



Volume 28

Issue 2 Symposium: *White Collar Crime: The Moral, Ethical, & Legal Implications of White Collar Crime in the 21st Century*

Article 6

6-1-2014

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Leslie A. Dickinson

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Recommended Citation

Leslie A. Dickinson, *Revisiting the "Merger Problem" in Money Laundering Prosecutions Post-Santos and the Fraud Enforcement and Recovery Act of 2009*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 579 (2014).

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**REVISITING THE “MERGER PROBLEM” IN MONEY
LAUNDERING PROSECUTIONS POST-SANTOS
AND THE FRAUD ENFORCEMENT AND
RECOVERY ACT OF 2009**

LESLIE A. DICKINSON*

INTRODUCTION

Congress and the Supreme Court often disagree on the meaning, scope, and language of federal statutes—the interpretation of the word “proceeds” in the federal money laundering statute is one such disagreement. The statute, 18 U.S.C. § 1956(a)(1), punishes persons engaging in certain “financial transactions” that involve “proceeds” of “specified unlawful activities” (predicate offenses which include virtually all white-collar crimes as defined under 18 U.S.C. § 1956(c)(7)).¹ However, as initially drafted, the statute did not define the term “proceeds.” Thus, federal courts of appeals disagreed on the appropriate meaning—some defining the term narrowly to mean only “net profits” (revenues *left over after* expenses are paid for the underlying offense), and others defining it more broadly as “gross receipts” (*all funds stemming from the underlying offense*).² Defining “proceeds” narrowly would make it more difficult for prosecutors to convict because they would, under the statute, need to prove a defendant’s gross criminal earnings, subtract all total expenses, and show that the money involved in the financial transaction constituted net profits. In contrast, with gross receipts, prosecutors only need to prove the base earnings.³ However, defining “proceeds” more broadly allows prosecutors to, in some circumstances, convict criminal defendants under the money laundering statute by merely proving the underlying crime.⁴ In other words, proving the underlying predicate offense automatically proves the

* J.D. Candidate, Notre Dame Law School, 2014; B.A., University of Michigan, 2011. Special thanks to Professor Jimmy Gurulé for his help and guidance during the preparation of this Note. I would also like to thank my parents, brother, family, and friends for their love and encouragement.

1. 18 U.S.C. § 1956 (2012).

2. See discussion *infra* Part I.

3. Jimmy Gurulé, *Does “Proceeds” Really Mean “Net Profits”? The Supreme Court’s Efforts to Diminish the Utility of the Federal Money Laundering Statute*, 7 AVE MARIA L. REV. 339, 340 (2009).

4. *Id.* at 515–18.

money laundering offense for the same act(s). This is particularly problematic when the penalty for the predicate offense is substantially lower than that for the money laundering offense. This result could lead to punishments over and above the defendant's moral culpability for the underlying act and is inconsistent with congressional intent.⁵

In *United States v. Santos*,⁶ the United States Supreme Court addressed the issue. Santos was charged with operating an illegal gambling business that used receipts from bets to pay the lottery's winners and employees.⁷ Santos was convicted under the money laundering statute, which imposed a 210-month sentence,⁸ and under the illegal gambling statute, which imposed a 60-month sentence.⁹ The district court defined "proceeds" as "gross receipts" under the money laundering statute.¹⁰ The result of this interpretation meant that the evidence proving the illegal gambling offense also satisfied the "proceeds" element of the money laundering statute. Because he was convicted of both, Santos received a sentence of twelve and a half more years in federal prison than he would have if he had only been convicted of the illegal gambling offense.¹¹

Santos appealed, and the Seventh Circuit weighed in on the issue, favoring the "net profits" interpretation and holding that the "gross receipts" interpretation would merge the money laundering offense with the separate underlying gambling offense, essentially punishing the defendant twice for the same criminal act ("The Merger Problem").¹² The Supreme Court granted certiorari and affirmed the Seventh Circuit's decision in a fractured four to one to four opinion with Justice Scalia writing for the plurality.¹³ The merging of the two offenses was particularly important in the *Santos* case because it involved a prosecution under the "promotional theory" of the money laundering statute which deals with fraudulent transactions involving the "carrying on of specified unlawful activity" into future acts of criminality.¹⁴ Scalia argues that virtually every payment in such gambling operations promote the carrying on of the lottery.¹⁵ Thus, a narrower definition of "proceeds" is necessary so that not all payments are considered both a violation of the money laundering statute and the underlying

5. *Id.* at 506 ("[T]he consequences of applying a 'gross receipts' definition of 'proceeds' to respondents are so perverse that Congress could not have contemplated them . . .").

6. 553 U.S. 507 (2008).

7. *Id.* at 507.

8. *Id.* at 510 (in violation of 18 U.S.C. § 1956(a)(1)(A)(i) (2012)).

9. *Id.* (in violation of 18 U.S.C. § 1955(h) (2012)).

10. *Id.*

11. Rachel Zimarowski, Note, *Taking A Gamble: Money Laundering After United States v. Santos*, 112 W. VA. L. REV. 1139, 1142 (2010).

12. *Santos v. United States*, 461 F.3d 886, 890 (7th Cir. 2006).

13. *United States v. Santos*, 553 U.S. 507, 515 (2008).

14. 18 U.S.C. § 1956(a)(1)(A)(i) (2012); See discussion *infra* Part I.

15. *Santos*, 553 U.S. 507 at 515–516.

ing gambling offense—a result Congress surely would not have intended.¹⁶

The scope of this holding, however, also applies to the “concealment theory” of the money laundering statute, which deals with transactions that are designed solely to “conceal or disguise the proceeds from the unlawful activity.”¹⁷ Unless “proceeds” means different things under the statute depending on the type of transaction (there is no evidence in the statutory text that it does), then *Santos*’ “net profits” interpretation would apply to both types of transactions.¹⁸ What Scalia fails to recognize, however, is that this merger problem is not present in concealment theory cases because most of the underlying offenses within the scope of the money laundering statute do not require proof that a defendant conducted a financial transaction with the *intent to conceal* the proceeds of the criminal activity.¹⁹ Thus, a defendant’s guilt, for example, in operating an illegal gambling business under 18 U.S.C. § 1955(a) would not automatically establish a violation of the federal money laundering statute under the concealment theory in 18 U.S.C. § 1956(a)(1)(B)(i). Because this double conviction problem does not apply to concealment cases, Scalia’s concern is overstated. Rather, the “merger problem” would only apply to a narrower subset of cases—those that involve the promotional theory of the money laundering statute.

After *Santos*, federal courts of appeals were divided on the scope of the Supreme Court’s holding. Some courts interpreted *Santos* to only apply in situations where illegal gambling was the predicate offense (the narrow view).²⁰ Other courts applied the “profits” definition to some cases and “gross receipts” to others depending on (1) the potential for a merger problem causing a radical increase in the statutory maximum sentence and (2) the legislative intent and history of that predicate offense (the moderate view).²¹ Finally, other courts interpreted the holding to apply to *all* predicate offenses (the broad view).²²

The issue became more complex when, one year after the case was decided, Congress enacted the Fraud Enforcement and Recovery Act of 2009 (“FERA”).²³ Section 2(f)(1) of FERA amends the money laundering statute to define “proceeds” to include “gross receipts” of the unlawful activity, essentially overturning *Santos*.²⁴ As discussed, the merger problem would then continue to be an issue for (1) money laundering cases under the promotional theory where the transactions in the underlying offenses were promoting or continuing the carrying-on of

16. *Id.*

17. 18 U.S.C. § 1956(a)(1)(B)(i) (2012); *See* discussion *infra* Part I.

18. Gurulé, *supra* note 3, at 340.

19. *Id.* at 357–58.

20. *See* discussion *infra* Part III.A.

21. *See* discussion *infra* Part III.B.

22. *See* discussion *infra* Part III.C.

23. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009).

24. *Id.* at § 2(f) (reversing *United States v. Santos*, 553 U.S. 507 (2008)).

the offense,²⁵ and (2) cases involving transactions that *facilitate* the already conducted specified unlawful activity under 18 U.S.C. § 1956(a)(3)(C).²⁶

FERA attempts to combat the merger problem by stating that, when prosecuting cases where the money laundering offense is closely connected to the specified unlawful offense, to the extent that there is no clear delineation between the two offenses, prior approval from a superior Department of Justice (DOJ) official is required.²⁷ This requirement is not an adequate solution to the problem. There are no limitations on higher officials' discretion for authorizing these prosecutions, and the language of the requirement itself is written vaguely. Furthermore, this merger problem applies to many other underlying white-collar criminal offenses, not just illegal gambling. It may occur in Ponzi schemes and mortgage, healthcare, mail, and bank fraud cases that deal with fraudulent financial transactions.²⁸

Because the merger problem still exists for a subset of cases and can apply to a number of other underlying offenses, prosecutors and judges need more guidance when determining whether such cases are to be prosecuted and how they are to be handled in sentencing. The Department of Justice, the Federal Sentencing Commission, and Congress must go further by amending both the money laundering statute itself and the statute's sentencing guidelines. The DOJ should also adopt policies to limit the number of prosecutions where merger problems could exist, especially when there is potential for substantially larger sentences.²⁹ Absent exigent circumstances, there should be a strong preference amongst DOJ officials to decline authorization of these prosecutions.

