No.

In the Supreme Court of the United States

RICHARD OLIVE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT H. DIETRICK
P.O. Box 682502
Franklin, TN 37068
(615) 864-2595

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3220
apincus@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

In *United States* v. *Santos*, 553 U.S. 507 (2008), the defendant was charged with both illegal gambling and a violation of the Money Laundering Act based on the illegal lottery activity. This Court interpreted the term "proceeds" in the Money Laundering Act, 18 U.S.C. § 1956(a)(1), to mean profits, not gross receipts. Four Justices concluded that "proceeds" should be given that meaning generally, based on the rule of lenity, because of the "merger problem" that otherwise would result: "nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery." 553 U.S. at 515 (plurality). Justice Stevens recognized the same problem, but concluded that "proceeds" means profits even apart from the rule of lenity. *Id.* at 524-528 (Stevens, J., concurring).

The courts of appeals are deeply divided in applying *Santos* to other cases involving merger problems. Some have limited the Court's holding to illegal lottery cases, while others have applied it more broadly; and courts across the board disagree over the factors that are relevant in determining whether to apply *Santos*' construction of "proceeds."

The question presented is whether "proceeds" in 18 U.S.C. § 1956 means "profits" only in those cases in which interpreting it to mean "gross receipts" would radically increase a defendant's mandatory minimum statutory sentence—or whether it means "profits" in all cases in which a defendant is prosecuted under the Money Laundering Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Olive respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of court of appeals (App., *infra*, 1a-38a) is reported at 804 F.3d 747.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2015, and a timely petition for rehearing was denied November 17, 2015. App., *infra*, 39a. On February 8, 2016, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including March 16, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Money Laundering Act, 18 U.S.C. § 1956, provided during the relevant time, and in relevant part:

(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.

18 U.S.C. § 1956 (2008).

STATEMENT

1. The Money Laundering Act makes it unlawful for an individual to conduct "a financial transaction which * * * involves the proceeds of [an] unlawful activity" when the individual knows "that the property involved in [the] transaction represents the proceeds of [such] unlawful activity." 18 U.S.C. § 1956(a).

The question frequently arises how the statute applies when the "financial transaction" charged in a money-laundering indictment is itself an indispensable element of the "unlawful activity" on which the charge rests. The answer depends on how the word "proceeds" is interpreted.

On the one hand, the word "proceeds" can be understood to mean *gross receipts*. But under that approach, the defendant may be subject to multiple punishments for the same conduct. After all, anyone engaged in an unlawful financial scheme (such as a Ponzi scheme or gambling operation) will necessarily

engage in financial transactions involving the gross receipts of the illegal activity as part of the day-to-day operation of the scheme. Thus, a conviction for the primary offense will inevitably lead to a conviction for money laundering—the two offenses are said to "merge."

That merger problem does not arise when, on the other hand, the word "proceeds" is interpreted to mean *profits*. In that case, a conviction for money laundering is possible only when proceeds that have exited the underlying illegal scheme as net proceeds are used in a distinct and separate financial transaction.

This question of statutory interpretation was the issue presented in *United States* v. *Santos*, 553 U.S. 507 (2008). There, the defendant was charged with both running an illegal lottery and money laundering for using the gross receipts of the lottery in the financial transactions necessary to operate it. The *Santos* plurality described the problem this way:

> If "proceeds" meant "receipts," nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery. Since few lotteries, if any, will not pay their winners, the statute criminalizing illegal lotteries would "merge" with the money-laundering statute[, so that a conviction under the former would always mean a conviction under the latter as well].

553 U.S. at 515-516 (citation omitted). What is more, the plurality continued, "[t]he merger problem is not limited to lottery operators." *Id*. at 516. "For a host of

predicate crimes, merger would depend on the manner and timing of payment for the expenses associated with the commission of the crime." *Ibid*. The plurality applied the rule of lenity to conclude that, as between "profits" and "receipts," "the tie must go to the defendant." *Id*. at 514.

