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United States District Court,
E.D. Texas,
Texarkana Division.

Lawrence D. KENEMORE, Jr.
v.
UNITED STATES of America.

Civil Action No. 5:08cv104. | Nov. 17, 2008.

Attorneys and Law Firms

Lawrence D. Kenemore, Jr., Texarkana, TX, pro se.

Paul Edward Naman, US Attorney's Office, Beaumont, TX, for Respondent.

Opinion

MEMORANDUM ORDER OVERRULING PETITIONER'S OBJECTIONS AND ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

DAVID FOLSOM, District Judge.

***1** Petitioner Lawrence D. Kenemore, Jr., an inmate confined at the Federal Correctional Institution in Texarkana, Texas, proceeding *pro se*, brought this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

The court referred this matter to the Honorable Earl S. Hines, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The Magistrate Judge recommends the petition be denied.

The court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record, pleadings and all available evidence. Petitioner filed objections to the magistrate judge's Report and Recommendation.

The court has conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED.R.CIV.P. 72(b). After careful consideration, the court concludes petitioner's objections should be overruled.

Petitioner contends the predicate offenses were mail fraud counts, not embezzlement. Further, petitioner argues that all 12 underlying counts of mail fraud involved "gross income" used to pay expenses. Because petitioner was not convicted in this district, the trial transcripts are not available to this court for review. However, given the determination that the *Santos* decision does not apply to cases other than those involving illegal gambling, even if petitioner is correct, the distinction is not material to the outcome of this petition.

Petitioner further asserts in his objections that he was convicted of a nonexistent offense in light of the holding in *United States v. Santos*, ---U.S. ----, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008). Petitioner claims the decision should be applied retroactively to his case based on the application of *Santos* to a Section 2241 proceeding before the United States District Court for the Southern District of Indiana. *See Morales v. Jett*, No. 1:08 cv786 (S.D. IN. June 11, 2008). However, another district court's retroactive application of *Santos* is not binding on this court. Further, the defendant in *Morales* was convicted of conspiracy to launder the proceeds of an illegal gambling business. Therefore, *Morales* fits within the narrow holding of *Santos*, unlike petitioner whose conviction involves embezzlement of funds from an employee benefit plan.

As set forth in the Report, petitioner's petition does not meet the criteria required to support a claim under the savings clause of 28 U.S.C. § 2255. *See Padilla v. United States*, 416 F.3d 424 (5th Cir.2005); *Reyes-Requena v. United States*, 243 F.3d 893 (5th Cir.2001). Thus, this petition should be denied.

ORDER

Accordingly, Petitioner's objections are **OVERRULED.** The findings of fact and conclusions of law of the magistrate judge are correct and the report of the magistrate judge is **ADOPTED.** A final judgment will be entered in this case in accordance with the magistrate judge's recommendations.

***2** LAWRENCE D. KENEMORE, JR., Petitioner

v.

KEITH ROY, Respondent

Report and Recommendation of United States Magistrate Judge

EARL S. HINES, United States Magistrate Judge.

This petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 is referred to the undersigned magistrate judge under 28 U.S.C. § 636, the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge, and General Order 05-10. Pursuant to that reference, and after careful consideration of the issues presented, this report containing proposed findings of fact, conclusions of law, analysis and a recommendation for disposition is submitted.

I. The Petition

A. Claim for Relief

Petitioner, Lawrence D. Kenemore, Jr., (Kenemore) is an inmate confined in the Federal Correctional Institution in Texarkana, Texas. The respondent, Keith Roy, is the warden at that penal institution, and as such is the petitioner's official custodian.

Kenemore alleges that his federal convictions in the northern district of Texas for money laundering and conspiracy to launder money are illegal because they were not based on evidence that he engaged in financial transactions involving profits derived from unlawful activity. Petitioner relies on the recent decision in *United States v. Santos*, --- U.S. ----, 128 S.Ct. 2020, 170 L.Ed.2d 912 (June 2, 2008), which-in petitioner's view-held that the federal money-laundering statute's reference to *"proceeds of ... unlawful activity"* means criminal profits. Petitioner argues that the prosecutor proved only that he conducted financial transactions with gross criminal *receipts*-as opposed to net criminal *profits*. Therefore, (a) there was a complete lack of evidence on two elements of the money laundering offense, [1] and (b) he was convicted of acts that are not crimes.