Part I of this Note discusses the history of the Money Laundering Control Act of 1986, the proof necessary to obtain a conviction under both the promotional and concealment theories, and why the application of the term "proceeds" in the Act was initially unclear. Part II examines the *Santos* decision and Scalia's merger argument. Part III considers money laundering cases post-*Santos*, but pre-FERA, and discusses how different appellate courts have interpreted the decision. Part IV explains Congress' response to *Santos*, the implementation of FERA, and FERA's current, unknown legacy on case law. Part V discusses the viability and scope of the merger problem, Scalia's overstatement of the issue, and why FERA does not go far enough. Finally, this Note concludes by proposing potential amendments to the federal sen-

25. 18 U.S.C. § 1956(a)(1)(A)(i) (2012).

26. See discussion *infra* Part V.

27. § 2, 123 Stat. at 1619 ("Sense of the Congress and Report Concerning Merger Cases").

28. See discussion *infra* Part V.A. The FBI has listed these offenses in particular, among few others, as "priority crime problem areas of the Financial Crimes Section of the FBI." Gerald Cliff & Christian Desilets, *White Collar Crime: What It Is and Where It's Going*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 481, 484 n.12 (2014) (citation omitted).

29. See discussion *infra* Part V.C. Oftentimes, the money laundering offense will call for a more severe sentence than the underlying offense. See, e.g., *United States v. Santos*, 553 U.S. 507, 527 (2008).

tencing guidelines, the money laundering statute itself, and the Department of Justice manual to find a balance in addressing any existing merger problems.

I. THE MONEY LAUNDERING CONTROL ACT OF 1986

The Money Laundering Control Act of 1986 (“MLCA”), 18 U.S.C. § 1956, makes it a federal crime to knowingly engage in a financial transaction that involves “proceeds” from “specified unlawful activity” with the intent to either (1) promote the carrying on of, or (2) conceal the nature, location, source, ownership, or control of proceeds from the underlying offense.³⁰ The purposes of the MLCA were to criminalize the concealment of illegal income and to stop the illegal funding of criminal enterprises that further their existence.³¹ The MLCA has expanded to include over 200 specified unlawful crimes including most white-collar offenses.³² Because of this, charging under section 1956 often involves indictments for other predicate offenses, with the section 1956 offense usually calling for a harsher penalty.³³

Subsections 1956(a)(1)(A)(i) and (a)(1)(B)(i) cover the promotional and concealment theories respectively. Each requires different proof in order to sustain a conviction. Under the promotional theory, the government must prove that the defendant knowingly (1) conducted or attempted to conduct a financial transaction (2) that represented some form of an unlawful activity, (3) the proceeds of which were derived from that specified unlawful activity, and (4) the transaction was done with the *intent to promote the carrying on* of the specified unlawful activity.³⁴ For the concealment theory, the government must prove that the defendant knowingly (1) conducted or attempted to conduct a financial transaction (2) that represented some form of criminal activity, (3) the proceeds of which were derived from that specified unlawful activity, and (4) the transaction was designed in whole or in part to *conceal or disguise the nature, location, source, ownership, or control* of the proceeds of the specified unlawful activity.³⁵

Subsection 1956(c) defines various terms used in the MLCA and applies these definitions to both the promotional and concealment theories. “Transaction,” as used in the MLCA, is broadly defined to include purchases, sales, loans, pledges, gifts, transfers, deliveries, or

30. Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 18 U.S.C. § 1956 (2012)). The MLCA also criminalizes fraudulent financial transactions with the intent to avoid an IRS reporting requirement for proceeds used to conduct or facilitate the underlying offense. *Id.*

31. Gurulé, *supra* note 3, at 351–52.

32. Zimarowski, *supra* note 11, at 1144.

33. *Id.* at 1145.

34. 18 U.S.C. § 1956(a)(1)(A)(i) (2012). See *United States v. Calderon*, 169 F.3d 718, 721 (11th Cir. 1999) (listing elements of the offense under 18 U.S.C. § 1956(a)(1)(A)(i)).

35. 18 U.S.C. § 1956(a)(1)(B)(i) (2012). See *United States v. Majors*, 196 F.3d 1206, 1212 (11th Cir. 1999) (listing elements of the offense under 18 U.S.C. § 1956(a)(1)(B)(i)).

other dispositions.³⁶ “Financial transactions” under section 1956 are transactions which either (1) affect interstate or foreign commerce involving (i) movement of funds by wire or other means, (ii) one or more monetary instruments, or (iii) involving transfer of title to any real property, vehicle or aircraft, or (2) involves the use of a financial institution which is engaged in or affects interstate or foreign commerce in any way or degree.³⁷ The term “specified unlawful activity” includes all racketeering offenses listed in 18 U.S.C. § 1961(1) and other offenses, such as those committed against foreign nations, the distribution of controlled substances, crimes of violence, bank fraud, bribery, theft, embezzlement, human trafficking, and numerous other federal felonies.³⁸

Notably lacking from the statute is a definition for the term “proceeds” as it applies to both the promotional and concealment theories. The lack of clear statutory intent has caused confusion over whether “proceeds” means “net profits” or “gross receipts.”³⁹ The controversy began in 2002 when the Seventh Circuit deviated from precedent in *United States v. Scialabba*.⁴⁰ Before this decision, courts consistently interpreted “proceeds” to mean “gross receipts.”⁴¹ In *Scialabba*, the defendants were convicted of running an illegal gambling business, filing false tax returns, conspiring to defeat tax collection, and money laundering.⁴² The defendants appealed their money laundering convictions, arguing that the convictions substantially augmented their sentences.⁴³ Judge Easterbrook wrote the opinion for the Seventh Circuit, holding that the money laundering statute is ambiguous as to “proceeds” so the rule of lenity must apply.⁴⁴ In other words, because Congress did not specify that “proceeds” be interpreted to include *all*

36. 18 U.S.C. § 1956(c)(3) (2012). See *United States v. Abrego*, 141 F.3d 142, 160 (5th Cir. 1998) (defining “transaction” under section 1956 to include transferring money to another); *United States v. Gough*, 152 F.3d 1172, 1173 (9th Cir. 1998) (finding that delivery of drug money is a “transaction” under section 1956); *United States v. Leslie*, 103 F.3d 1093, 1101 (2d Cir. 1997) (including a check exchange for cash as a “transaction” under section 1956).

37. 18 U.S.C. § 1956(c)(4) (2012). See *United States v. Goodwin*, 141 F.3d 394, 401 (2d Cir. 1997) (listing the elements defining a “financial transaction” under section 1956). The term is broadly defined. See *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990) (finding that a “[‘financial transaction’] includes the purchase, sale or disposition of any kind of property as long as the disposition involves a monetary instrument.”).

38. 18 U.S.C. § 1956(c)(7) (2012). See *United States v. Yusuf*, 536 F.3d 178, 185 (3d Cir. 2008) (“The term ‘specified unlawful activity’ covers a broad range of offenses. For example, the fraudulent *concealment* of a bankruptcy estate’s assets is categorized as a ‘specified unlawful activity.’”); *United States v. Taylor*, 984 F.2d 298, 301 (9th Cir. 1993) (listing the elements defining a “specified unlawful activity” under section 1956 and holding that wire fraud is a specified unlawful activity under this definition).

39. See *supra* INTRODUCTION for explanations of the two terms.

40. 282 F.3d 475 (7th Cir. 2002).

41. William T. Noonan, Jr., *Congress’ Failure to Define Proceeds and the Fallout After United States v. Santos*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 133, 134 (2010).

42. *Scialabba*, 282 F.3d at 475.

43. *Id.* at 476.

44. *Id.* at 477.

gross receipts, the courts must take the approach that favors the defendant—in this case, “net profits”—which imposes a higher burden of proof on the government.⁴⁵ Judge Easterbrook was also the first to bring up the merger argument for the “net profits” definition stating that, if courts did not apply the “net profits” definition, “the predicate crime [would otherwise] merge[] into money laundering . . . and the word ‘proceeds’ [would otherwise] lose[] operational significance.”⁴⁶ The defendants in this case had transferred some of the revenue from illegal video poker machines to meet expenses of the gambling business.⁴⁷ The Court held that these “gross receipts” from the sales were not used to hide or reinvest in the illegal business—the normal understanding of money laundering—and, because “proceeds” must be read as “profits,” the transactions that used gross receipts did not constitute money laundering.⁴⁸

The Third Circuit in *United States v. Grasso*⁴⁹ later rejected the Seventh Circuit’s rationale. Judge Ambro held, instead, that “proceeds” means “gross receipts,” not “net profits.” In *Grasso*, the defendant was convicted of mail fraud, wire fraud, and money laundering by reinvesting proceeds of a fraudulent “work-at-home” scheme to cover advertising, printing, and mailing expenses.⁵⁰ The Court held that the text and purpose of section 1956, along with existing case law in the Third Circuit, suggests that “proceeds” means “gross receipts.”⁵¹ When reinvesting his proceeds in furtherance of his fraudulent activity, Grasso paid for his business expenses with the receipts from his illegal sales, thus implicating the money laundering offense.⁵² Because the Third Circuit rejected the Seventh Circuit’s most recent interpretation of “proceeds” at that time, other jurisdictions continued to struggle with determining which definition was correct. The Supreme Court was, thus, posed to resolve this conflict four years later when the Court granted certiorari to *Santos*.