Justice Stevens concurred. "Allowing the Government to treat the mere payment of the expense of operating an illegal gambling business as a separate offense," he explained, "is in practical effect tantamount to double jeopardy, which is particularly unfair in this case because the penalties for money laundering are substantially more severe than those for the underlying offense of operating a gambling business." *Santos*, 553 U.S. at 527. Because "there is 'no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime,'" the word "proceeds" in the Money Laundering Statute must be understood to mean profits, and not gross receipts. *Id.* at 528.[1]

2. From January 2006 to May 2007, petitioner served as President and Executive Director of National Foundation of America (NFOA), through which he offered and sold investment contracts. NFOA's principle objective was "exchanging a customer's existing annuity for one of the company's installment plans, which promised higher returns." App., *infra*, 5a.

---

[1] Congress statutorily overruled *Santos* in 2009. See Pub. L. No. 111-21, § 2(f)(1) (May 20, 2009), 123 Stat. 1618. For reasons explained below (at 13-17), however, the question presented continues to have substantial prospective importance.

A nine-count indictment returned in 2012 alleged that petitioner had defrauded customers through a series of misrepresentations about the company's ability to guarantee annuity income in the amount promised. App., *infra*, 2a-3a. In addition to the underlying mail and wire frauds, petitioner was charged with money laundering for using the gross receipts of the criminal enterprise to pay an insurance agent a commission of $30,028.33. App., *infra*, 4a. The money-laundering count charged petitioner specifically with "the transfer and withdrawal of funds by the means set forth below, such property having been derived from a specified unlawful activity, namely, mail fraud." App., *infra*, 18a.

A jury found petitioner guilty of three counts of mail fraud in violation of 18 U.S.C. § 1341; four counts of wire fraud in violation of 18 U.S.C. § 1343; and two counts of money laundering, 18 U.S.C. § 1957, including the count concerning the payment to the insurance agent. App., *infra*, 1a. The district court sentenced petitioner to imprisonment for 36 months on each of the seven fraud counts and 60 months on each of the two money laundering counts, all to run consecutively, for a total of 372 months of imprisonment. *Ibid.* The court also ordered petitioner to pay restitution in the amount of $5,992,181.24. *Ibid.*

3. Petitioner appealed, arguing among other things that his money laundering conviction was invalid under *Santos*. In particular, petitioner contended that construing "proceeds" to mean "gross receipts" in his case would punish him twice for the same offense: both the money laundering conviction and the underlying fraud conviction, he argued, rested on the same criminal conduct.

The Sixth Circuit affirmed. App., *infra*, 1a-22a. The court acknowledged the existence of a merger problem. App., *infra*, 18a. "The mail fraud counts of the indictment charge that defendant 'through highly compensated insurance agents across the country, offered and sold investment contracts,'" and "[t]he money laundering count at issue charges defendant with 'the transfer and withdrawal of funds * * * derived from a specified unlawful activity, namely, mail fraud.'" *Ibid*. Because that was the same underlying conduct, the court "conclude[d] that there is a 'merger problem' in this case." *Ibid*.

But, the court said, "even though we conclude that a merger problem exists, defendant must *also* be exposed 'to a markedly increased statutory maximum'" in order to avail himself of the narrower "profits" interpretation of "proceeds" under the money laundering statute. App., *infra*, 18a (emphasis added) (quoting *United States* v. *Kratt*, 579 F.3d 558, 563 (6th Cir. 2009)). Reasoning that the simultaneous convictions for mail fraud and money laundering did not lead to a "markedly increased" sentence, even though the terms of imprisonment were imposed consecutively, the Sixth Circuit concluded that "proceeds" must be read to mean "gross receipts" in this particular case. App., *infra*, 19a.[2]

4. Judge Moore concurred only because she was bound by prior circuit precedent. App., *infra*, 23a-38a. "I must concur with the majority's conclusion that Olive's money-laundering conviction * * * did not

---

[2] Although the Sixth Circuit purported to review the *Santos* question under the plain error framework (App., *infra*, 24a-25a), the court fully analyzed the legal issue and ruled against petitioner on the merits, de novo.

merge with his mail-and wire-fraud convictions," she explained, "because I am bound by this court's prior published opinions." App., *infra*, 23a. "I do not believe, however, that this is the correct result under *United States* v. *Santos*, 553 U.S. 507 (2008)." *Ibid.*

