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Time of Request: Friday, May 24, 2013 22:38:16 EST
Client ID/Project Name:
Number of Lines: 155
Job Number: 2828:410907160

Research Information

Service: Terms and Connectors Search
Print Request: Current Document: 1
Source: New York Law Journal
Search Terms: doc-id(#1202425323018#)

1 of 1 DOCUMENT

New York Law Journal (Online)

October 17, 2008 Friday

LENGTH: 2206 words

HEADLINE: Money Laundering After 'Santos': A Supreme Mess;
Outside Counsel

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BODY:

The 2007-08 U.S. Supreme Court term had no shortage of high-profile criminal cases. Among other marquee issues, the Court tackled gun rights; the death penalty for child rapists; habeas corpus for aliens at Guant namo Bay; and judges' authority to reject federal sentencing guidelines on policy grounds.

But while those splashy decisions grabbed the headlines, none was more practically significant than **United States v. Santos**,[1] an everyday exercise in statutory construction.

In **Santos,** a fractured Court vainly tried to make sense of the undefined and ambiguous term "proceeds" in the federal money-laundering statute, 18 U.S.C. 1956, only to muddle both the word and the statute beyond comprehension.

This article tries to make sense of the opinion itself, and suggests a few strategies for litigating money-laundering cases after **Santos**.[2]

Background

Section 1956 has long enticed federal prosecutors with its breadth, flexibility and stiff maximum penalty of 20 years imprisonment. In essence, the statute punishes those who conduct financial transactions involving "proceeds" from a

laundry list of predicate crimes, intending either to promote the underlying offenses or to conceal the funds' illicit character. Though originally designed to combat organized crime, 1956 violations are now routinely added to indictments of every stripe - including garden-variety white-collar fraud indictments - for ease of conviction, extraction of guilty pleas and the promise of steep sentence bumps.

Santos illustrates the endlessly expanding reach of money-laundering prosecutions since the statute's 1986 enactment. The lead defendant was convicted just for paying ordinary business expenses - employee salaries and winning bets - of an illegal gambling operation. At issue was whether those disbursements constituted "proceeds" as used in 1956 and, more generally, whether "proceeds" means net profits or merely gross receipts. If receipts, the conviction would stand; if profits, it would fall. The question sharply divided the Court, producing four separate opinions - none commanding even a bare majority - by an unusual lineup of judges.

The Dueling 'Santos' Opinions

Justice Antonin Scalia, joined by Justices Clarence Thomas, David Souter and Ruth Bader Ginsburg, wrote for an unlikely plurality. He began by recognizing that "proceeds" is an inherently ambiguous word and noting that 1956 does not define it. Parsing the statutory language, Justice Scalia concluded that the term is subject to at least two conflicting interpretations, profits and receipts, neither of which is facially or contextually implausible.

Finding 1956 hopelessly ambiguous, Justice Scalia and the plurality brushed off the dusty rule of lenity, which resolves statutory ambiguities in favor of criminal defendants, to break the tie. Applying that default presumption, the plurality adopted the narrower profits reading of "proceeds" - not just in the gambling posture but across-the-board, for all predicate offenses. In other words, the plurality endorsed a categorical approach that would always peg "proceeds" to profits in every money-laundering prosecution. Receipts, by contrast, would never suffice. In choosing that course, the plurality doubted that Congress intended a 20-year sentence jump for defendants who merely pay auxiliary criminal costs or distribute illegal earnings among accomplices.

That did not settle the issue, however. Needing a fifth vote to overturn the defendants' convictions, the plurality acknowledged that the Court's holding was "limited" by a crucial concurring opinion from Justice John Paul Stevens. But what Justice Stevens actually said, and thus what the Court really held, provoked a fierce debate.

