”⁴⁰ Thus, the government will likely argue that while “proceeds” means “profits” when gambling is the specified unlawful activity, it means “receipts” with regard to other specified unlawful activities.⁴¹ Justice Scalia, writing for the three remaining justices from the plurality (Justice Thomas not having joined Section IV of the opinion), strongly suggested that the statute could not be parsed in this manner,⁴² but recognized that Justice Stevens’ concurrence limited the Court’s holding.⁴³ Still, Justice Scalia emphatically contended that Justice Stevens’ “speculations” constitute “the purest of dicta, and form no part of today’s holding.”⁴⁴ Justice Scalia further cautioned that while counsel are free to argue Justice Stevens’ view, “not only do the justices joining this opinion reject that view, but so also (apparently) do the justices joining” Justice Alito’s dissent.⁴⁵ As noted in the preceding paragraph, district courts thus far have not limited the *Santos* holding to gambling cases.⁴⁶

C. Traditional Challenges to ‘Incidental’ Money Laundering Charges After *Santos*

While it is clear in gambling cases that “proceeds” only means profits, in light of Justice Stevens’ concurrence,

there remains some ambiguity about the definition of “proceeds” when the charges involve other specified unlawful activity. As noted in the preceding section, there is certainly strong language in the portion of the opinion (Section IV) suggesting that “proceeds” should be uniformly defined throughout the money laundering statute, but there is also recognition that this section of the opinion does not constitute binding precedent because it is only joined by three of the justices.⁴⁷ Given this somewhat limited holding in *Santos*, counsel must be prepared to argue alternatively that financial transactions that are merely incidental to the underlying specified unlawful activity cannot serve as the basis for separate money laundering charges. In other words, the “merger problem” can, and should, serve as an independent basis to challenge money laundering charges regardless of the particular definition of “proceeds” employed by the court.

In dissent, Justice Breyer noted that the “merger problem” could be solved by holding that the money laundering offense and the underlying offense “must be distinct in order to be separately punished.”⁴⁸ The majority rejected this approach, noting in dicta that “the insuperable difficulty with this solution is that it has no basis whatever in the words of the statute.”⁴⁹ But, in fact, there is support in the statutory text, the legislative history, and due process principles to find that there must be a sufficient distinction between the underlying criminal activity and the financial transaction serving as the basis for the money laundering charge.⁵⁰

The statutory language in § 1956 and § 1957 recognizes a distinction between the “laundering transaction” and the crime that generated the proceeds used in that transaction. Both statutes require that the financial transaction involve the proceeds of specified unlawful activity. In other words, to commit a violation of either statute, the criminally derived proceeds must have been obtained *before* the commencement of the financial transaction and the financial transaction must not merely be *incidental* to that underlying crime.

Further, the legislative history makes clear that Congress “intended the money laundering statute to be a separate crime distinct from the underlying offense that generated the money to be laundered.”⁵¹ Specifically, the Senate report on the bill reflects that the statute was designed to fill in the “gap in the criminal law with respect to the *post-crime* hiding of ill-gotten gains.”⁵² The statute was designed to punish conduct not already covered by the

criminal statutes; namely, “conduct that *follows in time* the underlying crime rather than to afford an alternative means of punishing the prior ‘specified unlawful activity.’”⁵³ But, it is not just this temporal distinction that is important because “Congress intended to prevent an ill other than those already prohibited by other laws.”⁵⁴ For example, “the statute should not be interpreted to make any drug transaction a money laundering crime” because a financial transaction is invariably related to the underlying act of distribution.⁵⁵

Moreover, where the line is blurred and the financial transaction and predicate act are based on the same transaction, double jeopardy concerns are implicated.⁵⁶ This is what the *Santos* court refers to as the “merger problem.” Thus, courts have reversed convictions under both §§ 1956 and 1957 where the underlying crime and the financial transaction converge or substantially overlap. However, before one aggressively pursues this argument, it is important to recognize the existence of a line of cases where this distinction is largely ignored.

For example, in *United States v. Paramo*, the Third Circuit affirmed the defendant’s § 1956 conviction even though he was promoting “an already completed unlawful activity.”⁵⁷ There, the defendant perpetrated a mail fraud scheme that resulted in his receipt of IRS tax refund checks payable to a fictitious individual that were deposited in the bank.⁵⁸ None of the roughly \$204,000 in proceeds were used to perpetrate further fraud, but rather were used to help pay bills and personal expenses.⁵⁹ The Third Circuit concluded that *Paramo* promoted the previously completed mail fraud because he “[created] value out of an otherwise unremunerative enterprise.”⁶⁰ In other words, by depositing the proceeds from the fraud and spending that money, he “promoted” the already completed mail fraud.