In Judge Moore's view, the Sixth Circuit's decision in *Kratt*, which held "that 'proceeds' means 'profits only when the § 1956 predicate offense creates a merger problem that leads to a radical increase in the statutory maximum sentence and only when nothing in the legislative history suggests that Congress intended such an increase,'" was simply "wrong." App., *infra*, 23a. "In particular, the focus on whether the § 1957 offense 'radical[ly] increase[s] * * * the statutory maximum sentence,' is an inaccurate characterization of the holding of *Santos*." *Ibid.* (citation omitted).

Judge Moore supported her conclusion by canvassing the decisions of the other courts of appeals. She explained that "[m]ost of our colleagues" generally "interpret the term 'proceeds' to mean 'profits' when interpreting 'proceeds' as 'gross receipts' results in a 'merger problem.'" App., *infra*, 31a (collecting cases). "The Fourth, Tenth, and Eleventh Circuits," in contrast, have generally "confined the holding of *Santos*" to illegal gambling cases, although there is room for debate on the front in the Fourth and Eleventh Circuits. App., *infra*, 32a.

"Only the Ninth Circuit has 'considered whether the inclusion of the money-laundering charge under Section 1957 led to 'a radical increase in the statutory maximum sentence' for the underlying offense' when applying *Santos*," but even there, the issue is not independently outcome determinative. App., *infra*, 34a.

Breaking from the other courts, according to Judge Moore, "[t]he Fifth Circuit takes a slightly different approach," under which it first determines whether there is a merger problem; "[i]f defining 'proceeds' as 'gross receipts' does *not* result in a merger problem, then the Fifth Circuit presumes that 'proceeds' should be defined as 'gross receipts,' unless the legislative history suggests otherwise." App., *infra*, 32a (emphasis added) (discussing *Garland* v. *Roy*, 615 F.3d 391, 404 (5th Cir. 2010)).

In Judge Moore's estimation, "the Fifth Circuit has formulated the most accurate statement of Justice Stevens's *Santos* concurrence," which should "apply to [all] money-laundering offenses that occurred prior to May 20, 2009." App., *infra*, 35a. For those reasons, Judge Moore would have held "that the double charging was plain error because the government quite clearly indicted [petitioner] in the money-laundering count for the payment of essential expenses of his fraud scheme" in violation of *Santos*. App., *infra*, 38a.

Because she was "bound by *Kratt* and its progeny until the Supreme Court or [the Sixth Circuit] sitting en banc overrules it," however, Judge Moore concurred. App., *infra*, 38a.

REASONS FOR GRANTING THE PETITION

Further review is warranted for three reasons.

First, there is widespread, acknowledged confusion among the lower courts over the question presented. As a result, the Money Laundering Act is being applied in different ways in different circuits to otherwise identically-situated defendants.

Second, the issue is undeniably important. Notwithstanding congressional action in 2009 defining

"proceeds" to mean "gross receipts" for future prosecutions (see note 1, *supra*), *Santos* continues to apply in cases (like this one) where the government brings charges based in part on pre-2009 conduct. It also continues to apply retroactively in Section 2241 habeas proceedings, which are not subject to a statute of limitations and are brought in prisoners' districts of confinement, rather than their districts of conviction. Thus petitioner and prisoners like him in the Sixth Circuit (and in the Ninth Circuit) are likely to pursue collateral relief under *Santos* if they are transferred out of the Sixth Circuit into a more favorable jurisdiction at any time in the future.

Finally, the Sixth Circuit's decision is manifestly wrong. In effect, according to the lower court, the meaning of the word "proceeds" appearing in 18 U.S.C. § 1956(a)(1) varies from case to case, depending on how much a "gross receipts" definition increases the defendant's sentence. If it makes a "radical" difference, then "proceeds" means profits; if not, then it means gross receipts. That fluid approach to the meaning of a word in a criminal statute finds no support in this Court's precedents.