45. *Id.*

46. *Id.* at 475.

47. *Id.* at 476.

48. *Id.*

49. 381 F.3d 160, 166 (3d Cir. 2004).

50. *Id.* at 162.

51. *Id.* at 168. The Court looked to varying definitions of the word “proceeds” in the UCC, *Black’s Law Dictionary* and *Webster’s Dictionary* which all defined the term as “the total amount brought in” or, similarly, “gross receipts.” *Id.* In their examination of prior precedent, the Court noted “most courts have held that proceeds involve more than net profits.” *Id.* Finally, the Court looked to the text of the statute itself stating “[t]he ‘normal understanding of money laundering’ may entail ‘hid[ing] or invest[ing] profits in order to evade detection,’ as the Seventh Circuit posited, but the bifurcated text of the statute strongly suggests that Congress had a broader definition of money laundering in mind.” *Id.* (citation omitted).

52. *Id.* at 162.

II. UNITED STATES V. SANTOS

In *United States v. Santos*,⁵³ Efrain Santos was convicted of conspiracy to run an illegal gambling business,⁵⁴ running an illegal gambling business,⁵⁵ conspiracy to money launder,⁵⁶ and two counts of money laundering.⁵⁷ Santos ran an illegal lottery in Indiana.⁵⁸ He employed helpers who gathered bets from gamblers, kept a portion for their commissions, and delivered the rest to collectors.⁵⁹ These collectors would then deliver the money back to Santos, who used the money left over to pay the winners and the salaries of the collectors.⁶⁰

Santos was sentenced to 60 months imprisonment for the gambling offenses and 210 months for the money laundering counts.⁶¹ Santos appealed and the Seventh Circuit court of appeals affirmed the convictions.⁶² He then filed a motion under 28 U.S.C. § 2255, collaterally attacking the convictions. The district court approved his motions on the money laundering counts based on the Seventh Circuit's holding in *Scialabba*.⁶³ In applying *Scialabba*, the district court found nothing to show that the transactions for which the money laundering convictions were based involved profits.⁶⁴ The court of appeals affirmed, following the district court's reliance on *Scialabba*.⁶⁵ The Supreme Court granted certiorari and Justice Scalia, joined by Justices Souter, Thomas, Ginsburg, and Stevens concurring, affirmed the Seventh Circuit's decision.⁶⁶

Justice Scalia highlighted the inherent ambiguity of the term "proceeds."⁶⁷ He notes how some statutes that use the term have defined it to mean "profits," where others have defined it to mean "gross receipts."⁶⁸ Furthermore, he points out that both definitions have long been accepted in ordinary usage according to their dictionary definitions.⁶⁹ Because there is a true ambiguity in the meaning, Scalia argues that the Court must use the rule of lenity and interpret the word in the

53. 553 U.S. 507 (2008).

54. 18 U.S.C. § 371 (2012).

55. 18 U.S.C. § 1955 (2012).

56. 18 U.S.C. §§ 1956(a)(1)(A)(i), (h) (2012).

57. *Id.*

58. *Santos*, 553 U.S. at 509 (in violation of IND. CODE ANN. § 35-45-5-3 (West 2007)).

59. *Id.*

60. *Id.*

61. *Id.* at 510. The money laundering conviction more than tripled Santos' sentence for the same criminal act as the underlying illegal gambling offense.

62. *Id.*

63. *Id.*; *United States v. Scialabba*, 282 F.3d 475, 477 (7th Cir. 2002) (holding that the federal money laundering statute's prohibition of transactions involving "proceeds" applies to "profits" not "gross receipts"); see discussion *supra* Part I.

64. *Santos*, 553 U.S. at 510.

65. *Id.*

66. *Id.* Justice Thomas joined all but Part IV of Justice Scalia's opinion. *Id.* at 507.

67. *Id.* at 511.

68. *Id.* at 512.

69. *Id.* at 511.

way that most favors the defendant subjected to the ambiguity.⁷⁰ In this case, the “profits” definition is more defendant-friendly than the “receipts” definition because it places a higher burden of proof on the prosecution, so the rule of lenity finds in favor of the “profits” definition.⁷¹

Scalia’s second main argument for the “profits” definition is his concern with the “merger problem.”⁷² He values the protection of criminal defendants against mergers, arguing it could not be the intent of Congress to leverage one criminal activity into another.⁷³ He urges that, “if ‘proceeds’ meant ‘receipts,’ nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute” because most, if not all, lotteries pay their winners and all of those payments, in promoting the carrying on of the lottery, would violate both statutes.⁷⁴ As a result of this merger, defendants are confronted with increased sentences—well beyond those for the underlying offense giving rise to money laundering.⁷⁵

Scalia also argues that this merger problem has widespread implications that go beyond just illegal gambling cases.⁷⁶ “Generally speaking, 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, would merge with money laundering.”⁷⁷ He says that interpreting “proceeds” as “profits” eliminates the merger problem for these offenses because it would only apply to payments made above and beyond expenses paid to promote the lottery itself.⁷⁸ For example, the money laundering statute would not apply to paying employees or rent for an office space because those are not, by definition, “profits” or what remains *after* such expenses are paid.⁷⁹

Scalia further rejects other means of avoiding the merger problem—specifically, that the underlying offense and money laundering offense be distinct in order to be separately punishable.⁸⁰ He believes this solution has no basis in the words of the statute and is an unpredictable method of solving the problem.⁸¹ He also rejects the government’s argument that the “receipts” interpretation makes these cases easier to prosecute.⁸² He notes that Congress has imposed similar bur-

70. *Santos*, 553 U.S. at 514. 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 (1917).

71. *Id.* 514.

72. *Id.* at 515.

73. *Id.*

74. *Id.*

75. *Id.* at 516.

76. *Id.* at 517.

77. *Id.* at 516.

78. *Id.*

79. *Id.*

80. *Id.* at 518.

81. *Id.*

82. *Id.* at 519.

dens of proof on prosecutors elsewhere and that the government exaggerates prosecutorial difficulties.⁸³ Finally, Scalia emphasizes the importance of maintaining a consistent meaning of “proceeds” for all predicate crimes.⁸⁴

Justice Stevens provided the fifth vote to affirm, concurring in the judgment.⁸⁵ Stevens argues that Congress intended for “proceeds” to have the “profits” definition when referring to some predicate offenses and the “receipts” definition when referring to others.⁸⁶ He uses the legislative history of section 1956 stating that Congress made it clear that its intent for the term “proceeds” was to include gross receipts from the sale of contraband and the operation of organized crime syndicates involving such sales.⁸⁷ However, for other predicate offenses like unlicensed, stand-alone gambling ventures, there is no clear legislative history telling the courts how to interpret “proceeds.”⁸⁸ For such situations, Stevens uses Scalia’s congressional intent argument, stating that “applying ‘gross receipts’ . . . [leads to consequences] so perverse that I cannot believe they were contemplated by Congress.”⁸⁹ He also addresses the merger problem and argues that it would be particularly unfair in this case to allow the government to treat the mere payment of the expense of operating an illegal gambling business as a separate offense because the money laundering offense creates a substantially more severe sentence.⁹⁰ Thus, the rule of lenity should apply for this case.⁹¹

Justice Breyer wrote the first dissenting opinion.⁹² Breyer agrees that the merger problem was probably not a result that Congress intended.⁹³ He, however, argues that defining “proceeds” as “profits” is not the solution.⁹⁴ He believes that the better approach is to interpret the promotional theory to apply only where the money laundering transaction occurs *separately* and *after* the underlying offense is committed.⁹⁵ A person does not “*promote* the carrying on” of an underlying offense with only one act—the phrase implies *future* action.⁹⁶ In other words, the money laundering offense and the underlying offense must be distinct to be separately punishable with the money laundering offense *following in time* the *completion* of the underlying offense.⁹⁷ The

83. *Id.* at 519–20.

84. *Id.* at 522–23.

85. *Id.* at 524.

86. *Id.* at 525.

87. *Id.* at 525–26.

88. *Id.*

89. *Id.* at 526.

90. *Id.* at 527.

91. *Id.* at 528.