B. Respondent's Answer

The respondent opposes the granting of a writ on two principal grounds. First, respondent argues that this court lacks jurisdiction. The respondent asserts that the petition (i) constitutes a collateral attack on petitioner's money laundering convictions; (ii) as such, it must be regarded as a motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255; and (iii) only the district where the convictions were obtained (northern district of Texas) has jurisdiction. Further, respondent contends that *Santos* does not entitle petitioner to relief in any event because its precedential effect is limited to cases wherein the predicate offense is the operation of an illegal *gambling* business, in violation of Title 18, United States Code, Section 1955. The predicate offense in petitioner's case was not gambling, but rather *embezzlement* of employee benefit plan funds, in violation of Title 18, United States Code, Section 664.

II. Factual Background

On February 7, 1996, petitioner was indicted in a 25-count superseding indictment in the northern district of Texas. [2] The indictment charged petitioner with running an elaborate scheme whereby he created purported "unions" which established employee welfare benefit plans to pay workers' compensation medical and disability benefits for its members. Petitioner then (a) induced employers to contribute funds into "union trust funds" to provide workers' compensation coverage for their employees, (b) embezzled funds contributed by employers to the plans and (c) failed to pay covered medical and disability claims of employees. Based on petitioner's alleged conduct in devising and implementing the scheme, he was charged with (1) conspiracy to embezzle funds from employee benefit plans-1 count, (2) conspiracy to launder money-1 count, (3) mail fraud-11 counts, (4) embezzlement from employee benefit plans-2 counts, (5) money laundering-9 counts, and (6) making a false statement to the United States Department of Labor-1 count.

***3** On August 16, 1996, following a jury trial, petitioner was convicted on all counts. Petitioner was sentenced to a term of 235 months imprisonment on ten money laundering and conspiracy to launder money counts, and 60

months imprisonment on the remaining counts, all to run concurrently.

On August 28, 1997, after finding most of petitioner's 56 contentions on appeal to be frivolous, the Fifth Circuit Court of Appeals affirmed petitioner's convictions and sentences. *See United States v. Kenemore*, No. 96-11029 (5th Cir. Aug.28, 1997). Petitioner then filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. That motion was denied by the district court on November 17, 1999. *Kenemore v. United States*, No. 3:98cv2125 (N.D.Tex. Nov. 17, 1999).

III. Jurisdiction And The "Savings Clause"

A. Jurisdiction

Kenemore seeks relief through a *petition for writ of habeas corpus* pursuant to Title 28, United States Code, Section 2241 (Section 2241). To entertain a Section 2241 habeas petition, the district court must, upon filing of the petition, have jurisdiction over the prisoner or his custodian. *United States v. Gabor*, 905 F.2d 76, 78 (5th Cir.1990). Therefore, petitions for habeas corpus are submitted to courts where petitioners' are incarcerated. Section 2241 provides a mechanism for attacking the *manner* in which a sentence is *executed. Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir.2000).

A *motion to vacate, set aside or correct sentence* pursuant to Title 28, United States Code, Section 2255 (Section 2255) is the primary mechanism for collaterally attacking a federal conviction and sentence. *Id.;* 28 U.S.C. § 2255(e). Relief under this section is warranted for errors that occurred at trial or sentencing. *Cox v. Warden, Fed. Detention Ctr.*, 911 F.2d 1111, 1113 (5th Cir.1990). A Section 2255 motion must be presented to-and can be entertained initially only by-the court which imposed the sentence. 28 U.S.C. § 2255(a).

Kenemore does not challenge the *manner* in which his sentence is being executed; rather, he attempts to collaterally attack the *legality* of his money laundering convictions. A petition filed under Section 2241 which attacks errors that occurred at trial or sentencing is properly construed as a Section 2255 motion. *Id.* at 877-78. Section 2255(e) explicitly prohibits federal courts from entertaining applications for writs of habeas corpus in behalf of prisoners who could seek relief from the court which imposed the sentence through a Section 2255 motion. Therefore, this court cannot grant the relief sought unless an exception discussed next applies.