Stevens' Key Concurrence

While Justice Stevens accepted the profits definition for gambling purposes, Justice Scalia's plurality described his larger view as equating "proceeds" with profits "when there is no legislative history to the contrary." "That is all that our judgment holds," Justice Scalia maintained. "It does not hold that the outcome is different," i.e., that receipts can also qualify as proceeds, "when contrary legislative history does exist."[3]

For his part, though, Justice Stevens took strenuous exception to that formulation of his position. He countered that the meaning of "proceeds" varies with the predicate crime alleged, insisting that it also captures "gross revenues," not just net profits, from at least "the sale of contraband and the operation of organized crime syndicates involving such sales."[4]

But Justice Scalia shot back for the plurality that "[n]ot only do the Justices joining this opinion reject that view, but so also (apparently) do the Justices joining the principal dissent."[5] Speaking for the four dissenters, however, Justice Samuel Alito disputed even that iteration of their position. For Justice Alito and his fellow dissenters - Justices Stephen Breyer and Anthony Kennedy and Chief Justice John Roberts - five members of the Court, including Justice Stevens, agreed that receipts do constitute proceeds in contraband cases. And, according to the dissenters, Justice Stevens' variable meaning approach at least preserved what they thought was the "correct interpretation of the statute" - that

"proceeds" simply means receipts - most of the time.[6]

Receipts, Profits, Vagueness

So what is one to make of these discordant pronouncements? If nothing else, it seems clear that a majority of the **Santos** Court - the four-Justice plurality plus Justice Stevens - would limit "proceeds" to profits in at least some class of money-laundering cases not entailing "the sale of contraband and the operation of organized crime syndicates involving such sales."[7] Gambling infractions aside, however, the class' composition would be left by the Stevens concurrence for ad hoc determination based on an examination of legislative history.

At a minimum, then, prudent practitioners will demand proof of laundered profits in all noncontraband cases, seeking acquittals and dismissals in its absence. And even in contraband cases, counsel should at least preserve the claim that proceeds means profits in light of **Santos'** opaque holding and murky precedential implications. Indeed, one court has already read the decision that way in a drug prosecution.[8]

But how else can counsel contend with the run of contraband cases and others on the margins, which is the bulk of money-laundering prosecutions a defense lawyer faces? In those instances, 1956 as glossed, or, more accurately, further obscured, in **Santos** would seem ripe for a Fifth Amendment vagueness challenge.

A criminal statute is unconstitutionally vague, offending due process, if it fails to inform reasonable people of what it purports to prohibit or is so unclear as to invite arbitrary enforcement.[9] Vagueness claims are generally gauged against a defendant's own conduct, on an as-applied basis. But by the same token, most money-laundering indictments merely track 1956's amorphous charging language, with little or no factual detail. In similar circumstances, courts have recognized the propriety of facial vagueness attacks.[10] And in entertaining such challenges, there is authority for considering judicial interpretations of ambiguous statutory terms.[11]

A Model of Confusion

Measured under these criteria, 1956 as clouded in **Santos** is a prime example of a law encompassing an "incriminating fact" - what must be laundered, receipts or profits - that is wholly indeterminate, i.e., lacking "statutory definition[,] narrowing context, or settled legal meaning[.]"[12] As such, the money-laundering statute presents a virtual case study in vagueness, breathing new life into a rarely successful defense.

After **Santos** and its judicial cacophony, average citizens trying to decipher 1956 confront the following impossible situation:

An exceptionally broad and certifiably ambiguous statute - one with "a varied and lengthy list"[13] of some 250 predicate crimes, a "totally unenlightening"[14] legislative history and a staggering array of potential applications - that leaves a key operative term, "proceeds," abjectly undefined. Congress' silence on this score is particularly baffling since it explicitly defined "proceeds" in other provisions of the U.S. Code. See, e.g., 18 U.S.C. 981 (civil forfeiture).

A controlling Supreme Court opinion, intended to clarify the ambiguity, in which the land's nine highest judges cannot make heads or tails of the sketchy statutory term, only intensifying the uncertainty surrounding it.

A controlling Supreme Court opinion in which the land's nine highest judges cannot even agree on the meaning or precedential impact of the opinion itself, leaving the law completely up in the air.

If the nation's brightest legal minds cannot make sense of the money-laundering statute or its core proceeds element - nor even agree on what their own leading case construing them means or portends - how are regular people supposed to

fare any better? More pointedly, how can plain folk, unschooled in law, hope to unravel the statute and govern their behavior accordingly? To ask the questions is to answer them.