For these reasons, the petition should be granted. In saying this, we recognize that five Members of the Court were unable to agree on a single rationale in *Santos*. But the growing confusion among the lower courts on the meaning of *Santos* will not resolve itself without this Court's intervention. Meanwhile, the divisions among the courts of appeals will continue to produce different outcomes for identically-situated defendants. Review by this Court is therefore essential.

A. There is widespread confusion among the lower courts on how *Santos* applies in cases like this one.

The lower courts' interpretations of this Court's decision in *Santos* vary widely. Cf. *United States* v. *Foley*, 783 F.3d 7, 15 (1st Cir. 2015) (acknowledging "the ambiguity of *Santos*'s holding" and "the lack of clear guidance" on how best to interpret it). Some courts of appeals conclude that "proceeds" must be interpreted to mean "profits" when interpreting the provision to mean "receipts" would create a merger problem. But those courts consider different factors in determining whether a merger problem exists. Other circuits take a more restrictive view of *Santos* and limit its holding to illegal gambling cases. The Sixth Circuit and the Ninth Circuit hold that, in order for "proceeds" to mean "profits," the defendant must face a radical increase in his minimum mandatory sentence.

1. The **Eighth Circuit** takes the most straightforward approach. According to that Court, "[t]he narrowest holding in *Santos*," and therefore the controlling one under *Marks* v. *United States*, 430 U.S. 188 (1977), "was Justice Stevens's concurrence." *United States* v. *Rubashkin*, 655 F.3d 849, 865 (8th Cir. 2011). Accordingly, "'proceeds' must mean 'profits' whenever a broader definition would 'perversely' result in a 'merger problem.'" *Ibid.*

The **Second Circuit** has reached the same conclusion. According to that court, "Justice Stevens' concurrence controls the scope of the Court's holding in *Santos*," and therefore "'proceeds' mean[s] 'profits' when the anti-money laundering statute [is] applied to * * * unlawful activities" with respect to which a merger problem arises. *United States* v. *Peters*, 732 F.3d 93,

100 (2d Cir. 2013), cert. denied sub nom. *Peters* v. *United States*, 134 S. Ct. 2740 (2014).[3]

The **Fifth Circuit** agrees that when there is a merger problem, "proceeds" means "profits." *United States* v. *Lineberry*, 702 F.3d 210, 219 (5th Cir. 2012). But that court is open to defining "proceeds" to mean "profits" in other situations, as well. Even "[i]n the absence of a merger problem, the term 'proceeds' is presumptively defined as 'gross receipts,' unless the legislative history of the money-laundering statute supports a finding that 'proceeds' in a particular case means 'profits.'" *Ibid*.

In each of these courts, there is little doubt that petitioner would be entitled to relief, and that his money laundering conviction would be vacated. As the majority below observed, "a merger problem exists" in this case. App., *infra*, 18a. That is all that is required in the Second, Fifth, and Eighth Circuits.

2. Petitioner nevertheless was denied relief by the Sixth Circuit in this case because, according to that court, "even though we conclude that a merger problem exists, [a] defendant must also be exposed 'to a *markedly increased* statutory maximum'" before he is entitled to relief. App., *infra*, 18a (emphasis added) (citing *Kratt*, 579 F.3d at 563).

The Ninth Circuit has adopted the same interpretation of *Santos*. In *United States* v. *Bush*, 626

---

[3] Other courts have signaled agreement with this approach. See, *e.g.*, *United States* v. *Richardson*, 658 F.3d 333, 340 (3d Cir. 2011) (holding that under *Santos*, "'proceeds' means receipts" when "there is no merger problem"); *United States* v. *Lee*, 558 F.3d 638, 643 (7th Cir. 2009) (describing Justice Stevens's opinion as the "controlling concurrence").

F.3d 527 (9th Cir. 2010), the **Ninth Circuit** "note[d] that in *Kratt*, the Sixth Circuit * * * considered whether the inclusion of the money-laundering charge under Section 1957 led to 'a radical increase in the statutory maximum sentence' for the underlying offense." *Id.* at 538 (citing *Kratt*, 579 F.3d at 562). Following the Sixth Circuit's lead, the court there rejected the defendant's *Santos* argument in part because the sentence for his conviction for money laundering was "hardly a 'radical' [increase to] the twenty-five-year sentence for his various frauds." *Ibid.* See also *United States* v. *McCray*, 584 F. App'x 686, 687 (9th Cir. 2014) (vacating money laundering convictions because they merged with the underlying fraud convictions and "also led to 'a radical increase in the statutory maximum sentence'").