B. The "Savings Clause"

A "savings clause" exception permits prisoners to use a Section 2241 application for writ of habeas corpus as a vehicle for collaterally attacking the conviction when it appears that the remedy by a Section 2255 motion "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). A petition for writ of habeas corpus pursuant to Section 2241 is no substitute for a Section 2255 motion, and the burden of showing inadequacy or ineffectiveness of a Section 2255 motion rests squarely on the petitioner. *Jeffers v. Chandler*, 253 F.3d 827 (5th Cir.2001). A prior unsuccessful Section 2255 motion, or petitioner's inability to meet AEDPA's "second or successive" requirement,[3] does not make Section 2255 inadequate or ineffective. *Tolliver*, 211 F.3d at 878.

***4** The United States Court of Appeals for the Fifth Circuit has articulated the showing necessary to trigger Section 2255's savings clause. In *ReyesRequena v. United States*, 243 F.3d 893 (5th Cir.2001), the court held that "the savings clause of § 2255 applies to a claim (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion." *Id.* at 904. Thus, three issues are relevant analytically. First, there must be a *Supreme Court decision with retroactive effect.* Second, that decision must establish that the Section 2241 petitioner may have been convicted of a *nonexistent offense.* Third, the petitioner's claim must have been *precluded by established circuit law* at the time of petitioner's trial, appeal or first Section 2255 motion. Section 2241 petitioners must prove all three elements to successfully invoke the savings clause. *See Padilla v. United States*, 416 F.3d 424, 426 (5th Cir.2005).

IV. Discussion and Application

A. Introductory Comment

It is appropriate to observe as a threshold matter that should this or any court sustain petitioner's asserted *Santos* error, such action will not result in vacating all of petitioner's convictions. *Santos* does not impugn petitioner's multiple mail fraud, embezzlement and related conspiracy convictions. Nor does it impact petitioner's false statement conviction. As a practical matter, however, success here might result in petitioner's *release* . Elimination of petitioner's money laundering convictions would end his 235-month sentence, leaving him only with a 60-month sentence. The chronology of events in petitioner's case suggests that he may have already served the concurrent 60-month sentence.

B. Is Santos Applicable Retroactively?

Santos may not have retroactive effect. No justice of the Supreme Court declared such, and the only reported case to date on this subject held that Santos cannot be retroactively applied. *See Vaughn v. United States*, 2008 WL 2945449 at *3 (W.D.N.C. July 25, 2008). Whether other courts will follow *Vaughn* remains to be seen. [4] However, in light of the narrow holding in *Santos* (discussed next) this court need not ponder retroactivity further.

C. Was Petitioner Was Convicted of a Nonexistent Offense?

Assuming *arguendo,* i.e., only for the sake of full, sequential analysis, that *Santos* applies retroactively, the court must inquire next whether it teaches that petitioner was convicted of a nonexistent offense.

i. The Holding of Santos

In *Santos*, the unlawful activity that generated laundered money was a stand-alone, illegal gambling operation. The convicting trial court granted a Section 2255 motion and vacated the money laundering conviction. The trial court reasoned that (a) governing circuit precedent established that the federal money-laundering statute's use of the term "proceeds" is ambiguous in that proceeds could mean either gross or net income; [5] (b) such ambiguity triggers a "rule of lenity;" [6] and (c) since a profits definition is more defendant-friendly (i.e, harder to prove) and would prevent merger of the predicate illegal gambling crime into the money laundering statute, the court was required to define "proceeds" as "profits," not "receipts." Because no evidence showed that the financial transactions at issue were conducted with profits, the prosecution failed to prove the essential elements of the offense.

***5** The Seventh Circuit affirmed, but acknowledged that other circuits differed in their understanding of the meaning of "proceeds." [7] The court also observed that only Congress or the Supreme Court could resolve the debate over the ambiguous term. Taking its cue, the United States petitioned for a writ of certiorari, and certiorari was granted to resolve a conflict between the circuits. *See United States v. Santos*, --- U.S. ----, 127 S . Ct.2098, 167 L.Ed.2d 812 (2007).

The Supreme Court ultimately affirmed the Seventh Circuit's judgment, although the high court hardly resolved the polemic. One recent observer describes the *Santos* decision as follows:

> The high court's ruling did not resolve whether the 'profit' versus 'gross receipts' interpretation also applied to a list of 250 other crimes that could support a claim of money laundering-principally drug charges.