Paramo also illustrates the limitations of *Santos*. Even if the “profits” analysis applies where the specified unlawful activity is mail fraud, this would not seem to change the outcome in *Paramo*. Thus, contrary to the Court’s suggestion in *Santos*,⁶¹ the adoption of the “profit” definition of proceeds does not by itself solve the “merger problem.”

The Third Circuit in *Paramo* relied heavily on the prior Ninth Circuit decision in *United States v. Montoya*. In that case, the Ninth Circuit concluded that state legislator Joseph Montoya promoted a \$3,000 bribery payment by simply depositing the check into his personal bank account.⁶² Furthermore, depositing

the check allowed Montoya to classify the funds as a legitimate honorarium.⁶³ According to the court, Montoya “promoted” the bribe because he could not have used the money without depositing the check, even though the bribe had already been completed when he received it.⁶⁴ Again, it is unclear how *Santos* would have impacted the holding in *Montoya* given that the check constituting the bribe would likely be considered the legislator’s criminal “profit.”

Other courts have disagreed with this broad reading and taken a more defendant-friendly view of the distinction between the underlying crime and the financial transaction. For example, the Fourth Circuit asserted in *United States v. Heaps* that simply receiving “a money transfer and the subsequent placement of cash in a box” cannot promote an unlawful activity under § 1956.⁶⁵ There, the defendant’s wife cashed a \$2,000 wire transfer made payable to her as payment for drugs the defendant previously sold; she put the cash in a money box.⁶⁶ The Fourth Circuit concluded that the only crime Heaps committed was selling drugs.⁶⁷ Because “Congress intended to prevent an ill *other* than those already prohibited by other laws,” the court expressly rejected the proposition that every time drugs are distributed the financial transaction that invariably accompanies or follows that distribution “promotes” the underlying crime of drug distribution.⁶⁸

While the Fourth Circuit’s analysis in *Heaps* is straightforward and easy to apply, *Santos* introduces another factor into the equation. The \$2,000 received by the wife might be the gross revenue from the sale, but it also presumably included some degree of profit. It remains unclear after *Santos* whether the mere act of paying for the drugs or a subsequent financial transaction with the \$2,000 would constitute money laundering, at least to the extent of the profit obtained from that particular transaction.

Similarly, the Eleventh Circuit held that in bank fraud cases, “the underlying criminal activity must be *complete* before money laundering can occur.”⁶⁹ In *Christo*, a check kiting case, the defendant wrote checks from a business account (which did not have sufficient funds to cover the \$25,000 checks) at Bay Bank to make loan payments at SouthTrust Bank.⁷⁰ As with the mail and wire fraud statutes, the bank fraud statute prohibits a “scheme or artifice to defraud.”⁷¹ The Eleventh Circuit held that the crime of bank fraud is not completed until there is an “execution” of the plan to deceive, and this execution does not occur until the

money is moved.⁷² Thus, in *Christo*, the bank fraud was not complete until Bay Bank paid \$25,000 to SouthTrust Bank.⁷³ Accordingly, the court held that the withdrawal of funds to execute the *uncompleted* bank fraud could not promote the underlying crime because they were “one and the same.”⁷⁴ Again, it is unclear how *Santos* improves this situation for the defendant. Although there may be some incidental expenses, it would seem that the check kiting scheme involves mostly “profits” and not receipts.

The decision in *Christo* has broad applicability where mail, wire, or bank fraud charges serve as the specified unlawful activity in a money laundering case. It will often be the case that the financial transaction is part and parcel of the scheme itself, rather than something that follows completion of the scheme.

The Seventh Circuit analyzed this specific issue somewhat differently in *Mankarious* where the defendants’ money laundering convictions were based on mail fraud.⁷⁵ The court adopted the analysis of the Eleventh Circuit in *Christo*, but noted that unlike bank and wire fraud, mail fraud often involves a mailing long after the proceeds from the fraud are generated, and that in these anomalous circumstances, the proceeds from the fraud can serve as the basis for a money laundering charge even if the financial transaction occurs before any mailing.⁷⁶ The court also characterized the relevant issue as when the proceeds were generated, not when the scheme was completed.⁷⁷ From this perspective, because “the defendants’ schemes generated proceeds and then [the defendants] committed separate acts to launder those proceeds[,] ... it does not matter when all the acts constituting the predicate offense take place. It matters only that the predicate offense has produced proceeds in transactions distinct from those transactions allegedly constituting money laundering.”⁷⁸

