

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LAWRENCE SCIALABBA AND ROBERT T. CECHINI

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The principal federal money laundering statute, 18 U.S.C. 1956(a)(1), makes it a crime to engage in a financial transaction using the “proceeds” of certain specified unlawful activities with the intent to promote those activities or to conceal the proceeds. The question presented is whether “proceeds” means the gross receipts from the unlawful activities or only the profits, *i.e.*, gross receipts less expenses.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 282 F.3d 475.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2002. A petition for rehearing was denied on May 22, 2002 (App., *infra*, 8a-9a). On August 5, 2002, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including September 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, respondents were convicted of conspiring to conduct an illegal gambling business, in violation of 18 U.S.C. 371; conducting an illegal gambling business, in violation of 18 U.S.C. 1955; conspiring to commit money laundering, in violation 18 U.S.C. 1956(h); money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i); conspiring to commit tax fraud, in violation of 18 U.S.C. 371; and filing false tax returns, in violation of 26 U.S.C. 7206(1). 99 CR 296-1 Judgment 1 (N.D. Ill. filed Jan. 29, 2001) (Cechini Judg.); 99 CR 296-2 Judgment 1 (N.D. Ill. filed Jan. 29, 2001) (Scialabba Judg.).

Respondent Cechini was sentenced principally to 188 months of imprisonment, to be followed by three years of supervised release, and fined \$40,000. Cechini Judg. 2, 4, 5. Respondent Scialabba was sentenced principally to 108 months of imprisonment, to be followed by three years of supervised release, and fined \$17,500. Scialabba Judg. 2, 4, 5. The United States Court of Appeals for the Seventh Circuit vacated respondents' money laundering convictions and remanded to the district court for resentencing on the other convictions. App., *infra*, 1a-7a.

1. OK Amusement provided video poker and slot machines to bars, restaurants, bowling alleys, and other retail establishments in various towns in Illinois. Respondent Cechini was the sole proprietor of OK Amusement, and he hired respondent Scialabba to assist him. To play the machines, customers deposited money, and they received on-screen credits if they won. They could use the credits to continue playing, which was lawful, or they could redeem the credits for cash from the owners

of the retail outlets, which was not. Many outlet owners redeemed credits for cash. App., *infra*, 2a; Gov't C.A. Br. 2-3.

Each week, respondents opened the machines and collected any deposited money that the outlet owners had not already removed. From those deposits, respondents paid funds to the outlet owners based on a split of the difference between the “ins” (the amount of money deposited in the machines) and “outs” (the amount paid to winning customers). In addition, respondents used cash obtained from the machines to reimburse some owners for out-of-pocket payments made to winning customers. App., *infra*, 2a; Gov't C.A. Br. 4. OK Amusement and the outlet owners shared the cost of the state licenses authorizing operation of the machines for amusement (but not for gambling), and respondents used cash from the machines to pay those costs. App., *infra*, 3a; Gov't C.A. Br. 4-5. Respondents also used the gambling receipts to make weekly cash payments to lease the machines. App., *infra*, 3a; Gov't C.A. Br. 5-6.

2. The federal money laundering statute at issue here makes it a crime for anyone,

knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, [to] conduct[] or attempt[] 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; 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.

18 U.S.C. 1956(a)(1). In essence, subsection (A)(i) prohibits the use of the proceeds of the specified crimes to promote those crimes, and subsection (B)(i) prohibits the use of the proceeds to conceal the fact that they are the product of crime.

The money laundering statute defines “specified unlawful activity” to include, among a variety of other offenses, the racketeering crimes enumerated in 18 U.S.C. 1961(1). See 18 U.S.C. 1956(c)(7)(A). The racketeering offenses listed in Section 1961(1) in turn include the running of an illegal gambling business, in violation of 18 U.S.C. 1955. See 18 U.S.C. 1961(1).

Respondents were charged with violating the promotion subsection of the money laundering statute, Section 1956(a)(1)(A)(i), by using the receipts from their illegal gambling operations to pay the outlet owners, to lease the gambling machines, and to obtain the amusement licenses necessary to operate the machines. See Indictment, Counts 4-15. After a jury trial, respondents were convicted of those (and other) charges. See Cechini Judg. 1; Scialabba Judg. 1.

3. The court of appeals reversed respondents’ money laundering convictions. App., *infra*, 1a-7a. The government contended that respondents had violated Section 1956 by engaging in transactions—paying the outlet owners, leasing the gambling machines, and obtaining the amusement licenses necessary to operate the machines—with the funds removed from the gambling machines. The court of appeals characterized the government’s theory as “equivalent to saying that every drug dealer commits money laundering by using

the receipts from sales to purchase more stock in trade, that a bank robber commits money laundering by using part of the loot from one heist to rent a getaway car for the next, and so on.” *Id.* at 3a. The court stated that “none of these transactions entails financial transactions to hide or invest profits in order to evade detection, the normal understanding of money laundering.” *Ibid.* The court also said that respondents were not “charged with reinvestment in seemingly legitimate businesses or other means to whitewash (= ‘launder’) the funds; the focus was entirely on the disposition of the gross income.” *Ibid.* Based on those observations, the court reasoned that “the money laundering convictions depend on the proposition that gross income is ‘proceeds’ under the statute.” *Ibid.*