92. *Id.* at 529.

93. *Id.*

94. *Id.*

95. *Id.* at 530.

96. *Id.*

97. *Id.* See Gurulé, *supra* note 3, at 376–77 (“For example, purchasing communications equipment, such as cell phones and fax machines, could violate the promotion theory of money laundering. Purchasing communications equipment involves a promotional

money laundering transaction must promote the continuation of such offense into the future, not merely facilitate it.

Breyer also argues that the problem can be adequately addressed by the U.S. Sentencing Commission rather than in the courts.⁹⁸ Because Congress has already instructed the Commission to "avoi[d] unwarranted sentencing disparities" among similar criminal conduct, the Commission could make the offense level closer to that of the offense level for the predicate offense rather than "creating complex interpretations of the statute's language."⁹⁹

Justice Alito wrote the second dissent, which Chief Justice Roberts, and Justices Kennedy and Breyer joined.¹⁰⁰ Justice Alito is concerned with Congress' intent and believes that the plurality's interpretation would frustrate efforts to combat organized criminal enterprises if we look to the context in which the word is used.¹⁰¹ His first argument is that "proceeds" most customarily means "the total amount brought in" or "gross receipts."¹⁰² He points to the leading treaty on international money laundering, the United Nations Convention Against Transnational Organized Crime ("Convention"), which contains a provision similar to that in the concealment theory of section 1956.¹⁰³ Article 6.1 of the Convention criminalizes "[t]he . . . transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property"¹⁰⁴ The Convention defines "proceeds" to mean "*any* property derived from or obtained, directly or indirectly, through the commission of an offense."¹⁰⁵ This definition is more in line with a "gross receipts" approach because it does not limit "proceeds" to just the profits of the offense.¹⁰⁶ Alito also points to the Model Money Laundering Act and how it also defines "proceeds" as "property [of *any* kind] acquired or derived directly or indirectly from, produced through, realized through, or caused by an act or omission"¹⁰⁷ Furthermore, he notes that fourteen states have defined "proceeds" as "gross receipts" in their state money laundering statutes.¹⁰⁸ He argues that this "pattern of usage" by lawmakers seems to suggest that "gross receipts" is the customary definition for "proceeds" in a money laundering provision.¹⁰⁹

step beyond the mere operation of the illegal gambling venture; the mere collection of gambling receipts and payments to winning betters does not.") (citation omitted).

98. *Santos*, 553 U.S. at 530.

99. *Id.* at 530–31.

100. *Id.* at 531.

101. *Id.*

102. *Id.* at 532.

103. *Id.* at 533; *see also* United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000) [hereinafter Convention]. The concealment theory is codified in 18 U.S.C. § 1956(a)(1)(B)(i) (2012).

104. Convention, *supra* note 103, at 8.

105. *Id.* at 2 (emphasis added).

106. *Santos*, 553 U.S. at 533.

107. President's Commission on Model State Drug Laws, Economic Remedies, § 4(a) (1993) (emphasis added).

108. *Santos*, 553 U.S. at 534.

109. *Id.* at 534–35.

Alito next returns to the intent of the statute and argues that the objectives of the money laundering statute would be frustrated if “proceeds” were limited to “profits.”¹¹⁰ First, limiting the definition would “immunize successful criminal enterprises during those periods when they are operating temporarily in the red” because there would be no “profits” from which to criminalize.¹¹¹ Second, limiting the definition would pose substantial problems of proof.¹¹² Requiring prosecutors to trace funds back to a particular criminal activity to prove that the sales were profitable would be next to impossible.¹¹³ Special accounting rules would have to be developed to make these calculations and they would be difficult to discern because most criminal enterprises do not keep complete and accurate business and accounting records.¹¹⁴ Creating a heightened burden of proof, he argues, serves no discernible purpose in forwarding the Congressional aims of the statute.¹¹⁵

Alito believes that the merger problem can be avoided and addressed via sentencing guidelines.¹¹⁶ He would recommend an amendment to the money laundering sentencing guideline advising in favor of a less stiff sentence and giving judges more discretion in imposing lighter sentences than those called for by the guidelines.¹¹⁷

III. POST-SANTOS, PRE-FERA JURISPRUDENCE

After *Santos*, courts saw an influx in the number of money laundering convictions coming up for appeal on the proceeds issue.¹¹⁸ Some courts followed *Santos*, some distinguished it, and others took a middle approach.¹¹⁹ Ultimately, the approaches taken by the circuits can be grouped into three distinguishable categories: the narrow view, the moderate view, and the broad view of *Santos*.¹²⁰ Narrow view jurisdictions have limited *Santos*’ “profits” definition of “proceeds” only to gambling cases as Justice Stevens recommended.¹²¹ Moderate view jurisdictions apply *Santos*’ “profits” definition of “proceeds” to some underlying offenses other than illegal gambling and not to others.¹²² Finally, the broad view jurisdictions apply *Santos*’ “profits” definition to all underlying offenses.¹²³

110. *Id.* at 536.

111. *Id.* at 537.

112. *Id.*

113. *Id.* at 540.

114. *Id.* at 541.

115. *Id.* at 542.

116. *Id.* at 547.

117. *Id.*

118. Noonan Jr., *supra* note 41, at 143.

119. *Id.*

120. Brian Dickerson & Klodiana Basko, *Confusion in Defining “Proceeds” Under the Money Laundering Statute: A Survey of Circuit Opinions*, 57 FED. LAW. 23, 24-27 (2010); Zimarowski, *supra* note 11, at 1161; *Current Circuit Splits*, 7 SETON HALL CIR. REV. 377, 390-91 (2011) [hereinafter *Circuit Splits*].

121. Zimarowski, *supra* note 11, at 1161; *Santos*, 553 U.S. at 526-27 (Stevens, J., concurring).

122. Zimarowski, *supra* note 11, at 1161.

123. *Id.*

A. Narrow View of Santos

The Fourth, Eighth, and Eleventh Circuits follow the narrow view of *Santos*.¹²⁴ The narrow approach does just what the title suggests—limits the holding of *Santos* to its facts, only applying it to other illegal gambling cases.¹²⁵ This is the position that Justice Stevens takes in his concurrence.¹²⁶ The main justification that courts have cited for applying a narrow view is based on the Supreme Court’s decision in *Marks v. United States*.¹²⁷ The “Marks Rule” states that when no single rationale explaining the result of a Supreme Court case enjoys assent of at least five Justices, the holding of the Court should be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds.¹²⁸

The Eighth Circuit addressed the issue in regards to drug and narcotic offenses in *United States v. Spencer*.¹²⁹ In this case, the defendant was convicted of conspiracy to distribute cocaine, attempted possession with the intent to distribute it, and money laundering.¹³⁰ The court held that *Santos* does not apply in the drug context.¹³¹ Citing Alito’s dissent in *Santos*, the court points out that five of the Supreme Court justices agreed that “proceeds” include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales.¹³²

Similarly, the Fourth Circuit has not applied *Santos* to other predicate offenses.¹³³ In *United States v. Howard*,¹³⁴ defendants were convicted of various charges relating to prostitution, illegal drug sales, and for conspiracy to launder prostitution proceeds.¹³⁵ The court cited the Marks Rule stating that, because *Santos* was a plurality opinion, “the holding of the Court for precedential purposes is the narrowest holding that garnered five votes (Justice Stevens’).”¹³⁶ The Eleventh Circuit followed suit in *United States v. Demarest*,¹³⁷ also citing the Marks Rule and arguing that “[t]he narrow holding in *Santos*, at most, was that the gross

124. Dickerson & Basko, *supra* note 120, at 24; Zimarowski, *supra* note 11, at 1161–62 (citations omitted); Circuit Splits, *supra* note 120, at 390.

125. Dickerson & Basko, *supra* note 120, at 24.

126. See discussion, *supra* Part II (looking at the differences in legislative history for the illegal gambling offense).

127. 430 U.S. 188 (1977).

128. *Id.* at 193. The narrowest concurrence in *Santos* being Justice Stevens’ limited view that the “profits” definition only applies to illegal gambling offenses. *Santos*, 553 U.S. 507 (Stevens, J., concurring).

129. 592 F.3d 866 (8th Cir. 2009).

130. *Id.* at 870.

131. *Id.* at 879.

132. *Id.* at 880; *Santos*, 553 U.S. at 531 (Alito, J., dissenting).

133. Dickerson & Basko, *supra* note 120, at 25; Zimarowski, *supra* note 11, at 1163.

134. 309 F. App’x 760 (4th Cir. 2009).

135. *Id.* at 763.

136. *Id.* at 771 (citing *Marks*, 430 U.S. at 193); see also *United States v. Johnson*, 405 F. App’x 746 (4th Cir. 2010) (limiting *Santos* to illegal gambling operations and not applying it to illegal Ponzi schemes).