It is difficult to fully reconcile the *Mankarious* holding with the one in *Christo*, and difficult to comprehend how mail fraud can serve as a predicate offense for money laundering when, by the court’s own analysis, the mail fraud crime has not been completed before the financial transaction. Still, the holding in *Mankarious* seems limited to the somewhat unusual situation of a mail fraud that generates proceeds before any mailing occurs.⁷⁹ Indeed, the Seventh Circuit noted that its decision was not inconsistent with the Tenth Circuit’s in *Kennedy* because the mailing in that case occurred before the financial transaction that constituted money laundering.⁸⁰ While it is

convenient for future defendants that the Seventh Circuit took such pains to limit its holding to the particular facts of that case, it should be noted that the underlying holding in *Mankarious* is, in fact, at odds with the one in *Kennedy*. There, the Tenth Circuit held: “All that is required to violate § 1956 is a transaction meeting the statutory criteria that takes place *after* the underlying crime has been completed.”⁸¹

Finally, even in the cases sustaining convictions, courts often at least pay lip service to the well-established proposition that there must be a sufficient distinction between the underlying crime generating the proceeds and the financial transaction constituting money laundering.⁸² In these cases, the courts creatively analyze the facts to demonstrate that there was some separation between the underlying crime and the financial transaction.⁸³

While *Santos* will certainly help many defendants, it is clear that merely interpreting proceeds to mean profits will not solve the merger problem that was so prominently featured in each of the Court’s four opinions. Defense counsel will want to rely on the strong language in *Santos* expressing condemnation of enhanced punishment for individuals who do nothing more than commit the

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underlying crime. That criticism not only animates the Court's holding regarding the definition of proceeds, but also reinforces the proposition that there must be a sufficient distinction between the underlying crime and the financial transaction. *Santos*, thus, provides additional fodder for defense attorneys, particularly where mail, wire, or bank fraud charges serve as the basis for a money laundering charge, or where the financial transaction, like a wire transfer, is part of the underlying crime.

II. Concealment Requires 'Something More'

Money laundering concealment cases often involve allegations that someone is trying to conceal his or her connection to illegally obtained proceeds.⁸⁴ From the defense perspective, these cases often turn on one of two main issues: (1) whether there is sufficient separation between the underlying criminal conduct and the financial transaction, and (2) whether there is sufficient evidence of intent to conceal.⁸⁵ Recently the Supreme Court was asked whether any effort to conceal proceeds of unlawful activity satisfied the concealment element or whether something more was required. The Supreme Court answered that much more was required.

In *United States v. Regalado Cuellar*,⁸⁶ petitioner was arrested following the discovery of \$81,000 in cash under the floorboard of the car he was driving. He was stopped while heading toward Mexico and, along with other suspicious circumstances, a drug detection dog alerted to cash from his shirt pocket and the rear of the car, where the \$81,000 was later found hidden. Regalado Cuellar was charged with attempting to transport the proceeds of unlawful activity, knowing that the transportation was designed "to conceal or disguise the nature, the location, the source, the ownership, or the control" of the money in violation of 18 U.S.C. §1956(a)(2)(B)(i). Following a two-day trial, Regalado Cuellar was convicted.

On appeal, a divided panel of the Fifth Circuit held that the government must show more than Regalado Cuellar's concealment of the money because "that statute required that the purpose of the transportation itself must be to conceal or disguise the unlawful proceeds."⁸⁷ Explained another way, the venture must be undertaken intending to create the appearance of legitimate wealth.⁸⁸ On rehearing en banc, the Fifth Circuit vacated the panel's opinion and reinstated Regalado Cuellar's conviction. The

court did not require an attempt to create the appearance of legitimate wealth and held that the statute was satisfied by the extensive efforts made to prevent the detection of the funds.⁸⁹

Justice Thomas, writing for a unanimous court, rejected the argument that the statute requires an attempt to create the appearance of legitimate wealth. While recognizing that this is a common meaning of the term "money laundering," the statute criminalizes a broader range of conduct than only efforts to disguise the nature or source of illegal funds. It also reaches transportation designed to conceal or disguise the location, ownership, or control of illegal money.⁹⁰ As an illustration of this point, Justice Thomas provided the following example: "[A] defendant who smuggles cash into Mexico with the intent of hiding it from authorities by burying it in the desert may have engaged in transportation designed to conceal the location of the funds, but his conduct would not necessarily have the effect of making the funds appear legitimate."⁹¹