Petitioner would have been denied relief in the **Fourth**, **Tenth**, and **Eleventh Circuits**, as well, but for a different reason. Those courts have concluded "that the term 'proceeds' means 'net profits' *only* in the context of an illegal gambling enterprise." *United States* v. *Thornburgh*, 645 F.3d 1197, 1208 (10th Cir. 2011) (emphasis added). Accord *United States* v. *Simmons*, 737 F.3d 319, 324 (4th Cir. 2013) ("[W]e interpreted *Santos* narrowly to bind lower courts only in cases where illegal gambling constituted the predicate for the defendant's money-laundering conviction."); *United States* v. *Demarest*, 570 F.3d 1232, 1242 (11th Cir. 2009) ("The narrow holding in *Santos*, at most, was that the gross receipts of an unlicensed gambling operation were not 'proceeds' under section 1956."). Because petitioner's underlying offense was not an illegal lottery or other gambling operation, he would not have been entitled to relief in those circuits.

3. Petitioner would have obtained relief under *Santos* in the Second, Fifth, and Eighth Circuits. He was denied relief in the Sixth Circuit and likely would have been denied relief in the Fourth, Ninth, Tenth, and Eleventh Circuits as well. Such deep-seated disagreement among the lower courts should not be tolerated.

B. Proper resolution of the question presented is a matter of tremendous practical importance.

1. The question presented has frequently been litigated and is likely to arise frequently for years to come. The proper interpretation of *Santos* was addressed in more than a dozen cases in the last two years alone.[4] The question has arisen peripherally in scores more cases.

---

[4] See *United States* v. *Kerley*, 784 F.3d 327 (6th Cir. 2015), cert. denied 136 S. Ct. 350 (2015); *United States* v. *McCray*, 584 F. App'x 686 (9th Cir. 2014); *United States* v. *Esquenazi*, 752 F.3d 912 (11th Cir. 2014), cert. denied 135 S. Ct. 293 (2014); United States v. Rice, 551 F. App'x 656 (4th Cir. 2014), cert. denied sub nom. *Jacobs* v. *United States*, 134 S. Ct. 1953 (2014); *United States* v. *Lonich*, No. 14-CR-00139-SI-1, 2016 WL 324039 (N.D. Cal. Jan. 27, 2016); *Hogan* v. *Butler*, No. Civ. 6:15-046-GFVT, 2015 WL 4635612 (E.D. Ky. Aug. 3, 2015); *Westine* v. *Roberts*, No. 3:15-CV-9-GFVT, 2015 WL 3503236 (E.D. Ky. June 3, 2015); *Okolo* v. *Warden, FCI Beaumont*, No. 1:12-CV-53, 2015 WL 993478 (E.D. Tex. Mar. 3, 2015); *Svete* v. *Doe*, No. 1:14-CV-02091-JLT, 2015 WL 128120 (E.D. Cal. Jan. 8, 2015); *United States* v. *Allen*, No. 3:12-CR-90-TAV-HBG, 2014 WL 3368605 (E.D. Tenn. July 9, 2014); *United States* v. *Harris*, 301 F.R.D. 272, 274 (N.D. Ohio 2014); *Salazar-Espinoza* v. *Hastings*, No. CV213-100, 2014 WL 2999722 (S.D. Ga. July 2, 2014); *Mathison* v. *Berkebile*, No. Civ. 12-4156, 2014 WL 1871865 (D.S.D. May 8, 2014); *Neighbors* v. *United States*, No. 07-20124-CM, 2014 WL 909936 (D. Kan.

Congress took legislative action in 2009 to address the *Santos* question for future prosecutions. See page 4, note 1, *supra*. But the issue is certain to continue to arise in a significant number of cases for two reasons.