137. 570 F.3d 1232 (11th Cir. 2009).

receipts of an unlicensed gambling operation were not ‘proceeds’ under section 1956”¹³⁸

While the approaches taken in the Fourth, Eighth, and Eleventh Circuits may make sense under the Marks Rule, they are in tension with other Supreme Court precedents.¹³⁹ In *Clark v. Martinez*,¹⁴⁰ the court held that, prior to *Santos*, “the meaning of words in a statute cannot change with the statute’s application.”¹⁴¹ In *Martinez*, the Court sought to interpret certain words in a federal statute concerning alien detention for three different categories of aliens.¹⁴² The Court held that, while a limited definition for the phrase may apply to a certain category of aliens and not another, “[t]o give these same words a different meaning for each category [within the same statute] would be to invent a statute rather than interpret one.”¹⁴³ Thus, the most limited interpretation must govern all aspects of the statute.¹⁴⁴

In *Santos*, Justice Stevens’ concurrence argued that the most limited interpretation (“profits”) should be applied only to illegal gambling offenses.¹⁴⁵ However, *Martinez* would require that this limited interpretation also apply to all the predicate offenses.¹⁴⁶ Both the plurality and Alito’s dissent are consistent with *Martinez* in that they both agree that the meaning of the term proceeds “cannot vary from one money laundering case to the next.”¹⁴⁷ Thus, in following Justice Stevens’ concurrence, these narrow view circuits, while following one Supreme Court case,¹⁴⁸ are in conflict with another Supreme Court case.¹⁴⁹

B. Moderate View of Santos

The moderate view, followed by the Third, Sixth, and Ninth Circuits, attempts to reconcile both the plurality and Justice Stevens’ concurrence.¹⁵⁰ These circuits do allow some application of the “profits” definition outside of the context of illegal gambling, but still keep the “gross receipts” definition for some other predicate offenses.

138. *Id.* at 1242.

139. *Id.* at 1166; Dickerson & Basko, *supra* note 120, at 25.

140. 543 U.S. 371 (2005).

141. *Id.* at 378.

142. *Id.* The phrase at issue was “may be detained” in 8 U.S.C. § 1231(a)(6). The phrase was already defined for one category of aliens to mean detained as long as “reasonably necessary” to remove them from the country. *Zavydas v. Davis*, 533 U.S. 678, 689 (2001). The Court held that this definition must also apply to the other two categories.

143. *Id.*

144. *Id.*

145. *Santos*, 553 U.S. at 525 (Stevens, J., concurring).

146. *Martinez*, 543 U.S. at 380.

147. *Santos*, 553 U.S. at 548.

148. *Marks v. United States*, 430 U.S. 188 (1977).

149. *Martinez*, 543 U.S. at 371.

150. Dickerson & Basko, *supra* note 120, at 25; Zimarowski, *supra* note 11, at 1168.

The Third Circuit addressed the issue in *United States v. Yusuf*¹⁵¹ and *United States v. Fleming*.¹⁵² In *Yusuf*, the defendants were charged with varying counts related to mail fraud, tax evasion, and international money laundering.¹⁵³ The Third Circuit held that unpaid taxes disguised and retained by filing false tax returns through U.S. mail constitute "proceeds" of mail fraud under section 1986.¹⁵⁴ In defining proceeds, the court followed *Santos*, using the "profits" definition based on the lack of legislative history to the contrary and stating that the proceeds in this mail fraud case were "profits."¹⁵⁵ However, the Third Circuit in *Fleming* also held that the "profits" definition should not be used for *all* predicate offenses.¹⁵⁶ Drug trafficking, for example, is one such offense where "gross receipts" should be used.¹⁵⁷ In *Fleming*, the defendants were convicted of narcotics possession, distribution, and money laundering.¹⁵⁸ For this underlying offense, the Third Circuit cited Justice Alito's dissent in *Santos*, stating that "five justices agree with the position [that] proceeds include[s] gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales."¹⁵⁹ Thus, because the underlying offense in this case is the sale of drugs, the Court must follow the consensus of the five justices.¹⁶⁰ Both of these holdings show the Third Circuit applying different definitions to different predicate offenses based on the legislative history of those offenses.¹⁶¹ Further, we see the Third Circuit not limiting the definition of "profits" to illegal gambling charges.¹⁶²

The Sixth Circuit also applied this moderate view in *United States v. Kratt*.¹⁶³ The defendant in *Kratt* was convicted of bank fraud and money laundering from criminally derived property under 18 U.S.C. § 1957.¹⁶⁴ After establishing that "proceeds" under section 1957 has the same meaning as it does in section 1956, the court held, however, that this case did not present the type of merger problem that *Santos* was meant to avoid, and *Santos* only applies when the predicate offense creates such a merger problem.¹⁶⁵ The court applied a two-pronged analysis in determining the nature of the merger problem for a particular predicate offense. The merger problem in *Santos*, they held, is when

151. 536 F.3d 178, 185 (3d Cir. 2008).

152. 287 F. App'x. 150 (3d Cir. 2008); Dickerson & Basko, *supra* note 120, at 1168.

153. *Yusuf*, 536 F.3d at 181.

154. *Id.* at 189.

155. *Id.*

156. *Fleming*, 287 F. App'x at 150.

157. *Id.*

158. *Id.* at 152.

159. *Id.* at 154 (citing *Santos*, 553 U.S. at 531 (Alito, J., dissenting)).

160. *Id.*

161. Zimarowski, *supra* note 11, at 1169.

162. *Fleming*, 287 F. App'x at 154 (in contrast to the narrow view).

163. 579 F.3d 558 (6th Cir. 2009).

164. 18 U.S.C. § 1957 (2012) (criminalizing "knowingly engag[ing] . . . in a monetary transaction in criminally derived property of a value greater than \$10,000" if the underlying criminal offense was one of the enumerated offenses, including bank fraud).

165. *Kratt*, 579 F.3d at 562. The Court applied *Marks* by using the "narrowest ground" (Stevens' concurrence), but still accounting for Scalia's merger concern.

the interpretation leads to (1) a “radical increase in the statutory maximum sentence” and (2) “only when nothing in the legislative history suggests that Congress intended such an increase.”¹⁶⁶ Here, the court argued, neither section 1956 nor 1957 radically increased the statutory maximum sentence when the predicate offense was bank fraud or making false statements.¹⁶⁷ In fact, they both would actually create a *lower* sentence than either of the named predicate offenses.¹⁶⁸ Thus, the rationale of *Santos* in avoiding “perverse sentencing results” does not apply to Kratt’s offenses so the court, instead, looked to prior precedent, which applied the gross receipts definition.¹⁶⁹

The Ninth Circuit has also applied this framework.¹⁷⁰ In *United States v. Van Alstyne*,¹⁷¹ the defendant was convicted of mail fraud as part of a Ponzi scheme and money laundering.¹⁷² The court followed the same rationale in *Kratt*, stating that proceeds means profits only in merger situations of the kind that Scalia discussed in *Santos*.¹⁷³ However, the court focused on the central “scheme to defraud” required by the predicate offense rather than the legislative history or statutory maximum sentences of the predicate offense.¹⁷⁴ In *Van Alstyne*, the nature of the Ponzi scheme required payments to investors (which would inherently constitute money laundering under section 1956). “Convicting Van Alstyne of money laundering for the bank transfers inherent in the ‘scheme’ central to the mail fraud charges thus presents a ‘merger’ problem closely parallel to the one that underlay the majority result in *Santos*.”¹⁷⁵ Thus, the court dismissed two of Van Alstyne’s convictions for money laundering based on the presence of the merger problem and applied *Santos*’ “profits” definition to the mail fraud offenses.¹⁷⁶ Even though the Sixth and Ninth Circuits looked to different characteristics of the underlying offense, both ultimately follow the moderate rule that, in determining which definition of “proceeds” to apply, courts should evaluate on an offense-by-offense basis and only apply the “profits” definition where a merger problem exists.

Like the narrow view, however, the moderate view poses a *Martinez* problem.¹⁷⁷ By evaluating on an offense-by-offense basis, the moderate view would allow different definitions of “proceeds” to apply for different offenses.¹⁷⁸ Furthermore, in applying *Santos* on an *ad hoc* basis, the

166. *Id.*

167. *Id.* at 563.

168. *Id.*

169. *Id.* (citing *United States v. Prince*, 214 F.3d 740, 748 (6th Cir. 2000)).

170. Zimarowski, *supra* note 11, at 1170.

171. 584 F.3d 803 (9th Cir. 2009).

172. *Id.* at 807.

173. *Id.* at 814.

174. Compare *Van Alstyne*, 584 F.3d at 813–15, with *Kratt*, 579 F.3d 558, 562–64 (6th Cir. 2009).

175. *Van Alstyne*, 584 F.3d at 815.

176. *Id.* at 816.