Having explained what the statute does not require, the Court turned to what the statute does. The Court rejected the government's argument that the statute only requires evidence of *substantial* efforts at concealment.⁹² Instead, it focused on the word "designed" in the language of the statute, which requires that the accused know the transportation is "designed" to "conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds" of specified unlawful activity.⁹³ The Court recognized that there were two senses in which "designed" could be used. The first means a plan or a scheme. The second means a structure or arrangement. The Fifth Circuit employed the second meaning when it cited to the packaging of the money, its placement in a hidden compartment, and the efforts taken to mask its scent "as aspects of the transportation" that "were designed to conceal or disguise" the nature and location of the cash.⁹⁴ The Court found it implausible that Congress would intend this meaning for "design." The Court did not believe the statute was intended to apply to "[a] petty thief who hides money in his shoe and then walks across the border to spend the money in local bars,"⁹⁵ or to a person who "structured transportation in a secretive way but lacked any criminal intent. . . ." ⁹⁶ For the Court, the *purpose* of the transportation is critical, not the manner of the transportation.

The fact that Regalado Cuellar sought to prevent the authorities from finding the

money he was transporting to Mexico does not mean the purpose of taking the money to Mexico was to conceal it. There was no evidence that the purpose of taking the money to Mexico was to hide it there. In fact, the evidence presented at trial was just the opposite; the purpose of the transportation was to compensate the leaders of a drug smuggling operation. "The evidence suggest[s] that the secretive aspects of the transportation were employed to *facilitate* the transportation ... but not necessarily that secrecy was the *purpose* of the transportation."⁹⁷ The Court concluded: "Although [the concealment] element does not require proof that the defendant attempted to create the appearance of legitimate wealth, neither can it be satisfied solely by evidence that a defendant concealed the funds during transport."⁹⁸

Regalado Cuellar reflects an entirely new way of looking at money laundering prosecutions. Previously, in determining whether the statute had been violated, courts focused on the efforts that went into concealing or disguising a transaction. The more extensive those efforts or the more complex the transaction, the greater the likelihood that the court would find an intent to conceal. Thus, courts have upheld money laundering convictions involving complex and elaborate schemes,⁹⁹ but reversed convictions where the financial transactions are unsophisticated or easily traced by government investigators.¹⁰⁰

The Seventh Circuit has been home to many of these concealment money laundering cases. That court affirmed no fewer than nine cases under § 1956(a)(1)(B)(i) between 1991 and 2000 before overturning its first conviction. Three cases involved the use of multiple bank accounts.¹⁰¹ Straw people made purchases with illegally obtained money in four cases.¹⁰² Records were falsified in two cases.¹⁰³ One case even involved a simple, easy-to-follow money trail, but the conviction was still upheld due to the court's belief that the defendant tried to hide the funds' origins.¹⁰⁴

To understand how the analysis of these cases would be different under *Regalado Cuellar*, consider the decision of the Seventh Circuit in *United States v. Esterman*.¹⁰⁵ There, the defendant opened a bank account in Illinois for use in financing a business venture in Russia.¹⁰⁶ He received large amounts of cash that were transferred into the Illinois account, but diverted those funds from the business to himself by sending money to two separate banks through no less than 33 separate wire transfers.¹⁰⁷ He disposed of that money by withdrawing cash and

writing checks to at least three separate people; one was made payable to a pawn broker in the amount of \$36,620.¹⁰⁸ The defendant's claim was that there was insufficient evidence of intent to conceal because he merely transferred the funds to "a separate account and then spent them in an 'open and notorious' way."¹⁰⁹

The Seventh Circuit first reviewed prior cases in which it had found sufficient evidence of intent to conceal. The court noted that in each of these prior cases, there had been a specific effort to conceal funds.¹¹⁰ For example, in *United States v. Reynolds*, the president of a union siphoned off dues by diverting funds to a personal account and altering the union's dues records to understate the amount of dues collected.¹¹¹ In finding intent to conceal, the court noted that it did not rely on the alteration of the union records but rather "on the fact that the defendant 'used the [personal] account to conceal or disguise the proceeds.'"¹¹² In *Hollenback v. United States*, the court found sufficient intent to conceal where the defendant crafted an "elaborate mortgage scheme" that included "multiple irregular transfers calculated to avoid reporting requirements, in an attempt to conceal the drug-related origin of the funds."¹¹³