The court of appeals noted that “proceeds” is not defined in the statute, and it found that the statutory context does not indicate whether proceeds refers to gross receipts or net income. But the court thought that interpreting “proceeds” to mean gross receipts “could produce odd outcomes” in both the gambling and drug contexts. App., *infra*, 4a (questioning how “proceeds” would be defined if a slot machine paid out its winnings on the spot; asserting that the “proceeds” of drug dealing would be the net yield, rather than the gross receipts out of which inventory must be purchased). The court surmised that Congress would have said “receipts” rather than “proceeds” if it had meant to reach gross amounts received, and it found that the rule of lenity counseled against a gross-receipts interpretation. The court therefore read “proceeds” to mean “profits.” *Id.* at 5a. Furthermore, the court expressed concern that defining “proceeds” to mean “gross receipts” would result in the merger of the underlying crime and the money laundering, so that the same

transactions that constituted illegal gambling would also necessarily constitute money laundering. *Id.* at 5a-6a. To avoid that result, the court concluded that “the word ‘proceeds’ in § 1956(a)(1) denotes net rather than gross income of an unlawful venture.” *Id.* at 7a. Applying that definition, the court vacated respondents’ convictions for money laundering and remanded for resentencing on respondents’ other convictions. *Ibid.*

The government petitioned for rehearing and rehearing en banc. Judge Williams recused herself, and the petition was denied by an equally divided court. Judges Posner, Ripple, Manion, Kanne, and Diane P. Wood voted to grant rehearing en banc. App., *infra*, 9a & nn.*-**.

REASONS FOR GRANTING THE PETITION

The court of appeals has interpreted the principal federal money laundering statute in a fashion that contradicts its text, departs from the approach taken by other circuits, and threatens to complicate if not frustrate altogether many conventional applications of the statute. By holding that the word “proceeds” means “profits” under 18 U.S.C. 1956(a)(1), the court of appeals has incorrectly rejected the common understanding of the term “proceeds,” as well as the meaning that Congress has accorded the term in related statutes, including one enacted just two years before the money laundering statute. The court relied on reasoning that has broad implications for prosecutions, like the present one, that charge the defendants with engaging in financial transactions with the proceeds of specified crimes with the intent to *promote* those crimes. The court reasoned that, without financial transactions that “hide or invest profits in order to

evade detection,” a prosecution departs from “the normal understanding of money laundering.” App., *infra*, 3a. But Section 1956 contains separate subsections that explicitly prohibit transactions “with the intent to promote the carrying on of specified unlawful activity” (Section 1956(a)(1)(A)(i)) and transactions to “conceal” the source of the proceeds (Section 1956(a)(1)(B)(i)). The court of appeals’ theory, if extended to its logical limits, would eviscerate the promotion aspect of the statute.

The decision below cannot be reconciled with the results reached and reasoning employed by other courts of appeals applying Section 1956. The decision will also impair enforcement of the congressional prohibition on money laundering by subjecting the government to an unreasonable burden of proof and enmeshing the courts in complicated issues concerning the accounting principles that should govern illegal enterprises. For those reasons, and because the question presented is recurring and important, the court of appeals’ decision warrants review by this Court.

A. The Court Of Appeals’ Decision Incorrectly Constricts The Scope And Impairs Enforcement Of The Money Laundering Statute

The money laundering statute, as relevant here, targets transactions in unlawfully derived “proceeds” when those transactions are intended to promote the underlying illegal activity. 18 U.S.C. 1956(a)(1)(A)(i). The court of appeals would require the government to prove that the funds used in those transactions represent the “profits” of illegal activity. As the examples given by the court of appeals reveal, the court would thus have the government establish the profitability of illegal schemes, such as drug dealing and bank robbery,

in order to obtain a money laundering conviction. App., *infra*, 3a. Yet that approach would impose an unreasonable burden of proof on the government and entangle the courts in complicated interpretive questions. Unlike legitimate businesses, criminals rarely keep accounting records. Indeed, the Seventh Circuit itself has noted the “extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits.” *United States v. Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), *aff’d in part and rev’d in part*, 432 U.S. 137 (1977). Even if documentation can be found, it is not clear what principles of accounting should be applied to the operations of such criminal enterprises; the accounting industry does not prescribe standards for illegal ventures. The upshot of the court of appeals’ holding is to encumber the prosecution of ordinary money laundering cases with significant complications. If Congress had legislated a “profits” rule, then the government would have to shoulder that burden. But an examination of the statutory text and background reveals that Congress did no such thing.

1. The court of appeals’ definition of “proceeds” as “net income” or “profits”—for which the court cites no authority—is contrary to the word’s most common and “primary meaning.” *Muscarello v. United States*, 524 U.S. 125, 128 (1998). The initial definitions of “proceeds” provided by the *Random House Dictionary of the English Language* (2d ed. 1987), which lists first the most frequently encountered meanings of a word, *id.* at xxxii, are “something that results or accrues” and “the total amount derived from a sale or other transaction.” *Id.* at 1542 (emphasis added). The dictionary offers “profits” only as a secondary, less common definition. *Ibid.* Likewise, *Black’s Law Dictionary* (7th ed. 1999) defines “proceeds” as “1. The value of land, goods, or

investments when converted into money; the amount of money received from a sale. 2. Something received upon selling, exchanging, collecting, or otherwise disposing of collateral.” *Black’s Law Dictionary* distinguishes “proceeds” from “net proceeds,” which, in a sub-entry under “proceeds,” it defines as “[t]he amount received in a transaction minus the cost of the transaction (such as expenses and commissions).” *Ibid.* See *Webster’s Third New International Dictionary* 1807 (1993) (*Webster’s*) (providing, as the initial definition of “proceeds,” “what is produced by or derived from something (as a sale, investment, levy, business) by way of total revenue : the total amount brought in”).