177. See discussion *supra* Part III.A.

178. Zimarowski, *supra* note 11, at 1171 (citing *Clark v. Martinez*, 543 U.S. 371, 380 (2005)).

moderate view “both invites sentencing unpredictability and opens the statute up to constitutional attacks.”¹⁷⁹

C. Broad View of Santos

Finally, the broad view applies *Santos*’ profits definition to all predicate offenses and creates a bright line rule that has been followed by some district courts.¹⁸⁰ The Northern District of California was one of the first to put forth this broad view in *United States v. Hedlund*.¹⁸¹ In *Hedlund*, the defendant was convicted of Use of Property for the Purposes of Manufacturing Marijuana and money laundering for a mortgage payment made on the warehouse he used to store the illegal drugs.¹⁸² The court put substantial emphasis on *Clark v. Martinez*, and noted that the plurality in *Santos* did not limit their holding only to illegal gambling cases.¹⁸³ Because of this precedent, “profits” must apply to every predicate offense listed in the statute and, thus, Hedlund’s money laundering conviction must be vacated because the mortgage payment is a business expense and is not part of the profits of the business as defined under *Santos*.¹⁸⁴

The Western District of Virginia similarly rejected the narrow and moderate approaches in favor of the broad view. In *United States v. Shelburne*,¹⁸⁵ the defendant was convicted of health care fraud and money laundering based on transactions made as business expenses (not spent from profits from the illegality).¹⁸⁶ The court vacated the money laundering conviction, holding that *Santos* was not limited to illegal lottery offenses, so the “profits” definition applied.¹⁸⁷ Further, it rejected the moderate view’s contention that the “gross receipts” definition should be used so long as there is not a merger problem arguing that, “[u]nder the government’s view, *Santos*, as limited by Justice Stevens’ [narrower reasoning], breaks no new ground and simply applies existing circuit law.”¹⁸⁸

While this approach avoids the problem that the narrow and moderate views face with *Martinez*, it does contain a notable internal obstacle.¹⁸⁹ As we see in *Hedlund*, it ignores the fact that five of the nine Justices in *Santos* agreed that the “gross receipts” definition should be

179. *Id.* at 1172.

180. Dickerson & Basko, *supra* note 120, at 26; Zimarowski, *supra* note 11, at 1172-73.

181. No. CR-06-346-DLJ, 2008 WL 4183958 (N.D. Cal. Sept. 9, 2008).

182. *Id.* at 1 (in violation of 18 U.S.C. § 1956(a)(1)(A)(i) (2012)).

183. *Id.* at 6.

184. *Id.* at 4. The decision, however, conflicts with *Santos* where five of the Justices agreed that “proceeds” meant “gross receipts” in drug cases. *United States v. Santos*, 553 U.S. 507, 531 (2008) (Alito, J., dissenting).

185. 563 F. Supp. 2d 601 (W.D. Va. 2008).

186. *Id.* at 603.

187. *Id.* at 607.

188. *Id.* (citing Government’s Brief 9 in *Santos*); *United States v. Van Alstyne*, 584 F.3d 803, 815 (9th Cir. 2009).

189. Compare, *supra* Parts III.A & B, with *supra* Part III.C. The broad view would not require courts to apply *Santos* differently depending on the underlying offense.

used for all drug trafficking and related crimes. This has the potential effect of extending *Santos* beyond the Court's intended scope and, in the process, hindering both the congressional intent and the teeth of the money laundering statute.¹⁹⁰

As can be seen with the different approaches following the decision, district and circuit courts across the country have not come to a consensus regarding the scope and reach of *Santos*' profits definition. Because these inconsistencies create potential implications for prosecutors¹⁹¹ and criminal defendants¹⁹² and because *Santos* is relevant to other federal statutes,¹⁹³ it was imperative for Congress to respond swiftly to settle what its intentions were in drafting the MLCA. A year after *Santos*, Congress sought to do just this when enacting the Fraud Enforcement and Recovery Act of 2009.

IV. FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009

Congress responded to the controversy by enacting the Fraud Enforcement and Recovery Act of 2009 (FERA). FERA itself covers a broad range of financial fraud offenses including mortgage, securities, and commodities fraud.¹⁹⁴ Showing their disapproval of the opinion, Congress essentially overturned *Santos* by amending the money laun-

190. Noonan Jr., *supra* note 41, at 149. In applying "profits" to *all* predicate offenses, the broad view also makes proving the money laundering offense the most difficult of the three views for prosecutors. Christina M. Sindoni, Note, Global-Tech's "Patent" Failure: Why Congress Must Revise the Foreign Corrupt Practices Act's *Mens Rea* After Global-Tech, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 605, 628 (2014).

191. See Noonan Jr., *supra* note 41, at 152 ("[Depending on the jurisdiction,] [t]o prosecute money-laundering cases the government must now . . . take the extra step to prove that the proceeds allegedly laundered were indeed the profits of a criminal enterprise.").

192. See Zimarowski, *supra* note 11, at 1179 ("[T]he potential for disparate punishment [,depending on the jurisdiction,] for the same conduct has the possibility of stretching even further . . .").

193. Particularly, 18 U.S.C. § 1957.

194. President Obama expressed his intentions for the Act in a press release: This Act provides Federal investigators and prosecutors with significant new criminal and civil tools to assist in holding accountable those who have committed financial fraud. These legislative enhancements will help the Department of Justice to combat mortgage fraud, securities and commodities fraud, and related offenses, and to protect taxpayer money that has been expended on recent economic stimulus and rescue packages. With the tools that the Act provides, the Department of Justice and others will be better equipped to address the challenges that face the Nation in difficult economic times and to do their part to help the Nation respond to this challenge.

Press Release, President Barack Obama (May 20, 2009), available at <http://www.whitehouse.gov/the-press-office/statement-president-s-386>. These enhancements were thought to be particularly helpful as the prevalence of certain financial frauds continued to rise through the mid-2000s. See generally Cynthia A. Koller, Laura A. Patterson & Elizabeth B. Scalf, *When Moral Reasoning And Ethics Training Fail: Reducing White Collar Crime Through the Control of Opportunities For Deviance*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 549 (2014) (discussing the rise of mortgage fraud, as an example).

dering statute to define “proceeds” as “gross receipts” not “profits.”¹⁹⁵ The gross receipts definition applies to both sections 1956 and 1957 of the United States Code.¹⁹⁶

In addition to clarifying their intent for the definition of “proceeds,” Congress also included a section entitled “Sense of the Congress and Report Concerning Required Approval for Merger Cases” (“The Sense”) in FERA.¹⁹⁷

- (1) SENSE OF CONGRESS. – It is the sense of the Congress that no prosecution of an offense under section 1956 or 1957 of title 18, United States Code, should be undertaken in combination with the prosecution of any other offense, without prior approval of the Attorney General, the Deputy Attorney General, the Assistant Attorney General in charge of the Criminal Division, a Deputy Assistant Attorney General in the Criminal Division or the relevant United States Attorney, *if the conduct to be charged as “specified unlawful activity” in connection with the offense under section 1956 or 1957 is so closely connected with the conduct to be charged as the other offense that there is no clear delineation between the two offenses.*¹⁹⁸

The Sense also requires the Attorney General to report to the House and Senate Committees on efforts undertaken by the Department of Justice to ensure that review and approval takes place in appropriate cases.¹⁹⁹ These reports should include the number of merger prosecutions initiated with and without approval.²⁰⁰ If no approval was given for the prosecution, the Attorney General must report why.²⁰¹ The Sense also requires reportage of the number of times approval was denied for such prosecutions.²⁰² On its face, the Sense attempts to create a solution to the merger problem, which, Congress admits, *can* occur with the “gross receipts” definition.²⁰³

Since FERA’s enactment, it is still too early to tell what effect the amendment will have on future decisions because most of the money laundering cases discussing FERA involve criminal acts that occurred *before* FERA was enacted, so retroactivity has applied.²⁰⁴ However, in

195. 18 U.S.C. § 1956(c)(9) (“[T]he term ‘proceeds’ means any property derived from or obtained or retained directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.”).

196. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2, 123 Stat. 1617, 1618 (2009).

197. *Id.* at 1618-1619.

198. *Id.* (emphasis added).

199. *Id.*

200. *Id.*

201. *Id.*

202. § 2, 123 Stat. at 1619.