In contrast, although the defendant used multiple accounts in different states, the court noted that Esterman "made no effort to disguise or conceal" the withdrawals from the business account or the ultimate destination of the funds.¹¹⁴ Contrasting the facts to those in *Hollenback*, the court noted that "there was nothing complicated about his disposition of the funds: to the contrary, he simply made deposits into other bank accounts that were correctly identified and he engaged in some retail transactions."¹¹⁵ In buttressing its conclusion that the transactions lacked the requisite intent to conceal, the court noted that "the prosecutors easily traced Esterman's transfers from one account to the other."¹¹⁶

The Seventh Circuit attempted to reconcile its prior cases and *Esterman* by providing some basic criteria for evaluating whether or not a case involves sufficient intent to conceal. It noted such intent can be found where there is "more than one transaction, coupled with either direct evidence of intent to conceal or sufficiently complex transactions that such an intent could be inferred."¹¹⁷ However, such intent is lacking where, as in *Esterman*, there are "simple transactions that can be followed with relative ease, or transactions that involve nothing but the initial crime."¹¹⁸

Under *Regalado Cuellar*, the Court would not have had to engage in such an

extensive analysis of how the transaction was structured. This is because it no longer matters whether the mechanisms employed are complex or simple. If the transaction was not intended to conceal the true nature, ownership, or location of the funds, it is not money laundering. Conversely, no matter how easy it is for the authorities to discover the true nature, ownership, or location of the funds, if the purpose of the endeavor was to conceal this information, it is money laundering.

This is not to say that how a transaction is structured is irrelevant to the question of the defendant's intent. Consider the District of Columbia Circuit decision in *Adefehinti*.¹¹⁹ The defendants, using fake identities, flipped cheap properties in the District of Columbia by purchasing them at low prices and selling them to each other at artificially high prices after securing bank loans to fund the purchases.¹²⁰ Upon receiving bank loan checks, the "straw buyers" would split the profits and let the banks foreclose on the mortgages they did not pay.¹²¹ A check from the "sale" of one property formed the basis of the initial money laundering convictions.¹²² The check was made payable to a fictional buyer and endorsed in his name to a business account.¹²³ The business account name was likewise fabricated, but the account number matched one defendant's actual business account.¹²⁴ Upon cashing the \$41,010 check, \$7,000 was withdrawn as cash and the balance was deposited into accounts held in two defendants' names.¹²⁵ One defendant then wrote checks out of his business account to another.¹²⁶

Based on evidence presented at trial, and notwithstanding the use of a fictional buyer, a fabricated business name, cash proceeds, and layered transactions, the court concluded that there was no indication that the defendants intended to conceal the financial transactions or their personal involvement in moving the money.¹²⁷ The court noted that the defendants divided the proceeds by distributing cash or depositing them directly into accounts held under their legal names.¹²⁸ This is as far as the Court needed to go under *Regalado Cuellar*. The remainder of the court's analysis, which addressed the ease by which law enforcement could follow the money trail, is no longer necessary.¹²⁹

An earlier case from the District of Columbia Circuit illustrates how even simple transactions can constitute money laundering. In *United States v. Rouse*, defendant Donna Rouse knowingly received from a co-conspirator checks from the George Washington University Health Plan to which she knew she was

not entitled. Rouse then accepted, endorsed, and deposited these checks into her account, but would later use the funds for another co-conspirator's, Richard Gartmon's, benefit.¹³⁰ Rouse would buy goods and services for Gartmon, even though none of the checks bore Gartmon's name.¹³¹ The court concluded that there was sufficient evidence of intent to conceal because Rouse knew that the money she was spending for Gartmon was illegally obtained and she did not reference the true purpose of the checks on the memo line (which was contrary to her usual practice).¹³² Thus, notwithstanding relatively simple and straightforward financial transactions that were in all likelihood easily traced to Gartmon, the court found that the defendant possessed the requisite intent to conceal.

III. Sentencing in Money Laundering Cases

It would also appear that defendants in money laundering cases may be able to obtain additional relief at sentencing. Counsel should be aware of a recent Seventh Circuit case, *United States v. Carter*, affirming a § 3553(a) variance (not a departure) from the guideline range that was justified because, among other reasons, the case did not involve "heartland" money laundering (i.e., organized crime or drug trafficking).¹³³ Although there was a sizeable body of case law prior to the amendment of the guidelines in 2001 regarding downward departures for this type of non-heartland money laundering,¹³⁴ this doctrine had been rarely invoked in recent years. In *Carter*, the analysis is resurrected, but as support for a variance rather than a guideline departure. Thus, to the extent that prosecutors will continue to successfully bring money laundering cases after *Santos* and *Regalado Cuellar*, defense counsel — relying on *Carter*, *Kimbrough*,¹³⁵ the Sentencing Commission's 1997 report on money laundering cases,¹³⁶ and the plethora of cases discussing the intended heartland for money laundering cases¹³⁷ — should argue in non-racketeering and non-drug trafficking cases that defendants should be sentenced below the otherwise applicable guideline range.