The “profits” definition adopted by the court of appeals also departs from the meaning that Congress accorded the word “proceeds” just two years before it enacted the money laundering statute, when Congress amended the Racketeer Influenced and Corrupt Organizations (RICO) forfeiture statute. The forfeiture provision, as amended, provides that a RICO offender must forfeit “any property constituting, or derived from, any *proceeds* which the person obtained, directly or indirectly, from racketeering activity.” 18 U.S.C. 1963(a)(3) (emphasis added). All but one of the courts of appeals that have addressed the issue have determined that the word “proceeds,” as used in that provision, means gross receipts, not net profits. See *United States v. Simmons*, 154 F.3d 765, 770-771 (8th Cir. 1998); *United States v. DeFries*, 129 F.3d 1293, 1313-1314 (D.C. Cir. 1997); *United States v. Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996).¹

¹ The Seventh Circuit is the lone exception. As with the money laundering statute, the Seventh Circuit has suggested (in dictum) that “proceeds” in the RICO forfeiture statute means net rather

The legislative history of the RICO forfeiture statute confirms that “proceeds” does not mean “profits.”

[T]he term “proceeds” has been used in lieu of the term “profits” in order to alleviate the unreasonable burden on the government of proving net profits. It should not be necessary for the prosecutor to prove what the defendant’s overhead expenses were.

S. Rep. No. 225, 98th Cong., 1st Sess. 199 (1983). Indeed, the Senate Report on the RICO forfeiture provision specifically cited the Seventh Circuit’s recognition in *United States v. Jeffers* that reliable evidence of “net profits” in criminal conspiracies is hard to adduce. *Id.* at 199 n.24. There is no reason to believe that Congress intended to deviate from its approach in the RICO statute when it enacted the money laundering statute shortly thereafter and used the same term, “proceeds.” Rather, it is logical to conclude that Congress intended a consistent meaning for the term as used in the criminal law. See also *United States v. McHan*, 101 F.3d 1027, 1041-1042 (4th Cir. 1996) (interpreting “proceeds” as used in 21 U.S.C. 853, the drug forfeiture statute, to mean gross receipts rather than net income), cert. denied, 520 U.S. 1281 (1997).

Further undercutting a “net income” or “profits” interpretation is that those phrases have concrete meaning only after application of a system of accounting principles. But there is no source of generally accepted accounting principles for criminal enterprises. Therefore, application of a “profits” approach would require the courts to formulate an accounting theory for illegal businesses. The courts would have to resolve difficult

than gross receipts. See *United States v. Masters*, 924 F.2d 1362, 1369-1370, cert. denied, 500 U.S. 919 (1991).

and novel questions, such as whether illicit profit should be measured using accrual or cash accounting methods; whether such profit should be measured on an annual, monthly or other basis; and what costs can legitimately be deducted to arrive at the profit figure (*e.g.*, can the operator of an illegal business deduct a “salary” to compensate himself for the time he devotes to the business?). Congress should not lightly be understood to have handed such a task to the courts, without any guidance or ready body of case law to consult.

2. The court of appeals reasoned that the “profits” or “net income” definition of proceeds is appropriate because it confines the statute’s scope to what the court viewed as “the normal understanding of money laundering”—transactions designed “to whitewash (= ‘launder’) the funds” produced by crime “in order to evade detection.” App., *infra*, 3a. The court’s assumption that the statute prohibits only transactions designed to conceal illegal activity is fundamentally incorrect. Section 1956(a)(1), in relevant part, makes it unlawful for anyone,

knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, [to] conduct[] or attempt[] 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; 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.

18 U.S.C. 1956(a)(1). Only one of Section 1956(a)(1)'s subsections, Section 1956(a)(1)(B)(i), addresses financial transactions undertaken for the purpose of concealing a criminal's ill-gotten gains to evade detection. Another, independent subsection, Section 1956(a)(1)(A)(i), which is the provision at issue here, expressly prohibits transactions designed to promote unlawful activity regardless whether the perpetrator has any intent to conceal. The promotion subsection and the concealment subsection "are set forth in the disjunctive" and therefore "an intent to launder * * * is not a required element of [the promotion subsection] offense." *United States v. Montoya*, 945 F.2d 1068, 1076 (9th Cir. 1991). See *United States v. Carcione*, 272 F.3d 1297, 1302 n.8 (11th Cir. 2001); *United States v. Torres*, 53 F.3d 1129, 1139 n.7 (10th Cir. 1995), cert. denied, 519 U.S. 890 (1996); *United States v. Skinner*, 946 F.2d 176, 177-178 (2d Cir. 1991). Because Section 1956(a)(1)(A)(i) does not require an intent to conceal, the court of appeals erred in using that element as a guidepost for construing that subsection. In doing so, the court constricted the statute's scope in contravention of the congressional intent reflected in its plain language.