Pamela A. MacLean, *Prosecutors Dealt a Setback, Drug Sale Laundering Charge Must Involve Profits*, 31 NAT'L L. J., Sept. 22, 2008 at 3. Two other commentators share that view, although they express it in more colorful and oblique language:

> Using a baseball metaphor, in Santos, the outlook for the day's game wasn't brilliant sunshine before the Supreme Court's nine that day.

Elkan Abramowitz and Barry A. Bohrer, *The U.S. Supreme Court Money-Laundering Decisions*, 240 N.Y.L.J., July 1, 2008 at 3. Finally, yet another reviewer describes *Santos* as an "opaque holding" with "murky precedential implications." Marc Fernich, *Money Laundering After 'Santos': A Supreme Mess*, 240 N.Y.L.J., October 17, 2008 at 4.

This lingering ambiguity obligates this court to engage in a careful examination *in the Section 2241 context,* i.e., to decide whether the petitioner in this action has successfully invoked Section 2255's savings clause. That examination reveals that

the *only* point on which all nine justices agreed was that when interpreting statutes, courts must conscientiously endeavor to carry out the intent of Congress. Beyond that, the court was deeply fractured.

A majority of justices could not agree on the correct resolution of the grossversus-net-income debate. A plurality of four justices found no evidence of congressional intent to define "proceeds" as either receipts or profits in the legislative history. The plurality justices, therefore, agreed with the Seventh Circuit's reasoning and disposition. An equal number of justices, however, disagreed. The ninth justice, Justice Stevens, ultimately concurred in the *disposition* (but not the underlying *reasoning*) advocated by the plurality. Justice Stevens's concurrence created a five-member majority for affirming the Seventh Circuit. Thus, the Seventh Circuit's *judgment* (i.e., granting the Section 2255 motion) was affirmed.

Justice Stevens, who cast the deciding vote to affirm, *agreed* with the plurality that no legislative history indicated congressional intent to define "proceeds" as receipts when the predicate offense was a stand-alone gambling venture. He also concluded that *in the context of illegal gambling,* common sense and the rule of lenity dictated a profits definition. Justice Stevens stated:

> ***6** Faced with both a lack of legislative history speaking to the definition of "proceeds" *when operating a gambling business* is the "specified unlawful activity" and my conviction that Congress could not have intended the perverse result that would obtain in this case under [a receipts definition], the rule of lenity may weigh in the determination. And in that respect the plurality's opinion is surely persuasive. Accordingly, I concur in the judgment.

Santos, 128 S.Ct. at 2033-34 (emphasis added). This enunciation of Justice Stevens's concurrence prompted Justice Scalia, author of the plurality opinion, to observe:

> We think it appropriate to add a word concerning the *stare decisis* effect of Justice STEVENS' opinion. Since his vote is necessary to our judgment, and since his opinion rests upon the narrower ground, the Court's holding is limited accordingly.

Santos, 128 S.Ct. at 2031. [8]

ii. Does Santos Govern Petitioner's Convictions?

For present purposes, the court need not predict what will be the ultimate resolution of the gross-versus-net-income debate. Rather, this court need only note that *Santos* ended in a stalemate on the question as to whether the federal money laundering statute's term "proceeds" must be defined *uniformly* as "profits" or "receipts." The inescapable conclusion-considering the respective opinions of Justices Scalia and Stevens regarding *stare decisis*-is that "proceeds" refers to "profits," not "receipts" in money-laundering prosecutions involving stand-alone illegal gambling operations. Consequently, for present purposes (a Section 2255(e) savings clause analysis), *Santos* decriminalized only money laundering convictions not based on profits from *illegal gambling. Santos* did not hold that financial transactions conducted with receipts from *embezzlement* is a nonexistent offense.

Kenemore argues that *Santos* necessarily teaches that *all* convictions not based on laundered profits are illegal. *Santos* may or may not be a harbinger of this hypothesis. [9] This court, however, cannot entertain the proposition in this Section 2241 proceeding unless *Santos* affirmatively decriminalized Kenemore's conduct. As determined above, *Santos* did not decriminalize financial transactions conducted with embezzled employee benefit plan funds. Therefore, petitioner does not satisfy the actual innocence prong of *Reyes-Requena.* That failure leads inevitably to the conclusion that this court may not entertain Kenemore's collateral attack on his conviction.