Conclusion

For many years, it has seemed as if the scope of the money laundering statute was virtually limitless. Every financial transaction that followed a crime that reaped an economic benefit seemed to provide prosecutors with ammunition to

threaten money laundering and, in so doing, leverage plea agreements. Until recently, where defendants were charged and convicted of money laundering, very few convictions were reversed for insufficient evidence. While it is too soon to declare that the tide has turned, there is certainly a basis for reinvigorated representation in these kinds of cases, particularly where there is an insufficient distinction between the underlying crime and the financial transaction, where the financial transaction does not involve “profit,” or where the “concealment” is not the ultimate intent of the transaction.

Notes

1. Pink Floyd, *Money on The Dark Side of the Moon* (EMI UK 1973).
2. U.S.S.G. app. C, amend. 634 (2001).
3. See, e.g., United States Sentencing Commission, Table 3 Guideline Offenders in Each Primary Offense Category, 1999 Sourcebook of Federal Sentencing Statistics, 12, available at <http://www.ussc.gov/ANNRPT/1999/table3.pdf> (last visited Apr. 9, 2008); United States Sentencing Commission, Table 3 Guideline Offenders in Each Primary Offense Category, 2000 Sourcebook of Federal Sentencing Statistics, 12, available at <http://www.ussc.gov/ANNRPT/2000/table3.pdf> (last visited Apr. 9, 2008); United States Sentencing Commission, Table 3 Guideline Offenders in Each Primary Offense Category, 2006 Sourcebook of Federal Sentencing Statistics, 12, available at <http://www.ussc.gov/ANNRPT/2006/table3.pdf> (last visited Apr. 9, 2008).
4. *United States v. Santos*, 128 S. Ct. 2020 (2008).
5. *Id.* at 2025.
6. *United States v. Regalado Cuellar*, 128 S. Ct. 1994 (2008).
7. *Id.* at 2003.
8. *Santos*, 128 S. Ct. at 2026.
9. 18 U.S.C. §§ 1956, 1957 (2000).
10. *Id.* at § 1956(a)(1).
11. Michael McGuinn, *Money Laundering*, 43 AM. CRIM. L. REV. 739, 741 (2006).
12. *United States v. Esterman*, 324 F.3d 565, 570 (7th Cir. 2003) (citation omitted).
13. See, e.g., *United States v. Paramo*, 998 F.2d 1212, 1218 (3d Cir. 1993) (converting embezzled checks into cash at a bank account promoted the prior crime of mail fraud); *United States v. Montoya*, 945 F.2d 1068, 1076 (9th Cir. 1991) (depositing a check received as a bribe payment was separate from, and promoted, the actual bribe).
14. § 1956(a)(1).
15. *Id.*
16. *United States v. Adefehinti*, 510 F.3d 319, 322 (D.C. Cir. 2008) (citing § 1956(a)(1)(B)(i)).
17. See, e.g., *United States v. Prince*, 214

F.3d 740, 747 (6th Cir. 2000).

18. *Montoya*, 945 F.2d at 1076.
19. § 1956(c)(7); 1961(1).
20. *Adefehinti*, 510 F.3d at 322 (citing § 1956(a)(1)(B)(i)).
21. § 1956(a)(1).
22. § 1957(a),(f)(2).
23. *Santos*, 128 S. Ct. at 2025.
24. *Id.* at 2023.
25. *Id.* at 2025.
26. *Id.* at 2031.
27. See *id.* at 2026 (noting that if “proceeds” meant “receipts,” then every violation of an illegal lottery statute would also be a violation of the money laundering statute).
28. *Id.* at 2023. The Court referred to this as the “merger problem.” *Id.* at 2026.
29. *Id.* at 2026.
30. *Id.*
31. *Id.* at 2027.
32. See, e.g., *id.* at 2034-35 (Breyer, J., dissenting) (noting the “merger problem” but suggesting that there are other mechanisms to address it); *id.* at 2044 (Alito, J., dissenting) (agreeing that there is a merger problem where a defendant receives a higher money laundering sentence merely for doing no more than is required for a violation of the gambling statute, but this does not justify the majority’s interpretation of “proceeds”).
33. *Id.* at 2027.
34. *Id.*
35. See *id.* at 2028-29 (noting for example that the proceeds of specified unlawful activity are “the proceeds from the conduct sufficient to prove one predicate offense”) (emphasis in original).
36. See *id.* at 2039-44.
37. See *id.*
38. *United States v. Shelburne*, ___ F. Supp. 3d ___, 2008 WL 2588057, *4-5 (W.D. Va. Jul. 1, 2008).
39. *United States v. Thompson*, 2008 WL 2514090, *2 (E.D. Tenn. Jun. 19, 2008).
40. *Id.* at 2031 (Stevens, J., concurring).
41. See, e.g., *Shelburne*, 2008 WL 2588057 at 4 (government relied on the concurrence by Justice Stevens to argue that business expenses in health care fraud case could constitute “proceeds”).
42. See *Santos*, 128 S. Ct. at 2030-31.
43. *Id.* at 2031.
44. *Id.*
45. *Id.* Justice Alito’s dissent was joined by Chief Justice Roberts and Justices Kennedy and Breyer.
46. See, e.g., *Shelburne*, 2008 WL 2588057, *5 (disagreeing with the government’s narrow construction of *Santos*).
47. *Id.* at 2030-31.
48. *Id.* at 2035 (Breyer, J., dissenting).
49. *Id.* at 2028.
50. See, e.g., *United States v. Awada*, 425 F.3d 522, 524 (8th Cir. 2005) (“the underlying activity must be separate from the actu-