203. See discussion, *infra* Part V.B (arguing that the Sense does not go far enough in addressing the merger problem).

204. See *United States v. Sahabir*, 880 F.Supp. 2d 377 (N.D.N.Y. 2012) (stating that FERA does not apply if the criminal acts occurred before the amendments were enacted; *Santos*, if applicable, will govern); *United States v. Nathan*, 2012 WL 28604 (S.D. Tex. Jan. 4, 2012) (holding that FERA does not apply to an offense committed in 2000). The *ex post facto* clause applies across the board, even to cases that do not contain a merger

Lindsey v. United States,²⁰⁵ the court seems to apply the amendment to a crime committed in 2000—before FERA’s enactment. In *Lindsey*, the petitioner was convicted of mail, wire, and securities fraud and money laundering in connection with a Ponzi scheme.²⁰⁶ Lindsey filed a motion to vacate the sentence claiming his counsel was ineffective at not raising a constitutional challenge to the use of the “receipts” definition rather than the “profits” definition, contrary to *Santos*, which was controlling at the time.²⁰⁷ The court denied Lindsey’s motion and, while it claimed that FERA is “not relevant to the Petitioner’s case,” it nevertheless discussed FERA in the opinion.²⁰⁸

The FERA legislation has effectively overruled the plurality decision in *Santos*, and any prior ambiguity as to the meaning of “proceeds” has now been resolved. Therefore, under all circumstances, Petitioner’s claim that the holding in *Santos* rendered his conviction null and void is incorrect, and his claims that his counsel was ineffective for failing to raise any issue relating to *Santos*, must fail.²⁰⁹

The court’s willingness to use FERA’s redefinition of “proceeds” to block a section 2255 motion that is based on *Santos*, even to a pre-FERA case, suggests that the amendment may prove to be successful in putting the final nail in *Santos*’ coffin. The next logical question, however, is while the amendment may be successful in doing what it was set out to do, is it adequate to solve the still present “merger problem” that the court was so concerned about in *Santos*?

V. DO WE STILL HAVE A MERGER PROBLEM?

A. *The Scope of Justice Scalia’s Merger Concern*

Before addressing FERA’s response to the merger problem, an analysis of Justice Scalia’s concern for the issue itself is necessary to pinpoint exactly *where* the merger problem actually arises. In *Santos*, the merger concern was valid under the promotional theory of the money laundering statute because Santos’ conviction for the illegal gambling offense automatically established criminal liability for the money laun-

problem. See *United States v. Morris*, 2010 WL 1049936 (E.D. Ky. Mar. 19, 2010) (where the alleged violations of the money laundering statute were acts completely separate from the specified unlawful activities allegedly underlying a RICO violation, there is no risk of merger, but the Court still assumes that the *ex post facto* application of the new definition of “proceeds” in FERA does not apply). The Court in *Morris*, however, does note that “[FERA’s] existence, as well as the legislative history surrounding its addition to the money-laundering statute, are still relevant to some extent.” *Morris*, 2010 WL 1049936, at 3.

205. 2010 WL 3035751 (M.D. Ga. Mar. 19, 2010).

206. *Id.* at 1. The offenses related to the operation of a “Ponzi scheme to sell promissory notes with no source of income other than the investors’ funds.” (quoting *United States v. Cawthon*, No. 02-12360, slip op. at 2 (11th Cir. Aug. 6, 2003) (per curiam)).

207. *Lindsey*, 2010 WL 3035751, at 2; 28 U.S.C. § 2255 (2012).

208. *Lindsey*, 2010 WL 3035751, at 3.

209. *Id.* (emphasis added).

dering offense.²¹⁰ Santos was convicted of violating the statute with the intent to promote the carrying on of the specified illegal gambling activity.²¹¹ This included the act of paying the lottery's winners, runners, and collectors with the gross receipts of the business in order to promote the carrying on of the lottery.²¹² If the winners and, particularly, the employees receive their portion of the proceeds, the business will presumably carry on because the runners and collectors will have more of an incentive to continue working. As Scalia rightly points out, in such circumstances, these acts, while constituting a violation of the promotional theory, also violate the illegal lottery statute, hence, creating a merger problem and heightened sentencing for the same act.²¹³

While Scalia is correct that the merger problem arises in these particular promotional theory cases, his analysis and concerns are overstated. First, the merger problem, while not limited to illegal gambling offenses, only applies to some promotional theory cases where the predicate crimes involve, or sometimes require, financial transactions. For example, as discussed earlier in *United States v. Van Alstyne*,²¹⁴ the defendant was convicted of mail fraud and money laundering.²¹⁵ The court held that mail fraud is an underlying offense that can create a merger problem because, like in this case, "[t]he very nature of the scheme [central to the mail fraud charges] . . . required some payments to investors for it to be at all successful."²¹⁶ Van Alstyne's conviction of money laundering for the bank transfers inherent in the mail fraud charges presented a merger problem, radically increasing the statutory maximum sentence.²¹⁷ Similarly, in *United States v. Kratt*,²¹⁸ the court held that bank fraud and false statement offenses also create a merger problem because "nearly every consummated bank fraud and false statement offense involves depositing, withdrawing, transferring or exchanging funds derived from the [section 1957 money laundering] offense."²¹⁹

However, this is not the case for underlying offenses that do not deal with financial transactions because a conviction under such an offense would not necessarily mean a conviction under the money laun-

210. 18 U.S.C. § 1956(a)(1)(A)(i) (2012).

211. *United States v. Santos*, 553 U.S. 507 (2005).

212. *Id.*

213. *Id.* at 515–16.

214. 584 F.3d 803 (9th Cir. 2009).

215. Mail fraud has two elements: (1) having devised or intending to devise a scheme to defraud (or perform specified fraudulent acts), and (2) use of the mail for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts). 18 U.S.C.A. § 1341 (West 2008).

216. *Van Alstyne*, 584 F.3d at 815.

217. *Id.*

218. 579 F.3d 558 (6th Cir. 2009).

219. *Id.* at 563. *See also* *United States v. Cloud*, 680 F.3d 396 (4th Cir. 2012) (finding that an underlying mortgage fraud offense creates a merger problem when the money laundering convictions were based on paying the essential expenses of the mortgage fraud offense). The court in *Kratt*, however, found that, because the merger problem did not radically increase the statutory maximum sentence, there was no reason to vacate *Kratt's* conviction.

dering statute, which *requires* a fraudulent financial transaction. For example, under section 1961(1) of title 18, certain RICO offenses like murder, kidnapping, false use of passport, etc., which are termed “specified unlawful” activities in the money laundering statute, may not require a fraudulent financial transaction in order to be criminalized.²²⁰ Thus, if such a transaction was made to promote the offense, the underlying crime can be prosecuted under the money laundering statute, but as a separate offense and no merger problem would arise. Therefore, even though the merger problem may arise in promotional theory cases, it does not arise in *all* promotional theory cases.

Second, *Santos*’ holding reaches both the promotional and concealment theories of the money laundering statute, yet the merger problem *does not* arise in concealment theory cases. “There is no concern that the evidence used to convict for the underlying predicate offense would also prove a violation of the money laundering statute under the concealment theory.”²²¹ Regardless of whether or not the predicate offense requires a financial transaction element, concealment theory cases never create a merger problem. Under the concealment theory, the government must prove that the defendant conducted a fraudulent financial transaction with the intent to conceal or disguise the proceeds of the specified unlawful activity.²²² Most predicate offenses do not require an element of proof that the defendant conducted a fraudulent financial transaction with the intent to conceal or disguise the proceeds. Proving the predicate offense would, therefore, not automatically prove concealment under section (a)(1)(B)(i) so there is no merger problem. For example, had the money laundering conviction in *Santos* been under the concealment theory, the merger problem would not have been a concern because the illegal gambling statute only criminalizes the conducting, financing, managing, supervising, directing, or owning of an illegal gambling business.²²³ *Santos* being guilty of one of these acts “would not automatically establish a violation of the federal money laundering statute under the concealment theory.”²²⁴ This fact applies to other predicate crimes listed in section 1956(c)(7).²²⁵ Therefore, the merger problem does not apply to concealment theory cases under the money laundering statute.

Because *Santos* covers section 1956 more broadly, it also has implications for international money laundering offenses, which are codified in section (a)(2) of the statute.²²⁶ The international provision is simi-

220. “Specified Unlawful Activity” as defined in 18 U.S.C. § 1956(c)(7)(A) (2012) under 18 U.S.C. § 1961(1) (2012 & Supp. I 2013). See also 18 U.S.C. § 1956(c)(7)(D)–(F) (2012) for other predicate offenses that may not require fraudulent financial transactions to satisfy a violation, yet may also be a violation of the money laundering statute if a fraudulent financial transaction is made to promote the carrying on of that activity.

221. Gurulé, *supra* note 3, at 357.

222. 18 U.S.C. § 1956(a)(1)(B)(i) (2012).

223. 18 U.S.C. § 1955(a) (2012).

224. Gurulé, *supra* note 3, at 358.

225. See *id.* (for a discussion of this application to other predicate crimes).

226. 18 U.S.C. § 1956(a)(2) (2012).

lar to its domestic counterpart in (a)(1) because it criminalizes both the promotion²²⁷ and concealment²²⁸ of the specified unlawful activity.²²⁹ However, like with the concealment theory of the domestic statute, Scalia’s merger problem does not apply. Again, “[p]roof of the criminal activity that generated the property involved in the international transportation, transmission, or transfer of a monetary instrument or funds does not automatically prove a violation of section 1956(a)(2)(B)(i).”²³⁰ However, unlike the domestic statute, the international money laundering statute’s promotional theory has no risk of a merger problem. As the statute is written, proof that the transportation, transmission, or transfer involved “proceeds” of *specified unlawful activity* is not required.²³¹ There is no *requirement* that these proceeds be made from fraudulent means. Because using *illegal* proceeds of the specified unlawful activity is not a required element of the international money laundering offense, *Santos*’ definition of “proceeds” does not apply.