D. Was Petitioner's Claim Foreclosed by Circuit Law?

Even were *Santos* retroactive, and even if it were interpreted as meaning that petitioner was convicted of a nonexistent offense, *Reyes-Requena* instructs that petitioner still could not successfully invoke Section 2255's savings clause unless governing circuit law prevented him from asserting a *Santos*-

equivalent error at the time of his trial, appeal or first Section 2255 motion.

***7** In the Fifth Circuit, the scope of the money laundering statute has been traditionally understood to include payments of overhead and expenses with illegally-derived funds, as well as reinvestments thereof. [10] However, the Fifth Circuit has not-before or after *Santos*-addressed the gross-versus-net-income debate over the correct definition of the term "proceeds." Therefore, petitioner was not foreclosed from raising this argument at trial (which he claims that he did), or on appeal (which he also claims that he did), or in his first Section 2255 motion. Accordingly, petitioner cannot satisfy the third analytical issue of *Reyes-Requena.*

V. Recommendation

Petitioner does not satisfy the *Reyes-Requena* criteria necessary for collaterally attacking legality of his money laundering convictions in a Section 2241 petition for writ of habeas corpus under the savings clause of Section 2255. Thus, the petition should be denied.

VI. Objections

Objections must be (1) specific, (2) in writing, and (3) served and filed within ten days after being served with a copy of this report. 28 U.S.C. § 636(b)(1); FED.R.CIV.P 6(a), 6(b) and 72(b).

A party's failure to object bars that party from (1) entitlement to *de novo* review by a district judge of proposed findings and recommendations, *Rodriguez v. Bowen,* 857 F.2d 275, 276-77 (5th Cir.1988), and (2) appellate review, except on grounds of plain error, of unobjected-to factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n.,* 79 F.3d 1415, 1417 (5th Cir.1996) (en banc).

SIGNED this *30* day of *October*, 2008.

Footnotes

1 For a conviction under 18 U.S.C. § 1956(a)(1), the Government must prove that the defendant (1) conducted or attempted to conduct a financial transaction, (2) which the defendant knew involved the *proceeds of a specified unlawful activity*, (3) with the intent either to promote specified unlawful activity (§ 1956(a)(1)(A) (I)), *United States v. Cavalier,* 17 F.3d 90, 92 (5th Cir.1994), or to conceal or disguise the nature, location, source, ownership, or control of the *proceeds of unlawful activity* (§ 1956(a)(1) (B))....
United States v. Wyly, 193 F.3d 289, 295 (5th Cir.1999) (underscoring added).

2 *See United States v. Kenemore*, No. 3:95cr99 (N.D.Tex. Aug. 16, 1996).

3 The Antiterrorism and Effective Death Penalty Act (AEDPA), which became effective on April 24, 1996, amended 28 U.S.C. § 2255 by imposing requirements for bringing successive motions. As amended, Section 2255 prohibits consideration of a second or successive motion unless the motion is certified by the appropriate court of appeals to contain either: (1) newly discovered evidence sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court, that was previously unavailable. 28 U.S.C. § 2255.

4 *Vaughn* applied or relied upon the retroactivity analysis announced in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334(1989), which held that a new *procedural* rule of criminal law applies retroactively only if: (1) "[I]t places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or (2) "it requires the observance of those procedures that are implicit in the concept of ordered liberty." *Id.* at 311.
New *substantive* rules of law, however, always apply retroactively. *Davis v. United States,* 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974). New articulations of what elements must be proven to sustain convictions generally are considered substantive, and, therefore, do not implicate *Teague v. Lane* retroactivity analysis. *See United States v. McPhail,* 112 F.3d 197 (5th Cir.1997). If *Santos* announced a new substantive rule of criminal law, it will apply retroactively to cases on collateral review.

5 The money laundering statute states:
Whoever, knowing that the property involved in a financial transaction represents the *proceeds of some form of unlawful activity*, conducts or attempts to conduct such a financial transaction which in fact involves the *proceeds of specified unlawful activity*-(A) (I) with the intent to promote the carrying on of specified unlawful activity ... shall be sentenced to a fine ... or imprisonment....

> [A] financial transaction shall be considered to be one involving the *proceeds of specified unlawful activity* if it is part of a set of parallel or dependent transactions, any one of which involves the *proceeds of specified unlawful activity*, and all of which are part of a single plan or arrangement.