al laundering”); *United States v. Mankarious*, 151 F.3d 694, 705 (7th Cir. 1998) (“money laundering criminalizes a transaction in proceeds, not the transaction that creates the proceeds”).

51. *United States v. Edgmon*, 952 F.2d 1206, 1213 (10th Cir. 1991).
52. *Id.* (emphasis added, citation omitted).
53. *Id.* at 1214 (emphasis added).
54. *United States v. Heaps*, 39 F.3d 479, 486 (4th Cir. 1994).
55. *Id.*
56. *Awada*, 425 F.3d at 524.
57. 998 F.2d at 1218.
58. *Id.* at 1215.
59. *Id.* at 1217.
60. *Id.* at 1218.
61. *Santos*, 128 S. Ct. at 2028 (suggesting that the Court’s interpretation of “proceeds” resolves the merger problem).
62. *Montoya*, 945 F.2d at 1076.
63. *Id.*
64. *Id.*
65. 39 F.3d at 486.
66. *Id.* at 482.
67. *Id.* at 485.
68. *Id.* at 486 (emphasis added).
69. *United States v. Christo*, 129 F.3d 578, 580 (11th Cir. 1997) (emphasis in original).
70. *Id.*
71. 18 U.S.C. § 1344.
72. *Christo*, 129 F.3d at 580 (citations omitted).
73. *Id.*
74. *Id.*
75. *Mankarious*, 151 F.3d at 705.
76. *Id.*
77. *Id.*
78. *Id.* at 706.
79. See *id.* at 705-06.
80. *Id.* (citing *United States v. Kennedy*, 64 F.3d 1465, 1477 (10th Cir. 1995)).
81. *Kennedy*, 64 F.3d at 1477 (emphasis added).
82. See, e.g., *Mankarious*, 151 F.3d at 705-06.
83. *Mankarious*, 151 F.3d at 705.
84. *Adefehinti*, 510 F.3d at 322.
85. See *Esterman*, 324 F.3d at 570.
86. 128 S. Ct. 1994.
87. *Id.* at 1998 (quoting *United States v. Regalado Cuellar*, 441 F.3d 329, 333-334 (2006)).
88. *Id.* at 1999.
89. *Id.*
90. *Id.* at 2000.
91. *Id.*
92. *Id.* at 2003 (emphasis in original).
93. *Id.* at 2006.
94. *Id.* at 2003.
95. *Id.* at 2004.
96. *Id.*
97. *Id.* at 2005 (emphasis in original).
98. *Id.* at 2006.
99. See, e.g., *United States v. Thayer*, 204

F.3d 1352, 1354-55 (11th Cir. 2000) (using different accounts to funnel unlawful proceeds); *United States v. Majors*, 196 F.3d 1206, 1212-13 (11th Cir. 1999) (transferring money between companies using different participants' names, which amounted to a "shell game"); *United States v. Campbell*, 977 F.2d 854, 858 n.4 (4th Cir. 1992) (reducing house price for under-the-table payments).