Indeed, under one reading of the court of appeals' opinion, the court has excluded from the scope of the money laundering statute not only transactions in which a criminal uses illicitly-derived funds to cover the expenses of the *particular* crime that generated the funds, but *all* transactions in which ill-gotten funds are *reinvested* into an ongoing criminal enterprise, even if

those transactions promote *continued or expanded* criminal activity. The court suggested, for example, that the statute would not apply to a drug trafficker who “us[es] the receipts from sales to purchase more stock in trade” or a bank robber who “us[es] part of the loot from one heist to rent a getaway car for the next.” App., *infra*, 3a. That interpretation constitutes a dramatic curtailment of the scope of the statute as it has traditionally been understood. A large majority of prosecutions under the promotion subsection of the statute involve precisely those kinds of financial transactions, and such prosecutions are a staple of federal efforts to curtail organized crime, drug trafficking, and business fraud.²

² See, e.g., *United States v. Dovalina*, 262 F.3d 472, 476 (4th Cir. 2001) (evidence sufficient to support money laundering conviction because defendant “used cash proceeds from the sale of marijuana to promote additional marijuana sales”); *United States v. Stewart*, 256 F.3d 231, 250 (4th Cir. 2001) (evidence sufficient to support money laundering conviction because “a portion of the drug proceeds were reinvested into the drug operation”), cert. denied, 122 S. Ct. 1451 (2002); *United States v. Burgos*, 254 F.3d 8, 13 (1st Cir.) (money laundering conviction involving use of drug proceeds to buy additional drugs for distribution), cert. denied, 122 S. Ct. 497 (2001); *United States v. Taylor*, 239 F.3d 994, 998-999 (9th Cir. 2001) (evidence sufficient to support money laundering conviction because proceeds from prostitution used to transport minors across state lines for prostitution); *United States v. Reed*, 167 F.3d 984, 993 (6th Cir.) (evidence sufficient to support money laundering conviction because drug proceeds used “to facilitate the continuation of drug trafficking”), cert. denied, 528 U.S. 897 (1999); *United States v. Hawn*, 90 F.3d 1096, 1100 (6th Cir. 1996) (evidence sufficient to support money laundering conviction where defendant deposited check representing proceeds of fraud to promote “ongoing and future unlawful activity”), cert. denied, 519 U.S. 1059 (1997); *United States v. Golb*, 69 F.3d 1417, 1424 (9th Cir. 1995) (evidence sufficient to support money laundering conviction

3. The court of appeals mistakenly believed that its interpretation of the word “proceeds” is necessary to maintain a distinction between the offense of money laundering and the underlying crime that produces the laundered proceeds. See App., *infra*, 1a-2a, 5a-6a. But the court’s concern to maintain that distinction does not justify its unnatural and illogical constriction of the definition of “proceeds.” Rather, as other opinions have recognized, the distinction between a money laundering transaction and the underlying crime is maintained by generally requiring that the charged transaction “must follow and must be separate from any transaction necessary for the predicate offense to generate proceeds.” *United States v. Mankarious*, 151 F.3d 694, 706 (7th Cir.), cert. denied, 525 U.S. 1056 (1998); *United States v. Heaps*, 39 F.3d 479, 485-486 (4th Cir. 1994); *United States v. Conley*, 37 F.3d 970, 980 (3d Cir. 1994).

because drug proceeds used “to facilitate * * * continued use of * * * planes for drug trafficking”), cert. denied, 517 U.S. 1127 (1996); *United States v. Thomas*, 12 F.3d 1350, 1360 (5th Cir.) (evidence sufficient to support money laundering conviction because drug proceeds used to pay for later drug purchases), cert. denied, 511 U.S. 1114 (1994); *United States v. Cruz*, 993 F.2d 164, 167 (8th Cir. 1993) (evidence sufficient to support money laundering conviction because drug proceeds used to buy vehicle that was then used to transport drugs); *United States v. Cole*, 988 F.2d 681, 682 (7th Cir. 1993) (money laundering charges based on use of proceeds of investment fraud to pay “interest” to defrauded investors when “necessary to keep the scheme going”); *United States v. Johnson*, 971 F.2d 562, 566 (10th Cir. 1992) (evidence sufficient to support money laundering conviction because proceeds of fraud used to pay off home mortgage and buy expensive car in order to impress prospective victims with defendant’s business acumen); *United States v. Jackson*, 935 F.2d 832, 841 (7th Cir. 1991) (evidence sufficient to support money laundering conviction because drug proceeds used to buy beepers for use in continued drug operation).

For example, when a bank robber uses the loot from a robbery to pay his accomplices, the payments to the accomplices are distinct from the conduct constituting the robbery, so the separate-conduct requirement is satisfied. Likewise, the requirement is satisfied when a drug trafficker uses the proceeds from a drug sale to buy a stash house for his enterprise, because the house purchase and drug sale constitute distinct transactions. See *Conley*, 37 F.3d at 980 (“proceeds are derived from an already completed offense, or a completed phase of an ongoing offense”). On the other hand, the separate-conduct requirement would be violated in a case where “the payment for drugs itself [were] held to be a transaction that promoted the unlawful activity of that same transaction.” *Heaps*, 39 F.3d at 485.