Hence, if any statute is unconstitutionally vague, 1956 as addled in **Santos** would appear to be the one. Conversely, if 1956 in its current state is not unconstitutionally vague, then no statute fits the bill, extinguishing the doctrine entirely. If the vagueness concept is to retain vitality, it follows that 1956 fails in all its applications. This is especially true if, as some post-**Santos** decisions suggest, Justice Stevens' variable-meaning approach actually represents the case's holding. An interpretation that defines the same statutory word differently according to its factual setting is a recipe for arbitrariness that leaves the proscribed conduct purely to chance - precisely what the vagueness doctrine condemns.

The Merger Problem

Another potential argument comes from the so-called "merger problem" identified in all four **Santos** opinions. Simply stated, the problem is this: paying direct costs and dispensing loot to cohorts is part and parcel of the underlying predicate crime, so charging it separately as money laundering gives the government a 20-year sentence boost for what really amounts to a single offense.

The merger problem is not limited to illegal gambling cases. Rather, as Justice Scalia's plurality observed:

Anyone who pays for the costs of a crime with its proceeds - for example, the felon who uses the stolen money to pay for the rented getaway car - [c]ould [conceivably] violate the money-laundering statute. And any wealth-acquiring crime with multiple participants [c]ould become money laundering when the initial recipient . . . gives his confederates their shares. Generally, any specified unlawful activity, an episode of which includes transactions which are not elements of the offense and in which a participant passes receipts on to someone else, [c]ould merge with money laundering.[15]

As federal practitioners well know, prosecutors in money-laundering cases often try to squeeze two crimes out of one to leverage guilty pleas and inflated sentences. Prior to **Santos**, some lower courts sought to curb that ploy by requiring truly distinct laundering conduct that succeeds the predicate violation in time, and holding that "money laundering cannot properly be charged for 'merged' transactions."[16] Since all four **Santos** opinions appear to validate that approach, counsel should pursue it as appropriate.

Conclusion

Surely we have not heard the last word in the money-laundering debate. While Congress created the inscrutable hash that is 1956, **Santos** only perpetuates and deepens the mess. And with ordinary Americans forced to guess at what the statute now permits and prohibits, it is only a matter of time before the Court steps in again, to take another shot at cleaning up.

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Endnotes:

1. 128 S.Ct. 2020 (2008). A companion money-laundering case decided the same day, **Cuellar v. United States,** 128 S.Ct. 1994 (2008), is beyond this article's scope but also merits attention.

2. Since New York's money-laundering statute is patterned on 1956, **Santos** is equally pertinent to state criminal practitioners. See **People v. Rozenberg,** Misc3d, NYS2d , 2008 WL 3318609 (Sup. Ct. N.Y. Co. Aug. 12, 2008) (dismissing state money-laundering charges in light of **Santos**).

3. **Santos,** 128 S.Ct. at 2031 (plurality opinion).

4. Ibid. at 2032 (Stevens, J., concurring in the judgment) (footnote omitted).

5. Ibid. at 2031 (plurality opinion) (citation omitted).

6. Ibid. at 1035-36 & n.1 (principal dissenting opinion).

7. See n.5.

8. **United States v. Herlund,** No. CR-06-346-DLJ, 2008 WL 4183958 (N.D. Cal. Sept. 9, 2008).

9. See **United States v. Williams,** 128 S.Ct. 1830, 1846 (2008).

10. See, e.g., **United States v. Collier,** 358 F.Supp. 1351, 1354 (E.D. Mich. 1973), aff'd, 493 F.2d 327 (6th Cir. 1974).

11. Ibid. at 1355.

12. See n.10.

13. **Santos,** 128 S. Ct. at 2031 (concurring opinion).

14. Ibid. at 2025 n.3 (plurality opinion).

15. Ibid. at 2027.

16. Ibid. at 2034-35 (Breyer, J., dissenting) (citation and internal quotes omitted).

LOAD-DATE: September 16, 2011