100. See, e.g., *United States v. Olaniyi-Oke*, 199 F.3d 767, 770-71 (5th Cir. 1999).

101. See *United States v. Trost*, 152 F.3d 715, 720 (7th Cir. 1998) (establishing phony account for county funds and transferring money from that account to defendant's personal account); *United States v. Reynolds*, 64 F.3d 292, 297 (7th Cir. 1995) (diverting union dues to another person's account and altering union records); *United States v. Jackson*, 935 F.2d 832, 841-42 (7th Cir. 1991) (depositing defendant's illegally obtained funds in church bank account but using those funds personally satisfies concealment).

102. See *United States v. Smith*, 223 F.3d 554, 577 (7th Cir. 2000) (purchasing defendant's van in brother-in-law's name and obtaining fraudulent bank loan); *United States v. Holland*, 160 F.3d 377, 380 (7th Cir. 1998) (having an out-of-state banker pay defendant's expenses while defendant claimed to be bankrupt); *United States v. Santos*, 20 F.3d 280, 284 (7th Cir. 1994) (placing defendant's name on his friend's car's certificate of title because the friend could not explain that he partially paid for the car with marijuana); *United States v. Antzoulatos*, 962 F.2d 720, 727 (7th Cir. 1992) (allowing drug dealers to use defendant's business checks to buy cars and accepting small cash repayments to avoid currency transaction requirements).

103. See *Smith*, 223 F.3d at 577 (obtaining fraudulent bank loan); *Reynolds*, 64 F.3d at 297 (altering union books that recorded dues collected).

104. *Jackson*, 935 F.2d at 841-42.

105. *Esterman*, 324 F.3d at 571.

106. *Id.* at 566.

107. *Id.* at 568.

108. *Id.*

109. *Id.* at 569.

110. *Id.* at 570-71.

111. *Id.* at 571.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 572.

117. *Id.* at 572 (citations omitted).

118. *Id.* (citations omitted).

119. *Adefehinti*, 510 F.3d at 319.

120. *Id.* at 321 (noting the defendants had "appraisers lie about the properties' value").

121. *Id.*

122. *Id.* at 324.

123. *Id.* at 322.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 323.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 1374.

132. *Id.*

133. *United States v. Carter*, ___ F.3d ___, 2008 WL 3844058 (7th Cir. Aug. 19, 2008).

134. See Barry Boss & Louis Feuchtbaum, *Downward Departures in Money Laundering Cases: The Punishment Should Fit the Real Crime*, THE CHAMPION, Sept./Oct. 1998, at 45.

135. *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

136. U.S. SENTENCING COMM'N, Sentencing Policy for Money Laundering Offenses (Sept. 18, 1997), available at http://www.ussc.gov/r_congress/LAUNDER.PDF.

137. See, e.g., *United States v. Walter*, 87 F.3d 663, 672 (5th Cir. 1996).

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5. *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005); *United States v. Arnold*, 523 F.3d 941, amended and reh'g & reh'g en banc denied, 533 F.3d 1003 (9th Cir. 2008).

6. "In the course of a border search, and absent individualized suspicion, officers can review and analyze the information transported by any individual attempting to enter, re-enter, depart, pass through or reside in the United States. ..." Policy, Para. B.

7. Policy, Para. E (3).

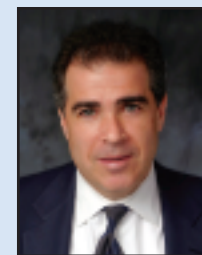
8. "If an officer suspects that the contents of such a document may constitute evidence of a crime or otherwise pertain to a determination within the jurisdiction of CBP, the officer must seek advice from the associate/assistant chief counsel or the appropriate U.S. Attorney's Office before conducting a search of the document." Policy, Para. E (3).

9. Bob Aaron, *New U.S. Policy a Matter of Considerable Concern*, LAW TIMES, Aug. 18, 2008.

10. William H. McMichael, *Rule May Endanger Attorney-Client Privilege*, AIR FORCE TIMES, June 3, 2008; Policy on Use of Department of Defense (DoD) Information Systems — Standard Consent Banner and User Agreement, Department of Defense, May 9, 2008. A copy is available at [http://www.nacdl.org/public.nsf/whitecollar/waiver_attachments/\\$FILE/DoD.pdf](http://www.nacdl.org/public.nsf/whitecollar/waiver_attachments/$FILE/DoD.pdf). ■

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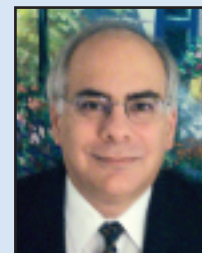
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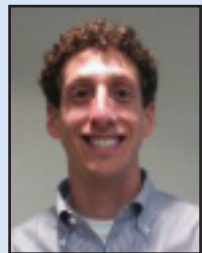
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