18 U.S.C. § 1956(a)(1)(A)(I) (emphasis added).

6 The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. *See United States v. Gradwell*, 243 U.S. 476, 485, 37 S.Ct. 407, 61 L.Ed. 857 (1917); *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931); *United States v. Bass*, 404 U.S. 336, 347-349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971).

7 In a footnote, the Seventh Circuit stated:

> Several other circuit opinions ... treat the word proceeds in § 1956(a)(1) as gross income, but these earlier opinions did not enter (because they were not asked to) the gross-versus-net-income debate.... See, e.g., *United States v. Monaco*, 194 F.3d 381, 385-86 (2d Cir.1999) *United States v. Akintobi*, 159 F.3d 401, 403-05 (9th Cir.1998); *United States v. Haun*, 90 F.3d 1096, 1101 (6th Cir.1996). *See also United States v. Silvestri*, 409 F.3d 1311, 1332-33 (11th Cir.2005) (18 U.S.C. § 1957 context; handling the term proceeds in a manner akin to that of *Akintobi* and *Haun;* no discussion of gross versus net income).

Santos v. United States, 461 F.3d 886, n. 4 (7th Cir.2006).

8 Justice Scalia considered the "narrower ground" to be that "proceeds" means "profits" when there is no legislative history to the contrary. Both Justice Stevens (the concurring justice) and Justice Alito (author of the dissenting opinion of four justices) quarreled with Justice Scalia's characterization of the *stare decisis* effect. However, no justice disputed Justice Scalia's statement that the court's judgment was limited to the narrow ground on which Justice Stevens concurred.

9 Strong language in Section IV of the *Santos* opinion suggesting that "proceeds" must be defined as "profits" uniformly throughout the money-laundering statute is not binding precedent because it is joined by only three justices. *See* Barry Boss, Jon May & Matt Swerdlin, *Money Laundering Defense After Santos and Regalado Cuellar*, 32 SEP CHAMPION 12, 14. Consequently, a majority of courts applying *Santos* to date do not embrace the position advocated by petitioner here:

> "In nearly all the district court cases [since *Santos],* judges have either refused to apply the 'profits' reading to drug crimes or other charges beyond gambling-the subject of the *Santos* case-or have upheld convictions, finding that the money at issue constituted profits.

Pamela A. MacLean, *Prosecutors Dealt a Setback, Drug Sale Laundering Charge Must Involve Profits*, 31 NAT'L L. J., Sept. 22, 2008 at 3. *But see United States v. Hedlund, 2008 WL 4183958 (N.D. Cal.* Sept. 9, 2008) (vacating guilty plea based on financial transaction, paying warehouse rent, with money derived from marijuana trafficking); *United States v. Shelburne*, 563 F.Supp.2d 601, 605-607 (W.D.Va.2008) (vacating money-launder conviction of a doctor accused of defrauding Medicaid based on payment of business expenses for building and equipment rent and dental supplies); and *United States v. Thompson*, 2008 WL 2514090 at *2 (E.D.Tenn. June 19, 2008) (pretrial ruling in a laundering case involving theft of government funds that government must prove that all or part of funds used to conduct the alleged financial transactions were profits).

10 *See United States v. Wyly*, 193 F.3d 289, 295-296 (5th Cir.1999) (kickback to public official for his participation in fraud scheme); *United States v. Coscarelli*, 105 F.3d 984, 990 (5th Cir .) (proceeds of telemarketing fraud used to pay coconspirators and cover overhead expenses) vacated, 111 F.3d 376 (5th Cir.1997), reinstated in relevant part, 149 F.3d 342 (5th Cir.1998 (en banc); *United States v. Dovalina*, 262 F.3d 472, 476 (5th Cir.2001) (use of drug proceeds "to promote additional marijuana sales"); *United States v. Meshack*, 225 F.3d 556, 572-573 (5th Cir.2000) (use of drug proceeds to pay for truck used in later drug sales), cert. denied, 531 U.S. 1100, 121 S.Ct. 834, 148 L.Ed.2d 716 (2001); and *United States v. Thomas*, 12 F.3d 1350, 1360 (5th Cir.) (use of drug proceeds to pay for later drug purchases), cert. denied, 511 U.S. 1095 and 1114, 114 S.Ct. 1861, 128 L.Ed.2d 483 (1994).