This case involves conduct similar to the accomplice payments and the stash house purchase: The payments to the outlet owners are akin to the accomplice payments because they compensate the defendants’ partners in crime, and the lease and licensing payments are akin to the stash house purchase because they facilitate future illegal activity. Thus, the Seventh Circuit’s cramped definition of proceeds is unnecessary to implement the requirement that the underlying criminal act and the money laundering conduct be distinct. Rather, it inappropriately excludes from the ambit of the money laundering statute conduct that goes beyond the underlying crime and entails use of the revenue produced by that crime to promote criminal activity—precisely what the promotion subsection of the statute is designed to prohibit.

B. The Decision Of The Court Of Appeals Departs From The Approach Of Other Courts Of Appeals

The decision of the court of appeals is not only incorrect but also departs from the construction that other courts of appeals have accorded the money laundering statute.

1. The definition of proceeds adopted by the Seventh Circuit conflicts with the definition used by the Sixth Circuit. In *United States v. Hawn*, 90 F.3d 1096, 1101 (1996), cert. denied, 519 U.S. 1059 (1997), the Sixth Circuit rejected a due process challenge to Section 1956(a)(1)(A)(i) that was based on the contention that the word “proceeds” is unconstitutionally vague. The court of appeals held that “proceeds” is not unconstitutionally vague because it “is a commonly understood word in the English language” that includes “what is produced by or derived from something (as a sale, investment, levy, business) by way of *total revenue*.” *Id.* at 1101 (emphasis added) (quoting *Webster’s* 1807 (1971)). Accord *United States v. Prince*, 214 F.3d 740, 747 (6th Cir.), cert. denied, 531 U.S. 974 (2000); see *United States v. Monaco*, 194 F.3d 381, 385-386 (2d Cir. 1999) (rejecting vagueness challenge to the term “proceeds” in Section 1956(a)(1) and quoting *Hawn*, 90 F.3d at 1101, for the proposition that “[p]roceeds’ is a commonly understood word in the English language”), cert. denied, 529 U.S. 1028 (2000). The Sixth Circuit’s “total revenue” definition directly contradicts the “profits” or “net income” definition adopted by the Seventh Circuit in this case.³

³ As noted above, the Seventh Circuit’s interpretation of “proceeds” is also at odds with the meaning that other courts of appeals have accorded the term in the related RICO forfeiture statute. Three courts of appeals have expressly held that “proceeds” as

2. In addition, the Third Circuit has, without conducting a “net income” analysis, upheld a money laundering conviction on facts that are essentially indistinguishable from the facts of this case. In *United States v. Conley*, 37 F.3d 970 (3d Cir. 1994), the defendants were convicted of a conspiracy to violate both the federal gambling statute, by conducting an unlawful video poker machine business, and Section 1956(a)(1)(A)(i), by using the proceeds of the operation to pay employees and to purchase machines. One of the defendants contended on appeal that collecting, dividing, and transferring the receipts of the gambling machines were essential facets of the gambling business and therefore could not constitute the separate crime of money laundering. Rejecting that claim, the court of appeals held that “the money, once collected from the poker machines, became ‘proceeds of specified unlawful activity’ within the meaning of the money laundering statute. Accordingly, any subsequent financial transaction involving these proceeds that promotes or furthers the illegal gambling business could form the basis of a charge of money laundering.” *Id.* at 980.

Although the Seventh Circuit acknowledged that “[t]he theory of prosecution in *Conley* was the same as the theory here” (App. *infra*, 6a), it purported to distinguish *Conley* because the defendant in that case did not argue that there is a difference between “revenues and

used in that statute means gross receipts rather than net income. See *United States v. Simmons*, 154 F.3d 765, 770-771 (8th Cir. 1998); *United States v. DeFries*, 129 F.3d 1293, 1314 (D.C. Cir. 1997); *United States v. Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996). Further, the Fourth Circuit has rejected a “net income” definition of “proceeds” as used in the drug trafficking forfeiture statute, 21 U.S.C. 853. See *United States v. McHan*, 101 F.3d 1027, 1041-1042 (1996).

proceeds” (*ibid.*). It is clear, however, that the Third Circuit viewed its task as defining the “essential elements” of money laundering (37 F.3d at 976), and it found that the defendants’ use of the receipts of the machines to pay the expenses of the operation constituted a prohibited transaction with “proceeds” (*id.* at 980). The result and reasoning in *Conley* cannot be reconciled with the outcome here.