Thus, while Scalia’s opinion in *Santos* applies to and, therefore, potentially alters many different types of money laundering prosecutions, the merger concern argument only applies to a certain subset of cases—those that deal with the promotional theory of the domestic money laundering statute in section 1956(a)(1)(A)(i). And within this subset of cases, the rationale only applies to those cases where the underlying predicate offense deals with fraudulent financial transactions. Scalia’s holding is drastically overstated.

B. *Does FERA Go Far Enough?*

While Scalia’s merger concern is relatively cabined to a narrow subset of cases under the promotional theory of section 1956, the problem still exists. Because criminal defendants could face up to twenty more years in prison under such circumstances where a merger exists, action must be taken. Further, in implementing FERA and clarifying that “proceeds” means gross receipts, Congress has swung the pendulum too far in the opposite direction and, in doing so, revived the merger problem.

227. 18 U.S.C. § 1956(a)(2)(A) (2012).

228. 18 U.S.C. § 1956(a)(2)(B)(i) (2012).

229. *Id.* “Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States (A) with the intent to promote the carrying on of a specified unlawful activity; or (B) knowing that the monetary instrument or funds involved . . . represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission or transfer 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 . . .” *But see* 18 U.S.C. § 1956(a)(1).

230. Gurulé, *supra* note 3, at 360–61.

231. *Id.* at 360. The domestic statute includes the words “financial transaction which involves the proceeds of specified unlawful activity” applying to *both* the promotional and concealment theories. *Compare* 18 U.S.C. § 1956(a)(1) (2012), *with* 18 U.S.C. § 1956(a)(2) (2012).

Congress' attempt to place some restrictions on prosecutions that contain merger problems does not go far enough. The "Sense" merely provides guidance rather than bright line rules. The section simply states that it is "the *sense* of the Congress that no prosecution of an offense under section 1956 or 1957 of title 18, United States Code, *should* be undertaken . . . without prior approval" where a merger problem exists.²³² This language suggests no definite protections for criminal defendants in these cases.²³³ While it is still too early to tell whether or not this provision will actually have teeth because *Santos* retroactivity still applies to most money laundering appeals on merger concern grounds,²³⁴ the provision's weak, purely discretionary language does not provide the adequate insurance needed to prevent these prosecutions regardless of how narrow the category of cases it actually affects is.

C. *Finding a Balance*

Justice Scalia and Congress seem to be on two ends of the spectrum when determining adequate protections for criminal defendants who are convicted under both the money laundering statute and a specified underlying offense for the same acts. We must find a balance between each approach. The following three proposals for striking that balance attack the problem from the back and the front ends: (1) amending the federal sentencing guidelines for money laundering prosecutions, (2) amending the money laundering statute itself to clarify the scope of the promotional theory, and (3) amending Department of Justice (DOJ) procedures in their policy manual.

First, and most importantly, to avoid the underlying consequence of the merger problem, the United States Sentencing Commission should amend the Federal Sentencing Guidelines for money laundering prosecutions. In such prosecutions where a true merger problem arises,²³⁵ the guidelines should provide a presumption for (1) consolidating the sentences for both offenses and (2) sentencing *only* under the predicate offense if that predicate offense has a lesser penalty than the money laundering offense. This amendment would provide the most direct and effective means of controlling unfair sentencing disparities without grappling with "complex interpretations of the statute's

232. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2(g)(1), 123 Stat. 1617 (2009) (emphasis added). The provision could have been worded more strongly so as to *require* prior approval and reporting requirements ("no prosecution *may* be undertaken . . .").

233. "Clearly, any prohibition on prosecutions implicating a merger problem is not absolute, and whether [the] authorization and reporting requirements are any kind of effective deterrent to such prosecution remains to be seen." Jon Reidy, *The Problem of 'Proceeds' in the Era of FERA*, 37 AM. J. CRIM. L. 317, 328 (2010). *But cf.* Tiffany M. Joslyn, *FERA's Silver Lining—An Account of NACDL's Efforts Combating Overcriminalization*, 33 CHAMPION 55, 56 (2009) ("The language of Section 2(g) is a positive and crucial step in preventing unfairness [from merger problems].").

234. See discussion *supra* Part IV.

235. This guideline would not apply to cases where merger problems do not arise—those where the money laundering offense follows and is separate in time from the predicate offense.

language."²³⁶ Had this been implemented prior to *Santos*, the prosecution would have consolidated Santos' illegal gambling and money laundering offenses and subsequently sentenced him under the guidelines for the offense with the lesser penalty—the illegal gambling offense which imposes a 60-month sentence rather than 210 months for the money laundering offense.

Second, in terms of attacking the problem from the front end, Congress could amend the promotional theory of the money laundering statute itself, as Justice Breyer suggests in his *Santos* concurrence, to provide a specific definition of "promoting the carrying on." Congress should stipulate that the fraudulent financial transaction must follow *in time* the specified unlawful activity in order to constitute a violation under the promotional theory of the money laundering statute. This would prevent any merger problems from occurring because the act constituting the money laundering offense would be separate and distinct from the act that constituted the underlying offense. If this definition was specified in the statute during *Santos*, paying off the winning gamblers and the salaries of the collectors would no longer constitute a violation of the promotional theory of the money laundering statute because the acts were not separate in time from the commission of the illegal gambling business (already a violation of 18 U.S.C. § 1955(a))—they were part of the commission of the same overall crime, and the illegal gambling offense had not yet been completed. Thus, Santos could only be convicted of, and subsequently sentenced under, the illegal gambling offense.

Finally, the Department of Justice could amend their policy manual by recommending not prosecuting the money laundering offense in cases where a true merger problem arose,²³⁷ absent exigent circumstances.²³⁸ Similar to the Sense of the Congress, senior DOJ official authorization would be required, but those officials should *not* authorize prosecution unless there are outstanding circumstances which render the prosecution necessary or compelling. Applying this policy amendment to *Santos*, DOJ officials would not have prosecuted Santos under the money laundering statute because of the clear potential for a merger problem.

The best option of the three would be to amend the promotional theory of the money laundering statute. This would provide the most binding protection against merger prosecutions from the start and would clear up any confusion regarding the application and scope of the promotional theory. However, a statutory amendment would

236. *United States v. Santos*, 553 U.S. 507, 531 (2005) (Breyer, J., dissenting). Justices Stevens and Alito also allude in their concurrence and dissent, respectively, to amending the sentencing guidelines. *Id.* at 527 & 547.

237. *See supra* note 235.

238. For a general discussion of how the Department of Justice can amend their manual for other procedural policies, such as deferred prosecution agreements, see Kristie Xian, Note, *The Price of Justice: Deferred Prosecution Agreements in the Context of Iranian Sanctions*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 631, 662 (2014).

require congressional deliberation and other bureaucratic hurdles. It would, thus, not likely lead to a timely solution to the problem.

Implementing both the sentencing guidelines amendment and the DOJ policy manual amendment could be an adequate alternative. If the DOJ decides to move forward with a merger prosecution, despite the supplemental policy manual recommendation to not prosecute merger cases, the amendment to the federal sentencing guidelines would act as a second protection, taking care of any sentencing disparities by requiring the lighter of the two sentences. Working together, these recommendations provide more comprehensive and absolute protections than FERA does for criminal defendants who fall in this narrow subset of cases where a merger may occur. Furthermore, they strike a balance between Scalia's over-inclusive "profits" definition and Congress' under-inclusive "gross receipts" definition.

CONCLUSION

Post-*Santos* jurisprudence shows that the Supreme Court's plurality opinion defining "proceeds" in the money laundering statute as "net profits" rather than "gross receipts" has not cleared up the debate over the correct definition of the term. Further, Congress' albeit swift response to that decision swung the pendulum too far in the other direction, reversing the holding and calling for a "gross receipts" definition. Congress' attempt to account for the Court's concern over merger problems and heightened sentences, however, does not go far enough.

While only relevant in a small subset of money laundering cases that (1) deal with predicate offenses that require fraudulent financial transactions and (2) promote the carrying on of that predicate offense under the promotional theory of the money laundering statute, the merger problem, nevertheless, has serious and potentially unjust implications for criminal defendants. In order to avoid these problems, the United States Sentencing Commission should amend the sentencing guidelines for money laundering prosecutions and require sentencing under the lesser of the two punishments when true merger problems arise. Congress should also amend the promotional theory of the money laundering statute to more explicitly state that it applies only where the fraudulent financial transaction giving way to the money laundering offense is separate and distinct, *following in time* the completed commission of the predicate offense. Finally, the Department of Justice should include a provision in their policy manual advising senior DOJ officials to not authorize prosecuting both crimes when there is a true merger risk.