First, many of the cases in which the question presented arises involve ongoing criminal schemes that stretch back for years and even decades. As a result, long after 2009, indictments continue to charge defendants with illicit schemes that include pre-2009 conduct. See, *e.g.*, *United States* v. *Lonich*, No. 14-CR-00139-SI-1, 2016 WL 324039 (N.D. Cal. Jan. 27, 2016). As to all such conduct, *Santos* applies. For that reason alone, the district courts and courts of appeals will continue to face the question presented with considerable frequency for years to come.

Second, the lower courts agree that *Santos* applies retroactively in habeas corpus proceedings under Section 2241. See, *e.g.*, *Wooten* v. *Cauley*, 677 F.3d 303, 309 (6th Cir. 2012) ("[W]e agree with the Fourth, Fifth, and Eleventh Circuits in holding that *Santos* is retroactive."); see also *Garland* v. *Roy*, 615 F.3d 391, 393 (5th Cir. 2010) (holding that a habeas petitioner raising a *Santos* claim "states a claim falling within § 2255's 'savings clause' and thus he may proceed under § 2241" and finding a merger problem).

That is critically important because "[t]here is no statute of limitations for federal prisoners filing habeas petitions pursuant to 28 U.S.C. § 2241." *Wooten*, 677 F.3d at 306 (citing *Morales* v. *Bezy*, 499 F.3d 668, 672 (7th Cir. 2007)). Thus, the question presented has been frequently litigated in the district courts under Section

---

Mar. 10, 2014); *United States* v. *Sarad*, No. 2:11-CR-00387-KJM, 2014 WL 127973 (E.D. Cal. Jan. 14, 2014).

2241. See, *e.g.*, *Okolo* v. *Warden, FCI Beaumont*, No. 1:12-cv-53, 2015 WL 993478 (E.D. Tex. Mar. 3, 2015); *Salazar-Espinoza* v. *Hastings*, No. 2:13-cv-100, 2014 WL 2999722 (S.D. Ga. July 2, 2014); *Mathison* v. *Berkebile*, No. 12-cv-4156, 2014 WL 1871865 (D.S.D. May 8, 2014).

There is, moreover, every reason to think that the litigation will continue. A Section 2241 petition "must be filed in the district court that has jurisdiction over a prisoner's place of confinement." *Martin* v. *Perez*, 319 F.3d 799, 802 (6th Cir. 2003). Unlike a petition under Section 2255, in other words, Section 2241 proceedings "may occur in a court of confinement that is different from the court of conviction." *Id.* at 803. That opens the possibility that a prisoner transferred from a prison in the Fourth, Ninth, Tenth, or Eleventh Circuits to a prison in the Second, Fifth, or Eighth Circuits will then be able to obtain *Santos* relief under Section 2241. See, *e.g.*, *Rudisill* v. *Martin*, No. 5:08-cv-272, 2013 WL 1871701, at *4 (S.D. Miss. May 3, 2013) (in a *Santos* case, holding that the court "must apply Fifth Circuit law (the law of the circuit of confinement)" and not the law of the circuit of conviction); accord *Owens* v. *Sanders*, No. 12-cv-5626, 2012 WL 6213790, at *5 (C.D. Cal. Nov. 7, 2012). But see *Hogan* v. *Butler*, No. 6:15-cv-46, 2015 WL 4635612, at *4-5 (E.D. Ky. Aug. 3, 2015) (reaching opposite conclusion).

In short, litigation over the question presented is likely to persist for many years to come, and involve a substantial number of cases.

2. Confusion over the question presented is also having a spillover effect on the interpretation of related statutes. In part due to the difficulty that the lower courts have had with *Santos*, for example, the lower

courts are divided on how "proceeds" should be interpreted when a defendant is charged under the Racketeer Influenced and Corrupt Organizations Act.

RICO states in relevant part that:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity * * * to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962.

Section 1963, which outlines criminal penalties for violations of Section 1962, notes that the defendant shall forfeit "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962." 18 U.S.C. § 1963.