3. The outcome here also cannot be squared with numerous cases in which courts of appeals have found sufficient evidence to support money laundering convictions based on the use of the receipts of illegal activity to compensate accomplices or to pay other costs incurred to conduct the activity. See, e.g., *United States v. Evans*, 272 F.3d 1069, 1082 (8th Cir. 2001) (prostitute’s payments to escort agency from proceeds of prostitution), cert. denied, 122 S. Ct. 1638 (2002); *United States v. Wylly*, 193 F.3d 289, 295-296 (5th Cir. 1999) (kickback to public official for his participation in fraud scheme); *United States v. Rudisill*, 187 F.3d 1260, 1267 (11th Cir. 1999) (use of proceeds from illegal telemarketing scheme to cover payroll expenses of scheme); *United States v. Reed*, 167 F.3d 984, 993 (6th Cir.) (drug proceeds used to pay antecedent drug debt), cert. denied, 528 U.S. 897 (1999); *United States v. King*, 169 F.3d 1035, 1039 (6th Cir.) (use of drug proceeds to pay drug couriers for drugs delivered on consignment), cert. denied, 528 U.S. 892 (1999); *United States v. France*, 164 F.3d 203, 208-209 (4th Cir. 1998) (drug proceeds used to post bail for confederate in scheme), cert. denied, 527 U.S. 1010 (1999); *United States v. Hildebrand*, 152 F.3d 756, 762 (8th Cir.) (use of proceeds of fraud scheme to pay for office supplies, secretarial services, and staff wages in furtherance of scheme), cert. denied, 525 U.S. 1033 (1998); *United States v. Cos-*

carelli, 105 F.3d 984, 990 (proceeds of telemarketing fraud used to pay co-conspirators and cover overhead expenses), vacated, 111 F.3d 376 (1997), reinstated, 149 F.3d 342 (5th Cir. 1998) (en banc); *United States v. Marbella*, 73 F.3d 1508, 1514 (9th Cir. 1996) (use of proceeds from fraud scheme to compensate individuals for referring victims); *Skinner*, 946 F.2d at 177-178 (use of drug proceeds to pay supplier).

To the extent that the Seventh Circuit has excluded from the money laundering statute transactions in which the defendant replenishes the stock-in-trade of an illegal business or otherwise uses the revenue of an illegal enterprise to continue or to expand the business, its decision also cannot be reconciled with many other appellate decisions upholding convictions under Section 1956(a)(1)(A)(i) against claims of evidentiary insufficiency. See, e.g., *United States v. Godwin*, 272 F.3d 659, 669 (4th Cir. 2001) (use of proceeds from Ponzi scheme to pay “interest” to “dissatisfied” investors to promote continuation of fraudulent scheme), cert. denied, 122 S. Ct. 1942 (2002); *United States v. Barragan*, 263 F.3d 919, 924 (9th Cir. 2001) (use of drug proceeds to rent motel rooms for conducting future drug deals); *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 (2001); *Torres*, 53 F.3d at 1137 n.6 (use of drug proceeds to buy drugs for future sale); *United States v. Munoz-Romo*, 947 F.2d 170, 177-178 (5th Cir. 1991) (use of drug proceeds to pay for car used in later drug transactions), cert. denied, 506 U.S. 802 (1992); see also cases cited in note 2, *supra*. Although the defendants in those cases did not argue that Section 1956(a)(1) prohibits only transactions involving net proceeds, the holdings of those cases reflect the understanding (which was universally accepted

until the decision in this case) that the statute prohibits the use of the revenue from criminal activity to pay for the overhead and expansion of that activity.

4. Indeed, before this decision, the Seventh Circuit itself understood the money laundering statute to prohibit such transactions. See, e.g., *United States v. Febus*, 218 F.3d 784, 787-788 (2000) (use of proceeds from illegal lottery to pay operation's collectors and winning players); *United States v. Masten*, 170 F.3d 790, 797-798 (1999) (use of proceeds of investment fraud to pay commissions to company's distributors); *Jackson*, 935 F.2d at 840-841 (use of drug proceeds to buy beepers for drug business). The government filed a petition for rehearing en banc asking the Seventh Circuit to resolve the tension between this case and its prior decisions, but an evenly-divided court (with Judge Williams recused) denied the petition. App., *infra*, 8a-9a.

There is no sufficient reason for this Court to await further developments in the Seventh Circuit before reviewing the question presented. In order for the Seventh Circuit to have another opportunity to consider the issue en banc, it would appear that the government would have to file a "test case" indictment barred by this decision, and the district court would have to dismiss the indictment on that basis, after which the government would have to appeal and seek initial hearing en banc. There is no guarantee, however, that the district court would dismiss the indictment and thus enable an appeal; instead, the court could allow the case to go to trial and later grant a judgment of acquittal or simply instruct the jury that "proceeds" means "profits." In either of those situations, the government would not be permitted to appeal. Even if the case reached the court of appeals (or if a case on

collateral attack raised the issue), there is no assurance that rehearing en banc would be granted to address the issue whether “proceeds” means “profits,” or that the court would eliminate the conflict over the interpretation of the term “proceeds.” As noted, in *United States v. Masters*, 924 F.2d at 1369-1370, the court had previously indicated that “proceeds” in the RICO forfeiture statute means “net, not gross, revenues—profits, not sales.” See note 1, *supra*. Under these circumstances, this Court’s intervention is warranted at this time.

C. The Question Presented Is Of Recurring Importance

Review at this juncture is particularly appropriate because the question presented is important, and the factual scenario that raises that question is a recurring one. Most money laundering prosecutions under the promotion subsection of the statute involve the use of revenue from criminal activity to pay the expenses of that activity or to fund its continuation or expansion. Those money laundering prosecutions are a vital part of the government’s efforts to combat organized crime, drug trafficking, illegal gambling, and fraud. The court of appeals’ decision, even if it is read narrowly, significantly constricts the scope of the money laundering statute and thereby impairs those law enforcement efforts. See pp. 11-12, *supra*. If the decision is read broadly, as statements in the opinion suggest it will be, see App., *infra*, 3a, the ruling will essentially eviscerate the promotion subsection of the money laundering statute, because reinvestment of the revenue from illegal activity will violate that provision only in the rare cases in which the revenue is used to fund a *different kind* of illegal activity.

The burdens on the effective enforcement of the congressional prohibition against money laundering have been outlined above. The government will be required to prove in every case that the criminal activity that generated the laundered funds produced a profit and that the funds involved in the laundering transaction represent a part of that profit. That requirement will be extremely burdensome because criminal businesses do not generally keep accounting records, and even less frequently keep accurate ones. In addition, “profits” and “net income” are not concepts with clear meanings but depend on the application of accounting principles. The court of appeals’ definition will thus prove as problematic for courts as for prosecutors. And the court of appeals’ rule will insulate from money-laundering liability defendants whose illegal businesses have, as yet, failed to turn a profit. It makes little sense to give a money-laundering defense to drug dealers, gamblers, and racketeers whose expenses over a period of time have happened to exceed their revenues. See pp. 10-11, *supra*.

Those burdens on the government and the courts will arise in *all* money laundering cases because the government must establish that a financial transaction involves the “proceeds” of specified unlawful activity even in a case brought under the concealment (rather than the promotion) subsection of the statute. See 18 U.S.C. 1956(a)(1) (using the word “proceeds” in the introductory language that applies to both subsections); App., *infra*, 7a (holding that “the word ‘proceeds’ in § 1956(a)(1) denotes net rather than gross income”) (emphasis added). Thus, even when a transaction is explicitly designed to conceal or to disguise the illicit origins of the funds, a defendant will evade conviction unless the government can demonstrate that the funds

represent profits rather than gross receipts. Because the court of appeals' decision, if allowed to stand, will pose broad and serious obstacles to enforcement of the congressional proscription of money laundering, this Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2002

expenses) and the word “proceeds” loses operational significance.

The business in this case is gambling, which is unlawful in Illinois unless licensed by the state. OK Amusement, of which Robert Cechini was sole proprietor, provided video poker machines to bars, taverns, and restaurants (collectively, the retail outlets). Patrons dropped coins into the machines and received on-screen “credits” if they won. These credits could be used lawfully to continue playing, or unlawfully as the basis of cash payouts. Many retail outlets redeemed credits for cash. Later, when Cechini or Lawrence Scialabba, his assistant, opened the coin boxes, the contents would be split with the outlet’s owner: some went to cover the payments made to customers, some was retained by the owner as compensation for his role in the business, and defendants kept the rest as compensation for the machines—which OK Amusement not only supplied but also fixed (if they broke down) or replaced (if they were seized in raids by the police).

Cechini and Scialabba have been convicted of running an unlawful gambling business, see 18 U.S.C. §§ 371, 1955; filing tax returns that failed to report their income from this business, see 26 U.S.C. § 7206(1); and conspiring to defeat tax collection from the outlets’ owners, see 18 U.S.C. § 371. They do not appeal from any of these convictions. But they do appeal from the money laundering convictions, because under the version of the Sentencing Guidelines in force before November 1, 2001, the money laundering convictions substantially augmented their prison terms. Compare *United States v. Buckowich*, 243 F.3d 1081 (7th Cir. 2001), with Amendment 634, effective November 1, 2001. See also *United States v. Perez*, 249 F.3d 583 (7th

Cir. 2001). Scialabba's base offense under the old version of U.S.S.G. § 2S1.1 was 31, producing a sentencing range of 108-135 months (and a sentence of 108 months); with no money laundering counts the offense level would have been 21 and the range 37-46 months. Cechini's base offense level was 34, with a range of 235-293 months; he received a sentence of 188 months (the bottom of the range for level 32, after the district court made an error in addition); but without the money laundering convictions his offense level would have been 23 and the sentencing range 84-105 months.

According to the prosecutor, Cechini and Scialabba violated § 1956(a)(1) when they handed some of the money in the coin boxes over to the outlets' owners and used more of that revenue to meet the expenses of the business (such as leasing the video poker machines and obtaining amusement licenses for them from the state). This is equivalent to saying that every drug dealer commits money laundering by using the receipts from sales to purchase more stock in trade, that a bank robber commits money laundering by using part of the loot from one heist to rent a getaway car for the next, and so on. An embezzler who spent part of the take on food and rent, in order to stay alive to cook the books again, would be a money launderer too. Yet none of these transactions entails financial transactions to hide or invest profits in order to evade detection, the normal understanding of money laundering. Nor were Cechini or Scialabba charged with reinvestment in seemingly legitimate businesses or other means to whitewash (= "launder") the funds; the focus was entirely on the disposition of the gross income. Thus the money laundering convictions depend on the proposition that gross income is "proceeds" under the statute.