Some courts have held that "proceeds" in RICO means profits. According to the Seventh Circuit, because "[t]he statute is designed to force criminals to disgorge their ill-gotten gains," "[w]e may assume * * * that the proceeds to which the statute refers are net, not gross, revenues—profits, not sales, for only the former are gains." *United States* v. *Masters*, 924 F.2d 1362, 1369-70 (7th Cir. 1991). By contrast, the Ninth Circuit has found that "proceeds" in RICO means gross receipts rather than net profits. *United States* v. *Christensen*, 801 F.3d 970, 1027-1028 (9th Cir. 2015) ("We agree with the view that 'proceeds' in the RICO forfeiture statute refers to gross receipts rather than

net profits," and discussing *Santos*). Accord *United States* v. *Lyons*, 870 F. Supp. 2d 281, 291 (D. Mass. 2012) ("the gross proceeds, not merely the net profits, of racketeering enterprises are subject to forfeiture under 18 U.S.C. § 1963," and citing *Santos*). Cf. *United States* v. *Peters*, 732 F.3d at 99-100 (similar analysis under 18 U.S.C. § 982, and discussing *Santos*).

C. Properly interpreted, "proceeds" means profits.

Widespread confusion over a question of substantial practical importance is reason enough to grant further review. The Sixth Circuit's error provides another weighty reason for granting the petition.

1. Under the Sixth Circuit's interpretation of *Santos*, the meaning of the word "proceeds" varies depending on the circumstances of each case. In those cases in which the addition of the money laundering sentence to the sentence for the underlying offense produces a "radical" increase in the maximum sentence, the term "proceeds" must be read to mean profits. Otherwise, it means gross receipts. This approach requires the lower courts to interpret the very same statutory word differently "based on an offense-by-offense inquiry that even the most law-abiding, prescient and lawyerly citizen would find hard to predict." *United States* v. *Kratt*, 579 F.3d 558, 563 (6th Cir. 2009).

That makes no sense. As the Court recently explained, there is nothing "to recommend the novel interpretive approach" that would make a statute's meaning "subject to change depending on the [circumstances of] each individual case." *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005). "To hold otherwise 'would render every statute a chameleon,' and 'would estab-

lish within our jurisprudence . . . the dangerous principle that judges can give the same statutory text different meanings in different cases.'" *Santos*, 553 U.S. at 522-523 (plurality opinion) (quoting *Clark*, 543 U.S. at 382, 386).

Those concerns take on special force in the context of criminal law, because of the constitutional requirement that the criminal law "give ordinary people fair notice of the conduct it punishes." *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015). To prevent the criminal law from varying from cases to case, the rule of lenity requires courts to give ambiguous criminal statutes a *single* meaning—a "'limiting construction called for by [the most forgiving] of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation.'" *Id.* at 523 (plurality opinion). The decision below cannot be squared with that fundamental principle and opens the door to similarly fluid constructions of other criminal statutes.

2. Even under a case-by-case approach, "proceeds" must be interpreted to mean "profits" here. The Sixth Circuit applies a rigid, three-step test to determine whether, on a case-by-case basis, "proceeds" means "profits." It asks, "[(1)] is there a merger problem; (2) does this problem lead to a radical increase in the statutory maximum sentence; and (3) does the legislative history fail to show that Congress intended the increase?" App., *infra*, 17a (quoting *Jamieson* v. *United States*, 692 F.3d 435, 440). If the answer to all three questions is yes, then "proceeds" means "profits." *Ibid.* But if the answer to one is no, then "proceeds" means "gross receipts." *Ibid.*

Justice Stevens's concurrence does not dictate such a rigid approach. More importantly, none of the four

opinions in *Santos* spoke in terms of "statutory maximum sentences." In fact, the merger problem can cause a defendant's overall sentence to increase radically even when the statutory maximum for any one count does not increase—here, for example, petitioner was sentenced to an additional five consecutive years of imprisonment, notwithstanding the merger problem. That is the precise sort of "radical increase" that *Santos* instructs courts to avoid. Any doubt on that score should be resolved by the rule of lenity, which requires interpreting "proceeds" to mean "profits" so that petitioner, and defendants like him, are not punished excessively for the same conduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. DIETRICK
P.O. Box 682502
Franklin, TN 37068
(615) 864-2595

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3220
apincus@mayerbrown.com

Counsel for Petitioner

MARCH 2016