Here is the text of § 1956(a)(1):

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; 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, shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

The prosecutor's argument is plain meaning: Divvying up income with tavern owners is a "financial transaction which involves the proceeds" (etc.). According to the United States, two opinions support its plain-meaning view: *United States v. Conley*, 37 F.3d 970 (3d Cir. 1994), and *United States v. Mankarious*, 151 F.3d 694, 706 (7th Cir. 1998). We do not read these cases so; and the meaning of this statute is not at all plain because it lacks a definition of "proceeds" and the context does not reveal whether the reference is to gross receipts or net income.

Treating the word as a synonym for receipts could produce odd outcomes. Consider a slot machine in a

properly licensed casino. Gamblers insert coins, and the machine itself returns some of them as winnings. Later the casino opens the machine and removes the remaining coins. What are the “proceeds” of this one-armed bandit: what’s left in the cash box, or the total that entered through the coin slot? At oral argument the prosecutor sensibly replied that the “proceeds” do not exceed what’s left after gamblers have received their jackpots; yet the only difference between the slot machine and the video poker machine is that the slot machine is automated and pays gamblers directly. Likewise, one would suppose, the “proceeds” of drug dealing are the *profits* of that activity (the sums available for investment outside drug markets), the net yield rather than the gross receipts that must be used to buy inventory and pay the wages of couriers. It would have been easy enough to write “receipts” in lieu of “proceeds” in § 1956(a)(1); the Rule of Lenity counsels against transmuting the latter into the former and catching people by surprise in the process.

If Congress had levied a tax on the “proceeds” of a casino, most speakers of English would understand this as a tax on the profits of the business (what’s left after paying suppliers and the winning gamblers) rather than on the amount wagered. It makes sense to read “proceeds” in § 1956(a)(1) the same way. If instead the word “proceeds” is synonymous with gross income, then we would have to decide whether, as a matter of statutory construction (distinct from double jeopardy), it is appropriate to convict a person of multiple offenses when the transactions that violate one statute necessarily violate another. See, e.g., *Heflin v. United States*, 358 U.S. 415, 79 S. Ct. 451, 3 L. Ed .2d 407 (1959); *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.

Ed. 2d 70 (1978); *Busic v. United States*, 446 U.S. 398, 100 S. Ct. 1747, 64 L. Ed. 2d 381 (1980). By reading § 1956(a)(1) to cover only transactions involving profits, we curtail the overlap and ensure that the statutes may be applied independently to sequential steps in a criminal enterprise.

Mankarious offers the prosecutor no support. The defendants were charged with mail fraud and money laundering, among other things. They received money from the mail fraud before they used the mail, which served to disguise their preceding fraud. The defendants engaged in transactions with this money before the mailing and argued that these funds can not be “proceeds” from mail fraud until the mail fraud is complete. We held, to the contrary, that a fraudulent *scheme* involving mail (for the federal crime is the whole scheme) can generate “proceeds” before the mailings have been completed. That decision has nothing to do with the difference between gross and net income; the distinction played no role in *Mankarious*, which was about timing rather than the difference between “proceeds” and “receipts.”

Conley is closer to the mark but does not hit it. The theory of prosecution in *Conley* was the same as the theory here: that using gross revenues of a gambling business to pay suppliers and employees violates § 1956(a)(1). But the defense differed. Instead of arguing that there is a difference between revenues and proceeds, the defendants in *Conley* embraced the idea that receipts equal “proceeds” and used that as the fulcrum of a contention that prosecution for both gambling and money laundering violates the double jeopardy clause of the fifth amendment, because proof of gambling shows money laundering too. The Third

Circuit rejected that variation on the “same transaction” approach to double jeopardy, remarking that the statutory *elements* of the offenses differ, and the Supreme Court has held that it is the elements of the crime rather than the underlying transactions that define an “offense” for purposes of the double jeopardy clause. See *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). *Conley* accepted the parties’ shared assumption that “proceeds” means gross income. It did not consider, and thus did not resolve, the question before us today. Nor does our opinion in *United States v. Jackson*, 935 F.2d 832, 839-42 (7th Cir. 1991), resolve it. Some of the transactions said to be money laundering in that prosecution involved the purchases of business supplies, but other transactions involved reinvestment of net profits; the court was not asked to, and did not, decide whether all gross receipts are “proceeds.” We now hold that the word “proceeds” in § 1956(a)(1) denotes net rather than gross income of an unlawful venture.

The money laundering convictions are vacated, and the matter is remanded to the district court for resentencing on the other convictions. This may affect the amount of forfeiture (previously set at about \$3 million), so it would be premature to address the defendants’ arguments that this sum was miscalculated.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 01-1291, 01-1292

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LAWRENCE SCIALABBA AND ROBERT T. CECHINI,
DEFENDANTS-APPELLANTS

May 22, 2002

Appeals From The United States District Court For
The Northern District Of Illinois, Eastern Division.

No. 99 CR 296
Ruben Castillo, Judge.

ORDER

Before: Flaum, Chief Judge, and COFFEY and
EASTERBROOK, Circuit Judges.

Plaintiff-appellee filed a petition for rehearing and
rehearing en banc on April 15, 2002. A vote of the

active members of the court was requested* and the petition for rehearing en banc was denied by an equally divided court.** All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

* Judge Williams did not participate in the consideration of this matter.

** Judges Posner, Ripple, Manion, Kanne and Diane P. Wood voted to grant rehearing en banc.